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Montana Code Annotated

Annotations

2010



Criminal Procedure • Access to Legal Services

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Published and Distributed by
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Capitol Bldg Rm 110
1301 E 6th Ave
PO Box 201706
Helena, MT 59620-1706
Telephone (406)444-3064 FAX (406)444-3036
Internet http://leg.mt.gov

Printed and Bound by
Sheridan Books, Inc.
100 North Staebler Road
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PREFACE TO VOLUME 10
(Annotations — August 2010)

Annotations to this volume include:

Case notes of applicable court decisions through:

- public domain citation 2009 MT 442
- volume 354 Montana Reports page 192
- volume 227 Pacific Reporter (3rd Series) page 42
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- volume 53 opinion number 2 of the Report and Official Opinions of Attorney General

Citations to the Administrative Rules of Montana implementing or authorized by a section of law and adopted through:

- issue 12 of the 2010 Montana Administrative Register

Amendment notes listed under compiler's comments are intended to explain only amendments made in the year indicated and may not accurately reflect current statutory language because of subsequent amendment.

The annotations are provided as a convenience to the user and are not intended to be an exhaustive compilation of the law under a given statute or in a given area.

TITLE 46
CRIMINAL PROCEDURE

CHAPTER 1
GENERAL PROVISIONS

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

1991 Chapter Comments: These statutes govern the practice and procedure in all criminal proceedings in the courts of Montana except when provision for a different procedure is specifically provided by law.

These statutes are intended to provide for the just determination of all criminal proceedings. The statutes must be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay.

Chapter Compiler's Comments

Section Not Codified: Section 95-202, R.C.M. 1947, was not codified in the MCA because it is redundant with 1-2-105. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 196, L. 1967.

Chapter Case Notes

Police Commission Hearings: In view of the limited nature of the proceedings and the lack of legal expertise on the part of the Commissioners, the provisions of this title do not govern Police Commission hearings. Steer v. Missoula, 169 M 389, 547 P2d 843 (1976).

Chapter Law Review Articles

Montana Supreme Court Survey—Criminal Procedure, Terrell, 45 Mont. L. Rev. 353 (1984).

Montana's Judicial System—A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (1967).

Criminal Law in the Ninth Circuit: Recent Developments, 15 Loy. L.A. L. Rev. 431-595 (Summer 1982).

Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1981-1982 (20 articles), 71 Geo. L. J. 339-828 (December 1982).

Part 1
Purpose and Application of Title

46-1-103. Scope — purpose — construction.

Case Notes

Search Warrant Procedural Irregularity Not Affecting Defendant's Substantial Rights: Defendant contended that because of a procedural error on the part of investigating officers who

were executing a search warrant, the District Court erred when it did not suppress the seized evidence. The error was detected and corrected within 24 hours. An error in the manner in which notice of seized articles is given is an irregularity in the proceedings that does not affect the substantial rights of the accused and thus does not constitute reversible error. The corrected receipt effectively gave defendant notice of seized items. St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998).

Appeal of Misdemeanor Conviction From Justice's Court to District Court — No Record of Oral Pronouncement of Sentence in Justice's Court — District Court Jurisdiction Upheld: Tweedy was convicted by a Justice's Court jury of misdemeanor assault and was scheduled for sentencing on April 18, 1989. On April 19, Tweedy filed a notice of appeal to the District Court. The Justice's Court filed its sentencing order on May 3. Later, in response to a motion by Tweedy to dismiss the underlying charge, the state contended that the District Court had not acquired jurisdiction over Tweedy. The Supreme Court held that since there was no evidence in the record that the sentencing hearing scheduled for April 18 did not, in fact, take place and since, under St. v. Mortenson, 175 M 403, 574 P2d 581 (1978), appeal may be taken within 10 days after sentence is orally pronounced in open court, Tweedy's notice of appeal was timely filed and the District Court had jurisdiction over the case. The Supreme Court also noted that the later enactment of 46-18-116, which applies to Justices' Courts by virtue of this section, requiring a signed judgment on the record, should eliminate confusion in the future regarding when the statutory time for appeal begins to run. St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996).

Guilty Plea Not to Be in Writing: Both 46-12-201, regarding the arraignment of an accused, and 46-17-201, regarding the procedure applicable to a plea in Justice's Court, require that a defendant appear in open court, that there be actual communication between the judge and defendant, that the judge first make the requisite inquiries of and provide mandated information to the defendant, and that a plea be accepted as part of that communicative process. There is no provision in either statute that allows a judge to accept a guilty plea from a defendant in either a felony or misdemeanor case through the expedient of the defendant or defendant's counsel simply filing a written plea with the court. The Supreme Court expressed its disapproval of the practice and admonished state courts to comply with the statutory mandates. However, in this case, defendant was at all times represented by counsel, who was personally involved in the written plea. Because defendant's substantive rights were not affected, acceptance of the written guilty plea by the trial court was allowed to stand. St. v. Schneiderhan, 261 M 161, 862 P2d 37, 50 St. Rep. 1242 (1993).

Part 2
Definitions

46-1-202. Definitions.

Compiler's Comments

2001 Amendment: Chapter 303 inserted definition of advanced practice registered nurse; and made minor changes in style. Amendment effective April 20, 2001.

1999 Amendment: Chapter 395 in definition of conviction before "plea" inserted "or nolo contendere"; in definition of sentence after "plea" inserted "of guilty or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 546 in definition of parole, in two places, substituted "board of pardons and parole" for "board of pardons"; and in definitions of parole and probation substituted "department of corrections" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 262 deleted definition of concealment that read: ""Concealment" means any act or deception done purposely or knowingly upon or outside the premises of a wholesale or retail store or other mercantile establishment with the intent to deprive the merchant of all or part of the value of the merchandise."

Name Change: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Case Notes

Aggravated Assault as Lesser Included Offense of Felony Homicide — Merger of Offenses — Conviction for Both Offenses Error: Russell was convicted of felony homicide and aggravated assault. Aggravated assault was charged as the predicate offense for charging felony homicide.

Russell asserted that because the felony homicide conviction was predicated on the same assault, the conviction for aggravated assault should be dismissed. The District Court declined to dismiss the assault conviction, but on appeal the Supreme Court reversed. A defendant cannot be found guilty of felony homicide without having committed a predicate felony offense. When the offenses are charged in that fashion, the offenses merge and the predicate offense becomes a lesser included offense of felony homicide. Therefore, the District Court erred by not granting Russell's motion to dismiss the lesser included offense of aggravated assault after being convicted of felony murder. St. v. Russell, 2008 MT 417, 347 M 301, 198 P3d 271 (2008).

Statements Made in Another State Without Effect on Montana Homicide Proceedings — Right to Counsel "Offense Specific": Schneider was stopped in Arizona while trying to gain entry into Mexico, and while detained, Schneider confessed to two murders in Montana. At the time of arrest, Schneider was on probation for felony theft in Montana and was prohibited from leaving the state without permission. Arizona charged Schneider with being a fugitive from justice and appointed a public defender. A Montana court moved to revoke Schneider's probation, and Montana officers went to Arizona to interrogate Schneider regarding the murders. Schneider waived his Miranda rights and did not request counsel during questioning, during which he made incriminating statements regarding involvement in the murders. Montana subsequently charged Schneider with two counts of accountability for deliberate homicide. Schneider moved to suppress the statements made in Arizona on grounds that his right to counsel was violated, but the motion was denied based on the holding in Texas v. Cobb, 532 US 162 (2001), and on appeal the Supreme Court affirmed. Under Cobb, the right to counsel is "offense specific", meaning that it only applies with respect to the charged or related offense and cannot be invoked once for all future prosecutions. Because the right to counsel in the Montana Constitution is consistent with Art. VI of the U.S. Constitution, the court declined Schneider's request to extend any further protection under Montana law beyond that expressed in Cobb. The constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those charged with other offenses. In addition, regarding Schneider's argument that the Arizona statement should be suppressed under the "same transaction" rule, the Arizona case was not before the Montana court and had no effect on the disposition of the issues. Thus, Schneider's statements made in connection with the Arizona fugitive charge were admissible in the Montana homicide proceedings, and Schneider's motion to suppress was properly denied. St. v. Schneider, 2008 MT 408, 347 M 215, 197 P3d 1020 (2008), following St. v. Reavley, 2003 MT 298, 318 M 150, 79 P3d 270 (2003).

Bond Forfeiture Not Generally Synonymous With Conviction — No Double Jeopardy for Assault Proceedings: Toth forfeited bond for disorderly conduct that occurred on the same day that he was charged with assault with a weapon. Toth claimed that if the bond forfeiture arose from the same events that led to the assault charge, double jeopardy would bar further conviction for assault. The Supreme Court disagreed. Absent specific legislation to that effect, bond forfeiture is not generally synonymous with a conviction for double jeopardy purposes. Bond forfeiture is essentially a civil action and is not admissible as evidence in any other civil action, but bond forfeiture is included within the definition of conviction for particular statutorily delineated purposes only, not including assault. Thus, even if Toth's felony assault charge bond forfeiture arose out of the same transaction as the disorderly conduct, jeopardy did not attach by the bond forfeiture, so Toth's claim failed. St. v. Toth, 2008 MT 404, 347 M 184, 197 P3d 1013 (2008). See also Scott v. S. Carolina, 513 SE 2d 100 (S.C. 1999).

Continuation of Trial Not Double Jeopardy Violation: Based on pretrial conversations with both counsel, a Justice's Court Judge anticipated an abbreviated bench trial designed to get Barron's DUI case through Justice's Court as quickly as possible so that Barron could then receive a trial de novo in District Court. However, defense counsel immediately began lodging objections, and the judge realized that the proceedings would not be quickly resolved. After concluding that neither party was ready for a more full-blown proceeding, the judge decided in the interests of justice to continue the trial to another date when the parties could be more fully prepared and more time could be allotted for trial. Defense counsel subsequently objected to the continuance on double jeopardy grounds, and following conviction and appeal to District Court, defense counsel again raised the issue, asserting that the trial following the continuation in Justice's Court constituted double jeopardy and warranted dismissal of the charges. The District Court declined to dismiss the charges, and Barron appealed. The Supreme Court considered whether Barron had been subjected to double jeopardy when the Justice's Court continued the initial bench trial and decided that no double jeopardy violation occurred. The trial following the lawful continuance did not constitute a new trial because the Justice's Court did not issue any findings or reach a verdict following the initial hearing, the state did not use the continuance to

encourage the judge to reexamine evidence presented in the initial hearing, and Barron was not subjected to multiple punishments for the same offense. Double jeopardy did not apply because Barron was not subject to a second or successive trial on the underlying charges. St. v. Barron, 2008 MT 69, 342 M 100, 179 P3d 519 (2008).

Remand or Order to Lift Stay Unnecessary Upon Affirmation by Appellate Court — Supreme Court Jurisdiction of Municipal Court Appeal Affirmed but Remanded by District Court: A Municipal Court sentenced Costa for misdemeanor traffic offenses, then stayed imposition of sentence pending Costa's appeal to District Court. The District Court affirmed judgment and remanded to the Municipal Court for imposition of sentence. The question then arose as to whether the Supreme Court had jurisdiction to address the District Court's decision. The Supreme Court noted that the definition of remand is to send something back for further action; however, the Legislature did not intend to require an appellate court to formally remand in cases involving affirmed criminal judgments. In addition, it is unnecessary for an appellate court to direct that a stay pending appeal be lifted once a defendant has exhausted the right to appeal and the underlying judgment and sentence have been affirmed. Therefore, the District Court's remand was premature, unnecessary, and of no immediate consequence and had no effect on the Municipal Court's final judgment and sentence. The Municipal Court stayed Costa's sentence pending appeal, which presumably encompassed an appeal to the Supreme Court, so because the District Court's remand was unnecessary, the Supreme Court had jurisdiction over Costa's appeal. Billings v. Costa, 2006 MT 181, 333 M 84, 140 P3d 1070 (2006).

Failure to Give Jury Instruction on Lesser Included Offense of Unlawful Restraint in Aggravated Kidnapping Trial — Reversible Error: In Meyer's aggravated kidnapping trial, Meyer requested a jury instruction allowing the jury to consider unlawful restraint as a lesser included offense, but the instruction was denied. The Supreme Court noted that what constitutes isolation in terms of kidnapping and unlawful restraint is an issue for the trier of fact to decide, as long as there is some basis in the evidence for its conclusion. The jury as trier of fact in this case did not receive full and fair instructions on the applicable law and thus was not allowed to consider whether Meyer was guilty of the lesser included offense of unlawful restraint in light of the evidence. The judgment was reversed, and the case was remanded for a new trial. St. v. Meyer, 2005 MT 215, 328 M 247, 119 P3d 1214 (2005).

Washington Youth Sexual Offender Required to Register as Sexual or Violent Offender if Residing in Montana: At age 15, Villanueva was adjudicated guilty of first degree rape in Washington state and was later required to register for life in that state as a sexual offender. Villanueva subsequently moved to Montana where he resided for 6 weeks. After being arrested for a domestic disturbance, it was discovered that Villanueva had not registered as a sexual or violent offender in Montana, and he was charged with failure to register. Villanueva contended that Montana law did not apply to his Washington registration requirement because he did not meet the definition of sexual or violent offender under 46-23-502 and because a 1989 Attorney General's opinion held that juveniles adjudicated delinquent under the Montana Youth Court Act whose cases have not been transferred to District Court are not required to register. Villanueva moved to dismiss the charge, but the District Court denied the motion. On appeal, the Supreme Court affirmed. Although the Washington definition of sexual offender may not have been identical to the Montana definition, Villanueva was nevertheless a sexual offender under Washington law and was therefore required to register in Montana under 46-23-504. Further, Villanueva could not rely on the Attorney General's opinion because he was not adjudicated under the Montana Youth Court Act. The Supreme Court noted that the Washington sexual offender registration law also required Villanueva to register in another state if he changed state residency, so under both Washington and Montana law, Villanueva was required to register as a sexual offender. Villanueva's motion to dismiss was properly denied. St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

Violation of City Ordinances Constituting Particularized Suspicion for Investigative Stop: An officer saw Todd drive into a closed city park and exit his vehicle with an open beer. When the officer approached Todd's vehicle to inform him that the park was closed and that the city had an open container ordinance, the officer observed that Todd appeared to be intoxicated, and Todd was arrested for DUI. Todd moved to dismiss on grounds that the officer lacked a particularized suspicion to investigate because Todd had not broken any driving laws. The Supreme Court disagreed. A particularized suspicion exists if an officer believes that a person or occupant of a vehicle has committed, is committing, or is about to commit an offense, including a violation of a city ordinance. Thus, Todd's violation of the city ordinances was sufficient to provide the officer with a particularized suspicion of an offense to obtain or verify an account of Todd's presence or conduct, and based on the officer's subsequent observations of objective data indicating Todd's

intoxication, the investigative stop was justified. Todd's motion to dismiss was properly denied, and Todd's DUI conviction was affirmed. St. v. Todd, 2005 MT 108, 327 M 65, 111 P3d 677 (2005).

Misinformation in Plea Agreement and Incomplete Information Provided by District Court Raising Doubt as to Intelligent Guilty Plea — Denial of Withdrawal of Plea Reversed: Rave was charged with sexual assault with bodily injury. Following advice of counsel, Rave accepted a plea agreement and pleaded guilty. Prior to sentencing, Rave moved to withdraw the guilty plea, but the motion was denied, and Rave was sentenced pursuant to the plea agreement. On appeal, the Supreme Court found that the plea agreement erroneously advised Rave that sexual assault may be a lesser included felony offense and that the penalty was the same as for sexual assault with bodily injury when, in fact, the lesser included offense was a misdemeanor. In addition, the District Court did not correct the misinformation in the plea agreement when accepting the guilty plea, so Rave could not have made a knowing, intelligent, and voluntary plea. Thus, the Supreme Court reversed the denial of Rave's motion to withdraw the guilty plea and remanded for further proceedings. St. v. Rave, 2005 MT 78, 326 M 398, 109 P3d 753 (2005).

Criminal Possession of Dangerous Drugs, but Not Possession of Precursors to Dangerous Drugs, Considered Lesser Included Offense of Criminal Production or Manufacture of Dangerous Drugs by Accountability: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. However, because the production or manufacture of dangerous drugs cannot be a criminal act until the drug has been created, the state had to first prove that Becker or one of his codefendants possessed drugs in order to convict Becker on the charge of producing or manufacturing those same drugs. Read together, 46-11-410(2)(a) and subsection (9)(a) of this section barred Becker's conviction for both criminal possession of dangerous drugs and accountability for criminal production or manufacture of dangerous drugs because criminal possession is a lesser included offense of criminal production or manufacture of dangerous drugs. However, criminal possession of precursors to dangerous drugs is not a lesser included offense of accountability for criminal production or manufacture of dangerous drugs. Thus, the Supreme Court reversed the criminal possession conviction and ordered resentencing on only the criminal possession of precursors and accountability for criminal production or manufacture. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005). See also St. v. Peterson, 227 M 511, 744 P2d 870 (1987).

Failure of Counsel to Argue Included Offenses Under State Law Considered Ineffective Assistance of Counsel: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. On appeal, Becker argued that he should have been convicted only of criminal production or manufacture by accountability because the other two charges were part of the manufacturing process and that failure to include the other charges violated his due process rights. The Supreme Court declined to address the double jeopardy issue under the plain error doctrine because Becker raised it for the first time on appeal. However, the court found it appropriate to address the issue under Becker's ineffective assistance of counsel claim. Becker's counsel's failure to include all the relevant charges in a dismissal motion and to rely on the proper statutory grounds for dismissal constituted deficient performance under the first prong of the Strickland test. The second Strickland prong was also met because Becker was prejudiced by counsel's deficient performance, inasmuch as there was a reasonable probability that the result of the proceeding would have been different but for counsel's errors. The Supreme Court thus vacated the convictions and remanded for resentencing. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005). See also St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001).

Misdemeanor Assault Not Lesser Included Offense of Sexual Assault — Denial of Lesser Included Offense Instruction Not Error: In a sexual assault trial, Cameron requested a jury instruction that misdemeanor assault was a lesser included offense of sexual assault. The request was denied. On appeal, Cameron raised several arguments regarding the lesser included offense and claimed error in denial of the instruction. The Supreme Court noted that under St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705 (1998), two criteria must be met before a defendant is entitled to a lesser offense instruction: (1) the offense must actually constitute a lesser included offense of the offense charged; and (2) there must be sufficient evidence to support the lesser included offense instruction. The court examined the elements of both offenses and concluded that the elements of misdemeanor assault and sexual assault are not similar and do not overlap. Thus, misdemeanor assault is not a lesser included offense of sexual assault. The jury was therefore properly instructed, and the sexual assault conviction was affirmed. St. v. Cameron, 2005 MT 32, 326 M 51, 106 P3d 1189 (2005), followed in St. v. Gerstner, 2009 MT 303, 353 M 86, 219 P3d 866 (2009).

Assault With Weapon Not Lesser Included Offense of Assault of Peace Officer — No Double Jeopardy in Convicting of Both Offenses: Matt was charged with assault with a weapon and with assault on a peace officer. Matt pleaded guilty to assault on a peace officer and moved to dismiss the assault with a weapon charge, contending that it was a lesser included offense of assault on a peace officer and that prosecution for assault with a weapon therefore violated Matt's double jeopardy rights. The Supreme Court noted that each offense requires proof of an element not included in the other offense, so assault with a weapon is not a lesser included offense of assault on a peace officer. Thus, prosecution of both offenses did not violate Matt's constitutional or statutory double jeopardy protections, and both convictions were affirmed. St. v. Matt, 2005 MT 9, 325 M 340, 106 P3d 530 (2005), following St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999).

Endangering Welfare of Children Not Lesser Included Offense of Sexual Intercourse Without Consent: At a felony sexual intercourse without consent trial, Grindheim requested a jury instruction on a lesser included offense of endangering the welfare of a child. The motion was denied, and on appeal, the Supreme Court affirmed. Because the elements of the crimes are different and require different elements of proof, endangering the welfare of a child cannot be considered a lesser included offense of sexual intercourse without consent. St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004). See also St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999).

Criminal Endangerment, Negligent Endangerment, and Partner or Family Member Assault Not Considered Lesser Included Offenses of Aggravated Assault: At trial for aggravated assault, the District Court refused Hoffman's request of lesser included offense instructions on the offenses of criminal endangerment, negligent endangerment, and partner or family member assault, and Hoffman appealed. The Supreme Court affirmed. Under subsection (8)(a) of this section, a lesser included offense is one that is established by proof of the same or less than all the facts required to establish commission of the offense charged, while under subsection (8)(c) of this section, a lesser included offense is one that differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission. Although Hoffman made prefatory reference to both subsections, the substance of Hoffman's argument focused entirely on subsection (8)(c), and the Supreme Court declined to address arguments related to subsection (8)(a) that were raised for the first time on appeal. It is incumbent on counsel to specify at trial which subsection is being relied upon. Subsection (8)(c) does not support a conclusion that criminal endangerment, negligent endangerment, or partner or family member assault is a lesser included offense of aggravated assault. The District Court's properly concluded that the offenses were too dissimilar to warrant a lesser included offense instruction. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), following St. v. Fisch, 266 M 520, 881 P2d 626 (1994).

No Abuse of Discretion in Refusing to Instruct Jury on Lesser Included Offense of Negligent Homicide Absent Supporting Evidence: German was convicted of attempted felony assault and deliberate homicide. At trial, the court instructed the jury on German's defense of justifiable use of force and gave a mitigated deliberate homicide instruction but refused to give a jury instruction regarding the lesser included offense of negligent homicide, finding no evidence to support the instruction. German appealed on grounds that the trial court erred in failing to give the negligent homicide instruction. The Supreme Court affirmed. District Courts have broad discretion in formulating jury instructions, including the authority to reject instructions that are not supported by evidence. A lesser included offense instruction must be given when properly requested and when the jury could be warranted in finding defendant guilty of the lesser included offense, based on the evidence, but the instruction need not be given if there is no evidence to support it. A lesser included offense instruction is not supported by the evidence when defendant's evidence or theory, if believed, would require an acquittal. Here, German's justifiable use of force defense, if proved, would have required an acquittal. German cited St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705 (1998), for the proposition that a defendant is generally entitled to a lesser included offense instruction and that the District Court may usurp the jury's function by factually deciding the merits of the lesser included offense. The Supreme Court disagreed. Martinez neither overruled nor was inconsistent with cases entitling defendant to a lesser included offense instruction when evidence supports the instruction, and in both civil and criminal proceedings, the determination of whether there is sufficient evidence to raise an issue of fact for a jury is a question of law for the trial court. Only when the trial court determines as a matter of law that factual disputes exist are those disputes turned over to the jury. In this case, German's own testimony was that he consciously made the decision to shoot the victim, so there was no support for a negligent homicide instruction and the trial court did not err in

refusing to give one. St. v. German, 2001 MT 156, 306 M 92, 30 P3d 360 (2001), following St. v. Swan, 279 M 483, 928 P2d 933 (1996).

Assault on Peace Officer Not Lesser Included Offense of Attempted Deliberate Homicide: Assault on a peace officer requires proof of an additional fact not necessary for attempted deliberate homicide, namely that the victim is a peace officer. Thus, assault on a peace officer is not a lesser included offense of attempted deliberate homicide. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001), distinguishing St. v. Castle, 285 M 363, 948 P2d 688 (1997).

No Error in Refusing Instruction on Mitigated Deliberate Homicide Absent Evidence of Extreme Emotional Distress: Martin contended that during his attempted deliberate homicide trial, the trial court erred in not giving an instruction on mitigated deliberate homicide, relying on St. v. Buckley, 171 M 238, 557 P2d 283 (1976), for the proposition that the instruction is required if there is any evidence of mitigation. The evidence Martin offered in support of the contention that he was under extreme emotional distress when he shot a pursuing police officer included the surprised look on his face after the shooting, coupled with his homelessness, unemployment, and pregnant girlfriend. The trial court concluded, and the Supreme Court agreed, that Martin's reliance on Buckley was misplaced and that Martin's evidence did not rise to the level of extreme emotional or mental distress. The evidence must indicate provocation of some sort in the form of a reasonable excuse or explanation. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Negligent Endangerment Not Lesser Included Offense of Assault of Peace Officer: Section 45-5-210 provides that criminal endangerment, negligent endangerment, and assault are not included as offenses of assault on a peace officer. Fuqua was convicted of assault on a peace officer and argued that 45-5-210 unconstitutionally eliminated consideration of his claim of negligent endangerment as a lesser included offense. The Supreme Court noted that negligent endangerment differs from assault on a peace officer by requiring a lesser kind of culpability and by requiring proof of different conduct; thus, negligent endangerment is not a lesser included offense of assault on a peace officer. Having so concluded, the court declined to address the constitutional question of whether the Legislature can specifically eliminate consideration of an offense as a lesser included offense. St. v. Fuqua, 2000 MT 273, 302 M 99, 13 P3d 34, 57 St. Rep. 1141 (2000).

Criminal Counts Part of Same Transaction Not Subject to Further Prosecution: In arguing that defendant's conduct attributable to Munchausen Syndrome by Proxy (MSBP) was part of the same transaction that led to joinder of offenses of similar character under 46-11-404, the state could not adopt a contrary position and argue that the counts were not part of the same transaction for purposes of further prosecution under 46-11-503. Although 46-11-404 does allow joinder of offenses of the same or similar character as well as those arising out of the same transaction, the distinction was irrelevant in this case because the state's theory was always that defendant's conduct attributable to MSBP was part of the same transaction. The Supreme Court held that MSBP is a criminal objective—namely, seeking of attention through harming one's children—so defendant's actions toward two children came within the same transaction; thus, further prosecution for one child's death was barred by a former prosecution that resulted in a conviction for criminal endangerment of another child. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000). See also St. v. Waldrup, 264 M 456, 872 P2d 772 (1994).

Gopher Rule Relates to Instructions on Lesser Included Offenses, Not Alternative Offenses: Beavers was charged with criminal endangerment, but maintained that he was entitled to a jury instruction on reckless driving as an alternative theory under the rule in St. v. Gopher, 194 M 227, 633 P2d 1195, 38 St. Rep. 1521 (1981), that a defendant is entitled to an instruction to cover every issue or theory having support in the evidence. However, Gopher applies only to instructions on lesser included offenses, not alternative offenses. The rule of law applied to alternative offenses is that of prosecutorial discretion. When the facts support a possible charge of more than one crime, the crime charged is a matter of prosecutorial discretion. (See St. v. Booke, 178 M 225, 583 P2d 405 (1978).) Beavers was properly disallowed arguing an alternative offense theory that involved an offense that was not a lesser included offense of the offense charged. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999).

Lesser Included Offense Must Constitute Included Offense of Crime Charged: A criminal defendant is entitled to jury instructions that cover every issue or theory having support in the evidence, including an instruction on a lesser included offense when one of the parties requests it and when the record contains evidence from which the jury could rationally find defendant guilty of the lesser included offense and acquit of the greater. However, in order for the District Court to instruct the jury on a lesser included offense, the offense must actually constitute an included offense of the crime charged. To make the determination, the Supreme Court will apply the test

in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), and consider the statutory definitions of the offenses involved, in light of the definitions in this section. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999).

Reckless Driving Not Lesser Included Offense of Criminal Endangerment: Reckless driving is a distinct offense and not an included offense of criminal endangerment. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999), following Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932).

Sufficient Evidence of Criminal Endangerment — Instruction on Negligent Endangerment Not Required: Martinosky was charged with felony criminal endangerment. During settlement of jury instructions, Martinosky offered a proposed instruction on negligent endangerment as a lesser included offense of criminal endangerment, but the instruction was refused. On appeal, without reaching the question of whether negligent endangerment was a lesser included offense of criminal endangerment, the Supreme Court found that the evidence established that Martinosky was fully aware of his actions and the probable outcome of those actions and thus acted knowingly, so an instruction on negligent endangerment was not warranted. St. v. Martinosky, 1999 MT 122, 294 M 427, 982 P2d 440, 56 St. Rep. 495 (1999), following St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705, 55 St. Rep. 1093 (1998).

DUI and Negligent Homicide Arising From Same Accident Not Part of Same Transaction — No Double Jeopardy: Booth pleaded guilty in Justice's Court to a DUI charge and claimed double jeopardy when he was subsequently charged in District Court with two counts of negligent homicide arising out of the accident that led to the DUI charge and conviction. Neither 46-11-503 nor 46-11-504 barred the District Court charges. Under each section, double jeopardy requires that the offenses arise out of the same transaction. Because Booth's conduct in allegedly causing the two deaths was not motivated by a purpose to accomplish the criminal objective of DUI, the DUI and negligent homicide offenses did not arise out of the same transaction within the meaning of the statutory definition of "same transaction" as conduct consisting of a series of acts that are motivated by a purpose to accomplish a criminal objective and that are necessary or incidental to the accomplishment of that objective. State ex rel. Booth v. District Court, 1998 MT 344, 292 M 371, 972 P2d 325, 55 St. Rep. 1395 (1998), followed in St. v. Condo, 2008 MT 114, 342 M 468, 182 P3d 57 (2008).

City Police Officer Making Arrest Outside Territorial Jurisdiction — Probable Cause Required: A city police officer, investigating a phone call reporting a suspected drunk driver, pursued Williamson outside city limits and arrested him, although the officer observed no erratic driving or other indicators of alcohol impairment prior to stopping Williamson's truck. Williamson moved to suppress all the evidence on the basis that the officer did not have probable cause to make the stop, contending that probable cause was necessary because the officer was acting outside his territorial jurisdiction as a city police officer and that the information within the officer's knowledge at the time of the stop did not rise to the level of probable cause. Williamson's motion was denied. Clarifying the difference between the probable cause necessary to effectuate a valid arrest and the particularized suspicion necessary to justify an investigative stop, the Supreme Court noted that although an officer ordinarily needs only a particularized suspicion for a traffic stop, under these circumstances, the officer was outside his jurisdiction when the stop was made and was thus not acting within the scope of his authority as a peace officer. The criminal procedures in 46-5-401 and 46-6-311 were not available to the officer. Rather, as a peace officer acting outside his territorial jurisdiction, his authority was limited to that provided to private citizens under 46-6-502, so probable cause was required. The citizen informant's telephone report was not sufficient to establish probable cause because the relayed report was devoid of information as to why the informant believed that Williamson was intoxicated and the officer did not inquire into the basis of the report before stopping Williamson's truck. The report created, at most, a suspicion that an offense was being committed, but that suspicion alone was insufficient to establish probable cause. Even if the informant had sufficient information to establish probable cause for a citizen's arrest of Williamson, that information was not relayed to the officer, who thus did not possess sufficient information to make the stop. The judgment was reversed because the District Court erred in refusing to suppress the evidence. St. v. Williamson, 1998 MT 199, 290 M 321, 965 P2d 231, 55 St. Rep. 843 (1998), distinguishing St. v. Schoffner, 248 M 260, 811 P2d 548 (1991), and followed in St. v. Reiner, 2003 MT 243, 317 M 304, 77 P3d 210 (2003), and St. v. Ellington, 2006 MT 219, 333 M 411, 143 P3d 119 (2006).

Supreme Court Without Jurisdiction Over Appeal From Guilty Plea With No Sentence: Diesen pleaded guilty to misdemeanor boating under the influence of alcohol, reserving his right to appeal the denial of his pretrial motion to dismiss for improper venue. Judgment was entered,

and sentencing was deferred pending appeal. The Supreme Court held that it had no jurisdiction to hear the appeal because no sentence had been given by the District Court. The Supreme Court pointed out that because judgment is defined as including a sentence, no appeal can be taken from a judgment pursuant to 46-20-104 until the sentence has been pronounced by the District Court. St. v. Diesen, 1998 MT 163, 290 M 55, 964 P2d 712, 55 St. Rep. 655 (1998).

Misdemeanor Traffic Offenses in Tribal Court and Felony DUI in State District Court Not Arising From Same Transaction — No Double Jeopardy: Couture was cited for two misdemeanor traffic offenses in tribal court. A few days later he was moved to state District Court and charged with felony DUI, sixth offense. He pleaded guilty to the tribal court misdemeanors and then sought dismissal of the District Court felony on grounds of double jeopardy. He contended that because the offenses all arose from the same transaction and he had been convicted in tribal court, prosecution in District Court was barred under 46-11-504. The District Court properly held that the misdemeanors—driving without a license and without proof of insurance—were unrelated to the criminal objective of DUI. Because by definition the offenses did not arise out of the same transaction, the District Court felony prosecution did not constitute double jeopardy. St. v. Couture, 1998 MT 137, 289 M 215, 959 P2d 948, 55 St. Rep. 548 (1998), following St. v. Sword, 229 M 370, 747 P2d 206 (1987).

Assault Lesser Included Offense of Deliberate Homicide — Error to Refuse Instruction on Lesser Included Offense: The defendant was convicted of deliberate homicide. At trial, the court refused the defendant's proposed jury instruction on the offense of assault. The Supreme Court determined that as a matter of law, under the express terms of this section, assault is an included offense of the crime of deliberate homicide. When there was some evidence supporting a defendant's theory that the defendant was guilty of assault but not murder, the District Court erred in refusing the proposed jury instruction on assault as a lesser included offense of deliberate homicide. St. v. Castle, 285 M 363, 948 P2d 688, 54 St. Rep. 1194 (1997).

Parole Officer Duty of Care to Supervise Parolees — Jury Instruction Properly Given: Corliss was paroled, after serving time for an execution-style slaying with a handgun, under the condition that he not possess a firearm. While on a visit, with the approval of his parole officer, to Washington state to look for work, Corliss failed to return to Montana within the established time, failed to see a parole officer in Washington, had a temporary restraining order obtained against him by a girlfriend because of threats made to her and her family, and had an altercation with his wife involving a handgun. In neither instance of violence did Corliss's parole officer investigate the circumstances of the violence. Later, Corliss shot and killed one friend of his girlfriend and injured another. Both the estates of the deceased woman and the wounded woman brought actions against the state for negligent supervision of Corliss's parole. The state objected to an instruction given by the District Court concerning a parole officer's duty of care, claiming that there must be some special relationship between the parole officer and the person injured by a parolee in order for a duty of care to arise. The Supreme Court reviewed statutes defining negligence, statutes describing the general duty of one individual toward another, and statutes concerning parole and concluded that Robbins had a general duty to exercise reasonable care in the supervision of Corliss and had a duty to the killed and injured women in particular. Starkenburg v. St., 282 M 1, 934 P2d 1018, 54 St. Rep. 214 (1997). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Incest Not Included Offense of Sexual Intercourse Without Consent: McQuiston contended that his conviction for both incest and sexual intercourse without consent violated double jeopardy protections because under 46-11-410, a defendant may not be convicted of more than one offense if one offense is an included offense in another, as defined in this section. The Supreme Court held that incest is not an included offense of sexual intercourse without consent but rather is a distinct and wholly separate offense, each crime requiring proof of distinct elements that the other does not have. McQuiston's conviction for both crimes was not a double jeopardy violation. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996), following St. v. Sor-Lokken, 247 M 343, 805 P2d 1367 (1991).

Prosecution for Possession Not Barred by Prior Conviction for DUI as Arising From Same Transaction: Tadewaldt argued that he could not be tried for felony possession of dangerous drugs because that charge arose out of the same transaction that resulted in his DUI conviction. The Supreme Court upheld the second conviction on the grounds that the DUI resulted from his being arrested for drugs that he had ingested. The DUI was not the same transaction as the charge for drugs in his possession that were found on his person subsequent to his being stopped for DUI. St. v. Tadewaldt, 277 M 261, 922 P2d 463, 53 St. Rep. 635 (1996), following the rationale of St. v. Sword, 229 M 370, 747 P2d 206 (1987).

Theft of Lost or Mislaid Property Not Lesser Included Offense of Theft of Stolen Property: Smith was charged with theft of stolen property and subsequently convicted. The District Court refused to give an instruction that theft of lost or mislaid property was a lesser included offense. The Supreme Court used the Blockburger test applied in St. v. Long, 223 M 502, 726 P2d 1364 (1986), and St. v. Arlington, 265 M 127, 875 P2d 307 (1994)—that is, whether proof of the same facts will support a conviction under either charge. The Supreme Court held that because the state would have to prove that the defendant knew that the property was lost or mislaid under one section of law but not under the other, theft of lost or mislaid property was not a lesser included offense of theft of stolen property. St. v. Smith, 276 M 434, 916 P2d 773, 53 St. Rep. 459 (1996). However, see St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999).

Judgment as Including Sentence — Sentence Not Strictly Premised on Punishment: A defendant had 60 days under former Rule 5(b), M.R.App.P. (now superseded), to appeal a final judgment. Although prior to the 1991 enactment of this section, "sentence" was interpreted as being the same as "punishment", this section now defines a sentence as any judicial disposition of a criminal proceeding upon a plea, verdict, or finding of guilt. The judicial disposition is itself a sentence regardless of whether actual punishment is deferred or imposed immediately. This broader definition applies to deferment cases, but in double jeopardy cases, the narrower meaning premised on the punishment factor still applies. Therefore, a judgment that includes a deferred sentence is final for purposes of appeal, and an appeal filed more that 60 days after sentencing was dismissed as untimely. St. v. Rice, 275 M 81, 910 P2d 245, 53 St. Rep. 48 (1996), followed in Davis v. St., 2004 MT 112, 321 M 118, 88 P3d 1285 (2004).

Resetting Execution Date Not Considered Appealable Judgment — Setting Execution Date as Ministerial Rather Than Judicial: McKenzie was sentenced for deliberate homicide and aggravated kidnapping, and the death penalty was imposed in 1975. Despite the subsequent process of appeals spanning nearly 20 years, the 1975 sentence was never vacated by any court. The District Court held a hearing in 1995 to reset the execution date after the appeals proceedings, none of which were ultimately successful for McKenzie, had run their course. McKenzie claimed that the hearing constituted a resentence that reimposed the death sentence, which was beyond the jurisdiction of the District Court. The Supreme Court noted that setting the execution date was a ministerial function rather than a judicial act. Because McKenzie's substantial rights could not be implicated by that ministerial act, the District Court's order resetting the execution date could not be defined as a new judgment from which an appeal could lie. The District Court merely executed the judgment before it. Further, under St. v. Hanners, 254 M 524, 839 P2d 1267 (1992), once the valid judgment and sentence had been signed, the District Court had no jurisdiction to vacate the original judgment except as provided by law. Montana has no law allowing amendment of an original judgment at a hearing resetting an execution date. St. v. McKenzie, 271 M 32, 894 P2d 289, 52 St. Rep. 312 (1995).

Included Offense Based Upon Less Risk, Injury, or Culpability — Negligent Endangerment Not Lesser Included Offense of Aggravated Assault: Fisch was convicted of aggravated assault after the District Court refused to accept a jury instruction on negligent endangerment, which Fisch argued was a lesser included offense of aggravated assault. Citing St. v. Sheppard, 253 M 118, 832 P2d 370 (1992), the Supreme Court held that a person is entitled to an instruction on a lesser included offense only if, based upon the evidence, the jury could rationally find the person guilty of the lesser offense and if that entitlement is based upon one offense being, in law, an included offense of the other. Because the definition of "included offense" is written in the disjunctive with the qualifier "only", a lesser included offense may differ in one and only one way from that of the offense charged. Fisch's argument fails because at least two of the variations in degree exist between the offense charged and negligent endangerment. Moreover, Fisch's "less serious risk", "less serious injury", and "lesser kind of culpability" arguments under subsection(8)(c) of this section also fail. As a result, the Supreme Court held that no amount of evidence as to negligent endangerment would entitle Fisch to the instruction he sought. St. v. Fisch, 266 M 520, 881 P2d 626, 51 St. Rep. 907 (1994), followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

Included Offense Based Upon Similar Proof — Failure to Raise in District Court: Fisch was convicted of aggravated assault after the District Court refused to accept a jury instruction on negligent endangerment, which Fisch argued was a lesser included offense of aggravated assault. Citing St. v. Henderson, 265 M 454, 877 P2d 1013, 51 St. Rep. 606 (1994), the Supreme Court noted that Fisch's argument for a lesser included offense based upon subsection(8)(a) of this section was not raised in the District Court and that Fisch could not change his theory on

appeal from that argued in the District Court. St. v. Fisch, 266 M 520, 881 P2d 626, 51 St. Rep. 907 (1994).

Indecent Exposure to Different Victims on Different Dates Not Considered Same Transaction — Prosecution Not Barred: After charging Waldrup with three counts of indecent exposure, to which he pleaded guilty on two counts, police continued to investigate previous reports of a man exposing himself. Waldrup was a suspect. After Waldrup was identified from a photographic lineup, he was charged with four additional counts of indecent exposure in incidents involving four different victims. Under 45-5-504, a third or subsequent conviction of indecent exposure allows for enhancement of punishment to a felony. Waldrup moved to dismiss the charges on the grounds that prosecution was barred for reasons of fundamental fairness and violation of constitutional provisions. The District Court granted the dismissal motion on the basis of double jeopardy. About 1 week after dismissal, the Supreme Court decided St. v. Berger, 259 M 364, 856 P2d 552 (1993), holding that the 1991 amendments to 46-11-503 did not eliminate the "same transaction" requirement or expand statutory protection to unrelated offenses. Because the charges against Waldrup were based on incidents that were not part of the same transaction, within the meaning of this section, the incidents could not be considered part of a plan resulting in the repeated commission of the same offense against the same person. Thus, prosecution of the four later counts was not precluded. St. v. Waldrup, 264 M 456, 872 P2d 772, 51 St. Rep. 344 (1994).

Premature Appeal of Judgment Not Including Sentence — De Novo Appeal Only — Appeal Not Perfected Properly Dismissed: Todd was convicted of assault in Justice's Court and, before he was sentenced, filed a notice of intention to appeal. The Justice's Court nevertheless proceeded to sentencing, and Todd was sentenced to pay a $250 fine or to perform community service, to pay costs, and to a 6-month deferred sentence. Several months after fulfilling the community service, Todd was informed that he had not paid the costs, whereupon the state moved for imposition of sentence and for dismissal of the earlier appeal. The court granted the state's motion, and Todd subsequently filed a notice of appeal from the Justice's Court's order dismissing the first appeal. The District Court held that it had no jurisdiction to review the Justice's Court's order and dismissed the appeal. Citing St. v. Hegeman, 248 M 49, 808 P2d 509 (1991), and St. v. Wilson, 252 M 264, 827 P2d 1286 (1992), the Supreme Court held that the right to appeal from a judgment was a right to appeal from a judgment that includes a sentence and that because sentence had not been pronounced at the time that Todd filed his first notice, the notice was premature and ineffective. The Supreme Court held that the second notice of appeal was also ineffective in that it was filed months after sentencing and not within the time required by statute. The District Court was correct in holding that it had no jurisdiction to review the Justice's Court's order dismissing the first appeal, both because the appeal to District Court is a trial de novo and not a review of lower court orders and because the notice of appeal was untimely filed. St. v. Todd, 262 M 108, 863 P2d 423, 50 St. Rep. 1466 (1993), followed in St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996), and St. v. Mora, 277 M 411, 922 P2d 516, 53 St. Rep. 736 (1996).

Arrest by Peace Officer Outside Officer's Jurisdiction — Applicability of Driving Under the Influence Implied Consent Law: A peace officer is by statute "any person who by virtue of the person's office or public employment is vested by law with a duty to maintain public order and make arrests for offenses while acting within the scope of the person's authority". Though a city police officer's authority did not extend beyond the city limits and his arrest of a driver beyond the city limits for being under the influence could only be a citizen's arrest, he was within the definition of a peace officer even when outside the geographical area in which he had jurisdiction because he was at the time of the arrest a peace officer in fact and by virtue of holding the particular job. Therefore, the implied consent law applied even though it refers to a person "arrested by a peace officer". Maney v. St., 255 M 270, 842 P2d 704, 49 St. Rep. 980 (1992).

Right to Due Process and Speedy Trial Denied — When Defendant Becomes "Accused" — Insufficient Reason for Delay — Prejudice to Defendant: Where 376 days elapsed between the filing of a complaint in Justice's Court charging the defendant with arson and the filing of an information in District Court, and 423 days elapsed between the defendant's arrest and the defendant's scheduled trial, the court did not err in dismissing with prejudice for lack of a speedy trial the information charging the defendant with arson. The defendant became an "accused" on the day the complaint was filed against him in Justice's Court, the State failed without good reason to diligently pursue the charges against the defendant, and the defendant had asserted the denial of his right to a speedy trial and had shown prejudice in his plausible claims that he was no longer able to recall facts constituting an alibi and was no longer able to discover physical evidence for use in his defense independently of that evidence found by the prosecution. The

defendant thus satisfied the requirements to prove a violation of his constitutional right to a speedy trial. St. v. Larson, 191 M 257, 623 P2d 954, 38 St. Rep. 213 (1981).

Issuance of Search Warrant by Justice of the Peace in Case Involving Dangerous Drugs: Justices' Courts are constitutionally created, and when the Legislature has had the opportunity to limit their jurisdiction and has not seen fit to do so, a legislative intent to authorize the practice of Justices' Courts issuing search warrants is presumed as a Justice of the Peace meets the United States constitutional standard of "a neutral and detached magistrate" to examine the application for a search warrant and determine whether reasonable cause exists for its issuance. St. v. Snider, 168 M 220, 541 P2d 1204 (1975).

Issuance of Warrant by City Judge: A City Court Judge does not have the statutory authority to issue search warrants, and the trial court correctly suppressed evidence obtained under color of a search warrant executed by a City Court Judge. St. v. Tropf, 166 M 79, 530 P2d 1158 (1975), applied, with regard to substitute judges, in Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

Disqualification of Justice of the Peace: Under former law, the word "judge" did not include "justice of the peace", and a Justice of the Peace could not be disqualified on a simple affidavit for substitution of judge. Bailey v. St., 163 M 380, 517 P2d 708 (1973).

Attorney General's Opinions

Criminal Trials on Sundays: Montana law does not permit criminal trials to be conducted on Sundays except to conclude a trial already initiated, as specified in 3-1-302. 43 A.G. Op. 27 (1989).

Power of "Accident Investigator" to Enforce Provisions of Mandatory Insurance Law: The role of an "accident investigator", who is not a peace officer, in enforcing the provisions of the mandatory insurance law is the same as that of a private person. If the accident investigator has reasonable cause to believe an offense has been committed, he must execute a sworn complaint pursuant to 46-6-201. 38 A.G. Op. 49 (1979).

Private Citizen Cannot Prosecute Complaint: Since the term "magistrate" includes Justices of the Peace in 7-4-2712, the County Attorney is charged with the responsibility of prosecuting complaints in Justice's Court and a Justice of the Peace cannot allow a private citizen to prosecute a complaint. However, a County Attorney is vested with normal discretion and need not file and prosecute every individual's complaint when there is insufficient evidence to warrant prosecution or when such a prosecution would not be in the interests of justice. 36 A.G. Op. 47 (1975).

Law Review Articles

Two Crimes for the Price of One: Reshaping Felony Homicide in State v. Russell, Henkel, 71 Mont. L. Rev. 205 (2010).

Discussion of State v. Tropf and State v. Snider, 37 Mont. L. Rev. 274 (1976).

Collateral References

Criminal Law *key* 205, 207(1); Indictment and Information *key* 1; Officers and Public Employees *key* 1.

22 C.J.S. Criminal Law §§1, 433; 67 C.J.S. Officers and Public Employees §1.

Part 4
Incarceration Enhancement

46-1-401. Penalty enhancement — pleading, proof, and mental state requirements.

Compiler's Comments

2003 Amendment: Chapter 154 in (1) in introductory clause after "impose" deleted "an incarceration"; inserted (1)(d) providing that a penalty enhancement may not be imposed unless a defendant who knowingly and voluntarily pleaded guilty to an offense also admitted to the enhancing act, omission, or fact; in (3) near middle of first sentence substituted "a penalty" for "an incarceration period" and inserted second sentence providing that aggravating circumstances are enhancing acts, omissions, or facts; in (4) near middle after "enhance the" deleted "incarceration"; and made minor changes in style. Amendment effective October 1, 2003.

Effective Date: Section 8, Ch. 524, L. 2001, provided that this section is effective on passage and approval. Approved May 1, 2001.

Case Notes

No Exception to Sixty-Day Rule for Prosecutor's Filing of Notice to Seek Death Penalty — Lack of Prejudice to Defendants Irrelevant: The defendants petitioned the Supreme Court to take supervisory control and reverse the trial court's decision that the prosecutor's failure to file the

notice to seek the death penalty within the 60 days required by rule was acceptable because the late filing did not prejudice the defendants. The defendants argued that the late filing was a violation of their rights to due process under the federal and state constitutions. The Supreme Court held that it did not have to resort to a due process analysis but that the issue could be decided on the basis of Art. VII, sec. 2(3), Mont. Const., granting the Supreme Court its rulemaking authority. The Supreme Court noted that it had amended Standard 1.1.a. in 2002 to include the 60-day notice rule and that the Legislature had not exercised its right to disapprove the rule in the two following legislative sessions. The state argued that the 60-day rule was subject to exceptions, stating that in the present case, the defendants and their counsel were well aware that the death penalty was a potential punishment and that the notice was filed sufficiently in advance of the trial to afford the defendants ample opportunity to defend against a capital case. The Supreme Court stated that the state's reliance on St. v. Sol, 282 M 69, 936 P2d 307 (1997), for the proposition that the defendants were entitled only to adequate notice was misplaced. The Supreme Court held that even if the defendants' rights to due process were met by adequate notice, that did not nullify their argument that the 60-day notice rule is a mandate. The defendants argued that the plain language of the 60-day rule was clear and left no room for the trial court to inject the concept of allowing a late notice if a defendant is not prejudiced by the delay. The Supreme Court agreed and held that the court rules were subject to the same rules of interpretation as statutory law and the notice rule was clear on its face that a prosecutor has only 60 days after arraignment to file the notice of intent to seek the death penalty. The Supreme Court pointed out that the rule states that the prosecutor "shall" not "should" or "may" file the notice within 60 days and that the use of shall creates a mandate for when the notice must be filed. Miller v. District Court., 2007 MT 149, 337 M 488, 162 P3d 121 (2007).

Enhanced Sentence for Use of Weapon — Apprendi Applied Retroactively Under Harmless Error Test — Enhanced Sentence Without Unanimous Jury Finding Harmless Error: After Adams received an enhanced sentence for use of a weapon during an aggravated assault, Adams appealed on grounds that there was insufficient evidence to support a finding that a weapon was used and that the enhanced sentence violated due process because there was no separate jury finding that a weapon was used, as required by Apprendi v. N.J., 530 US 466 (2000). The 2001 Legislature updated the law to address the Apprendi requirement, but as it read in 1997 during Adams's sentencing, this section did not require a separate jury finding, so Adams argued that this section was therefore unconstitutional. The Supreme Court held that Apprendi imposes a new obligation on the state and is thus a new rule that applies retroactively to cases pending on direct appeal or not final at the time that the new rule was issued, so Apprendi applied retroactively to Adams's direct appeal. Nevertheless, the Supreme Court affirmed the sentence on both issues. First, there was uncontroverted evidence that a weapon was involved in the crime. Second, the Supreme Court applied Neder v. U.S., 527 US 1 (1999), to determine the proper test to apply when a trial court fails to instruct the jury to make a finding of materiality. Under Neder, the proper test is the harmless error test, i.e., whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Thus, in this case, the question was whether, beyond a reasonable doubt, Adams would have received an enhanced sentence based on the display or use of a weapon had the question been submitted to the jury. Given evidence that a gun was used was uncontroverted, the result would have been the same, so any error in failing to present the question to the jury was harmless. Adams v. St., 2007 MT 35, 336 M 63, 153 P3d 601 (2007), applying St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001).

Maximum Statutory Sentence for Deliberate Homicide When Death Penalty Not Sought: Because 46-18-202(2) does not remove from the jury a determination of facts necessary to restrict parole, the statutory maximum for deliberate homicide when the death penalty is not sought is life imprisonment without the possibility of parole. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006), followed in St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009).

No Implied Presumption of Parole Eligibility — Federal Constitutional Protections Not Violated by Sentence of Life Imprisonment Without Parole — Montana Constitutional Protections Not Addressed: Garrymore was sentenced to life in prison without parole for the deliberate homicide of his adopted infant child. Garrymore appealed the parole restriction and sought to have the sentence vacated on grounds that 45-5-102(2) contains an implicit presumption of parole eligibility. Garrymore contended that under the statute, standing alone and without the operation of 46-18-202, he was entitled to a parole-eligible sentence, subject to 46-23-201, that was taken away by the sentencing judge in violation of due process and a trial by jury. The Supreme Court found nothing in sentencing statutes that creates a presumption in favor of parole eligibility that must be overcome in order for a sentencing judge to impose a parole

restriction. Rather, sentencing courts have broad discretion under 46-18-202 to impose parole eligibility restrictions on felony sentences, and the Legislature has placed no limitation on the exercise of that authority. A parole-eligible sentence was not taken away from Garrymore because he was not entitled to such a sentence to begin with. Additionally, although the judge must state the reasons for a parole eligibility restriction when one is imposed, no particular finding of fact need be included among those reasons. Therefore, because the statutory maximum for violating 45-5-102(1)(a) is life in prison without parole, restricting Garrymore's parole eligibility did not violate any federal constitutional rights. The Supreme Court also declined to address Garrymore's undeveloped argument that the parole eligibility restriction violated the Montana Constitution's greater jury trial right absent a compelling reason why Montana's greater jury trial right dictated a different result. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006), followed in St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

Sentencing Court Neither Allowed nor Required to Increase Punishment for Charged Offense: Garrymore contended that 46-18-202 allowed or required the sentencing court to add on to the sentence imposed by 45-5-102(2), in violation of this section. The Supreme Court disagreed. Under 45-5-102, a District Court may impose both life imprisonment and life imprisonment without the possibility of parole. Thus, 46-18-202(2) does not, vis-a-vis an act, omission, or fact, allow or require a sentencing court to increase punishment for a charged offense. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006).

Error in Applying Weapon Enhancement Sentence Without Complying With Statutory Procedure: Following a conviction for negligent homicide, the District Court sentenced Strauss to 20 years in prison plus 10 years for use of a firearm. Strauss contended that the sentence was unlawful because Strauss was not notified of the enhancement before the sentencing hearing and because the jury did not make a separate finding at trial that the enhancing act occurred, as required by this section. The Supreme Court agreed. It was error to enhance Strauss's sentence without following the statutory procedure in this section, so the weapon enhancement portion of the sentence was stricken. St. v. Strauss, 2003 MT 195, 317 M 1, 74 P3d 1052 (2003).

Collateral References

Application of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) to state death penalty proceedings. 110 ALR 5th 1.

Part 5
Mediation of Criminal Proceedings

Part Compiler's Comments

Preamble: The preamble attached to Ch. 203, L. 2007, provided: "WHEREAS, the Montana Legislature recognizes the increasing burden on all levels of courts in the State of Montana; and

WHEREAS, mediation and other methods of alternative dispute resolution have proved effective in lessening the burden in other areas of the legal system; and

WHEREAS, many crimes are more amenable to mediation than to criminal prosecution; and

WHEREAS, it is the intent of the Montana Legislature to allow judges of the District, Justices', City, and Municipal Courts to suggest, and the parties to request by motion, mediation for certain criminal proceedings."

Effective Date: This part is effective October 1, 2007.

Part 11
Drug Offender Accountability and Treatment

Part Compiler's Comments

Preamble: The preamble attached to Ch. 282, L. 2005, provided: "WHEREAS, the Legislature recognizes that a critical need exists in this state for the criminal justice system to reduce the incidence of substance abuse and the crimes resulting from it; and

WHEREAS, requiring that accountability and rehabilitating treatment, in addition to or in place of conventional and expensive incarceration, will promote public safety and the welfare of individuals involved, reduce the burden on the general fund, and benefit the common welfare of this state; and

WHEREAS, state courts already have the jurisdiction to implement drug treatment courts via the inherent power of each respective court; and

WHEREAS, the goals of this legislation include but are not limited to reducing recidivism, reducing substance abuse, increasing the personal, familial, and societal accountability of drug offenders to productive, law-abiding, and taxpaying citizens, and reducing the costs of incarceration."

Severability: Section 11, Ch. 282, L. 2005, was a severability clause.
Saving Clause: Section 12, Ch. 282, L. 2005, was a saving clause.
Effective Date: Section 13, Ch. 282, L. 2005, provided that this part is effective April 19, 2005.

46-1-1104. Drug treatment court structure.

Case Notes

No Youth Court Authority to Expunge DUI Offenses — Elements of Judicial Estoppel Not Met: Following Darrah's completion of a Youth Drug Court program in 2004, the Youth Court ordered that Darrah's prior criminal record be expunged, including a previous minor in possession offense and a 2002 DUI. Darrah was subsequently charged in 2005 with second offense DUI, based on the prior 2002 DUI, and in 2006 Darrah was charged with third offense DUI. Citing the principle of judicial estoppel, Darrah asserted that because the Youth Court record had been expunged, the 2002 DUI should not count against him. The District Court disagreed and Darrah appealed. The Supreme Court applied the elements of judicial estoppel set out in Vogel v. Intercontinental Truck Body, Inc., 2006 MT 131, 332 M 322, 137 P3d 573 (2006), and determined that Darrah had failed to demonstrate that each element was met, so judicial estoppel did not apply. Further, there is no authority under which the Youth Court could order expungement of Darrah's DUI offenses. The District Court was affirmed. St. v. Darrah, 2009 MT 96, 350 M 70, 205 P3d 792 (2009), following St. v. Chesley, 2004 MT 165, 322 M 26, 92 P3d 1212 (2004).

46-1-1112. Funding.

Compiler's Comments

2009 Amendment: Chapter 3 deleted former (3) that read: "(3) Funding must be provided from the drug treatment court federal resources account or other available resources for a period of 5 years from April 19, 2005, to research the impact of Montana drug treatment courts on recidivism and money saved as a result of implementing this part"; and made minor changes in style. Amendment effective October 1, 2009.

Part 12
Mental Health Treatment Court

Part Compiler's Comments

Effective Date: Section 11, Ch. 514, L. 2007, provided that this part is effective July 1, 2007.

CHAPTER 2
JURISDICTION

Chapter Law Review Articles

Criminal Jurisdiction in Montana Indian Country, Wilson, 47 Mont. L. Rev. 513 (1986).

Oliphant v. Schlie: Tribal Criminal Jurisdiction of Non-Indians: Paragraph I.B. discusses jurisdiction of crimes by or against Indians. Mitchell, 38 Mont. L. Rev. 342 (1977).

Developing Theories of State Jurisdiction Over Indians: The Dominance of the Preemption Analysis, Lynaugh, 38 Mont. L. Rev. 63 (1977).

Criminal Procedure—Montana Law and the Federal Impact: Paragraph IV.A. discusses post-investigative concerns pertaining to jurisdiction and venue. Elison, 38 Mont. L. Rev. 52 (1977).

Indian Juveniles and Legislative Delinquency in Montana: This article discusses, in part, criminal jurisdiction of Indians. Mudd, 33 Mont. L. Rev. 236 (1972).

Part 1
Jurisdiction of the State

46-2-101. State criminal jurisdiction.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 1-5. See also Model Penal Code, section 1.03(5) and the Montana Constitution [1889], Article VIII, section 11 [now Art. VII, sec. 4, 1972 Mont. Const.].

The purpose of this section is to establish a broad grant of jurisdiction for all crimes rather than individual grants for specific crimes. This section should clarify and centralize the topic of criminal jurisdiction which is now scattered and confused with the topic of venue.

The phrase "partly within this State" as used in subsections [(1) and (2)] is intended to cover all situations included in offenses commenced outside and consummated within this state and

those commenced within and consummated outside this state, and, also, when some elements thereof occur within the state.

Subsection [(1)(a)] covers situations where some elements of the crime were committed in Montana, if not the complete crime.

Subsection [(1)(b)] covers extraterritorial attempts to commit crimes in Montana.

Subsection [(1)(c)] covers solicitation or conspiracy outside the state which result in some element of the crime being performed within the state.

Subsections [(1)(b)] and [(1)(c)] thus allow Montana to prosecute for inchoate offenses which are committed outside the state but relate to intended offenses within the state, and thus should be within the power of the state. The language in [46-2-101] makes no distinction between a principal and an accessory for purposes of jurisdiction.

Subsection [(2)] is an intentionally broad statement of jurisdiction. It does not require that the complete criminal act be committed in Montana. This is achieved through the use of the phrase "partly within this State." It is intended that this provision will permit the state to prosecute for homicide (a) although only the conduct which puts in motion the instrument or agency of death occurs in Montana; (b) only the physical contact which causes death occurs in Montana; (c) only the death occurs in Montana. Another example would be obtaining property in Montana by means of false pretenses made in another state. Subsection [(3)] grants jurisdiction to Montana to prosecute for a person's failure to comply with a legal duty or obligation regardless of the location of the offender at the time of the omission.

Subsection [(4)] purports to claim for the State of Montana the maximum territorial jurisdiction compatible with state sovereignty and federal claims. Provisions for federal jurisdiction are compiled in [2-1-202 through 2-1-211 and 2-1-307], covering such places as military reservations, national parks, etc. Also, see [2-1-301 through 2-1-306] pertaining to Indian reservations. The extent of federal jurisdiction is qualified by the terms by which the federal government acquired the land.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Federal Crime Defined by State Law Considered Federal Offense — Incorporation of State Law Definition: An Indian juvenile was charged with burglary under the federal Indian Major Crimes Act, 18 U.S.C. 1153, by reference to Montana's burglary statute only for the purpose of definition. The Act creates federal jurisdiction over 14 major offenses, including burglary, committed by Indians against Indians or any other person in Indian country, but does not define residential burglary. However, under the Act, if an enumerated crime is not defined and punished in accordance with federal law, the offense is defined and punished in accordance with the laws of the state in which the crime occurred. The juvenile argued that because the burglary was determined by reference to substantive state law, the violation of 18 U.S.C. 1153 did not constitute a violation of federal law. The Ninth Circuit Court disagreed. The fact that no federal residential burglary statute exists, requiring incorporation of Montana's definition of burglary, does not strip the commission of burglary on an Indian reservation of its federal character. Therefore, offenses defined by state law are nevertheless treated as federal offenses under the federal Act. U.S. v. Male Juvenile, 280 F3d 1008 (9th Cir. 2002).

Pursuit of Traffic Offender Onto Reservation Allowed — Good Faith Exception to Exclusionary Rule Applicable to Evidence Seized During Arrest of Tribal Member by Nontribal Officers on Reservation: Bird was observed by city police officer Olson driving recklessly in Cut Bank, but when Olson attempted to stop Bird, a chase ensued onto the Blackfeet Indian Reservation, where Bird was eventually stopped and held by the city police officer and an assisting county officer. When the officers were informed that Bird was an enrolled tribal member, they notified a tribal police officer, who arrested Bird and a passenger, and transported them off the reservation and back into Cut Bank in violation of the extradition provision of the Blackfeet Tribal Code. Bird was subsequently charged in City Court with reckless driving and was convicted. Bird appealed to District Court, moving to dismiss for lack of jurisdiction and to suppress evidence of activities and statements after the vehicle crossed onto the reservation. The District Court found that the city officer did not have jurisdiction to arrest Bird on the reservation and granted Bird's motion to suppress. The state appealed, and the Supreme Court reversed. Pursuant to U.S. v. Patch, 114 F3d 131 (9th Cir. 1997), under the doctrine of hot pursuit, once the officer observed an offense occur within his jurisdiction, he had authority to pursue the violator onto the reservation in order to make an arrest. Further, the evidence was

erroneously suppressed because the good faith exception to the exclusionary rule, discussed in St. v. Nahee, 745 P2d 172 (Ariz. App. 1987), applied. The city and county officers acted in good faith reliance that the tribal officer would carry out the arrest and extradition in a manner conforming to tribal code procedures, and it was the tribal officer who neglected to follow the tribal code. The primary purpose of the exclusionary rule—to ensure that law enforcement is not rewarded by violating a defendant's constitutional rights and to deter such conduct in the future—would not be served by sanctioning the city and county officers for a mistake in which they had no part. Failure to follow tribal extradition procedures did not warrant exclusion of the evidence in this case. Cut Bank v. Bird, 2001 MT 296, 307 M 460, 38 P3d 804 (2001). See also State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976).

District Court Lacking Jurisdiction to Hear Charges of Theft Allegedly Committed on Indian Reservation — Felony Theft Not Continuing Offense: Eagle Speaker was charged with five counts of felony theft for allegedly stealing five horses on the Blackfeet Indian Reservation and transporting them off-reservation to Shelby for sale. Eagle Speaker contended that as an enrolled tribal member, the state lacked jurisdiction to prosecute because the alleged thefts occurred on the reservation and involved other members of the tribe. The District Court agreed. On appeal, the state alleged that there was probable cause to believe that both elements of felony theft occurred outside the reservation when Eagle Speaker tried to sell the horses in Shelby. The Supreme Court affirmed. Under St. v. Mullin, 268 M 214, 886 P2d 376 (1994), the crime of felony theft is not a continuing offense for purposes of tolling the statute of limitations. Rather, a theft is complete once all the elements of the crime transpire, and in this case, all elements of the theft, if it occurred, clearly occurred on the reservation. The offense of theft occurs for jurisdictional purposes where the elements of the offense take place. The alleged theft occurred on the reservation, and the state was without jurisdiction to hear the charges. St. v. Eagle Speaker, 2000 MT 152, 300 M 115, 4 P3d 1, 57 St. Rep. 600 (2000).

Elements of Crime Committed in Montana and Wyoming — Montana Jurisdiction Proper: Defendant contended that Montana had no jurisdiction to prosecute for robbery, aggravated kidnapping, and deliberate homicide because the actual killing occurred in Wyoming. However, uncontroverted evidence showed that the first two crimes occurred in Montana and that two of the three elements of deliberate homicide took place in Montana, with only the actual death occurring in Wyoming. All offenses were therefore within the scope of Montana jurisdiction pursuant to this section. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Minor Portion of Crimes Committed by Indian on Reservation — State Jurisdiction: Defendant contended that if any portion of a major offense occurred within Indian country, under the Major Crimes Act, 18 U.S.C. 1153(a), federal jurisdiction was exclusive. However, in this case, major elements of robbery, aggravated kidnapping, and deliberate homicide were satisfied within Montana and outside of Indian country. The state has jurisdiction of off-reservation offenses even though a connected offense occurs within Indian country. The fact that defendant crossed the reservation three times during the course of the kidnapping did not deprive the state of jurisdiction. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), distinguishing U.S. v. Torres, 733 F2d 449 (7th Cir. 1984).

Offense Committed Partly Within State: The defendant and his companions picked the victim up in Montana and subsequently beat and robbed him before transporting him to Wyoming, where they killed him. The Supreme Court held that the District Court did have jurisdiction because part of the events constituting aggravated kidnapping occurred in Montana. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Part of Crime Occurring on Reservation: The defendant and his companions picked the victim up in Montana and subsequently beat and robbed him before transporting him to Wyoming, where they killed him. During the course of events, the parties entered and left reservation land several times. The defendant, a full-blood Native American, argued that the federal government had exclusive jurisdiction to try the case. The Supreme Court ruled that the major portion of the criminal activity occurred off the reservation and therefore the state did have jurisdiction to try the defendant. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Presence of Intent to Kill Not Bar to Felony-Murder Conviction: The defendant and his companions picked the victim up in Montana and subsequently beat and robbed him before transporting him to Wyoming, where they killed him. The defendant was convicted of felony murder and argued that Montana did not have jurisdiction to try him for the crime. The defendant argued that he could not be tried for felony murder in Montana because the killing was not causally connected to the aggravated kidnapping in that he did not originally intend to kill the victim. The defendant contended that the decision to kill the victim occurred in Wyoming and therefore Wyoming had jurisdiction over the deliberate homicide. The Supreme Court held

that the felony-murder rule eliminated the state's burden to prove intent and that the presence of intent did not mean that the defendant could not be convicted on that particular crime. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Result of Deprivation as Element of Offense: Defendant was a long-distance truck driver operating a truck belonging to his employer. While defendant was on a trip outside Montana, the employer withdrew authorization for defendant to operate the truck, after which defendant failed to return the truck to its owner. The majority found that the result of depriving the owner of his truck was an element of the offense of theft under 45-6-301, that the deprivation occurred in Montana because of defendant's failure to return the truck to its owner in Montana, and that therefore the Montana court had jurisdiction of the charge under subsection (2) of this section. A dissenting opinion asserted that the elements constituting theft are elements of conduct and mental state, and not result. St. v. White, 230 M 356, 750 P2d 440, 45 St. Rep. 270 (1988).

Illegal Pretrial Process and Procedure — State's Right to Charge and Try Case: Youth Court petition initiating proceedings did not state the facts constituting the offense youth was charged with in ordinary and concise language so as to enable a person of common understanding to know what was intended. The petition did not include a witness list. An arrest warrant was issued out of the Youth Court, although there is no provision in the Youth Court Act for issuance of an arrest warrant. Presumably the warrant was issued under 46-6-201, but there was no showing of probable cause supported by oath or affirmation reduced to writing. The youth had already been arrested in Oklahoma at the time the warrant was issued. By what process and authority he was arrested in Oklahoma was not shown, nor was it shown he was arrested by a law enforcement officer. He was subsequently transferred to the District Court for trial as an adult and convicted of two counts of deliberate homicide. The Youth Court proceedings from issuance of the warrant for arrest onward were patently defective. However, this did not preclude the State from having him transferred to the District Court, proceeding against him, and obtaining a conviction. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Tribal Indians — Crime Committed in Hardin: The area of Hardin, Montana, was disestablished from the exterior boundaries of the Crow Reservation by a valid act of Congress, and Montana courts had jurisdiction of crime of rape committed in the town by a Crow Indian. Little Light v. Crist, 649 F2d 682 (9th Cir. 1982).

Jurisdiction Over Solicitation: In a trial for solicitation of another to possess dangerous drugs, trial court properly refused to exclude as irrelevant all evidence of events outside Montana. It also properly refused to grant motion to dismiss for lack of jurisdiction a motion premised on the exclusion of evidence. Appellant solicited another person in Montana to commit, unknowingly and in another jurisdiction, the offense of possession of dangerous drugs by being an unwitting carrier from Peru to Los Angeles. St. v. Bush, 195 M 475, 636 P2d 849, 38 St. Rep. 2045 (1981).

Tribal Indians — Arrest: Petitioner, a Crow Indian, was arrested within the exterior boundaries of the Crow Reservation for a crime committed off the Reservation. The court followed State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976), which held that the arrest of an Indian on a reservation for a crime committed off the reservation was a valid arrest. In re Little Light, 183 M 52, 598 P2d 572 (1979).

Crime Committed on Air Force Base: There is nothing in the language of this section indicating legislative intent to restrict jurisdiction this state had previously exercised over crimes committed on land purchased by the federal government. St. v. Stewart, 175 M 286, 573 P2d 1138 (1977).

Indians Generally: Crimes committed by Indians within Montana but without the bounds of "Indian Country" are within the jurisdiction of the state courts. Petition of Fox, 141 M 189, 376 P2d 726 (1962); In re Diserly's Petition, 140 M 219, 370 P2d 763 (1962); Buckman v. St., 139 M 630, 366 P2d 346 (1961).

Tribal Indians — Forgery: A state court had jurisdiction of the prosecution of a tribal Indian for forgery of a check obtained from an Indian agency office when the check was cashed in a town outside of the boundaries of the Indian reservation. Petition of Fox, 141 M 189, 376 P2d 726 (1962).

Tribal Indians — Larceny: A state court presumptively had jurisdiction of the prosecution of a tribal Indian charged with larceny of a horse from Indian land when the accused did not show that the entire crime took place on Indian land. St. v. Akers, 106 M 43, 74 P2d 1138 (1938).

Tribal Indians — Statutory Rape: A state court properly entertained jurisdiction of a prosecution for a crime committed by a tribal Indian against an Indian girl while off the reservation, as against the contention that the federal court had exclusive jurisdiction of the offense. St. v. Youpee, 103 M 86, 61 P2d 832 (1936).

Stolen Property Brought From Canada: There was no variance between the information charging larceny of horses in the county and proof that the horses were stolen in Canada and driven into the county. St. v. De Wolfe, 29 M 415, 74 P 1084 (1904), overruled on other grounds in St. v. Penna, 35 M 535, 90 P 787 (1907).

Collateral References

Criminal Law *key* 92, 97(1).

22 C.J.S. Criminal Law §§189 through 193.

21 Am. Jur. 2d Criminal Law §455.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts—modern view. 97 ALR 5th 201.

Fraud or mistake: modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake. 25 ALR 4th 157.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state. 16 ALR 4th 1318.

Part 2
Jurisdiction of the Courts

Part Case Notes

Constitutionality of Conviction Before Lay Judge: Kentucky's court system, which vested jurisdiction of penal and misdemeanor cases punishable by a fine of up to $500 and/or 1 year's imprisonment concurrently in police and circuit courts, provided that while police court (now City Court) judges in first- and second-class cities must be members of the bar they need not be in smaller cities, and required a trial de novo in the circuit court upon any appeal from a police court judgment, did not violate either the Equal Protection or Due Process Clause of the 14th amendment. North v. Russell, 427 US 328, 49 L Ed 2d 534, 96 S Ct 2709 (1976).

Legislature's Authority to Confer Jurisdiction: Within constitutional limitations, the Legislature may confer jurisdiction in any class of cases on either the District Courts or Justices' Courts. St. v. Holt, 121 M 459, 194 P2d 651 (1948).

Part Attorney General's Opinions

Gambling Offenses: The District Court has exclusive jurisdiction over violations of the Montana Card Games Act, the Bingo and Raffles Law, and the sports pool law, found in Title 23, ch. 5. 35 A.G. Op. 86 (1974).

46-2-201. Jurisdiction of the district court.

Commission Comments

Source: R.C.M. 1947, section 94-4917. See also Montana Constitution [1889], Article VIII, section 11 [now Art. VII, sec. 4, 1972 Mont. Const.].

This section is a general statement of the broad jurisdiction vested in the District Courts by the Montana Constitution [1889] in Article VIII, section 11 [now Art. VII, sec. 4, 1972 Mont. Const.]. The District Courts have power over all criminal cases amounting to a felony and all misdemeanors not specifically delegated to the Justice or Police Courts. The District Courts are courts of general jurisdiction in criminal matters in the State of Montana.

Case Notes

Jurisdiction of Offense of Selling Alcohol Without a License: The District Court was the proper court to try the offense of sale of beer or wine without a valid state license. St. v. Barnes, 232 M 405, 758 P2d 264, 45 St. Rep. 1150 (1988).

Youth Legally Capable of Committing Crime — Jurisdiction When Crime Disclosed After Majority: The District Court has jurisdiction to try an individual charged at age 22 for felonies allegedly committed at age 15, as provided in the court's constitutional grant of jurisdiction over all felonies. The Youth Court Act does not contain any direct statement or implication that the Legislature intended to set the minimum age of criminal responsibility at 16, making a 15-year-old incapable of committing a crime. The primary purposes of statutes defining a "delinquent youth" and providing for transfer to District Court are to clarify that delinquency proceedings are noncriminal and to prohibit prosecution of youths in District Court while they are youths. State ex rel. Elliot v. District Court, 211 M 1, 684 P2d 481, 41 St. Rep. 1184 (1984).

District Court Jurisdiction — Invoked by Probable Cause in Leave to File Information — Res Judicata After Appeal Process: The issue of subject matter jurisdiction cannot be waived or conferred by consent of a party and may be raised at any stage of a judicial proceeding or sua sponte by the court; but if the question of jurisdiction turns upon a finding of whether the

affidavit of application for leave to file an information shows probable cause and the defendant has been found guilty and the judgment has not been appealed or has been affirmed on appeal, the issue of probable cause is res judicata. St. v. Davis, 210 M 28, 681 P2d 42, 41 St. Rep. 898 (1984).

District Court Not Appellate Court for City or Justice's Court: A District Court may not sit as a court of review. Therefore, on appeal from a Justice's or City Court, the District Court must try a case de novo and may not remand it. Hardin v. Myers, 194 M 248, 633 P2d 677, 38 St. Rep. 1512 (1981).

District Court Jurisdiction — Venue — "Indian Country": An attack on District Court jurisdiction made on the basis of alleged failure to prove the venue of the crime and on the allegation the crime occurred in "Indian Country" was rejected. The District Court could take judicial notice that the areas where the crimes occurred are not within the Crow Indian Reservation but are in Big Horn County, Montana, thus proving venue. An argument that the landholdings between Indians and non-Indians in a "checkerboard" pattern made the entire area "Indian Country" was also rejected because of precedent to uphold the "disestablishment" of the land in question. St. v. Bad Horse, 185 M 507, 605 P2d 1113 (1980), followed in St. v. Johnson, 257 M 157, 848 P2d 496, 50 St. Rep. 209 (1993).

Evidence of Prior Convictions: The defendant's prior convictions for driving while intoxicated did not have to be proved at the trial in order to establish District Court jurisdiction even though such convictions were necessary to invoke potential penalties sufficiently harsh to invoke District Court jurisdiction. Prior convictions are generally for consideration only at sentencing. Section 46-18-503 (renumbered 46-13-108) expresses a legislative concern that evidence of prior convictions may prejudice the defendant during the trial. St. v. Nelson, 178 M 280, 583 P2d 435 (1978).

Sufficiency of Information: An information charging the defendant with "the crime of Driving While Under the Influence of Intoxicating Liquor (3rd offense)" was sufficient to establish jurisdiction in the District Court even though 61-8-714 uses the term "third or subsequent conviction" rather than "third offense" in providing for a potential penalty sufficiently harsh to invoke District Court jurisdiction. St. v. Nelson, 178 M 280, 583 P2d 435 (1978).

Jurisdiction Retained: When the District Court's jurisdiction is originally invoked by an information charging a felony, it is not lost by the State's subsequently reducing the charge to a lesser included misdemeanor. St. v. Shults, 169 M 33, 544 P2d 817 (1976).

Collateral References

Criminal Law *key* 86.

21 Am. Jur. 2d Criminal Law §§457 through 460.

46-2-202. Jurisdiction of justices' courts.

Case Notes

Issuance of Search Warrant by Justice of the Peace in Case Involving Dangerous Drugs: Justices' Courts are constitutionally created, and when the Legislature has had the opportunity to limit their jurisdiction and has not seen fit to do so, a legislative intent to authorize the practice of Justices' Courts issuing search warrants is presumed as a Justice of the Peace meets the United States constitutional standard of "a neutral and detached magistrate" to examine the application for a search warrant and determine whether reasonable cause exists for its issuance. St. v. Snider, 168 M 220, 541 P2d 1204 (1975).

Enlargement of Jurisdiction by Implication: A statute providing for penalty assessments in addition to the statutory limitations on the imposition of fines was void for indirectly enlarging the jurisdiction of the Justices' Courts and police courts (now City Courts), as prescribed by statutes, when the title of the bill enacting the statute did not express a purpose to enlarge jurisdiction. State ex rel. Sanders v. Butte, 151 M 171, 441 P2d 190 (1968).

Unlicensed Practice of Medicine: The Justice's Court did not have jurisdiction of a prosecution for practicing medicine without a license, bearing maximum punishment of $1,000 fine or 1 year's imprisonment. State ex rel. Freebourn v. District Court, 105 M 77, 69 P2d 748 (1937).

Collateral References

Criminal Law *key* 90(2).

47 Am. Jur. 2d Justices of the Peace §§10 through 22.

46-2-203. Jurisdiction of city courts.

Commission Comments

Source: New.

The language of this section sets the jurisdiction of the police [now city] and municipal courts in the language of the Montana Constitution [1889], Article VIII, section 24 [now deleted]. The commission is not empowered to alter municipal ordinances and it does not attempt to do so. The commission merely placed this section concerning police [now city] and municipal courts at this point in the reorganization to facilitate comparison of the jurisdiction of the three major courts (District, Justice and Police). The police magistrate may also be constituted an ex-officio justice of the peace [, a conclusion that is questionable since deletion of sec. 24].

Case Notes

Authority of Properly Appointed Substitute Justice of the Peace to Issue Search Warrant: A search warrant was issued by a substitute Justice of the Peace, and Beaupre contended that the fruits of the search should be suppressed because no attempt was made to call in another Justice of the Peace or City Judge and because the substitute was not properly appointed. The Supreme Court dismissed the claims. The regular Justice of the Peace had letters from judges in nearby cities indicating that they were not available should the Justice of the Peace be absent, and the letters were updated every 6 months in accordance with the Attorney General's recommendations in 48 A.G. Op. 11 (2000). Further, the substitute was timely designated during the second term of the regular Justice of the Peace, and incorrect wording on the waiver of training form was inconsequential and did not affect the authority of the substitute to act. St. v. Beaupre, 2004 MT 300, 323 M 413, 102 P3d 504 (2004). See also Potter v. District Court, 266 M 384, 880 P2d 1319 (1994), and St. v. Vickers, 1998 MT 201, 290 M 356, 964 P2d 756 (1998).

City Court Jurisdiction Over Misdemeanor Public Nuisance Charges: This section provides a City Court with jurisdiction over criminal misdemeanor charges as authorized by 3-11-102. A violation of 45-8-111, maintaining a public nuisance, is clearly a misdemeanor; therefore, a City Court has jurisdiction over a criminal prosecution for public nuisance. Billings v. Panasuk, 253 M 403, 833 P2d 1050, 49 St. Rep. 499 (1992).

Issuance of Warrant by City Judge: A City Court Judge does not have the statutory authority to issue search warrants, and the trial court correctly suppressed evidence obtained under color of a search warrant executed by a City Court Judge. St. v. Tropf, 166 M 79, 530 P2d 1158 (1975), applied, with regard to substitute judges, in Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

Enlargement of Jurisdiction by Implication: A statute providing for penalty assessments in addition to the statutory limitations on the imposition of fines was void for indirectly enlarging the jurisdiction of the Justices' Courts and police courts (now City Courts), as prescribed by statutes, when the title of the bill enacting the statute did not express a purpose to enlarge jurisdiction. State ex rel. Sanders v. Butte, 151 M 171, 441 P2d 190 (1968).

Driving While Intoxicated: The city police court (City Court) had jurisdiction of the defendant, arrested by a city police officer without a warrant, while driving on city streets, and promptly taken to the city police court where the arresting officer reported and charged the defendant with operating a motor vehicle within the corporate limits of the city while under the influence of intoxicating liquor, in violation of a city ordinance. Bozeman v. Ramsey, 139 M 148, 362 P2d 206 (1961).

46-2-204. Jurisdiction of municipal courts.

Commission Comments

Source: New.

The language of this section sets the jurisdiction of the police [now city] and municipal courts in the language of the Montana Constitution [1889], Article VIII, section 24 [now deleted]. The commission is not empowered to alter municipal ordinances and it does not attempt to do so. The commission merely placed this section concerning police [now city] and municipal courts at this point in the reorganization to facilitate comparison of the jurisdiction of the three major courts (District, Justice and Police). The police magistrate may also be constituted an ex-officio justice of the peace[, a conclusion that is questionable since deletion of sec. 24].

CHAPTER 3
VENUE

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal

procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

Chapter Law Review Articles

Criminal Procedure—Montana Law and the Federal Impact: Paragraph IV.A. discusses jurisdiction and venue. Elison, 38 Mont. L. Rev. 52 (1977).

Part 1
General Provisions

Part Commission Comments

1991 Part Comments: As in every area of the 1987 criminal procedure statutes, the Commission sought to eliminate unnecessary code sections and to bring the criminal procedure processes into conformity with case law. The Commission's principal concern was to eliminate the confusion generated from the use of the term "venue" vis-a-vis "place of trial". The transition should not be difficult, however, because the place of trial has long been synonymous with venue. See Stanton Trust v. Johnson, 104 Mont. 235, 238 (1937), and Milliken v. Gray, 81 Cal. Rptr. 525, 528 (1969). The Commission suggested a definition for "place of trial", which now appears in 46-1-202.

A significant change incorporated by these statutes is the phrase identifying the proper place to file a criminal charge. Under the 1987 code, venue was the county in which the trial was held—the place where the offense was committed. The plain language statute now avoids the use of the term "venue" and recognizes that the initial step in any criminal prosecution is the filing of a charge. Under the statutes, the proper place of trial is where the charge was filed unless otherwise ordered by the court.

The statutes retain the substance of the 1987 general code provisions governing venue for a criminal prosecution. See 1987 MCA 46-3-101 through 46-3-106. The only general provision not retained in the statutes is 1987 MCA 46-3-103, which related to an offense committed on or near a county boundary. The Commission determined that the substance of that provision is now adequately reflected in 46-3-114, which relates to cases in which the county of offense is unknown.

Two provisions of the 1987 code, treason (MCA 46-3-206) and escape from prison (MCA 46-3-203) allowed the trial to be conducted in any county. Treason is a constitutional offense (Art. II, sec. 30, Mont. Const.) and has no statutory counterpart. As such, the Commission felt that the offense of treason did not require a specific statute identifying the place of trial. Given the arrangement between Powell County and the state regarding prosecution for escape from prison, the Commission felt that the code section allowing such prosecutions in any county in the state was unnecessary.

The code provisions identifying venue for specific criminal offenses have not been retained. The statutes are sufficiently general to establish the proper place of trial in any criminal case.

Part Case Notes

No Finding of Juror Prejudice Due to Pretrial Publicity: The District Court did not err in denying defendant's motion for a change of venue and a motion for an individually sequestered voir dire when the allegations given for the requested change of venue failed to establish any possibility of jury prejudice due to pretrial publicity. The two jurors who learned anything about

the case in the newspaper or radio were eliminated by peremptory challenge. Further, an alternate juror who read the articles but was not prejudiced did not sit as a juror in the deliberations. St. v. Hansen, 194 M 197, 633 P2d 1202, 38 St. Rep. 1541 (1981).

District Court Jurisdiction — Venue — "Indian Country": An attack on District Court jurisdiction made on the basis of alleged failure to prove the venue of the crime and on the allegation the crime occurred in "Indian Country" was rejected. The District Court could take judicial notice that the areas where the crimes occurred are not within the Crow Indian Reservation but are in Big Horn County, Montana, thus proving venue. An argument that the landholdings between Indians and non-Indians in a "checkerboard" pattern made the entire area "Indian Country" was also rejected because of precedent to uphold the "disestablishment" of the land in question. St. v. Bad Horse, 185 M 507, 605 P2d 1113 (1980), followed in St. v. Johnson, 257 M 157, 848 P2d 496, 50 St. Rep. 209 (1993).

Venue Jurisdictional Fact to Be Proved at Trial: Venue is a jurisdictional fact that must be proved at the trial the same as any other material fact in a criminal prosecution. Positive testimony that the violation occurred at a specific place is not required; it is sufficient if it can be concluded from the evidence as a whole that the act was committed in the county where the indictment is found. Here, there was no testimony specifically directed to the venue issue, but testimony taken for other purposes indicated that the defendant had the stolen property in his possession in Yellowstone County. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979).

Multiple Offenses Committed in Different Counties: When the defendant was charged under former law with grand larceny, larceny by a bailee, or obtaining money by false pretenses and, with respect to the larceny and false pretenses charges, it was alleged that he exercised control over the property in Cascade County, while at least some of the acts alleged in the remaining charges were alleged to have occurred in Cascade County, venue was proper in Cascade County. St. v. Bretz, 166 M 444, 534 P2d 496 (1975).

Stolen Property Brought From Canada: There was no variance between the information charging larceny of horses in the county and proof that the horses were stolen in Canada and driven into the county. St. v. De Wolfe, 29 M 415, 74 P 1084 (1904), overruled on other grounds in St. v. Penna, 35 M 535, 90 P 787 (1907).

46-3-110. Filing the charge.

Commission Comments

1991 Comment: This statute is largely a reflection of 1987 MCA 46-3-101(1) and is designed to work in conjunction with 46-3-111, which provides for the appropriate place of trial. This statute recognizes that the initial step in any criminal proceeding is the filing of a charge. Rather than designate the place of trial, this statute establishes that the charge is properly filed in the county in which the offense was committed.

The Montana criminal procedure code, the Federal Rules of Criminal Procedure, and the Uniform Rules of Criminal Procedure do not designate a proper place to file a charge. In this respect, the statute is new. The statute, however, provides a base upon which the appropriate place of trial may be determined—whether or not the place of trial is later changed. See Title 46, ch. 13, part 2.

Compiler's Comments

1995 Amendment: Chapter 177 inserted (2) allowing a charge under 45-7-306 to be filed, without defendant's objection, in any county in the state.

Code Commissioner Change: Pursuant to sec. 5, Ch. 546, L. 1995, the Code Commissioner substituted Department of Corrections for Department of Corrections and Human Services.

Case Notes

Proper Venue for Prosecution of Common Scheme to Manufacture Methamphetamine in Several Counties — Possession Charge Dismissed for Improper Venue: Following arrest in Sanders County, Galpin was charged in Ravalli County with possession of methamphetamine in Sanders County, operating a methamphetamine lab in Ravalli County, possessing methamphetamine precursors in Ravalli and Missoula Counties, and criminal endangerment in Ravalli County. Citing venue grounds, Galpin questioned the evidence on the endangerment charge and moved to dismiss the possession charge and the Missoula County precursor charge because there was no evidence that the crimes were committed in Ravalli County where the charges were filed. The Supreme Court agreed that possession has but one requisite act, which is possession of the drug itself, and because neither the state's information nor trial testimony established that Galpin possessed methamphetamine anywhere but Sanders County, Ravalli County was not the proper venue for the possession charge, so it was dismissed. However, in pursuit of the common scheme to manufacture methamphetamine, Galpin kept precursors in

storage facilities in both Ravalli and Missoula Counties and knowingly or purposely prepared, processed, or manufactured the drug as he traveled between Ravalli and Missoula Counties, so venue was proper in Ravalli County for the precursor charges. Ravalli County was also a proper venue for the criminal endangerment charges based on witness testimony that Galpin manufactured methamphetamine on at least three occasions at the witness's home in Ravalli County when children were present. St. v. Galpin, 2003 MT 324, 318 M 318, 80 P3d 1207 (2003).

Proper Venue of Custodial Interference Proceeding: Price was charged with custodial interference after failing to return his daughter to her mother. Price moved to dismiss the charge for improper venue, arguing that Lake County, where he had withheld the child, rather than Missoula County, where both parties resided and where dissolution proceedings were taking place, was the proper venue. Venue is a jurisdictional fact that must be proved at trial as any other material element. Deprivation of custodial rights is a requisite element of the offense of custodial interference, so the state must establish that the defendant: (1) knowing that there was no legal right to do so, took, enticed, or withheld a child; and (2) deprived the legal custodian of custody. When establishing the commission of an offense requires proving two or more acts, the charges may be filed in any county in which any of the acts occurred. In this case, at least one of the elements of custodial interference occurred in Missoula, so Missoula County was a proper venue for prosecution of the offense, and the District Court properly denied the motion to dismiss for improper venue. St. v. Price, 2002 MT 229, 311 M 439, 57 P3d 42 (2002), followed in St. v. Young, 2007 MT 323, 340 M 153, 174 P3d 460 (2007).

Charges Filed in Wrong County — Venue Waived Upon Plea of Guilty: Thompson was charged in Powell County for felony escape while in detention in Yellowstone County. As part of a plea agreement, Thompson pleaded guilty and signed a waiver of rights. On appeal, Thompson contended that his constitutional and statutory rights were violated because he was prosecuted in a different county from the county where the alleged offense was committed. However, pursuant to St. v. Feeley, 170 M 227, 552 P2d 66 (1976), and McGuinn v. Risley, 210 M 349, 681 P2d 699 (1984), the statutory right to venue may be waived. Further, 46-3-111 provides that in criminal cases, venue is waived if not raised prior to the first witness being sworn. Thus, despite the fact that charges were filed in the wrong county, any assertion of improper venue was waived by Thompson's failure to object prior to pleading guilty. St. v. Thompson, 1999 MT 108, 294 M 321, 981 P2d 778, 56 St. Rep. 444 (1999), distinguishing St. v. Preite, 172 M 318, 564 P2d 598 (1977), St. v. Jackson, 180 M 195, 589 P2d 1009, 36 St. Rep. 169 (1979), and St. v. Johnson, 257 M 157, 848 P2d 496, 50 St. Rep. 209 (1993).

46-3-111. Place of trial.

Commission Comments

Source: New. See Montana Constitution [1889], Article III, section 16 [now Art. II, sec. 24, 1972 Mont. Const.].

The place of trial is fixed by the Montana Constitution [1889], Article III, section 16 [now Art. II, sec. 24, 1972 Mont. Const.]. The place of trial, however, is subject to a change of venue for prejudice. See [46-13-203]. Change of Place of Trial.

If an objection to venue is made, and it is shown that the offense occurred in a different county, or there is cause for the change, then the proceeding will be dismissed in that county. The same proceeding would then be reinstated in the proper county.

The second sentence was included by the commission because it felt that a failure by defendant to object to the venue before trial should be construed as a waiver. The important element of the waiver feature is that the defense should forewarn the prosecution that it plans to contest venue so that a legitimate determination can be made before the trial rather than allowing the question of venue to slip by and then grant the defendant a new trial or reversal for a defect that was never seriously questioned or fairly raised. The section is designed to prevent a defendant who knows that the place of trial is improperly alleged from saying nothing until after his gamble on the verdict has lost.

Under the proposed code, venue is completely separated from jurisdiction. Venue is a constitutional right of the defendant which may be waived, while jurisdiction is the power of the court to act and may not be waived.

The concept of venue in a criminal case is thereby brought into agreement with the view of venue and jurisdiction found in civil cases. See Stanton Trust & Savings Bank v. Johnson, 65 P.2d 1188, 104 Montana 235, 238.

Venue falls within that class of constitutional rights of the defendant which may be waived either by affirmative action, or through failure to object at the proper time. As such, venue should not be regarded as an absolute right, for not only may it be waived, but upon proper

motion by either the state or defendant the place of trial may be changed by proving the existence of prejudice. Thus, venue is not an essential element of the actual trial, to be proved beyond a reasonable doubt. Instead the determination of the correct place of trial should be a pre-trial procedure principally for the benefit and convenience of the parties involved to be established by a preponderance of the evidence.

Compiler's Comments

1991 Amendment: At beginning of (1) deleted "In all criminal prosecutions" and before "unless" substituted "charge is filed" for "offense was committed"; in (2), near end of first sentence, inserted "the first witness is sworn at the time of" and in second sentence substituted "proper county in which to file the charge" for "venue" and at end substituted "further proceedings may take place" for "proceeding to trial"; and made minor changes in style.

Case Notes

General 25
Proper Venue 25
Improper Venue 26
Change Required 26
Change Not Required 27

GENERAL

Charges Filed in Wrong County — Venue Waived Upon Plea of Guilty: Thompson was charged in Powell County for felony escape while in detention in Yellowstone County. As part of a plea agreement, Thompson pleaded guilty and signed a waiver of rights. On appeal, Thompson contended that his constitutional and statutory rights were violated because he was prosecuted in a different county from the county where the alleged offense was committed. However, pursuant to St. v. Feeley, 170 M 227, 552 P2d 66 (1976), and McGuinn v. Risley, 210 M 349, 681 P2d 699 (1984), the statutory right to venue may be waived. Further, this section provides that in criminal cases, venue is waived if not raised prior to the first witness being sworn. Thus, despite the fact that charges were filed in the wrong county, any assertion of improper venue was waived by Thompson's failure to object prior to pleading guilty. St. v. Thompson, 1999 MT 108, 294 M 321, 981 P2d 778, 56 St. Rep. 444 (1999), distinguishing St. v. Preite, 172 M 318, 564 P2d 598 (1977), St. v. Jackson, 180 M 195, 589 P2d 1009, 36 St. Rep. 169 (1979), and St. v. Johnson, 257 M 157, 848 P2d 496, 50 St. Rep. 209 (1993).

Judicial Notice of County in Which City is Located: Where testimony establishes that an act took place in a particular city, judicial notice may be taken of the county wherein the city is located, citing St. v. Jackson, 180 M 195, 589 P2d 1009 (1979), followed in St. v. Bad Horse, 185 M 507, 605 P2d 1113 (1980). St. v. Harvey, 219 M 402, 713 P2d 517, 43 St. Rep. 46 (1986).

Jurisdiction to Issue Investigative Subpoenas: The plain language of 46-4-301 vests every District Court Judge with the power to issue investigative subpoenas with no jurisdictional limitation. There simply is no requirement, explicit or implicit, that the subpoena be issued by the sitting judge of the district where the crime allegedly occurred. The venue statutes have no application to the jurisdictions of any District Court to issue such subpoenas, which jurisdiction is coextensive with the state boundaries. St. v. Holmes, 212 M 526, 687 P2d 662, 41 St. Rep. 1535 (1984).

Same Defendant — Similar Facts — Change of Venue Required: Paisley appealed to the District Court a conviction of a misdemeanor sexual assault. The case was to be tried de novo in the District Court. Earlier, in St. v. Paisley, 204 M 191, 663 P2d 322, 40 St. Rep. 763 (1983), the Supreme Court had approved an order granting a change of venue in companion cases on felony charges. In the interests of consistency, the Supreme Court issued a Writ of Supervisory Control ordering the District Court to grant a change of venue. State ex rel. Paisley v. District Court, 673 P2d 815, 40 St. Rep. 1852 (1983).

Constitutionality: The right to be tried in the county where the offense was "committed" was not violated because "committed" does not mean the point at which all the elements of the crime have occurred. St. v. Bretz, 166 M 444, 534 P2d 496 (1975).

More Than One County With Proper Venue: The rule that an action remains in the county in which it was brought when it and the one to which transfer is sought both have proper venue applies in criminal cases. St. v. Bretz, 166 M 444, 534 P2d 496 (1975).

PROPER VENUE

Criminal Endangerment — Sufficient Proof of Mental State and Jurisdiction: Cybulski contended that the state failed to prove criminal endangerment because there was insufficient proof that Cybulski acted knowingly or that the alleged offense occurred in Custer County. The

Supreme Court disagreed with both arguments. Under 45-2-103, the existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense. Here, Cybulski drove at a high rate of speed for nearly 50 miles on the wrong side of the interstate while intoxicated. A rational trier of fact could conclude beyond a reasonable doubt that Cybulski either was aware of her conduct and the risk it was creating or was unaware solely because of her intoxicated condition, so the element of knowingly was proven. Under 46-3-112, if two or more acts are requisite to the commission of an offense, the charge may be filed in any county in which any of the acts occurred. Cybulski admitted that she drove on the wrong side of the interstate in Custer County and made no objection to charges being filed in Custer County, so venue in Custer County was proper. St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009).

Venue for Failure to File Tax Returns: Tax returns are required to be filed with the Department of Revenue. The Department is required to be located in Helena, Montana. Section 46-3-101 (renumbered as this section) provides that in all criminal prosecutions, trial shall be in the county where the offense was committed. The offense charged here was failure to properly file tax returns, so that venue was properly with Lewis and Clark County where Helena is located. St. v. Poncelet, 187 M 528, 610 P2d 698 (1980).

Proof of Proper Venue Beyond a Reasonable Doubt: Venue in a criminal case must be proved beyond a reasonable doubt. When the defendant was charged with preparation of false evidence for submitting fraudulent petitions for workers' compensation settlements, sufficient evidence was presented from which the jury could determine that the State proved venue in Cascade County. Both petitions for settlement contained defendant's signature followed by his Great Falls address, and the settlement checks were sent to the defendant in Great Falls. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Venue Jurisdictional Fact to Be Proved at Trial: Venue is a jurisdictional fact that must be proved at the trial the same as any other material fact in a criminal prosecution. Positive testimony that the violation occurred at a specific place is not required; it is sufficient if it can be concluded from the evidence as a whole that the act was committed in the county where the indictment is found. Here, there was no testimony specifically directed to the venue issue, but testimony taken for other purposes indicated that the defendant had the stolen property in his possession in Yellowstone County. St. v. Jackson, 180 M 195, 589 P2d 1009 (1979).

Multiple Offenses Committed in Different Counties: The action against the defendant, who was charged with 52 offenses committed in several counties, was properly venued in the county where the information was filed, even though elements of some of the offenses may have occurred in another county. St. v. Bretz, 166 M 444, 534 P2d 496 (1975).

Sufficiency of Information: An information stating generally that a crime was committed in a county, but containing no other allegation as to venue, was sufficient. St. v. Tully, 31 M 365, 78 P 760 (1904).

IMPROPER VENUE

Similar Offenses in Different Counties — Not to Be Combined in Same Trial: Defendants were charged with theft of coins from a juke box in Roosevelt County and also with the same offense in Blaine County. Defendants were originally charged with misdemeanor theft in Blaine County and later charged with felony theft in an amended information combining the offense in Roosevelt County. Defendants objected, claiming the offenses were unrelated and that venue for the Roosevelt County theft did not properly lie in Blaine County. The general venue rule is that in criminal actions venue is proper only in the jurisdiction where the crime occurred. The State claimed that the offense fit into the "common scheme" exception, where the acts requisite to the commission of a crime, occurring in more than one jurisdiction, establish proper venue in any one of the affected counties. The court held that the offenses were linked by similarity and nothing else. The court held that two separate and distinct offenses had occurred in two different jurisdictions. Under Montana law, the crimes must be separately charged and tried in the counties where they occurred. St. v. Adams, 190 M 233, 620 P2d 856, 37 St. Rep. 2053 (1980).

CHANGE REQUIRED

Local Prejudice as Grounds for Change of Venue: An accused is entitled to a change of venue when it appears there are reasonable grounds to believe that prejudice actually exists and that by reason of the prejudice there is a reasonable apprehension that the accused cannot receive a fair and impartial trial. The District Judge should exercise his discretion in determining that the actual prejudice is sufficiently pervasive to warrant a change of venue, and his ruling will not be disturbed absent a showing of abuse of discretion. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982).

Publicity — Applicable Standard: The rule that a change of venue for prejudice requires a showing of existing prejudice substantial enough to make a fair trial impossible is unworkable and is discarded in favor of the rule, adopted prospectively only, that one is entitled to a venue change when it appears there are reasonable grounds to believe the alleged prejudice actually exists and there is a reasonable apprehension that accused will not receive a fair trial. St. v. Link, 194 M 556, 640 P2d 366, 38 St. Rep. 982 (1981).

Improper Denial of Motion for Change of Venue — Vacation of Conviction: The court erred in denying the defendant's motion for change of venue when no proof was adduced at the trial of any unlawful act of the defendant in the county of trial which would constitute an element of the alleged crime. This was fatal to the state's case as venue must be proved as a jurisdictional fact, and the conviction was vacated. St. v. Preite, 172 M 318, 564 P2d 598 (1977), distinguished in St. v. Thompson, 1999 MT 108, 294 M 321, 981 P2d 778, 56 St. Rep. 444 (1999).

CHANGE NOT REQUIRED

Balanced Reporting Including Widow's Grief, Prosecution's Statements During Investigation and Pretrial, and DNA Testing: The test for change of venue due to prejudicial pretrial publicity is whether the publicity was inflammatory and whether it actually did inflame the prejudice of the community to the extent that a reasonable possibility exists that the defendant may not receive a fair trial because of a widespread community belief that the defendant is guilty. Informatory news articles did not contain editorializing or a calculated attempt to convince the public of the suspect's guilt. The articles included a few reports about the homicide widow's grief and the prosecution's statements that concerned investigations or that were made during pretrial proceedings. Balanced reporting of DNA evidence in the state's first DNA case could not be called inflammatory. Therefore, the change of venue motion was properly denied. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Content and Effect of Pretrial Publicity — Review in Federal Habeas Corpus Proceeding: In assessing whether pretrial publicity precludes a fair trial, a court must consider the content of the publicity and its effect on the jury. A single misstatement of facts in a newspaper article 6 months prior to trial did not constitute inflammatory or impassioned press coverage. Where each person on the jury either had not read the newspaper article or could not recall the details of the article, the impact of the pretrial publicity was insufficient. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Publicity — Necessary Findings: A finding that publicity incident to a trial was sufficient to warrant a venue change, without a finding of existing prejudice and an assessment of the effect of the publicity, constituted an abuse of discretion. Prejudice per se cannot be found from publicity. The order for a venue change would be reversed. St. v. Link, 194 M 556, 640 P2d 366, 38 St. Rep. 982 (1981).

Venue — Effect of Publicity: A motion for change of venue based on pretrial publicity must be supported by evidence of the frequency and inflammatory nature of the publicity. It must be such as to excite undue prejudice, rendering it impossible for the accused to have a jury free from prejudice. The motion here was not supported by evidence and was denied. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Failure to File Tax Return — Venue: Venue of a criminal action charging intentional failure to file a properly completed Montana individual income tax return would lie in either Lewis and Clark County or the county in which defendants reside. But, since the complaint was filed in the former and no legal justification or prejudice was shown to support transfer, the Supreme Court reversed the District Court's change of venue from Lewis and Clark County. Dept. of Revenue v. Lane, 187 M 230, 609 P2d 300 (1980), following St. v. Bretz, 169 M 505, 548 P2d 949 (1976).

Change of Venue Properly Denied: News articles concerning the crime were published approximately 6 months prior to trial; nothing indicated that any of the jurors had even read the articles, and there was no showing that any juror was tainted or predisposed by the appearance of these articles. Therefore, the trial court did not abuse its discretion in denying a change of place of trial. St. v. Kirkaldie, 179 M 283, 587 P2d 1298 (1978).

Effect of Amended Charges: The court erred in granting a motion for change of venue when the information was amended to allege witness tampering in a county in which the action was not brought. The charges cannot stand independent of the original charges and venue remains in the county where the action was brought. St. v. Bretz, 169 M 505, 548 P2d 949 (1976).

Law Review Articles

Venue—Perjury: Jurisdiction over a perjury charge is in the county where the perjury (in this instance, giving a false affidavit) originated. (St. v. Rother, 130 M 357, 303 P2d 393 (1956).) Hilley, 18 Mont. L. Rev. 225 (1957).

Collateral References

Embezzlement: where is embezzlement committed for purposes of territorial jurisdiction or venue. 80 ALR 3d 514.

Burden of proof: necessity of proving venue or territorial jurisdiction of criminal offenses beyond reasonable doubt. 67 ALR 3d 988.

Prosecution: change of venue by state in criminal case. 46 ALR 3d 295.

Misdemeanor: right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like. 34 ALR 3d 804.

Publicity: pretrial publicity in criminal case as ground for change of venue. 33 ALR 3d 17.

46-3-112. Requisite act in multiple counties.

Commission Comments

Source: A.L.I., section 242.

This provision allows the trial to take place in the most convenient county where an element of the offense occurred. It does not matter if the final consummation of the offense occurred in another county. The only elements of the crime which are of interest are those acts constituting or requisite to the consummation of the offense; the trial of the case may be held in any county in which such acts occur. [Annotator's note: The 1981 amendment allows trial in any county in which any offense occurred when two or more acts are committed in furtherance of a common scheme.]

Compiler's Comments

2003 Amendment: Chapter 344 inserted (3) providing that if an element of an offense under 45-5-220, 45-5-625, 45-8-212, or 45-8-213 involves an electronic communication, the charge may be filed in the county in or from which the electronic communication was sent or in the county in which the electronic communication was received or to which it was sent. Amendment effective October 1, 2003.

1995 Amendment: Chapter 177 in (1) and (2), at beginning, inserted exception clause; and made minor changes in style.

1991 Amendment: In (1), near end, substituted "charge may be filed" for "trial may be"; inserted (2) concerning act occurring in more than one county; and made minor changes in style.

1981 Amendment: Substituted "When" for "Where" at the beginning of the section; inserted "or when two or more acts or offenses are committed in furtherance of a common scheme" after "any offense"; and inserted "or offenses" after "acts" at the end of the section.

Case Notes

Illegal Outfitting Chargeable in County Where Some Outfitting Acts Occur: Ruiz was charged in a fish and game sting operation with outfitting without a license after meeting officers in Missoula County and taking them to Flathead Lake to hunt. The charge was filed in Missoula County, and Ruiz contended that because the actual hunting activity took place in a different county, the charge was filed in an improper venue. The Supreme Court noted that the definition of an outfitter includes a person who provides a personal service for a person to hunt and who accompanies that person, either part or all of the way, on a hunting expedition. Ruiz met the officers in Missoula County and accompanied them on their hunting expedition, so the outfitting violation occurred at least in part in Missoula County. Therefore, charging the crime in Missoula County was a proper venue. St. v. Ruiz, 2004 MT 135, 321 M 357, 91 P3d 565 (2004).

Proper Venue for Prosecution of Common Scheme to Manufacture Methamphetamine in Several Counties — Possession Charge Dismissed for Improper Venue: Following arrest in Sanders County, Galpin was charged in Ravalli County with possession of methamphetamine in Sanders County, operating a methamphetamine lab in Ravalli County, possessing methamphetamine precursors in Ravalli and Missoula Counties, and criminal endangerment in Ravalli County. Citing venue grounds, Galpin questioned the evidence on the endangerment charge and moved to dismiss the possession charge and the Missoula County precursor charge because there was no evidence that the crimes were committed in Ravalli County where the charges were filed. The Supreme Court agreed that possession has but one requisite act, which is possession of the drug itself, and because neither the state's information nor trial testimony established that Galpin possessed methamphetamine anywhere but Sanders County, Ravalli County was not the proper venue for the possession charge, so it was dismissed. However, in pursuit of the common scheme to manufacture methamphetamine, Galpin kept precursors in storage facilities in both Ravalli and Missoula Counties and knowingly or purposely prepared, processed, or manufactured the drug as he traveled between Ravalli and Missoula Counties, so venue was proper in Ravalli County for the precursor charges. Ravalli County was also a proper venue for the criminal endangerment charges based on witness testimony that Galpin

manufactured methamphetamine on at least three occasions at the witness's home in Ravalli County when children were present. St. v. Galpin, 2003 MT 324, 318 M 318, 80 P3d 1207 (2003).

Proper Venue of Custodial Interference Proceeding: Price was charged with custodial interference after failing to return his daughter to her mother. Price moved to dismiss the charge for improper venue, arguing that Lake County, where he had withheld the child, rather than Missoula County, where both parties resided and where dissolution proceedings were taking place, was the proper venue. Venue is a jurisdictional fact that must be proved at trial as any other material element. Deprivation of custodial rights is a requisite element of the offense of custodial interference, so the state must establish that the defendant: (1) knowing that there was no legal right to do so, took, enticed, or withheld a child; and (2) deprived the legal custodian of custody. When establishing the commission of an offense requires proving two or more acts, the charges may be filed in any county in which any of the acts occurred. In this case, at least one of the elements of custodial interference occurred in Missoula, so Missoula County was a proper venue for prosecution of the offense, and the District Court properly denied the motion to dismiss for improper venue. St. v. Price, 2002 MT 229, 311 M 439, 57 P3d 42 (2002), followed in St. v. Young, 2007 MT 323, 340 M 153, 174 P3d 460 (2007).

Proper Venue for Filing of Stalking Charges: Cooney contended that alleged acts of stalking committed against Busby occurred in Missoula and in Colorado where Busby was living when the charges were brought. However, the state introduced numerous letters sent to Busby's parents' home in Powell County, as well as an offensive telephone message left there, to prove that the acts necessary to establish stalking occurred in Powell County. It was not error for the District Court to determine that proper venue was in Powell County. St. v. Cooney, 271 M 42, 894 P2d 303, 52 St. Rep. 320 (1995).

Similar Offenses in Different Counties — Not to Be Combined in Same Trial: Defendants were charged with theft of coins from a juke box in Roosevelt County and also with the same offense in Blaine County. Defendants were originally charged with misdemeanor theft in Blaine County and later charged with felony theft in an amended information combining the offense in Roosevelt County. Defendants objected, claiming the offenses were unrelated and that venue for the Roosevelt County theft did not properly lie in Blaine County. The general venue rule is that in criminal actions venue is proper only in the jurisdiction where the crime occurred. The State claimed that the offense fit into the "common scheme" exception, where the acts requisite to the commission of a crime, occurring in more than one jurisdiction, establish proper venue in any one of the affected counties. The court held that the offenses were linked by similarity and nothing else. The court held that two separate and distinct offenses had occurred in two different jurisdictions. Under Montana law, the crimes must be separately charged and must be tried in the counties where they occurred. St. v. Adams, 190 M 233, 620 P2d 856, 37 St. Rep. 2053 (1980).

Failure to File Tax Return — Venue: Venue of a criminal action charging intentional failure to file a properly completed Montana individual income tax return would lie in either Lewis and Clark County or the county in which defendants reside. But, since the complaint was filed in the former and no legal justification or prejudice was shown to support transfer, the Supreme Court reversed the District Court's change of venue from Lewis and Clark County. Dept. of Revenue v. Lane, 187 M 230, 609 P2d 300 (1980), following St. v. Bretz, 169 M 505, 548 P2d 949 (1976).

Amendment of Charges to Add Interrelated Acts Committed in Different County: When the defendants, while in Missoula County jail awaiting trial on charges pending in Powell County, were charged in counts added to the information already filed in Powell County with conspiracy and solicitation to commit perjury, tampering with witnesses, and fabrication of physical evidence, all in connection with the previously filed charges, the additional crimes charged were interrelated with and dependent upon the pendency of the other charges. Thus, one of the acts necessary to their commission occurred in Powell County, and it was error for the District Court there to order venue on the additional counts changed to Missoula County. St. v. Bretz, 169 M 505, 548 P2d 949 (1976).

False Report Mailed to Another County: When the defendants, president and cashier of a bank, prepared an alleged false report to the Superintendent of Banks in one county and transmitted it by mail to the Superintendent of Banks in another county, the District Court of the former county had jurisdiction. St. v. Cassill, 70 M 433, 227 P 49 (1924).

Collateral References

Criminal Law *key* 108(1), 112.

22 C.J.S. Criminal Law §§224 through 228.

21 Am. Jur. 2d Criminal Law §467.

Power of state trial court in criminal case to change venue on its own motion. 74 ALR 4th 1023.

Bribery: venue in bribery cases where crime is committed partly in one county and partly in another. 11 ALR 4th 704.

Rape: venue in rape cases where crime is committed partly in one place and partly in another. 100 ALR 3d 1174.

Homicide: venue in homicide cases where crime is committed partly in one county and partly in another. 73 ALR 3d 907.

46-3-113. Assisting in commission of or committing an offense.

Commission Comments

Source: A.L.I., sections 241 and 244. See also R.C.M. 1947, sections 94-5615 and 94-5616.

This section combines the language of sections 94-5615 and 94-5616 [since repealed] and eliminates the distinction between principal and accessory.

Compiler's Comments

1995 Amendment: Chapter 177 at beginning inserted exception clause; and made minor changes in style.

1991 Amendment: Near end substituted "charge may be filed" for "offender may be tried"; and made minor changes in style.

46-3-114. County of offense unknown.

Commission Comments

Source: New. See Illinois Code, Chapter 38, section 1-6(f) and R.C.M. 1947, section 94-5607.

The term "instrument of conveyance" was used in this section to cover all modes of transportation. This language avoids the need of listing all types of conveyances as used in the older section and avoids the possibility of an omission. The language creates a distinction between an offense committed against the vehicle itself and against a passenger on the vehicle.

Compiler's Comments

1995 Amendment: Chapter 177 in (1) and (2), at beginning, inserted exception clause; and made minor changes in style.

1991 Amendment: Inserted (1) concerning inability to determine county of offense; and substituted (2) concerning offense against public or private conveyance for former text that read: "(2) If an offense is committed in, on, or against any instrument of conveyance passing within this state and it cannot readily be determined in which county the offense was committed, the offender may be tried in any county through which such instrument of conveyance has passed or in the county where the travel terminates".

Case Notes

Travel in and Through County in Private Conveyance Adequate to Establish Venue — Boat as Private Conveyance: Diesen's boat collided with Hallock's boat in Fort Peck Lake, in either Valley County or Garfield County. Diesen was convicted in Valley County Justice's Court of boating under the influence, and he appealed. In District Court, Diesen moved for dismissal, alleging that the venue was improper because the state had failed to prove that any element of the offense had occurred in Valley County. The District Court applied this section in concluding that Diesen's boat was a private conveyance and held that because the state proved beyond a reasonable doubt that the boat traveled in and through Valley County on its way to Fort Peck Marina, the Valley County Justice's Court was an appropriate venue. The Supreme Court affirmed denial of Diesen's motion to dismiss. St. v. Diesen, 2000 MT 1, 297 M 459, 992 P2d 1287, 57 St. Rep. 1 (2000).

Judicial Notice as to Location: Courts will take judicial notice of the fact that a point located a given number of miles from a named town is in a certain county. St. v. Akers, 106 M 43, 74 P2d 1138 (1938).

Collateral References

Criminal Law *key* 111.

22 C.J.S. Criminal Law §§226 through 229.

21 Am. Jur. 2d Criminal Law §464, et seq.

46-3-115. Offense consummated within the state.

Commission Comments

Source: Illinois Code [of Criminal Procedure], Chapter 38, section 1-6(d).

This provision is complementary to [46-3-201 (now repealed)] and provides for venue for acts which commence in another state and end in Montana.

Compiler's Comments

1995 Amendment: Chapter 177 at beginning inserted exception clause; and made minor changes in style.

1991 Amendment: Substituted present text concerning charging of offense in any county where act requisite to offense is committed or continued for former text that read: "If the commission of an offense commenced outside the state is consummated within this state, the offender shall be tried in the county where the offense was consummated".

Case Notes

Stolen Property Brought From Canada: There was no variance between the information charging larceny of horses in the county and proof that the horses were stolen in Canada and driven into the county. St. v. De Wolfe, 29 M 415, 74 P 1084 (1904), overruled on other grounds in St. v. Penna, 35 M 535, 90 P 787 (1907).

Collateral References

Criminal Law *key* 97(1).

22 C.J.S. Criminal Law §§203 through 206.

21 Am. Jur. 2d Criminal Law §464, et seq.

CHAPTER 4
INVESTIGATIVE PROCEDURES

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

1991 Chapter Comments: The statutes governing the investigation of death included provisions for the conduct of an autopsy (1987 MCA 46-4-101 through 46-4-104) and the conduct of a coroner's inquest (1987 MCA 46-4-201 through 46-4-207). Research revealed that only five states addressed these investigative procedures in their criminal codes. None of the states that have adopted criminal procedure rules have retained these investigative procedures in rule form.

The Commission neither felt the need for nor addressed any amendments to the code provisions governing autopsies. Certainly, an autopsy is a valuable tool, but it does not seem related to criminal procedure. Although an autopsy may be required by either the County Attorney or the Attorney General, the conduct of an autopsy is generally controlled by the County Coroner. The Commission suggested that the autopsy provisions be removed to Title 7, MCA, which contains provisions governing the County Coroner's office.

The Coroner's inquest is a juried inquiry into the cause of any suspicious death. Although an inquest is not commonly called for, the procedure has proved to be a useful investigative tool under certain circumstances. The inquest provisions have been retained in the statutes, but some changes have been made to reflect the manner in which inquests are conducted. The Coroner's register requirement that appeared at 1987 MCA 46-4-207 has not been retained.

Neither the Federal Rules of Criminal Procedure nor the Uniform Rules of Criminal Procedure have provisions for these investigative procedures.

Chapter Case Notes

Differences Between Suspects in Photographs — Lineup Not Impermissibly Suggestive: A witness identified Baldwin in a photographic lineup, but Baldwin contended that the lineup was impermissibly suggestive because of numerous differences among the subjects in the photographs. The Supreme Court was not persuaded. Mere variations in appearance among photographs presented to a witness do not automatically invalidate an identification. St. v. Baldwin, 2003 MT 346, 318 M 489, 81 P3d 488 (2003), following U.S. v. Robertson, 606 F2d 853 (9th Cir. 1979).

One-on-One Showup Identification Impermissibly Suggestive — Witness Testimony Permissible Under Totality of Circumstances: Bingman sought to exclude the testimony of witnesses in a felony DUI trial on grounds that the witnesses' observation of Bingman through a two-way window at the police department was impermissibly suggestive, resulting in an unreliable identification. The suggestive nature of one-on-one showup identifications has been previously recognized. In St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107 (2000), the Supreme Court set out a two-part test for determining whether evidence gained from such an identification is permissible. The state conceded that the identification procedure was impermissibly suggestive, satisfying the first part of the Clark test. The second part of the test requires a determination of whether, under the totality of the circumstances, the identification gave rise to a substantial likelihood of irreparable misidentification. In this case, despite the impermissibly suggestive nature of the showup identification procedure, the certainty with which the witnesses identified Bingman outweighed the likelihood of misidentification, so the District Court did not err in allowing the witnesses' testimony. St. v. Bingman, 2002 MT 350, 313 M 376, 61 P3d 153 (2002).

Identification Procedure Impermissibly Suggestive — Motion In Limine to Suppress Witness's In-Court Identification Properly Denied — No Substantial Likelihood of Irreparable Misidentification: A witness stood by defendant's car for several minutes after an accident observing him for injuries and then left to get help when she saw that he appeared drunk and that there was a pistol on the car seat. When the witness returned and police arrived, the defendant and pistol were gone. After many procedural delays and the suppression of evidence of defendant's driver's license taken from the car, the County Attorney's office sent a letter to the witness along with two photographs of defendant in jailhouse attire. The state affirmatively identified the person in the photos as defendant and asked the witness to notify the County Attorney's office if the photos didn't depict the person whom she saw in the car. Defendant's motion in limine to prohibit the witness's identification testimony was denied by the District Court. On appeal, the Supreme Court held that although the identification procedure was impermissibly suggestive, considering the totality of the circumstances, it did not create a substantial likelihood of misidentification and the motion was properly denied. St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107, 57 St. Rep. 185 (2000).

Illegal Activities of Informant Not Considered Outrageous Government Conduct: Briner cited the doctrine of outrageous government conduct, as recognized in U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986), when contending that the government's failure to monitor and control the activities of an informant upon whose testimony Briner was convicted violated a sense of justice and barred his conviction. However, there was no evidence that: (1) the government participated in or was aware of the informant's illegal activities; (2) the government engaged in brutality to or coercion of the informant to convince him to inform; (3) Briner was entrapped; or (4) there was any connection between local law enforcement and the informant's illegal activities. As established in U.S. v. Simpson, 813 F2d 1462 (9th Cir. 1987), the government is not held accountable for unrelated criminal activity of an informant, especially when law enforcement was unaware of such activity. Consequently, the doctrine of outrageous government conduct did not apply. St. v. Briner, 253 M 158, 831 P2d 1365, 49 St. Rep. 402 (1992).

Evaluation of Likelihood of Misidentification: D.K. was forcibly raped at knife point in her home in Butte. After the rape, D.K. was shown photographic lineups, one of which contained a 1977 photo of defendant and the other a current picture of defendant. D.K. could not identify her attacker but showed interest in the photos of defendant. Defendant's photos were the only ones bearing the words "Police Dep't. Butte, Montana". At a physical lineup, D.K. immediately identified defendant as her attacker. The trial court granted defendant's motion to exclude the photo identification but denied motions to suppress evidence of the physical lineup or to prevent any in-court identification. On appeal, defendant contended that the photo lineups were impermissibly suggestive and tainted any later identification. The Supreme Court followed the

two-pronged test of determining if the identification procedure was impermissibly suggestive and, if so, whether under the totality of the circumstances the procedure had a tendency to give rise to a likelihood of misidentification (St. v. Lara, 179 M 201, 587 P2d 930 (1978)). The court used the five factors set out in Neil v. Biggers, 409 US 188, 34 L Ed 2d 401, 93 S Ct 375 (1970), to evaluate the likelihood of misidentification. Considering the totality of the circumstances, the court did not find that the photo lineups gave rise to an "irreparable misidentification". St. v. Bauer, 210 M 298, 683 P2d 946, 41 St. Rep. 1066 (1984). The five-part Neil test was applied in St. v. Schoffner, 248 M 260, 811 P2d 548, 48 St. Rep. 424 (1991), St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107, 57 St. Rep. 185 (2000), and St. v. Baldwin, 2003 MT 346, 318 M 489, 81 P3d 488 (2003). See also St. v. Hedrick, 229 M 145, 745 P2d 355, 44 St. Rep. 1849 (1987).

Photographic Lineup — When Not Overly Suggestive — No Right to Have Counsel Present: A defendant appealed from a robbery conviction. He alleged that a motion to suppress evidence relating to pretrial photographic lineup procedures should have been sustained. The motion was based on contentions that the victim's ability to identify him was tainted by the fact the victim had seen him in police custody shortly after the robbery and that the victim may have seen another photograph of him which had been in the custody of a police officer. The defendant also challenged the suggestiveness of the lineup because his attorney was not present. If the photographic identification process was so suggestive as to present a "substantial likelihood of misidentification", an in-court identification of the defendant would not be permitted. Under the circumstances of this particular case, there was not a substantial chance of misidentification. Further, the reviewing court followed a U.S. Supreme Court decision and stated that the confrontation clause is not violated by a photoarray identification process, and therefore the right to counsel does not attach. Accordingly, the motion to suppress was properly denied. St. v. Dahl, 190 M 207, 620 P2d 361, 37 St. Rep. 1852 (1980).

Chapter Law Review Articles

Criminal Procedure—Montana Law and the Federal Impact, Elison, 38 Mont. L. Rev. 27 (1977).

Part 1
Investigation of Death — Autopsy

46-4-101. Jurisdiction — death and cause of death in different counties.

Commission Comments

Source: New.

This provision is intended to preclude jurisdictional disputes over the body and the right to act.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: Inserted (1) relating to jurisdiction of Coroner of county where dead human body is found; in (2), at end of first sentence, substituted "the coroner of the county where the acts or events causing death occurred has jurisdiction" for "the coroner of either county shall have jurisdiction" and in second sentence substituted "If a coroner that has jurisdiction of a death fails to act, the state medical examiner has jurisdiction" for "If a conflict of jurisdiction should arise or should said coroners fail to act, the coroner of the county where the death occurred shall have the primary jurisdiction"; inserted (3) relating to jurisdiction of Coroner in county in which he serves and relating to travel to another county; and made minor changes in style.

Coordination: Section 265(3), Ch. 800, L. 1991, provided: "If Senate Bill No. 331 is passed and approved and if it includes a section that amends 46-4-101, then the sections of [this act] that amends 46-4-101 is void." Senate Bill No. 331 amended 46-4-101 and was enacted as Ch. 660, L. 1991.

46-4-103. Autopsy — when conducted, scope.

Commission Comments

Source: New.

This section, in conjunction with [46-4-102 (now repealed)], gives the coroner wide discretion to perform or provide for autopsies to be performed. This is consistent with the primary function of the office. This section specifically authorizes autopsies without the holding of inquests. Records and reports of autopsies made under this act shall be received as evidence in any court or other proceeding, except that statements by conclusions on extraneous matters are not intended

to be made admissible. The person preparing a report hereunder to be given in evidence may be subpoenaed as a witness in any civil or criminal case by any party. Copies of the report, when duly attested by the coroner shall be received in any proceeding as the original and are to be part of the public record.

Compiler's Comments

2007 Amendment: Chapter 345 inserted (5) requiring autopsies pursuant to 72-17-216 and 72-17-218 on decedent whose death is under investigation and who made anatomical gift. Amendment effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

1991 Amendment: In (1), in first sentence, inserted "performed on any dead human body for which the death requires an inquiry" and inserted "or associate medical examiner", inserted third sentence relating to no need for family consent of an ordered autopsy, and in last sentence inserted "county attorney, or attorney general"; deleted former (2) that read: "(2) A full record of the facts found shall be made on a form provided by the division of forensic science in triplicate, the coroner and medical examiner retaining one copy and delivering the other to the county attorney"; in (3), after "investigation", inserted "or inquiry"; inserted (4) relating to appropriate facilities if a morgue is not provided; and made minor changes in style.

Coordination: Section 265(4), Ch. 800, L. 1991, provided: "If Senate Bill No. 331 is passed and approved and if it includes a section that amends 46-4-103, then the section of [this act] that amends 46-4-103 is void." Senate Bill No. 331 amended 46-4-103 and was enacted as Ch. 660, L. 1991.

Applicability of Commission Comments: The 1974 and 1977 amendments should be scrutinized for their effect on the applicability of the commission comments.

46-4-104. Liability of mortuary or physician.

Commission Comments

Source: Utah Code, section 26-20-10.

Intended to protect those who may be requested to act by the coroner in removal of a body or in performing an autopsy on a body.

Compiler's Comments

1991 Amendment: Made minor changes in style.

1985 Amendment: In second sentence, after "chapter", inserted "or for performing an autopsy on request of a federal officer investigating a death within a federal jurisdiction".

46-4-110. Powers of coroner.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Attorney General's Opinions

Removal of Body — Death Certificate: Whenever a County Coroner investigates a death, he has authority to remove the body. The Coroner must make the decision as to whether or not a physician will sign the death certificate whenever the deceased was not under the care of a physician. 37 A.G. Op. 179 (1978).

Collateral References

Coroners *key* 1, 8.

18 C.J.S. Coroners and Medical Examiners §§7 through 26.

46-4-111. Coroner's authority to seize and preserve evidence.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

46-4-112. Subpoenaing of witnesses and documents.

Collateral References

Coroners *key* 13.

18 C.J.S. Coroners and Medical Examiners §17.

18 Am. Jur. 2d Coroners or Medical Examiners §§7 through 16.

46-4-113. Examinations and tests.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

46-4-114. Reporting fetal deaths.

Compiler's Comments

2005 Amendment: Chapter 519 near beginning substituted "physician assistant" for "physician assistant-certified". Amendment effective October 1, 2005.

46-4-122. Human deaths requiring inquiry by coroner.

Compiler's Comments

1993 Amendment: Chapter 287 in (3) inserted reference to shipping body into state.

46-4-123. Inquiry report.

Compiler's Comments

2007 Amendment: Chapter 268 inserted second and third sentences relating to rules for the transportation and delivery of a fetus; and made minor changes in style. Amendment effective October 1, 2007.

Part 2
Inquests

46-4-201. Inquest — definition — when held — how conducted.

Commission Comments

Commission Comment Not Divided: This section is a recodification of part of section 95-803, R.C.M. 1947. Section 46-4-202 is also derived from section 95-803. The commission comments to section 95-803 are printed in their entirety under 46-4-201.

Source: New.

The purpose of this provision is to eliminate the coroner's inquest except when the county attorney requests one to be held. The county attorney should request inquests to be held when he believes them necessary in:

(a) All violent deaths, whether apparently homicidal, suicidal, or accidental.

(b) Deaths not caused by readily recognizable disease, disability or infirmity, where there is a reasonable possibility of criminal action.

(c) Deaths under suspicious circumstances.

(d) Deaths from causes which might constitute a threat to public health.

(e) Deaths of inmates of public institutions not hospitalized therein for disease.

(f) Deaths from occupational disease or hazards.

The preliminary determination of whether a crime has been committed is primarily a police function. It is generally recognized that a coroner seldom has the training to investigate properly and that in most instances an inquisition is a clumsy means of investigation. Therefore, the power of a coroner to investigate and to hold inquests has been restricted.

One of the primary purposes of an inquest is to "clear the air" in the case of a controversial death, and to require a secret inquest would defeat this objective.

Compiler's Comments

1997 Amendment: Chapter 478 in first sentence in (2) substituted "may" for "shall"; at beginning of (2)(a) and in (4)(a)(i), before "jail", inserted "prison" and after "jail" substituted "other correctional facility" for "penal institution"; in introductory clause in (2)(a) inserted language regarding death not caused by terminal condition or execution and inserted second sentence applying subsection to death caused by terminal condition only if person under medical care at time of death; and made minor changes in style.

1991 Amendment: In (1), at end, inserted "and is conducted by the coroner before a coroner's jury"; in (2), in second sentence, inserted "while a person is being taken into custody or is in the custody of a peace officer", substituted "is caused by a peace officer" for "from the use of a firearm by a peace officer", and at end substituted "shall order" for "shall direct"; in (3) inserted third sentence relating to examination of witnesses; and made minor changes in style.

Coordination: Section 20(1), Ch. 660, L. 1991, provided: "If Senate Bill No. 51 is passed and approved and if it includes a section that amends 46-4-201, then that section of Senate Bill No. 51 is void."

1983 Amendment: Inserted (4) relating to disqualified actions by a coroner who is also a peace officer.

Code Commissioner Correction: In (4)(b), the Code Commissioner inserted "(a)" after "under subsection (4)" to precisely cite the provision referenced.

Collateral References

Coroners *key* 10.
18 C.J.S. Coroners and Medical Examiners §§9 through 23.
18 Am. Jur. 2d Coroners or Medical Examiners §§7 through 16.

46-4-202. Summoning and swearing in of jurors — instructions.

Commission Comments

Source: R.C.M. 1947, section 94-201-2.
[See commission comments to 46-4-201.]

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In (1), near beginning, substituted "jury of at least 6 but not more than 12 persons" for "a jury of not more than nine persons" and at end inserted "and selected at random from a list of eligible jurors that is furnished to the coroner annually by the county clerk of court"; in (2), at beginning, substituted "The jury selected by the coroner must" for "When six or more of the jurors attend, they must"; and made minor changes in style.

Coordination: Section 20(2), Ch. 660, L. 1991, provided: "If Senate Bill No. 51 is passed and approved and if it includes a section that amends 46-4-202, then that section of Senate Bill No. 51 is void."

1983 Amendment: Inserted (3) requiring the coroner to instruct the jurors as to their duties.
See compiler's comments to 46-4-201.

Attorney General's Opinions

Impaneling Coroner's Jury: The Coroner has the power to select jurors by any reasonable mode suitable to perform his duty to impanel a Coroner's jury. 37 A.G. Op. 87 (1977).

Collateral References

Coroners *key* 12.
18 C.J.S. Coroners and Medical Examiners §14.
18 Am. Jur. 2d Coroners or Medical Examiners §13.

46-4-203. Coroner's subpoena.

Commission Comments

Source: R.C.M. 1947, section 94-201-3.
No change.

Compiler's Comments

1991 Amendment: At beginning inserted "Upon the request of the county attorney" and deleted second sentence that read: "He shall summon and examine as a witness each person who, in his opinion or that of the jury, has any knowledge of the facts and may summon a surgeon or physician to inspect the body and give a professional opinion as to the cause of the death"; and made minor changes in style.

Scope of Commission Comments: The commission comments predate the 1979 amendments.

Collateral References

Coroners *key* 13.
18 C.J.S. Coroners and Medical Examiners §17.
18 Am. Jur. 2d Coroners or Medical Examiners §§7 through 16.

46-4-205. Verdict of jury — form.

Commission Comments

Source: R.C.M. 1947, section 94-201-5.
No substantial change.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: Inserted first two sentences relating to viewing the body and review of the death scene and in third sentence, at beginning, substituted "After viewing the body and the death scene" for "After inspecting the body"; in (2), after "where", deleted "and by what means"; inserted (3) relating to whether death was by criminal means; at end of (4) inserted "if known. If

the jury finds that the death was not by criminal means, that fact must be stated on the verdict form"; and made minor changes in style.

Coordination: Section 20(3), Ch. 660, L. 1991, provided: "If Senate Bill No. 51 is passed and approved and if it includes a section that amends 46-4-205, then that section of Senate Bill No. 51 is void."

Collateral References

Coroners *key* 18.

18 C.J.S. Coroners and Medical Examiners §19.

18 Am. Jur. 2d Coroners or Medical Examiners §15.

46-4-206. Recording and filing of testimony and proceedings.

Commission Comments

Source: R.C.M. 1947, section 94-201-6.

No change.

Compiler's Comments

1991 Amendment: Inserted first sentence relating to testimony under oath, in second and third sentences substituted "witnesses examined and proceedings before the coroner's jury must be recorded and transcribed by a competent stenographer appointed by the coroner. The record of the inquest and the verdict of the jury must be filed by the coroner" for "witnesses examined before the coroner's jury must be reduced to writing by the coroner or under his direction and forthwith filed by him with the inquisition", at end of third sentence, after "district court of the county", inserted "in which the inquest was held", and deleted former second sentence that read: "The coroner must order the inquest proceedings recorded and transcribed by a qualified stenographer"; and made minor changes in style.

Coordination: Section 20(4), Ch. 660, L. 1991, provided: "If Senate Bill No. 51 is passed and approved and if it includes a section that amends 46-4-206, then that section of Senate Bill No. 51 is void."

Collateral References

Coroners *key* 17.

18 C.J.S. Coroners and Medical Examiners §16.

46-4-207. Coroner's register.

Commission Comments

Source: R.C.M. 1947, section 16-3407.

No material change.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 3
Investigative Subpoenas — Reporting Requirement for Peace Officers

Part Commission Comments

1991 Part Comments: The statutes relating to the use of investigative subpoenas are primarily a restatement of 1987 MCA 46-3-301 through 46-3-306. The changes were made to simplify and condense the former language.

Part Attorney General's Opinions

Compelling Release of Confidential Health Care Information: A County Attorney may seek an investigative subpoena in order to compel a health care provider to release confidential health care information under 50-16-314 (repealed by Ch. 632, L. 1987, and replaced by 50-16-535 and 50-16-536). 38 A.G. Op. 82 (1980).

46-4-301. Issuance of subpoena.

Compiler's Comments

1999 Amendment: Chapter 318 in (2) at beginning inserted exception clause; inserted (3) clarifying the showing necessary for the discovery of constitutionally protected material; and made minor changes in style. Amendment effective April 16, 1999.

Preamble: The preamble attached to Ch. 318, L. 1999, provided: "WHEREAS, in State v. Nelson, 283 Mont. 231, 941 P.2d 441, 54 St. Rep. 576 (1997), the Montana Supreme Court held

that discovery of constitutionally protected material, such as medical records, requires a showing of a compelling state interest."

1991 Amendment: In three places substituted references to prosecutor for references to Attorney General or County Attorney; and made minor changes in style.

Case Notes

Revealing Limited Medical Information During Police Interview Not Considered Waiver of Constitutional Right to Confidentiality in Medical Records — Voluntary Medical Information Outside Scope of Fruit of Poisonous Tree Doctrine — Adequate Probable Cause for Investigative Subpoena of Medical Records: Bilant was involved in a three-car accident and was subsequently arrested for DUI and a seat belt violation. During an interview following the arrest, Bilant revealed to an officer that he had taken pain medication on the day of the accident. The officer called Bilant's health care provider for confirmation, and the provider confirmed that Bilant had a prescription for a drug similar to the pain medication that he mentioned. The officer then procured an investigative subpoena regarding documentation on all prescriptions issued to Bilant, including any advisory warnings, and the provider sent Bilant's entire medical file. Bilant contended that the state violated both his constitutional right to privacy and the statutory protections of 50-16-535. The state maintained that Bilant waived his claim of confidentiality in his medical information when he voluntarily revealed his use of pain medication to the officer. The Supreme Court agreed with Bilant. Medical records are quintessentially private and deserve the utmost constitutional protection. None of the statutory prerequisites for disclosure of the medical records were met. In deciding to reveal limited medical information in a police interview, Bilant did not forfeit his constitutional right to subsequently claim confidentiality in his medical records. The officer conducted an illegal search in seeking the constitutionally protected private medical information without probable cause and the benefit of an investigative subpoena under this section, and the information gleaned from the telephone call should have been suppressed. Bilant then contended that the use of the illegally obtained information formed an improper basis for the investigative subpoena and that the results of the subpoena should also have been suppressed pursuant to the fruit of the poisonous tree doctrine, which forbids the use of evidence that comes to light as the result of an initially illegal act. However, on this point, the Supreme Court disagreed with Bilant. One exception to the doctrine is that the derivative evidence is admissible if it is obtained from an independent source. Here, Bilant himself provided the source by giving voluntary medical information from other than the illegal telephone inquiry. The Supreme Court recognized that an investigative subpoena seeking constitutionally protected medical information requires greater justification for state access than the administration of justice rationale used to obtain public information under this section, so in reviewing the probable cause basis for constitutionally protected material, the court excised the illegal evidence from the application and reviewed the remaining information de novo to determine whether probable cause existed for issuing the subpoena. In this case, even when the information subject to suppression was excised, the remaining evidence established probable cause that a DUI was committed and underscored a compelling state interest in medical records related to prescription medicines in order to confirm Bilant's initial admission to the officer. Thus, the subpoena was issued in accordance with the statutory requirements for constitutionally protected medical records, and Bilant's conviction was affirmed. St. v. Bilant, 2001 MT 249, 307 M 113, 36 P3d 883 (2001). See also St. v. New, 276 M 529, 917 P2d 919 (1996), and St. v. Nelson, 283 M 231, 941 P2d 441 (1997).

Investigative Subpoena — Discovery of Medical Records: The District Court did not err in denying the defendant's motion to exclude evidence of blood tests taken at the hospital after a car accident. The state's application for an investigative subpoena demonstrated that it had probable cause to believe an offense had been committed and that the defendant's medical records contained evidence of the offense. St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

Administration of Justice Standard Unconstitutional as Applied to Constitutionally Protected Medical Records — Compelling State Interest Required: The defendant was treated for a broken jaw following an automobile accident. Concerned with the defendant's lack of pain, the treating physician ordered a blood alcohol test, the results of which were later discovered by an investigating officer through an investigative subpoena and used to convict the defendant of driving under the influence. On appeal, the Supreme Court affirmed the defendant's conviction but ruled that as applied to the discovery of constitutionally protected material such as medical records, the state law that allows the issuance of an investigative subpoena "if the administration of justice so requires" is unconstitutional. Medical records may be discovered through an investigative subpoena only upon a showing of compelling state interest under Art.

II, sec. 10, Mont. Const. St. v. Nelson, 283 M 231, 941 P2d 441, 54 St. Rep. 576 (1997), followed in St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998), and distinguished in St. v. Dolan, 283 M 245, 940 P2d 436, 54 St. Rep. 583 (1997).

Exclusionary Rule Not Extended to Investigative Subpoenas: The defendant argued that the officer obtaining the investigative subpoena had misread a warranty deed and alleged that the defendant had paid the sellers of his residence $10,000 in addition to his downpayment, when in reality the document stated that consideration of only $10 had been paid. The Supreme Court stated that the erroneous conclusions contained within the application did not invalidate the remaining information and declined to extend the exclusionary rule to investigative subpoenas. St. v. Baldwin, 242 M 176, 789 P2d 1215, 47 St. Rep. 614 (1990).

Jurisdiction to Issue Investigative Subpoenas: The plain language of 46-4-301 vests every District Court Judge with the power to issue investigative subpoenas with no jurisdictional limitation. There simply is no requirement, explicit or implicit, that the subpoena be issued by the sitting judge of the district where the crime allegedly occurred. The venue statutes have no application to the jurisdictions of any District Court to issue such subpoenas, which jurisdiction is coextensive with the state boundaries. St. v. Holmes, 212 M 526, 687 P2d 662, 41 St. Rep. 1535 (1984).

Availability of Investigative Subpoena: A subpoena must be issued by a court and is not available to the Attorney General or other prosecuting attorneys independent of a court or grand jury. Under former law, a subpoena was not available in cases not filed. State ex rel. Woodahl v. District Court, 166 M 31, 530 P2d 780 (1975).

46-4-302. Penalty for failure to appear or obey.

Compiler's Comments

1991 Amendment: In (2)(b) substituted "prosecutor" for "county attorney"; and made minor changes in style.

1987 Amendment: Inserted (2) relating to refusal of a person granted immunity to testify; and made minor change in phraseology.

46-4-303. Relief from improper subpoena.

Compiler's Comments

1991 Amendment: Made minor change in style.

46-4-304. Conduct of investigative inquiry.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (1) in fourth sentence after "shall" deleted "appoint" and inserted reference to ordering office of state public defender to assign counsel; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1991 Amendment: At beginning substituted "prosecutor" for "attorney general or the county attorney"; and made minor changes in style.

46-4-305. Self-incrimination — immunity.

Compiler's Comments

1991 Amendment: At beginning of (2) substituted "prosecutor" for "attorney general or the county attorney", before "judge" deleted "justice or", and after "subpoena" deleted "on behalf of the state"; near beginning of (3) substituted "part" for "section"; and made minor changes in style.

1983 Amendment: In (1), in second sentence after "subpoenaed", substituted remainder of sentence and third sentence granting immunity from the use of compelled testimony or evidence derived from it against that person in any prosecution and allowing a grant of immunity from prosecution for a transaction for "immunity from prosecution or punishment for or on account of any transaction or other matter concerning which the person testifies or produces evidence pursuant to the subpoena".

Collateral References

Enforceability of agreement by law enforcement officials not to prosecute if accused would help in criminal investigation or would become witness against others. 32 ALR 4th 990.

46-4-306. Applicability of other laws — costs.

Compiler's Comments

1993 Amendment: Chapter 262 at end of (1), after "county attorney", inserted "and the appropriate city shall bear all costs, including the cost of service, when the application for the

subpoena is made by a city attorney"; inserted (3) regarding payment of investigative costs; and made minor changes in style.

1991 Amendment: In (2) substituted "46-15-112" for "46-15-111".

46-4-307. Sexual abuse of children — report to national center for missing and exploited children.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

Part 4
Custodial Interrogations — Recording

Part Compiler's Comments

Effective Date: This part is effective October 1, 1999.

46-4-406. Purpose.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

46-4-407. Definitions.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

46-4-408. Recordings required.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

46-4-409. Exceptions to custodial recording requirements.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

46-4-410. Cautionary jury instruction.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

46-4-411. Handling and preservation of electronic recordings.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

CHAPTER 5
SEARCH AND SEIZURE

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based

on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

1991 Chapter Comments: The law of search and seizure has proved to be a dynamic part of American jurisprudence. The law requires a valid search warrant before a search and seizure may occur. There are exceptions to that rule, however, and those exceptions are continually being revised. The Commission recognized that any attempt to define the exceptions to the warrant requirement might stifle this evolutionary process. The statute, therefore, states only a basic warrant requirement and exceptions to that requirement. No attempt to define or list all of the exceptions has been made.

Following the basic warrant requirement, the statutes concern the issuance and execution of a warrant and the disposition of any property seized. The majority of the statutes in this area preserve the 1987 code. When appropriate, the statute is compared with the Federal Rules of Criminal Procedure or the Uniform Rules of Criminal Procedure.

Chapter Law Review Articles

Embracing Big Brother? State v. A Blue in Color, 1993 Chevrolet Pickup, Perkins, 68 Mont. L. Rev. 471 (2007).

Search by Private Persons: State v. Long, Dobson, 47 Mont. L. Rev. 189 (1986).

Criminal Procedure, Everly & Mullowney, 42 Mont. L. Rev. 371 (1981).

Criminal Procedure, Johnson & Johnson, 41 Mont. L. Rev. 329, 377 (1980).

The Exclusionary Rule and Acts of Private Persons: State v. Helfrich, Reep, 41 Mont. L. Rev. 281 (1980).

Chapter Collateral References

State constitutional requirements as to exclusion of evidence unlawfully seized—post-Leon cases. 19 ALR 5th 470.

Part 1
Legality and Admissibility

Part Case Notes

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Unreasonable Search and Seizure 43

GENERAL

Field Sobriety Test Not a Search: Purdie was stopped as part of routine traffic control as he passed a vehicular accident. The police officer who stopped him smelled alcohol. When Purdie left the accident scene driving erratically, the police officer stopped him again and asked him to get out of the car and perform some field sobriety tests. He showed a lack of coordination during the tests. Purdie argued that the test results were the fruits of an illegal warrantless search. The Supreme Court disagreed. Field sobriety tests are not searches protected by the constitution. St. v. Purdie, 209 M 352, 680 P2d 576, 41 St. Rep. 754 (1984).

Standing by Overnight Guest to Contest Search of Dwelling: The defendant appealed his denial of standing to contest a search of a dwelling that resulted in evidence against him. The defendant was an overnight guest in the dwelling searched, and that fact coupled with his lack of ownership interest in the dwelling is a factor to consider in determining standing, but it is not the controlling factor. Another factor to consider is whether the defendant had a reasonable expectation of freedom from government intrusion. Here, the dominion over the dwelling exercised by the defendant as the sole occupant at the time of search and the fact that evidence was seized in areas where he slept and stored his belongings were sufficient to grant standing to the defendant. St. v. Isom, 196 M 330, 641 P2d 417, 39 St. Rep. 137 (1982).

Arrest and Search Warrants — Probable Cause Requirements: For the issuance of a proper warrant, only a probability of criminal conduct must be shown. A County Attorney and a Sheriff's deputy, both of whom had been on the scene of an abduction, gave sworn testimony to the Justice of the Peace. The County Attorney's signed affidavit became part of an arrest warrant and a search warrant. Although the combination of the sworn testimony and the affidavit established probable cause, there was also additional testimony that placed the defendant at the scene of the abduction where the victim's watch was found in a pool of blood before warrants were sought. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Specificity of Search Warrant — Required Information — Limits of Coverage: For the search of a vehicle, all that is needed to meet the requirements of specificity is that the officer with reasonable effort can ascertain the automobile intended to be searched, and its owner, if possible.

The affidavit for the search warrant here listed five of seven criteria needed for identification of a motor vehicle (i.e., owner, make, model, year, color, motor number, and license number), and that was sufficiently specific. Under the search warrant "any other contraband" not specifically described could be seized as long as a reasonable relationship was demonstrated between the authorized search and seizure of the items not specifically described therein. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

REASONABLE SEARCH AND SEIZURE

Reasonable Cause for Warrantless Probationary Search — Motion to Suppress Properly Denied: Smith's live-in girlfriend was arrested on a probation violation for failing to report her change in residence and subsequently tested positive for drugs, which provided reasonable cause for her probation officer to conduct a warrantless search of her new residence—Smith's trailer. The search revealed weapons, drug paraphernalia, items used to manufacture and distribute drugs, and some of the girlfriend's personal items. The officer then decided to search a bus parked near the trailer, and while waiting for a warrant, Smith arrived. Based on the items found in the trailer and an officer's knowledge that Smith's driver's license was suspended, Smith was arrested and found to be in possession of a large amount of cash, drugs, and paraphernalia. More drugs and chemical precursors of methamphetamine were subsequently found in Smith's vehicle and in the bus. Smith moved to suppress all evidence obtained in the searches on grounds that the initial search was unlawful because it was not justified as a probation search or by any other exception to the warrant requirements, but the motion was denied. On appeal, the Supreme Court affirmed. Because the initial search was a probationary search of the residence of the woman living with Smith and was justified by reasonable cause and because Smith did not challenge the legality of the searches of his person and vehicles, the District Court did not err in determining that the searches were lawful and in denying Smith's motion to suppress the evidence. St. v. Smith, 2008 MT 7, 341 M 82, 176 P3d 258 (2008).

Frisk Incident to Investigatory Stop: A peace officer may frisk an individual for weapons incident to making an investigatory stop. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), following Terry v. Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968).

Delayed Seizure of Articles in Plain View: A seizure that is proper under the "plain view" exception may be delayed, so long as the delay is reasonable. St. v. Romero, 224 M 431, 730 P2d 1157, 43 St. Rep. 2309 (1986).

Warrantless Administrative Search Under Federal Law and "Plain View" Seizure Upheld: Where the defendant moved to suppress evidence of his possession and intent to sell hashish, arguing that the warrantless search under federal law by an agriculture inspector of a package addressed to him and seizure of the package violated his constitutional rights, the District Court did not err in denying the defendant's motion to suppress. The search was conducted under the Federal Plant Pest Act, 7 U.S.C. sections 147a -167, and the Hawaiian and territorial quarantine rules, 7 C.F.R. section 318. Under the administrative search principles articulated in Camara v. Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967), and See v. City of Seattle, 387 US 541, 18 L Ed 2d 943, 87 S Ct 1737 (1967), a government official is entitled to conduct administrative searches without a warrant when, as in this case, the evidence could otherwise be speedily removed. Nor, under Camara and U.S. v. Davis, 482 F2d 893 (9th Cir. 1973), must probable cause be shown for this type of search. The package and its contents were then lawfully seized under the "plain view" rule announced in Coolidge v. New Hampshire, 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971), and modified in Texas v. Brown, 460 US 730, 75 L Ed 2d 502, 103 S Ct 1535 (1983). The defendant's United States Constitution fourth amendment rights were therefore not violated. St. v. Kelly, 205 M 417, 668 P2d 1032, 40 St. Rep. 1400 (1983).

Warrantless Testing and Reopening of Evidence After Lawful Search and Seizure Upheld: Where an agriculture inspector in Hawaii lawfully opened a package in Hawaii, had its contents chemically tested in Hawaii, and shipped the package to Bozeman, Montana, where police officers opened the package without a warrant and made a controlled delivery to and arrested the defendant, the District Court did not err in denying the defendant's motion to suppress the evidence in the package. Once the agriculture inspector in Hawaii had recognized and seized the package under federal law, the defendant had no further reasonable expectation of privacy in the seized package. Under the rationale of U.S. v. Andrews, 618 F2d 646 (10th Cir. 1980) and U.S. v. Ford, 525 F2d 1308 (10th Cir. 1975), no privacy interest of the defendant was violated by transmission of the package for testing in Hawaii and shipment and opening of the package in Montana. Because government dominion over the package "continued unbroken" for all reasonable purposes, from its seizure in Hawaii to its delivery in Montana, the package could be opened without a warrant. St. v. Kelly, 205 M 417, 668 P2d 1032, 40 St. Rep. 1400 (1983).

Seizure of Evidence in Auto After Arrest on a "Particularized Suspicion": Seizure of evidence that was in plain view in defendant's car as he was arrested after a "particularized suspicion", meeting the test adopted in St. v. Gopher, 193 M 189, 631 P2d 293 (1981), was valid because the arrest was a lawful arrest. St. v. Schatz, 194 M 59, 634 P2d 1193, 38 St. Rep. 1687 (1981).

UNREASONABLE SEARCH AND SEIZURE

Suspicion Insufficient: An arrest or search and seizure made without a warrant is illegal and therefore unreasonable when it is made upon mere suspicion or belief unsupported by facts, circumstances, or credible information calculated to produce such belief. State ex rel. Wong You v. District Court, 106 M 347, 78 P2d 353 (1938).

Search of Person Unlawfully Arrested: The constitutional provision against unreasonable search and seizure applies to the person and his baggage and personal belongings and to the search of a person unlawfully arrested and the seizure of his personal belongings. St. v. Mullaney, 92 M 553, 16 P2d 407 (1932).

When Unreasonable: Searches and seizures that are not lawful and are not conducted as the law prescribes are unreasonable. St. v. Mullaney, 92 M 553, 16 P2d 407 (1932); State ex rel. King v. District Court, 70 M 191, 224 P 862 (1924). See also State ex rel. Sadler v. District Court, 70 M 378, 225 P 1000 (1924).

No Consent: The admission of evidence that shoes taken from the defendant without his consent corresponded with tracks found near the scene of the killing did not deprive the defendant of the rights guaranteed to him by the Montana Constitution. St. v. Fuller, 34 M 12, 85 P 369 (1906).

46-5-101. Searches and seizures — when authorized.

Commission Comments

1991 Comment: This statute replaces the general rule authorizing searches and seizures previously codified as 1987 MCA 46-5-101. That section, like the code in many states, provided for a general warrant requirement and allowed for only a few exceptions. The exceptions provided for in Montana's 1987 code were: (1) search incident to arrest; (2) search with consent; and (3) search within the scope of a lawful inspection. Many other exceptions recognized in Montana were not codified; these include the plain view search, the auto search, and the inventory search.

As previously indicated, this statute continues the general warrant requirement and recognizes that exceptions to the warrant requirement do exist. While the statute differs from the 1987 code, it is not anticipated that this change will result in any changes in practice or in law.

The Uniform Rules of Criminal Procedure do not provide for searches and seizures. The Federal Rules of Criminal Procedure are reflected in this statute in that the federal rules do not attempt to identify the exceptions to the general warrant requirement. See Rule 41, Fed. R. Crim. P.

Source: New.

This is new and has no counterpart in present Montana sections or codes of other states. It is intended to state the law as to when searches and seizures are authorized and codifies the present law as laid down by state and federal decisions. It is the law in Montana and under the federal decisions that a search and seizure may be made without a warrant as an incident to a lawful arrest or where the individual freely and intelligently gives his unequivocal and specific consent to search, uncontaminated by any express or implied duress. State v. Tomich, 332 F.2d 987 (9th Cir.) Also see: State v. Nelson, 130 Mont. 466, 304 P.2d 1110.

Subsection (4) is not meant to broaden any right to inspection, but only to provide when search and seizure may be made under constitutionally authorized inspections. Therefore, reasonable regulatory sections which are designed to protect the public welfare are not within the protection of unreasonable search and seizures (e.g., right of livestock inspectors, building inspectors, et al.).

Compiler's Comments

1993 Amendment: Chapter 262 in (2), before "recognized", inserted "judicially".

1991 Amendment: In first sentence substituted "evidence, contraband, and persons" for "instruments, articles, or things" and near end substituted "Title 46" for "the provisions of this chapter"; deleted former (1) and (2) that read: "(1) as an incident to a lawful arrest;

(2) with the consent of the accused or of any other person who is lawfully in possession of the object or place to be searched or who is believed upon reasonable cause to be in such lawful possession by the person making the search"; in (1), before "search warrant", deleted "valid";

deleted (4) that read: "(4) under the authority and within the scope of a right of lawful inspection granted by law"; and inserted (2) concerning recognized exceptions to warrant requirement.

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GENERAL

Admissible Evidence in Drug Case Obtained Through Informant — Actual Informant Testimony Allowed: A confidential informant wearing a wire purchased drugs from Schwartz, but no search warrant was issued for the electronic monitoring. The state indicated that it would call the informant to testify but would not introduce the results of the electronic monitoring. Schwartz moved to suppress all evidence seized as the result of a search conducted by the informant. The motion was denied, and on appeal, the Supreme Court affirmed. The evidence derived through the informant and not through contemporaneous electric monitoring was admissible. Thus, the District Court was correct in declining to suppress actual testimony by the confidential informant, including identification of Schwartz as the seller and identification of the actual drugs purchased. St. v. Schwartz, 2009 MT 234, 351 M 384, 212 P3d 1060 (2009). See also St. v. Hanley, 186 M 410, 608 P2d 104 (1980), and St. v. Bassett, 189 M 28, 614 P2d 1054 (1980).

No Privacy Expectation for Defendant With Respect to Rental Car When Rental Agreement Terminated: Payne, who was driving a rental car, was stopped for speeding and subsequently arrested for driving under the influence. During the stop, based on observations, the officer asked Payne if he was carrying drugs or large amounts of cash, and Payne responded that he was not. Payne also stated that he was traveling from Pittsburgh to Seattle to visit his children and flying back. The officer was suspicious because Payne was driving thousands of miles to visit but flying back after only a few hours. Payne was transported to the Sheriff's office, the vehicle was towed, and the rental company was notified. The rental company immediately terminated its contract with Payne under terms of the agreement and requested that Payne's personal items be removed from the car so that the company could have someone retrieve the vehicle. Payne subsequently consented to a search of the car, but officers obtained a warrant covering Payne's property that was found in the car. When removing Payne's property, the officer found some drugs and paraphernalia in plain view and removed a toolbox from the trunk. The toolbox contained $129,970. A petition for forfeiture was filed for the funds in the toolbox, and Payne argued that the petition should be dismissed, claiming that the search of the vehicle was illegal. The Supreme Court held that Payne did not have a reasonable expectation of privacy in the contents in the vehicle once the rental company had justifiably terminated the agreement based upon Payne's arrest. The Supreme Court also held that no constitutional protections extended to the items in plain sight in the vehicle and that once Payne was lawfully stopped, the officer's contact with the rental company did not constitute an illegal pretext for securing the company's permission to remove Payne's property from the car. The Supreme Court also held that the rental company's knowing and voluntary request for the removal of Payne's property from the car constituted a recognized exception to the warrant requirement of this section. St. v. $129,970.00 in U.S. Currency, 2007 MT 148, 337 M 475, 161 P3d 816 (2007).

Analysis of Federal Knock and Announce Statute — Involvement of Federal Postal Inspector: A postal inspector suspected that a package addressed to Ochadleus contained drugs. The inspector took the package to the Billings DEA office, and a drug-sniffing dog alerted to the package. The inspector obtained a search warrant, and the package was found to contain marijuana. The inspector then obtained a warrant to search the intended destination of the package. The package was delivered by the inspector later that day, and shortly thereafter, state officers executed the search warrant and arrested Ochadleus for possession with intent to distribute. Ochadleus contended that the state officers violated the federal knock and announce statute, 18 U.S.C. 3109, noting that the officers failed to knock. The Supreme Court disagreed. The statute does not directly apply to state law enforcement officers, but rather applies when federal officers are a significant part of a search conducted pursuant to a state warrant, as in this case involving a federal postal inspector and the federal Drug Enforcement Administration. Additionally, the statute does not contain an express requirement that officers actually knock on the door, but rather requires that officers give notice of their authority and purpose. Here, Ochadleus's roommate saw the officers through the window in the door and then backed away. It

was reasonable for the officers to assume that the action of backing away was a refusal to admit them, and it would have been futile for the officers to knock before entering. Thus, the federal statute was not violated, the forced entry was lawful, and Ochadleus's conviction was affirmed. St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005).

Knock and Announce Rule — Exigent Circumstances Exception — Futility Exception — Warrant Requirements: Without knocking and announcing its presence, a SWAT team broke down the doors of a rental home, discovered a methamphetamine lab, and arrested the occupants, including Anyan. Anyan contended that the entry was illegal and that evidence seized should be suppressed. Following a guilty plea, Anyan appealed on grounds of the illegality of the no-knock entry. Absent state statutory or case law, the Supreme Court examined extensive federal precedent, concluding that pursuant to the right of privacy and the right to be free from illegal search and seizure, an officer serving a search warrant must comply with the knock and announce requirement unless there are exigent circumstances that would present a threat of physical violence or the likelihood that evidence would be destroyed. Mere suspicion or evidence that firearms are present in the residence or that a particular resident is armed is not sufficient to create an exigency; rather, there must be specific information to lead the officer to a reasonable conclusion that the presence of firearms raises a concern for officer safety. Another exception to the knock and announce requirement, known as the futility exception, arises when police have a reasonable suspicion that the occupants know of the police presence and purpose prior to entry and that knocking and announcing would be futile. In addition, the decision to make a no-knock entry should ordinarily be made by a neutral and detached magistrate as part of the application for a search warrant, along with any foreknown exigent circumstances justifying a no-knock entry, but an investigating officer may make the decision if unexpected exigent circumstances arise at the scene. The knock and announce rule is flexible, and courts must determine whether an unannounced entry was reasonable under the particular circumstances of each case, including the time that an officer must wait prior to forced entry. However, unless exigent circumstances exist, the failure of officers to knock and announce their presence renders evidence procured during execution of the search warrant inadmissible. Thus, the officers' no-knock entry into Anyan's house violated federal and state constitutional rights to be free from unreasonable search and seizure, and failure of the District Court to suppress the evidence seized during the search was reversible error. St. v. Anyan, 2004 MT 395, 325 M 245, 104 P3d 511 (2004), followed in St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005), in which the Supreme Court reiterated that no-knock entry into a residence is the exception and not the rule. The Anyan futility exception was also applied in St. v. Hill, 2008 MT 260, 345 M 95, 189 P3d 1201 (2008), where officers responding to a domestic disturbance call did not knock but announced their presence through the open door of a trailer and observed defendant moving aggressively toward the back of the trailer, but defendant ignored their order to stop. The officers had a reasonable suspicion that the trailer occupants knew of their presence and purpose prior to entry. A woman screaming in the trailer indicated an ongoing domestic disturbance, and continuing to wait at the open door after defendant failed to respond would have been superfluous, futile, and dangerous.

Requisite Objective Data and Resulting Suspicion for Lawful Stop and Frisk in Motel Room: Officers were lawfully searching Roehr's motel room when Dawson knocked on the door. An officer opened the door, and Dawson entered, asking for Roehr. The officer told Dawson that he was going to conduct a pat-down search for weapons and asked Dawson if he possessed any weapons, drugs, or needles. Dawson said that he had no weapons. The officer repeated the question. Dawson motioned toward his coat pocket and said that he had some "smoke" in there. The "smoke" turned out to be methamphetamine and drug paraphernalia. Dawson sought to suppress the evidence, contending that the search was illegal because the officer had no articulable, reasonable suspicion that Dawson had engaged in criminal activity. On appeal, the Supreme Court noted that Roehr was a known criminal and that his room had been under surveillance for suspected drug activity. The officer had probable cause to believe that Roehr was conducting transactions involving dangerous drugs and stolen property in the room. When Dawson appeared, asking for Roehr, the officer had a particularized suspicion, based on the totality of the circumstances, to believe that Dawson had committed or was about to commit an offense. Thus, sufficient cause existed to detain Dawson. Further, in the officer's experience, people involved in drug offenses frequently carry weapons. The officer had no prior dealings with Dawson to help him determine whether Dawson was armed and did not know whether Dawson presented a danger to the officers conducting the search of the room, so reasonable cause existed to suspect that Dawson was armed and dangerous. Therefore, the officer possessed the requisite objective data and resulting suspicion to lawfully stop and frisk Dawson, and denial of the

motion to suppress the fruits of the search was not error. St. v. Dawson, 1999 MT 171, 295 M 212, 983 P2d 916, 56 St. Rep. 668 (1999), distinguishing St. v. Anderson, 1999 MT 60, 293 M 490, 977 P2d 983, 56 St. Rep. 252 (1999).

Field Sobriety Tests Constitute Search — Particularized Suspicion Needed: Field sobriety tests are not merely observations of a person's physical behavior but constitute a search under the fourth amendment to the United States Constitution and Art. II, sec. 11, Mont. Const., because an individual's constitutionally protected privacy interests are implicated in both the process of conducting the tests and in the information disclosed by the tests. An officer observes certain aspects of an individual's physical and psychological condition that would not otherwise be observable. A compelling state interest is needed to invade privacy interest. Montana has a compelling state interest in removing drunk drivers from the road. The officer's observation of such traits as the manner of walking to and from the squad car, height and weight, speech, appearance, and smell is distinguished and does not constitute a search because an individual has no reasonable expectation of privacy as to the traits. An investigatory stop and field sobriety tests are constitutional if based upon particularized suspicion. The particularized suspicion for the investigatory stop may also serve as the particularized suspicion for the field sobriety tests if the basis for the stop leads the officer to believe that the driver is intoxicated. Part or all of the grounds for the particularized suspicion for the field sobriety tests may arise after the investigatory stop when the officer, in the present case, observed defendant drive from a bar at night with her headlights off, he activated his overhead lights, she did not respond, he activated his siren, she stopped in half a block, he smelled alcohol on her breath and saw bloodshot eyes, she had difficulty in producing her license, and he asked her to perform three field sobriety tests. Administration of the tests was a constitutionally permissible search arising from a particularized suspicion that was based on the officer's observations after the investigatory stop. The lower court properly found that the officer had reasonable grounds to believe that defendant was driving under the influence. Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75, 55 St. Rep. 415 (1998), followed in St. v. Steinmetz, 1998 MT 114, 288 M 527, 961 P2d 95, 55 St. Rep. 450 (1998), and Bramble v. St., 1999 MT 132, 294 M 501, 982 P2d 464, 56 St. Rep. 532 (1999).

Frisk and Search Incidental to Termination of Employment: An employment dispute, including threats by an employee against company management, led to a termination meeting. Because of the nature of the dispute, one of the managers requested the presence of a Sheriff at the meeting "to keep the peace". The Sheriff asked that the request and reasons for asking assistance be made in writing. The manager provided a written request, giving details of the threats. The Sheriff and two deputies were present and frisked the employee upon his arrival. The frisk and search lasted less than 2 minutes. On appeal, the employee contended that the company requested the Sheriff's presence at the meeting and that the ensuing frisk was an invasion of the employee's right of privacy, citing Johnson v. Supersave Mkt., Inc., 211 M 465, 686 P2d 209 (1984), for the premise that a person's right to liberty is legally protected from invasion and that emotional distress proximately caused thereby constitutes recoverable damages for invasion of privacy. The District Court properly held that the officer's search was not a substantial invasion of a legally protected interest, that the employee had provided no authority to support an invasion of privacy tort theory, and that the search was part of and could not be separated from the termination. There was no evidence that the employer participated in the decision to frisk and search, and an agency relationship was not established. Koepplin v. Zortman Min., Inc., 267 M 53, 881 P2d 1306, 51 St. Rep. 880 (1994).

Issuing Magistrate Involved in Police Investigation — Subsequent Search Warrant Improper: Following a burglary and upon receiving a report of an empty safe being found in the water, the Sheriff, a deputy, and the Justice of the Peace traveled to the site, discussing the evidence and the investigation. Two days later, after additional evidence was gathered, the Justice of the Peace issued a search warrant to search Wilson's truck. Upon conviction, Wilson challenged the impartiality of the Justice of the Peace to issue a warrant. Once the magistrate became an active participant in the police investigation, his impartiality ceased and he could no longer make a neutral and detached evaluation of the evidence to determine whether probable cause existed and thus could no longer protect Wilson's right to be free from a search not based on probable cause. Because the warrant was invalid, the subsequent search was illegal and evidence from the search was suppressed. St. v. Wilson, 266 M 146, 879 P2d 683, 51 St. Rep. 697 (1994).

Seizure of Clothing as Material Evidence of Crime: Defendant was lawfully taken into custody on charges of robbery, and the police followed their standard practice of taking detainees' clothing. It was not error for the police to take defendant's shoe and match it with a print found at the crime scene when there was probable cause to believe defendant's clothing

would provide material evidence of the crime for which he was arrested. St. v. Jellison, 236 M 300, 769 P2d 711, 46 St. Rep. 376 (1989).

Drugs Found in Search for Marital Property — No Expectation of Privacy: When search of a storage shed pursuant to a court order to retrieve marital property revealed illegal drugs, the search was not for contraband or any illegally possessed property and defendant could not claim a legitimate expectation of privacy, especially since he disclaimed any interest in the shed's contents. St. v. Clausen, 228 M 20, 740 P2d 679, 44 St. Rep. 1308 (1987).

Investigatory Stop of Vehicle by Officer Armed With Shotgun — Justified and Appropriate in Circumstances: Although a deputy stopping a vehicle was armed with a shotgun held in port position and later testified that the defendants were not free to leave, the manner in which the deputy stopped the defendants' vehicle was justified and appropriate in the circumstances and did not amount to an arrest. The criteria set forth in St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981), for an investigatory stop were satisfied when the deputy was sufficiently qualified although his length of employment, experience, and training were not great and when the facts he possessed made his suspicions particularized to a specific activity in a specific vehicle. St. v. Morsette, 201 M 233, 654 P2d 503, 39 St. Rep. 2078 (1982).

Juveniles — Suppression of Statements and Evidence: In the trial of a juvenile for shooting a police officer, a motion for suppression of evidence, obtained under authority of a lawful inspection and statements voluntarily made, was erroneously granted. However, statements made after a waiver of counsel, which were void because of lack of counsel for the underaged defendant, were properly suppressed. St. v. District Court, 176 M 257, 577 P2d 849 (1978).

Liability of Police Officer: The action of a police officer proceeding on the basis of his reasonable, good faith understanding of the law cannot be tortious. Strung v. Anderson, 529 P2d 1380, 32 St. Rep. 144 (1975) (not reported in Montana Reports), followed in Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998).

Permissible Purposes: The process of search and seizure may be invoked only in furtherance of public prosecution. State ex rel. King v. District Court, 70 M 191, 224 P 862 (1924).

PRIVATE CITIZEN SEARCHES

No Right to Object to Search of Another's Home and Seizure of Another's Property: No illegal search or seizure was made when a private citizen, after allegedly promising a Deputy Sheriff to do so, went to the home of the woman who hired petitioner to kill her husband and obtained a gun (evidence of the alleged crime) from her. Petitioner's lawyer was not negligent for not moving to suppress introduction of the pistol as evidence at the time of the trial and not making it a subject for appeal. In re Gillham, 218 M 187, 707 P2d 1100, 42 St. Rep. 1508 (1985).

Looking Through Crack in Door of Defendant's Locked Shed: Kloberdanz told the Sheriff that he believed that Henderson was storing a stolen red Peterbilt truck in a shed on his property. Kloberdanz told the Sheriff that he had received a letter from his friend Herrick reporting the theft of his truck from Colorado over Memorial Day weekend. The letter contained a detailed description and sketch of the truck. Two of Kloberdanz's coworkers had mentioned that they had seen a new red Peterbilt in Henderson's shed while picking up some equipment at Henderson's property. Kloberdanz took advantage of an opportunity to go to the Henderson property to pick up equipment for his employer and while there looked through a crack in the door of the locked shed. He told the Sheriff that he had seen a truck that matched the description and sketch of the truck stolen from Herrick. The information Kloberdanz obtained by looking through the crack in the door of the locked shed was obtained in violation of Montana law. U.S. v. Henderson, 721 F2d 662 (9th Cir. 1983).

Integrity of Judicial System: The Montana Constitution provides that "the right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest". The judicial system must not become an accomplice to constitutional violations by admitting illegally obtained evidence. Therefore, evidence obtained by a private citizen in violation of the state constitutional right to privacy is subject to the exclusionary rule and may not be admitted into evidence in a criminal trial in Montana. St. v. Van Haele, 199 M 522, 649 P2d 1311, 39 St. Rep. 1586 (1982).

Manager Search of Rented Storage Unit: After renter of storage unit entered his unit, manager of the storage unit rental business wanted to know how much longer he would be on the premises and wondered what renter was doing, as the unit's door was closed and there were no windows or lights in the unit. She opened the door after a knock and calling out to renter produced no result. Renter was sitting on the floor pointing a gun at the manager and had two suitcases behind him in the dim interior of the unit. Manager left. Pursuant to a suggestion of the business' home office, the manager removed the hinge pins on the door, cut off the padlock, entered, opened a suitcase, found a number of bottles of pills, and called the police. Based on the

manager's information the police obtained a search warrant, found over 100 bottles of pills in the suitcases and a purse, and renter was arrested, charged, and convicted of criminal possession of dangerous drugs with intent to sell them. On appeal it was found that the evidence was obtained in violation of renter's state constitutional right to privacy and should have been excluded. The conviction was reversed because it was not supported by the remaining evidence or the law. St. v. Van Haele, 199 M 522, 649 P2d 1311, 39 St. Rep. 1586 (1982).

Entry to Defendant's Porch: There was testimony that two men entered the defendant's porch while the defendant was not at home. The same two men returned and talked to the defendant. The two men returned for a third time with a Deputy Sheriff. After obtaining a search warrant, the Deputy Sheriff searched the defendant's premises. After certain stolen items were found, the defendant was arrested and later convicted of theft. The court rejected the defendant's argument that the two men conducted an unlawful search the first time they entered his porch in violation of the defendant's right of privacy. St. v. Brown, 199 M 472, 649 P2d 1306, 39 St. Rep. 1531 (1982).

Landlord Search of Apartment: The defendant, who had signed a lease allowing his landlord the right to enter the defendant's apartment, borrowed a vacuum cleaner from the landlord, who, upon entering the defendant's room to retrieve the vacuum, saw light coming from a closet and inadvertently discovered marijuana and drug paraphernalia. The District Court did not err in denying the defendant's motion to suppress the evidence taken after a search warrant was obtained. The landlord was justified in entering the room to show it to prospective lessees or to retrieve the vacuum. Once the landlord was in the apartment, he was justified in inspecting the closet to see if the cause of the light constituted a fire hazard. The landlord could, under the circumstances, permit the police officer to observe the items in the closet, and the officer's observation could be used as a basis for the warrant. St. v. Sayers, 199 M 228, 648 P2d 291, 39 St. Rep. 1309 (1982).

Citizen Search Without Probable Cause Unlawful Warrantless Search: In appeal by the state from a motion suppressing all evidence resulting from an unreasonable search and seizure, the Supreme Court affirmed. A warrantless search is per se unreasonable unless it falls within one of the defined exceptions. Before the warrantless search, neither private citizen searcher could have obtained a valid search warrant because he was not possessed, through his own knowledge or through demonstrably reliable informants, of facts sufficient to establish probable cause, an essential ground for the issuance of a warrant. Since the warrantless search here was per se unreasonable, it was unconstitutional under our federal and state constitutions and therefore unlawful. St. v. Hyem, 193 M 51, 630 P2d 202, 38 St. Rep. 891 (1981).

Warrantless Citizen Search of House — Defendants' Right of Privacy Violated: A warrantless citizen search of house violated defendants' right of privacy without the showing of a compelling state interest. Since the citizens were acting in their individual capacities and not for the state, state action was not involved, and the searchers could never be in a position of showing a compelling state interest, which is the only exception to the restriction against the invasion of individual privacy. Citizens gained entry by pretending to be interested in purchasing the house. Although defendants were aware that their rented house was for sale and being shown to prospective buyers in their absence, defendants did not consent to the search under their bed which turned up stolen skis and thereby waive their right of privacy. St. v. Hyem, 193 M 51, 630 P2d 202, 38 St. Rep. 891 (1981).

Search and Seizure Law — Application to Private Individuals of Montana: Although under the United States Constitution illegally obtained evidence is admissible when seized by a nongovernmental agent not acting in concert with any governmental agency, the Montana Constitution, through sections 10 and 11 of Article II, affords an individual greater explicit protection than do cases interpreting the United States Constitution. The search and seizure provisions of Montana law apply to private individuals as well as law enforcement officers. Therefore, evidence obtained through an illegal invasion of privacy by an individual is not to be admitted. St. v. Helfrich, 183 M 484, 600 P2d 816 (1979).

Exclusionary Rule Applies: The exclusionary rule for suppression of evidence must also apply to searches by private citizens such as security guards, private detectives, political investigators, or any citizen who conducts an unreasonable search or illegal intrusion into the privacy of another. St. v. Coburn, 165 M 488, 530 P2d 442 (1974).

Employer Searching Employee: The motion to suppress evidence was properly granted when the employer removed marijuana from the defendant's coat in a search without a warrant. St. v. Coburn, 165 M 488, 530 P2d 442 (1974).

SEARCH INCIDENT TO ARREST

Particularized Suspicion to Support Canine Sniff of Vehicle and Probable Cause for Warrant to Search Vehicle: Following arrest on outstanding warrants, a dog alerted on Stombaugh's vehicle, a warrant was obtained, and a drug search was conducted. Stombaugh contended that fruits of the search should have been suppressed because officers lacked particularized suspicion to conduct the canine sniff and lacked probable cause to obtain a warrant to search the vehicle. The Supreme Court disagreed and affirmed. Based on the facts that Stombaugh's family reported to police regarding Stombaugh's drug use and notified officers that Stombaugh would be visiting the family's home, Stombaugh's admission of pending drug charges in Washington and police confirmation of the pending felony drug charges, Stombaugh's urgency in seeking removal of the vehicle out of the county and an unusual desire to pay more than the vehicle was worth to do so, and discovery of a white pill on the vehicle dashboard and Stombaugh's evasiveness about the pill, the District Court did not err in holding that officers had particularized suspicion to conduct the canine sniff of the vehicle. In addition to the factors considered for particularized suspicion (except the white pill), the warrant application also described the alert of the drug dog on the vehicle, Stombaugh's admission that the vehicle contained drug paraphernalia, and the officers' experience and qualifications with regard to drug crime investigation. Under the totality of the circumstances, the District Court correctly concluded that probable cause existed for issuance of the search warrant. St. v. Stombaugh, 2007 MT 105, 337 M 147, 157 P3d 1137 (2007).

Invalid Warrantless Search of Defendant's Hands Absent Exigent Circumstances: Officers responding to a break-in found blood on doorknobs, light switches, broken glass, and other objects in the house and garage. Matching the description of the suspect, Hardaway was picked up near the scene and found to have blood on his hands. Hardaway was arrested for burglary, and during postarrest processing, blood was swabbed from his hands without permission or a warrant. The blood sample matched the blood evidence found at the scene. Hardaway moved to suppress blood swab evidence obtained from his hands after arrest, but the motion was denied. The District Court reasoned that the swabbing either was not a search, pursuant to St. v. Holzapfel, 230 M 105, 748 P2d 953 (1988), or was justified as a search incident to arrest, pursuant to St. v. Ulrich, 187 M 347, 609 P2d 1218 (1980). Hardaway appealed on grounds that the swabbing was clearly a search that was required to be justified by both probable cause and exigent circumstances and that no exigent circumstances existed because he was in custody at the time and a warrant could have been obtained. The Supreme Court agreed and reversed. The court adopted the analysis of what constitutes a search set out in Cupp v. Murphy, 412 US 291 (1973), holding that Hardaway had a reasonable expectation of privacy as to his person and personal security (overruling Holzapfel) and that the swabbing constituted a search subject to federal and Montana constitutional protections. Although his hands and the blood on them were exposed to the public for viewing, it was not the viewing that constituted a search, but rather the swabbing. Further, even though the swabbing could be considered a search incident to arrest pursuant to federal law and the bright-line rule in U.S. v. Robinson, 414 US 218 (1973), that requires no further justification than a lawful arrest for the search exception to apply, the Supreme Court opted to grant greater individual privacy rights protection to Hardaway based on the Montana Constitution, consistent with the prior holding in St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977). The court noted its consistent holdings that a warrantless search incident to an arrest must be commensurate with its underlying purpose of preventing an arrestee from using any weapons, escaping, or destroying incriminating evanescent evidence in the arrestee's possession, considered inherently anticipated exigent circumstances under 46-5-102(1) through (3); however, to the extent that a warrantless search incident to a lawful arrest is conducted pursuant to 46-5-102(4), which deals with discovering and seizing any persons, instruments, articles, or things that may have been used in the commission of or that may constitute evidence of the offense, specific and articulable exigent circumstances are also required to justify and render the search lawful (distinguishing and partially overruling Ulrich). Here, there were simply no exigent circumstances requiring a warrantless search. Hardaway was at the station house, under the full control of the police, with no present means of destroying the blood evidence. Hardaway could have consented to the swab or waited in discomfort until a warrant was obtained, but either way the evidence was going nowhere. Therefore, the swabbing of Hardaway's hands was not a valid search incident to arrest. St. v. Hardaway, 2001 MT 252, 307 M 139, 36 P3d 900 (2001), distinguished in St. v. Madplume, 2007 MT 11, 335 M 290, 150 P3d 956 (2007).

Shining of Ultraviolet Light Not Considered Search: Agents dusted money used in a drug deal with invisible detection powder that showed up only under an ultraviolet light. After

defendant's arrest, his hands and wallet were inspected under ultraviolet light for traces of the dust and the positive results admitted into evidence. The Supreme Court adopted the rationale in Commonwealth v. DeWitt, 314 A2d 27 (Pa. Super. 1973), in holding that the shining of the ultraviolet light did not constitute a search so as to implicate privacy rights under either the U.S. or Montana Constitution. The court found persuasive the fact that defendant was validly arrested, that the wallet was properly seized, and that the light only afforded an opportunity to learn if defendant may have touched the drug money. St. v. Holzapfel, 230 M 105, 748 P2d 953, 45 St. Rep. 53 (1988).

Valid Search of Wallet After Arrest: The District Court properly allowed into evidence the results of a postarrest, nonconsensual, warrantless search of defendant's wallet. The Supreme Court adopted the reasoning in U.S. v. Passaro, 624 F2d 938 (9th Cir. 1980), that a wallet is an element of clothing "which is, for a reasonable time following a legal arrest, taken out of the realm of protection from police interest". The search also satisfied the privacy guaranties of the Montana Constitution because the arrest reduced the arrestee's expectation of privacy. St. v. Holzapfel, 230 M 105, 748 P2d 953, 45 St. Rep. 53 (1988).

Delayed Seizure of Articles in Plain View: A seizure that is proper under the "plain view" exception may be delayed, so long as the delay is reasonable. St. v. Romero, 224 M 431, 730 P2d 1157, 43 St. Rep. 2309 (1986).

Proper Seizure of Keys in Ignition at Time of Arrest: Defendant was charged with and convicted of criminal possession of dangerous drugs with intent to sell. Defendant contended his automobile keys were illegally seized and admitted into evidence. Defendant was properly arrested. The keys were in the auto ignition at the time of arrest. The arresting officer took possession of the auto and drove it to the courthouse. He then turned the keys over to the property officer. A warrant was obtained for the search of the auto. In the course of executing that warrant, the keys were used to unlock the trunk and a suitcase in the trunk that contained 30 pounds of marijuana. Defendant asserted that a warrant describing the keys should have been obtained. The Supreme Court held that the keys themselves merely provided the state with access to the trunk and suitcase. Only after their use did it become apparent that the keys were significant as evidence because one of them opened the suitcase. The keys were properly seized incident to a lawful arrest and as such were properly admissible as evidence. St. v. Canon, 212 M 157, 687 P2d 705, 41 St. Rep. 1659 (1984).

Inventory Search Incident to a Lawful Arrest: Armstrong was arrested for shoplifting. Shoplifting is a misdemeanor for which bail bond schedules are established in Yellowstone County. The arresting officer however refused to accept the scheduled bond because he knew that Armstrong was a major suspect in the Lords homicide. During an inventory search of Armstrong after his arrest, a $100 bill was found which connected Armstrong to the Lords homicide. Armstrong argues that the police should have released him on bail and therefore the inventory search was illegal and the evidence should be suppressed. The court said that under the circumstances the police not only had the right to refuse the bail bond, but they had a duty to detain him. The arrest was lawful and the inventory search was incident to a lawful arrest. Since the $100 bill was lawfully seized, it is admissible in the homicide trial. St. v. Armstrong, 189 M 407, 616 P2d 341 (1980).

Neutron Activation Test for Gunpowder Residues: The defendant was arrested at the police station without a warrant, and the police administered a neutron activation test to determine if there were gunpowder residues on the defendant's hands. The defendant sought to suppress the results of the test on the grounds that his right to be secure against unreasonable searches and seizures was violated. The Supreme Court held that a search incident to a lawful arrest is an exception to the warrant requirement of the 4th amendment. The administration of a neutron activation test following the defendant's arrest was within the permissible scope of a search incident to a lawful arrest. Once the search incident to arrest is found to be reasonable the State has no further burden to show that the evidence is destructible. St. v. Ulrich, 187 M 347, 609 P2d 1218 (1980).

Complaint Conclusory and Complainant Not Examined: An arrest warrant was invalid and the subsequent search and seizure unlawful when the complaint of the Deputy County Attorney, under oath, disclosed nothing more than conclusion, the complainant was not examined under oath, and an undercover agent could not say that he had purchased from the defendant. State ex rel. Wicks v. District Court, 159 M 434, 498 P2d 1202 (1972), distinguished in State ex rel. Douglas v. District Court, 161 M 525, 507 P2d 1055 (1973), and followed in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995).

CONSENT TO SEARCH AND SEIZURE

Inevitable Discovery of Laptop Computer Evidence — Motion to Suppress Properly Denied: Lacey shared a residence with Dozier, although the property was owned by Dozier. Dozier discovered incriminating evidence on Lacey's laptop computer, which was in the common area of the residence and which Dozier was allowed to access. Officers came to the residence and Dozier allowed them to seize the computer. Lacey later asserted that the officers lacked probable cause to seize Lacey's personal property without Lacey's consent. Because Lacey had a possessory interest in the property, Dozier did not have the right or authority to consent to seizure of the computer. However, because the computer was searched pursuant to a federal search warrant rather than on Dozier's consent, Dozier's consent was immaterial. Rather, even if probable cause did not exist for seizure of the laptop, the evidence later discovered pursuant to the federal warrant was admissible under the inevitable discovery exception to the fruit of the poisonous tree doctrine, and Lacey's motion to suppress was properly denied. St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009). See also St. v. Notti, 2003 MT 296, 318 M 146, 79 P3d 289 (2003), and St. v. Dasen, 2007 MT 87, 337 M 74, 155 P3d 1282 (2007).

Failure to Give Miranda Warning Before Consensual Search of Vehicle Held to Be of No Legal Consequence: Clark was stopped by highway patrol officer Gleich after Gleich received a report from his brother, a Deputy Sheriff, that the two persons in the car had just been involved in a domestic disturbance and that neither of them possessed a valid driver's license. After the stop, Clark consented to a search of the vehicle. The Supreme Court affirmed the District Court's decision that because Miranda warnings are, under the U.S. Constitution, to precede custodial interrogations and not searches, the lack of a Miranda warning before a consensual search of Clark's vehicle was of no legal consequence. The Supreme Court noted that the U.S. Supreme Court held in U.S. v. Patane, 542 US 630 (2004), that there is no requirement that a Miranda warning be given before a request is made for consent to a search. St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Voluntariness of Consent to Search — Totality of Circumstances: In determining whether consent to search was made voluntarily and was uncontaminated by coercion or duress, the Supreme Court considers the totality of the circumstances. In this case, Copelton was sitting in a car driven by Garcia, and when asked by officers if they could search the vehicle, Garcia shrugged his shoulders and gestured with his hands in an affirmative manner. The search revealed drugs, and Copelton was arrested for felony possession with intent to distribute. On appeal, Copelton asserted that his motion to suppress the fruits of the search should have been granted because Garcia did not knowingly and voluntarily consent to the warrantless search. A native of Mexico, Garcia had limited education with no instruction regarding the American legal system and a limited understanding of English. Copelton also noted that the officers did not inform Garcia of the right to refuse consent to the search and questioned whether a mere shrug of the shoulders was enough to indicate consent. Nevertheless, the Supreme Court affirmed. Garcia testified that he had prior experiences with law enforcement officers, including prior vehicle searches, that he clearly understood what the officer was asking when the officer requested to search the vehicle, and that he consented to the search because he had nothing to hide. Thus, Garcia's limited foreign education and limited ability to speak and understand English did not impede his ability to knowingly and voluntarily consent to the search. Further, lack of knowledge of the right to refuse consent is not determinative that consent was not voluntary in and of itself, and nonverbal consent can be effective when conduct indicates unequivocal consent. Under the totality of the circumstances, Copelton's motion to suppress was properly denied. St. v. Copelton, 2006 MT 182, 333 M 91, 140 P3d 1074 (2006), following St. v. Snell, 2004 MT 269, 323 M 157, 99 P3d 191 (2004).

No Capacity or Actual Authority of Youth to Consent to Search of Parent's Home: While conducting a search for Lowe, officers learned that Lowe was staying at Schwarz's home and drove to Schwarz's residence to initiate an arrest. Schwarz was not home, but Schwarz's 13-year-old daughter answered the door and consented to a search of the residence. Without attempting to contact Schwarz, the officers entered the home without a warrant and discovered drugs. When Schwarz arrived home, she was arrested for possession of dangerous drugs. Following conviction, Schwarz appealed on grounds that the search was illegal because the minor daughter did not have authority to consent to a search of the home. The Supreme Court agreed and reversed, adopting a per se rule that a youth under the age of 16 years has neither the capacity nor the actual authority to relinquish a parent's privacy rights and consent to a search of the parent's home. St. v. Schwarz, 2006 MT 120, 332 M 243, 136 P3d 989 (2006). See also St. v. Melees, 2000 MT 6, 298 M 15, 994 P2d 683 (2000).

No Expectation of Privacy for Trespasser — Entry Lawful and Warrantless Search Reasonable: Gilmore kept some belongings in a locked bedroom in Kathie Gilmore's house, and Kathie had no key to the room. Based on a tip from a confidential informant that marijuana plants had been observed in the window of the residence, officers requested and were given permission by Kathie to search the house without a warrant. Although she gave conflicting statements, Kathie stated that some of Gilmore's belongings were in the locked bedroom but he paid no rent, that Gilmore had previously assaulted her and that she was afraid of him, that she did not want him living in the house and had asked him to leave, and that she had no key to the room and advised the officers to kick down the door. Upon entering, the officers observed Gilmore asleep on the couch and drug paraphernalia in plain view. The officers then obtained a warrant and seized drugs and paraphernalia. Gilmore moved to suppress the evidence on grounds that the search was unlawful because Kathie did not have authority to authorize entry into the locked bedroom and that Gilmore had an expectation of privacy in the bedroom. The District Court found that in this case, the officers were acting under the appropriate authority of Kathie to consent to the search and denied the motion to suppress. The Supreme Court held that as a trespasser, Gilmore had no expectation of privacy in the bedroom. The District Court was affirmed. St. v. Gilmore, 2004 MT 363, 324 M 488, 104 P3d 1051 (2004). See also St. v. McLees, 2000 MT 6, 298 M 15, 994 P2d 683 (2000).

Valid Consensual Search — Totality of Circumstances: A minimum number of police officers went to Beaupre's residence, requested and were granted permission to enter the residence, inquired whether they could search the residence and were verbally authorized to do so, corroborated the oral permission with Beaupre's husband's written consent, and then discovered evidence of a drug lab upon searching the residence. The District Court held that the search was consensual, but on appeal, Beaupre contended that the search was not valid because the Beaupres were coerced into consenting. The Supreme Court concluded that under the totality of the circumstances, the search was consensual, and the District Court was affirmed. St. v. Beaupre, 2004 MT 300, 323 M 413, 102 P3d 504 (2004). See also St. v. Olson, 2002 MT 211, 311 M 270, 55 P3d 935 (2002).

Particularized Suspicion Sufficient Justification for Request for Consent to Search Vehicle — No Illegal Detention — Motion to Suppress Properly Denied: Snell was stopped for speeding and was also cited for failure to carry proof of insurance. While writing out the citation in the patrol car, the officer asked Snell if he could search the vehicle, and Snell consented. The officer discovered drugs, and Snell was charged with possession and intent to distribute marijuana. Snell moved to suppress the evidence. Snell conceded that he had voluntarily consented to the search, and the state conceded that the officer did not have probable cause. The motion to suppress was denied, and Snell appealed. The Supreme Court considered both the consent and illegal detention issues. First, the court reasoned that the officer had particularized suspicion to stop the vehicle and that Montana law does not require additional justification for requesting consent, so Snell's voluntary consent was sufficient to justify the warrantless search of the vehicle (see St. v. Parker, 1998 MT 6, 287 M 151, 953 P2d 692 (1998)). Second, the court concluded that because the officer did not coerce or restrain Snell, order him to stay, or prevent Snell from exiting the patrol car, a reasonable person would have felt free to leave the patrol car upon completion of the traffic stop, so the poststop interaction between Snell and the officer was a voluntary exchange rather than an illegal detention or unlawful seizure (see St. v. Merrill, 2004 MT 169, 322 M 47, 93 P3d 1227 (2004), and St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004)). Snell's motion to suppress was properly denied. St. v. Snell, 2004 MT 269, 323 M 157, 99 P3d 191 (2004). See also St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Invalid Third-Party Consent to Warrantless Search of Private Residence — Consenting Party to Have Actual Authority to Consent to Search: A warrantless search conducted inside a home is per se unreasonable, subject to only a few exceptions, one of which is when the search is conducted pursuant to consent that is freely and voluntarily given. The state may justify a warrantless search by showing that permission was obtained from defendant or from a third party who possessed common authority over or other sufficient relationship to the premises or effect sought to be inspected, but the state has the burden of showing that consent was voluntary. However, for third-party consent to be valid, the consenting party must have actual authority to consent, as opposed to apparent authority. In the present case, McLees lived with his father, Scott, in an apartment owned by his grandfather, Earl, and investigating officers obtained Earl's voluntary consent before searching the residence. The District Court held that Earl had common authority to consent to the search and denied McLees' motion to suppress incriminating evidence found in the search. The Supreme Court disagreed. Under U.S. v. Matlock, 415 US 164, 39 L Ed 2d 249, 94 S Ct 988 (1974), common authority may not be implied from the mere property

interest of a third party in the property to be searched. Rather, the authority that justifies third-party consent rests on the mutual use of the property by persons having joint access or control for most purposes. Here, the record was insufficient to show that Earl had common authority over McLees' apartment. Earl never went to the apartment unless Scott was there. Earl did not have free access to and was not a cohabitant of the apartment and did not share in its use. The fact that Earl owned the property was not dispositive when McLees had a reasonable expectation of privacy by living there. Earl therefore did not have a sufficient relationship with the apartment that would give him actual authority to consent to a warrantless search. While declining to address whether the seized evidence was admissible under the independent source rule or the inevitable discovery rule, the Supreme Court held that it was inadmissible under the third-party consent rule and reversed for further proceedings. St. v. McLees, 2000 MT 6, 298 M 15, 994 P2d 683, 57 St. Rep. 25 (2000), following St. v. Sorenson, 180 M 269, 590 P2d 136 (1979), St. v. Lopez, 896 P2d 889 (Hawaii 1995), and St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997), distinguishing Ill. v. Rodriguez, 497 US 177, 111 L Ed 2d 148, 110 S Ct 2793 (1990), and followed, with regard to third-party authority to consent to search, in St. v. Gilmore, 2004 MT 363, 324 M 488, 104 P3d 1051 (2004).

No Warrantless Search When Defendant Showed Hiding Place of Drugs: After police discovered that an undelivered UPS package contained marijuana, they delivered the package to Arthun's home and it was accepted by his wife. Police later observed Arthun at his home but did not see the package disposed of. Still later, police discussed the situation with Arthun and he led them to another building and showed the police where the package containing marijuana was hidden. Arthun's motion to suppress was denied by the District Court, and the denial was affirmed by the Supreme Court. Citing St. v. Graves, 191 M 81, 622 P2d 203 (1981), the Supreme Court held that discovery of the UPS box did not constitute a "search" in violation of the fourth amendment. The Supreme Court noted that after having been given his Miranda warnings, Arthun voluntarily led officers to the building and showed them where the box was hidden and that under these circumstances, the disclosure of the drugs was voluntary. St. v. Arthun, 274 M 82, 906 P2d 216, 52 St. Rep. 1133 (1995).

Test of Voluntariness:

Under the totality of the circumstances in this case, the evidence shows that defendant's consent to the search of her business premises was obtained voluntarily. The facts that she is of foreign descent, is small in stature, and was handcuffed and in the custody of seven police officers when she gave consent do not negate the voluntariness of her consent. Defendant is an American citizen who had owned several businesses in this country. She had worked in the past with law enforcement personnel as an interpreter. While custody is a factor in the totality of the circumstances test, it does not necessarily negate consent. St. v. Kim, 239 M 189, 779 P2d 512, 46 St. Rep. 1610 (1989).

Voluntariness is to be determined from the totality of the circumstances, and consent was voluntary under the circumstances of this case. St. v. Stemple, 198 M 409, 646 P2d 539, 39 St. Rep. 1085 (1982); State ex rel. Kotwicki v. District Court, 166 M 335, 532 P2d 694 (1975), followed in St. v. Kim, 239 M 189, 779 P2d 512, 46 St. Rep. 1610 (1989), and St. v. Herrera, 1998 MT 173, 289 M 499, 962 P2d 1180, 55 St. Rep. 703 (1998).

Defendant voluntarily went to the Billings Police Department in connection with a homicide investigation. It later came out that defendant had serious mental and drug abuse problems. Defendant was interrogated by two police officers. He was kept incommunicado in a small room for several hours, the officers used the "mean cop-nice cop" interrogation technique, and the officers lied to defendant about how much was known of his involvement in the crime (guilt assumption technique). The officers told defendant his problems might be mental or medical rather than criminal. Defendant then gave written consent to search his house and van. The police then brought in a psychiatrist who administered sodium amytal to defendant. The next day defendant was convinced by the psychiatrist to confess. The District Court suppressed evidence found during the search, ruling that the consent was involuntarily given. The question of voluntariness largely depends upon the facts of each case, no single fact being dispositive. The determination of voluntariness, rather, depends upon the "totality of the circumstances". The issue of voluntariness is a factual one addressed to the discretion of the trial court and will not be disturbed if supported by substantial credible evidence. The totality of the circumstances in the present case includes not only the police techniques employed, which were particularly coercive, but also the testimony presented by experts that defendant was a paranoid schizophrenic with severe drug problems. There can be no doubt that substantial evidence exists to support the suppression finding. St. v. Allies, 190 M 475, 621 P2d 1080, 37 St. Rep. 2089 (1980).

Reasonableness of Warrantless Search — Specific Consent Required: In order to overcome the presumption against waiver of the constitutional right prohibiting warrantless searches and seizures, the state must show that defendant gave unequivocal, specific consent to entry, uncontaminated by duress or coercion. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988), citing St. v. Brough, 171 M 182, 556 P2d 1239 (1976).

Insufficient Findings by Trial Court — Remand: In considering a motion to suppress evidence discovered during a search of the defendant's motel room, the trial judge made inadequate findings of fact; therefore, the matter was remanded for a second evidentiary hearing. The trial judge made no finding of whether the defendant knowingly exposed his motel room to the police officer; whether the officer intruded beyond any invitation extended by the defendant; whether, if the officer did intrude, the intrusion had any effect on what the officer was able to observe in the motel room; or what the officer could observe from his position at the doorway of the motel room. St. v. Wilson, 218 M 359, 708 P2d 270, 42 St. Rep. 1647 (1985).

Abandonment As Waiver of Right to Object: The Dumas Hotel in Butte was robbed. The police were notified, and an investigation was begun. Police officers observed LaMere's residence for 3 days, observing no activity. They contacted the landlord, who invited an officer to enter the apartment. The apartment appeared abandoned. Later that day the landlord signed a consent to search. During the search, police found what appeared to be a map of the Dumas Hotel and a piece of pantyhose that was apparently part of a mask. LaMere contended that the entry to the apartment was illegal because no exigent circumstances existed which excused the lack of a warrant. He also contended that the requirement of filing an inventory and delivering a copy to the person from whose premises property was taken was not complied with. The Supreme Court held that because LaMere had abandoned the apartment he had disclaimed any right to object to the place being searched. On abandonment the landlord was in possession and had authority to consent to the search. There is no statutory requirement that items seized under a consent search be inventoried and reported to a magistrate. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983).

Consent — Defendant's Knowledge of Right to Refuse: Following Schneckloth v. Bustamonte, 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041 (1973), the Montana Supreme Court rejected defendant's claim that his consent to the search of his truck was not voluntary because he had not been informed of his right to refuse. The court ruled that the Montana Constitution did not require application of a stricter standard than the totality of circumstances test used in Schneckloth. St. v. Stemple, 198 M 409, 646 P2d 539, 39 St. Rep. 1085 (1982).

No Warrantless Search Where Defendant Hands Over Murder Weapon: Where defendant was asked by police officers if a knife was involved in an altercation in which police officers were informed that defendant participated, and defendant answered "yes" and handed the knife to the police, no search by the police was involved and thus no warrantless search and seizure without consent was involved which would justify suppression of the knife. St. v. Graves, 191 M 81, 622 P2d 203, 38 St. Rep. 9 (1981), followed in St. v. Arthun, 274 M 82, 906 P2d 216, 52 St. Rep. 1133 (1995).

Consent to Monitor Telephone Conversation: In holding that the recording of a telephone conversation between an informant and defendant was not a violation of this section, the Supreme Court, following St. v. Hanley, 186 M 410, 608 P2d 104, 37 St. Rep. 427 (1980), held that a court order is not necessary to monitor a telephone conversation if one of the parties to the telephone conversation consents. The Supreme Court distinguished St. v. Brackman, 178 M 105, 582 P2d 1216, 35 St. Rep. 1103 (1978), because in Brackman it held there was an invasion of privacy because persons engaged in conversation in an open parking lot have a reasonable expectation of privacy, whereas with a telephone conversation no such expectation exists. St. v. Coleman, 189 M 492, 616 P2d 1090, 37 St. Rep. 1661 (1980), followed in (No Entrapment) St. v. Canon, 212 M 157, 687 P2d 705, 41 St. Rep. 1659 (1984).

Standing to Suppress Evidence — Person Living in Searched Apartment Rented by Another: The defendant had a legitimate expectation of privacy in the apartment searched. He shared it with his girlfriend and except with respect to her had complete dominion and control over the apartment and could exclude others from it. The defendant had standing to contest the legality of a search and seizure within the apartment. St. v. Allen, 188 M 135, 612 P2d 199 (1980).

Warrantless Entry and Arrest Valid — Subsequent Search Invalid: While the officers' initial entry into the apartment and the subsequent arrest and seizure of marijuana on the table were valid, the so-called "consent" search of the rest of the apartment was unlawful. One renter's consent was fraudulently secured and otherwise invalid under 41-5-303 (renumbered 41-5-331). St. v. Allen, 188 M 135, 612 P2d 199 (1980).

Blood Alcohol Test Found Voluntary: The admissibility of the results of the blood alcohol test in this case is not based on implied consent to the withdrawal of the defendant's blood under 61-8-402. Instead, it is founded on the actual consent of the defendant, which he admits. The issue turns on whether the defendant's consent was voluntary or was coerced by psychological means. The court held that there was substantial evidence that the defendant's consent was free and voluntary and that the lower court committed no error in denying the defendant's motion to suppress the results of the blood alcohol test. St. v. Kirkaldie, 179 M 283, 587 P2d 1298 (1978).

Probationer Search Clause: Execution of a probationer search clause by law enforcement personnel, being instrumental in achieving the objectives of probation, is a proper condition of probation. St. v. Means, 177 M 193, 581 P2d 406 (1978).

Search Without Voluntary Consent or Warrant: When the defendant was held incommunicado until he consented to a search and probable cause did not exist, a search of a car trunk was unlawful and marijuana seized was properly suppressed. St. v. Brough, 171 M 182, 556 P2d 1239 (1976).

Invalid Consent: When the Sheriff confiscated the defendant's truck without his knowledge after arrest and later obtained the defendant's signature on a consent form which did not purport to be retroactive, while the defendant was held in jail in the absence of counsel, material taken from the truck was illegally obtained and inadmissible. St. v. Keller, 170 M 372, 553 P2d 1013 (1976).

Requirements — Burden of Proof:

Equivocal conduct by a defendant is not a sufficient basis for an inference that he consents to a search because the consent to a search must be freely given and unequivocal and specific consent must be shown by clear positive evidence. St. v. LaFlamme, 170 M 202, 551 P2d 1011 (1976).

A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, express or implied. The State has the burden of proving that such consent was given. St. v. Tomich, 332 F2d 987 (9th Cir. 1964).

Consent Valid When Defendant Arrested Previously: The defendant's consent to the search of his car was voluntary even though he had spent the night in jail and was still in custody because the defendant had previously been arrested and knew his rights. State ex rel. Kotwicki v. District Court, 166 M 335, 532 P2d 694 (1975).

Consent Following Miranda Warnings: When the appellant, convicted of robbery, had been given three Miranda warnings during the course of the investigation, evidence obtained from the appellant's apartment after he gave consent to the police to go there was not the product of an unlawful search and seizure. St. v. Braden, 154 M 90, 460 P2d 85 (1969).

Waiver of Right to Object:

When the defendant had taken the Sheriff to his house and turned over the alleged murder weapon to the Sheriff, there was no illegal search and seizure since the defendant voluntarily consented to turning over the rifle. St. v. Williams, 153 M 262, 455 P2d 634 (1969).

Any right which the defendant may have had to complain of a seizure at the time of his arrest was waived when he voluntarily surrendered the evidence to police officers upon request. St. v. Nelson, 130 M 466, 304 P2d 1110 (1956).

One consenting to a search of his premises without a warrant cannot complain that it was illegal. State ex rel. Muzzy v. Uotila, 71 M 351, 229 P 724 (1924).

SEARCH AND SEIZURE ON AUTHORITY OF WARRANT

Totality of Circumstances, Including Odor of Marijuana, Sufficient Probable Cause to Support Search Warrant: The Department of Public Health and Human Services received a call alleging that Morse was selling drugs in the presence of her juvenile daughter, and the local drug task force received two additional calls alleging that Morse was distributing drugs from her apartment. When police visited Morse's apartment, there were four other people there, all of whom had prior drug-related arrests, including Morse. The officers smelled marijuana and observed an empty electric digital scale in the living room. Morse refused a search of the apartment, so officers obtained a search warrant. In executing the warrant, the officers found drugs and paraphernalia. At trial, Morse moved to suppress the evidence based on lack of probable cause for the warrant. The motion was denied, and on appeal, the Supreme Court reviewed the totality of the circumstances and affirmed. The smell of marijuana did not in itself establish probable cause, nor did the telephone calls. However, when considered with Morse's drug history, the criminal backgrounds of the other four people, and the presence of the scale, the search warrant application established probable cause, and the motion to suppress was properly denied. St. v. Morse, 2006 MT 54, 331 M 300, 132 P3d 528 (2006).

Authorization to Search Garage No Justification of Search of House, Even if Items in Garage Are Portable to House: A search warrant application that supported search of defendant's unattached garage did not justify a search of the house, and the fact that the suspected crime was operation of a meth lab and that materials for operating such a lab could be searched for under the search warrant and are easily portable and thus could be moved between a house and a garage did not justify the search of the house. St. v. Graham, 2004 MT 385, 325 M 110, 103 P3d 1073 (2004).

Search of Defendant's Truck Invalid: The Beaverhead County Sheriff's Office was contacted and informed that Lott was going to receive a shipment of drugs in the mail. The officers obtained a warrant to search Lott's house and his three vehicles on the basis that the vehicles might be used to distribute the drugs. When the package arrived, Lott was at work and asked a coworker to deliver the package to him at work. When Lott left work, he was stopped, his truck was searched, and the drugs were found. The Supreme Court held that the search of the truck was invalid because the warrant did not contain any specific facts demonstrating probable cause that the drugs would be located in the vehicle. The Supreme Court also held that the search of the truck did not come under the automobile exception to the warrant requirement based on probable cause and exigent circumstances because of the lack of exigent circumstances. St. v. Lott, 272 M 195, 900 P2d 306, 52 St. Rep. 696 (1995).

Substantial Preliminary Showing of False Affidavit: The defendant satisfied the test adopted by the Supreme Court in St. v. Sykes, 194 M 14, 663 P2d 691, 40 St. Rep. 690 (1983), for challenging the validity of an affidavit used by law enforcement officers to obtain a search warrant. The defendant made a substantial preliminary showing that the state's affidavit was based on deliberate falsehood or reckless disregard for the truth. Thus, the trial judge did not err in considering evidence on this issue at the probable cause hearing. St. v. Wilson, 218 M 359, 708 P2d 270, 42 St. Rep. 1647 (1985). The Sykes standard was modified, inasmuch as a defendant need no longer prove that the person providing false information did so knowingly, intentionally, or with a reckless disregard for the truth before the false statements may be excised from the application or affidavit, in St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Plain View Doctrine — Seizure of "Suspicious Objects": In executing a search warrant for drugs and a fugitive, law officers seized drug records. Defendant's motion to suppress the drug records was based in part on the claim that the records did not fall within the plain view doctrine because the law officers read the records. A law officer testified at the suppression hearing that the papers were strewn about the room and thus were inadvertently observed and were determined to be related to the items specified in the warrant and to have obvious evidentiary value without being touched, picked up, or rifled through in any way. He further testified that drug records are frequently found during searches for narcotics. In view of these circumstances and because a suspicion that the objects viewed are evidence or instrumentalities of a crime is sufficient to satisfy the requirement that the incriminating nature of the articles be apparent, the Supreme Court ruled that it was proper to admit the records. St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984).

Arrest Based on Void Warrant Not Lawful: Marijuana seized under the authority of a void search warrant could not have been seized as an incident of a lawful arrest since the marijuana served as the ground for arrest and was discovered by means of a void process and illegal entry. St. v. Langan, 151 M 558, 445 P2d 565 (1968).

WARRANTLESS INSPECTION

Warrantless Entry Justified Under Exigent Circumstances Exception — Evidence Admissible Under Plain View Doctrine: Officer Cameron investigated a report that Kenfield was on the way to a remote small town to purchase alcohol for minors. The officer arrived at Kenfield's residence and heard loud music and smelled marijuana. Cameron was out of radio range. No one answered when Cameron knocked at the door and announced himself, but Cameron heard running feet. Concerned with the minors' well-being, Cameron entered the residence and saw drug paraphernalia and residue on the kitchen sink. Cameron then called dispatch from the residence and requested backup, and officers subsequently seized drugs and other contraband. Kenfield was arrested for drug production or manufacture, distribution of drugs to minors, and sexual abuse of children. Kenfield moved to suppress the fruits of the warrantless search, but the motion was denied, and Kenfield appealed, but the Supreme Court affirmed. The odor of marijuana, coupled with the facts that the occupants attempted to avoid contact with Cameron and that Kenfield was believed to have been on the way to purchasing alcohol for minors, was sufficient for Cameron to form a reasonable belief that Kenfield had committed or was committing an offense. Additionally, the remoteness of the area, the time of the incident, the

failure of Cameron's radio communication, Cameron's concern for the minors, the lack of response to the knock and announce, and the possibility that relevant evidence would be destroyed constituted exigent circumstances warranting immediate entry into the residence. Therefore, warrantless entry into Kenfield's home was justified, as was the seizure of drug evidence in plain view. St. v. Kenfield, 2009 MT 242, 351 M 409, 213 P3d 461 (2009), following St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065 (1998), distinguishing St. v. McBride, 1999 MT 127, 294 M 461, 982 P2d 453 (1999).

Disclaimer of Authority to Grant Permission to Search Vehicle Constituting Waiver of Right to Privacy: After stopping Hurlbert for speeding, officers noticed additional behavior that led them to believe that Hurlbert might be engaged in illegal activity. The officers asked Hurlbert for permission to search the vehicle, but Hurlbert declined because the vehicle belonged to his wife. The officers then called the wife, who gave permission to search the vehicle, although Hurlbert initially declined permission for a warrantless search of his personal items in the vehicle. No contraband was found in the vehicle, but while the search was underway, Hurlbert spontaneously admitted that there was drug paraphernalia in his personal possessions in the vehicle. Hurlbert then consented to a search of his possessions, and a search of his backpack indeed revealed drugs and paraphernalia. Hurlbert contended on appeal that because he lawfully possessed the vehicle at the time of the stop, he had a reasonable expectation of privacy in it and was entitled to protection from unlawful searches and seizures. Hurlbert also maintained that his wife's consent to search the vehicle was not valid because she was not in possession of the vehicle at the time of the search and she was coerced into consenting to the search. The Supreme Court affirmed. Hurlbert could not demonstrate that he was prejudiced in any way from the search of the vehicle, because the search revealed nothing unlawful. Additionally, when Hurlbert disclaimed that he had any authority to grant permission to search the vehicle, he thereby conceded that he did not have a reasonable expectation of privacy in the vehicle and waived the right to object to a search of the vehicle. St. v. Hurlbert, 2009 MT 221, 351 M 316, 211 P3d 869 (2009).

Search of Residence on Permission of Minor Child Violative of Parent's Right to Privacy — Evidence Properly Suppressed — Exception: Police were dispatched to a residence in response to a report of a sexual assault on a young woman, who was discovered to be a minor. Following questioning in the living room, the girl led the police to her bedroom, where an alleged assault by her father had occurred. Because police believed that the minor had lawfully granted permission to search the residence, they seized items from the bedroom, including the sheets, comforter, and blanket from the bed and the victim's pajamas. They also had the victim change clothes so they could take possession of the underwear that the victim was wearing at the time of the alleged assault. The girl later signed a form granting permission to search the residence. The father's DNA was found on the bedding and he was charged with felony sexual assault. The father argued that the search and seizure were unconstitutional because they were conducted without his consent or a search warrant. The state contended that in a case such as this where the child granting entrance to the home was the possible victim of a sexual assault, a warrant was unnecessary. The District Court, citing St. v. Schwarz, 2006 MT 120, 332 M 243, 136 P3d 989 (2006), held that because the minor did not have actual authority to consent to a search, police were obligated to obtain consent from the parent or a search warrant prior to seizing items from the bedroom. Because neither consent nor warrant was obtained, the court suppressed all evidence seized from the house. The state appealed. The Supreme Court cited St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), for the factors used to determine whether a state action constitutes an unreasonable or unlawful search or seizure: (1) whether the person challenging the state's action has an actual subjective expectation of privacy; (2) whether society is willing to recognize that subjective expectation as objectively reasonable; and (3) the nature of the state's intrusion. The court also noted that warrantless searches conducted inside a home are per se unreasonable, subject only to a few specifically established and well-delineated exceptions, none of which were present here. The court affirmed the holding in Schwarz, holding that the child did not have authority to consent to the search of her parent's home. The focus was on the violation of the privacy rights of the parent in control of the home, not the general privacy rights of the child, except where, as with the underwear the victim was wearing during the alleged assault, society would recognize as reasonable a person's privacy interest in the intimate apparel that she was wearing at the time. Therefore, the evidence seized from the residence must be suppressed because it was the product of an illegal search and seizure, with the exception of the daughter's underwear, because the father did not have an actual subjective expectation of privacy in the underwear that his daughter was wearing at the time the alleged assault occurred that society would find objectively reasonable. The District Court did not err in granting the motion to

suppress all the evidence, with the exception of the underwear. The case was remanded for further proceedings. St. v. Ellis, 2009 MT 192, 351 M 95, 210 P3d 144 (2009).

Failure to Demonstrate Exigent Circumstances Justifying Warrantless Entry Into Residence for DUI Evidence — Reversed: Saale was involved in a one-car rollover after leaving a bar. Witnesses who helped Saale from the vehicle observed that Saale appeared to be highly intoxicated but not seriously injured. Saale's husband then arrived and took Saale home. Officers went to the home, but the husband refused to allow anyone into the home and refused to bring Saale outside. Officers had been advised by the County Attorney's office that they could enter the home without a warrant because of exigent circumstances of Saale's possible intoxication and trying to elude officers and because Saale might be severely injured from the accident. Therefore, officers handcuffed the husband and removed him from the area, entered the home, and removed Saale back to the scene of the accident, where Saale sat in the patrol car for 45 minutes. Saale subsequently failed a portable breath test and was arrested for DUI second offense. Saale moved to suppress evidence from the warrantless search. The District Court held that the exigent circumstances warrant exception gave officers the right to enter the home and to take Saale back to the accident scene, to question Saale about the accident and potential injuries, and to protect against the destruction of Saale's blood alcohol level as evidence of DUI, so the dismissal motion was denied. Saale appealed, and the Supreme Court reversed. Entry into the home without consent was reasonable only if the exigent circumstances were legitimate, but in this case officers had neither a lawful nor practical exigency justifying warrantless invasion of the home to obtain evidence. The argument for preservation of DUI evidence was negated by the fact that no physical evidence had been taken from Saale at the time of entry, so there was no evidence to destroy, and by the fact that Saale sat in the patrol car for 45 minutes before a breath test was even taken. The argument that possible injury constituted an exigent circumstance was belied by the fact that witnesses informed the officers that Saale did not appear to be injured and by the fact that if injuries had been obvious to officers when Saale was removed from the home, Saale would have been taken to the hospital rather than to the accident scene to sit idly and unattended in the patrol car while officers investigated the accident. Absent proof of exigent circumstances, warrantless entry into Saale's home was unreasonable and constituted reversible error. St. v. Saale, 2009 MT 95, 350 M 64, 204 P3d 1220 (2009), following St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001), and distinguishing St. v. Deshner, 158 M 188, 489 P2d 1290 (1971), and St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065 (1998).

Sufficient Probabilities Supporting Particularized Suspicion to Justify Investigative Stop — Motion to Suppress Properly Denied: McMaster was stopped for investigation after an officer observed apparent traffic violations and erratic driving. The officer was called to make the stop following a police officer's observations of McMaster's possible drug trafficking activities at the Conrad Town Pump. McMaster moved to suppress the fruits of the search on grounds that the officer lacked particularized suspicion to make the investigative stop. The motion was denied, and on appeal the Supreme Court affirmed. The determination whether particularized suspicion supports an investigative stop does not deal with hard certainties, but rather with probabilities. In this case, McMaster was known by officers to be involved in drug deals, and his furtive conduct at the Town Pump led officers to believe that a possible drug deal was in progress. McMaster was identified as the probable driver of the vehicle through a personalized license plate and by physical description. This evidence, coupled with McMaster's apparent traffic violations and erratic driving, constituted sufficient particularized suspicion that McMaster was involved in criminal activity to justify the investigative stop. St. v. McMaster, 2008 MT 294, 345 M 408, 191 P3d 443 (2008). See also St. v. Gopher, 193 M 189, 631 P2d 293 (1981).

Exigent Circumstances Sufficient to Justify Warrantless Search to Avoid Possible Destruction of Drug Evidence: Law enforcement officers were tipped off that defendant was transporting one-half pound of methamphetamine into the state and tracked defendant to another person's apartment in Corvallis. Officers began surveillance of the apartment and observed two individuals who appeared to be watching the officers. Within a minute, two persons left the apartment, and the officers concluded that their presence was known to persons in the apartment. Shortly thereafter, the officers received a call from an officer in Butte informing them that defendant had called an informant in Butte and told the informant that defendant knew he was being watched and asked the informant to come to Corvallis to help get rid of the drugs. The officers then discussed the possibility that defendant could destroy the drugs before a valid search warrant could be issued in 4 to 7 hours and decided to call for backup and enter the apartment. Upon entering, the officers found defendant and a woman present. Defendant had no drugs on his person, but had $1,500 in his wallet and appeared to be under the influence of methamphetamine. When the warrant eventually arrived, officers found 3½ grams of

methamphetamine packaged for sale. Defendant was charged with felony conspiracy to commit criminal distribution of dangerous drugs, felony criminal possession with intent to distribute, felony criminal endangerment, and misdemeanor criminal possession of drug paraphernalia. Defendant pleaded not guilty to all charges and moved to suppress the fruits of the warrantless search. The motion was denied, and defendant was convicted on one confessed count of intent to distribute. On appeal, defendant contended that the warrantless search was unlawful, but the Supreme Court affirmed. The facts that the officers had already witnessed one suspect flee the scene, knew that defendant was aware of the officers' presence, and knew that a third party had been contacted to help defendant get rid of the drugs, combined with the knowledge that procurement of a search warrant would take 4 to 7 hours, established the presence of exigent circumstances sufficient to justify warrantless entry into the apartment to avoid destruction of the alleged one-half pound of methamphetamine. St. v. Ruggirello, 2008 MT 8, 341 M 88, 176 P3d 252 (2008), applying the exigent circumstances test set out in St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004).

Reasonable Cause for Warrantless Probationary Search — Motion to Suppress Properly Denied: Smith's live-in girlfriend was arrested on a probation violation for failing to report her change in residence and subsequently tested positive for drugs, which provided reasonable cause for her probation officer to conduct a warrantless search of her new residence—Smith's trailer. The search revealed weapons, drug paraphernalia, items used to manufacture and distribute drugs, and some of the girlfriend's personal items. The officer then decided to search a bus parked near the trailer, and while waiting for a warrant, Smith arrived. Based on the items found in the trailer and an officer's knowledge that Smith's driver's license was suspended, Smith was arrested and found to be in possession of a large amount of cash, drugs, and paraphernalia. More drugs and chemical precursors of methamphetamine were subsequently found in Smith's vehicle and in the bus. Smith moved to suppress all evidence obtained in the searches on grounds that the initial search was unlawful because it was not justified as a probation search or by any other exception to the warrant requirements, but the motion was denied. On appeal, the Supreme Court affirmed. Because the initial search was a probationary search of the residence of the woman living with Smith and was justified by reasonable cause and because Smith did not challenge the legality of the searches of his person and vehicles, the District Court did not err in determining that the searches were lawful and in denying Smith's motion to suppress the evidence. St. v. Smith, 2008 MT 7, 341 M 82, 176 P3d 258 (2008).

Suspect Interrogated in Home Without Miranda Warning — Motion to Suppress Improperly Denied: Following a lead of methamphetamine use at Munson's home, detectives went to the home and, without giving Munson a Miranda warning, questioned Munson for 1 ¾ hours before Munson confessed to possessing methamphetamine paraphernalia. Munson was arrested for criminal possession of dangerous drugs and paraphernalia, and at trial, Munson moved to suppress the evidence and statements made to the officers, but the motion was denied. On appeal, the Supreme Court reversed. The officers created a custodial atmosphere, and Munson's freedom of action was significantly restricted. Under the totality of the circumstances, a reasonable person in Munson's position would not have felt free to terminate the interview and leave or to ask the officers to leave, so for purposes of Miranda, Munson was in custody and subjected to an interrogation. Therefore, failure of the officers to give Munson a Miranda warning rendered Munson's statements inadmissible. Because Munson's consent to a search was not given freely and without duress or coercion, all evidence seized under the guise of consent was also inadmissible. St. v. Munson, 2007 MT 222, 339 M 68, 169 P3d 364 (2007), following St. v. Osteen, 216 M 258, 700 P2d 188 (1985), and St. v. Rushton, 264 M 248, 870 P2d 1355 (1994).

Warrantless Search of Duffle Bag in Area of Drug Lab Based on Exigent Circumstances: While detoxifying property where a drug lab was found, officers discovered a locked duffle bag sitting on or near contaminated bedding and heard sounds of sloshing liquid and clanging glass or metal within the bag. The officers were concerned with a possible chemical reaction and explosion, so they removed the bag from the premises, laid it on a tarp, and notified the safety officer of the suspect liquids. The safety officer believed that obtaining a search warrant to open the bag would take at least 45 minutes, which posed a potential threat to the safety of the officers and the property and persons in the immediate area, so the bag was opened immediately without a warrant, and drug lab materials were found and removed. Defendant asserted that the search was unlawful on grounds that the officers had no right to even pick up the bag without a warrant because if they suspected that it contained methamphetamine lab materials, then they should have known that disturbing the bag could unleash hazardous fumes and explosive chemicals. The state contended that exigent circumstances existed because the officers were necessarily

required to immediately determine if dangerous chemicals were present. The Supreme Court noted that exigent circumstances for conducting a warrantless search exist when it is not practical to secure a warrant. Citing U.S. v. Lloyd, 396 F3d 948 (8th Cir. 2005), the court held that the "dangers created by methamphetamine labs can justify an immediate search because of exigent circumstances due to the volatile nature of such labs". In this case, the existence of exigent circumstances allowed the immediate warrantless search of the duffle bag. St. v. Gomez, 2007 MT 111, 337 M 219, 158 P3d 442 (2007).

No Expectation of Privacy for Trespasser — Entry Lawful and Warrantless Search Reasonable: Gilmore kept some belongings in a locked bedroom in Kathie Gilmore's house, and Kathie had no key to the room. Based on a tip from a confidential informant that marijuana plants had been observed in the window of the residence, officers requested and were given permission by Kathie to search the house without a warrant. Although she gave conflicting statements, Kathie stated that some of Gilmore's belongings were in the locked bedroom but he paid no rent, that Gilmore had previously assaulted her and that she was afraid of him, that she did not want him living in the house and had asked him to leave, and that she had no key to the room and advised the officers to kick down the door. Upon entering, the officers observed Gilmore asleep on the couch and drug paraphernalia in plain view. The officers then obtained a warrant and seized drugs and paraphernalia. Gilmore moved to suppress the evidence on grounds that the search was unlawful because Kathie did not have authority to authorize entry into the locked bedroom and that Gilmore had an expectation of privacy in the bedroom. The District Court found that in this case, the officers were acting under the appropriate authority of Kathie to consent to the search and denied the motion to suppress. The Supreme Court held that as a trespasser, Gilmore had no expectation of privacy in the bedroom. The District Court was affirmed. St. v. Gilmore, 2004 MT 363, 324 M 488, 104 P3d 1051 (2004). See also St. v. McLees, 2000 MT 6, 298 M 15, 994 P2d 683 (2000).

No Privacy Interest in Rental Car by Unauthorized Driver Who Disavows Ownership of Contents: Hill was stopped for speeding and ticketed. After the stop was completed, the officer engaged Hill in small talk, inquiring where Hill was going and where his traveling clothes were. Hill replied that it was a quick trip, so no extra clothes were needed. Although no bags or clothes were in sight, the officer asked if Hill was carrying anything illegal. Hill said no, and the officer asked if Hill would consent to a search of the vehicle, to which Hill initially consented. In going over the terms of the consent form, Hill related that the car had been rented by a friend and that a search of the trunk was probably not a good idea because Hill did not know what the friend might have placed there. The officer then checked on the origin of the car and discovered that it had been acquired through a rental agency, but that the car was 2 days late in being returned, and that Hill was not an authorized driver. The agency asked that the car be impounded and gave permission for a search. The officers found two bags in the trunk, but Hill disclaimed ownership of the bags. A search of the bags revealed drugs and Hill's cell phone charger. Hill was then charged with drug crimes and later moved to suppress the evidence, but the motion was denied. On appeal, the Supreme Court affirmed. Hill had no reasonable expectation of privacy in the car's contents because he was not an authorized driver, had no relation to the car's owner or renter, and voluntarily disclaimed knowledge and ownership of anything in the car. Hill could not expect privacy in a car he illegally possessed, and once Hill waived control over the bags, he implicitly granted permission for the bags to be accessed. The search of the trunk was reasonable because permission was granted by the car owner, and the trunk contents were effectively surrendered by Hill, making the car owner's permission to search the vehicle sufficient to permit a full search of items found in the car. St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004), distinguishing St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), and St. v. Tackitt, 2003 MT 81, 315 M 59, 67 P3d 295 (2003).

Lack of Exigent Circumstances Justifying Warrantless Search of Fanny Pack — Motion to Suppress Evidence Properly Granted: After Lanegan was arrested for obstructing a peace officer and handcuffed, the officer proceeded to conduct a warrantless search of Lanegan's fanny pack and discovered drugs and drug paraphernalia. Lanegan was then charged with drug crimes. Lanegan moved to suppress the evidence, and the motion was granted. The state appealed, but the Supreme Court affirmed. A search incident to arrest may be conducted under the conditions in 46-5-102, but in this case, none of the conditions were present. The search would not have protected the officer or prevented Lanegan's escape because Lanegan was already handcuffed, nor would the search have resulted in discovery of anything that could have been used in or fruits of the crime of obstructing a peace officer. Warrantless searches are per se unreasonable, but one exception is when there are exigent circumstances that would cause a reasonable person to believe that prompt action is necessary to prevent physical harm, destruction of relevant

evidence, escape, or some other consequence improperly frustrating legitimate law enforcement efforts. However, the search in this case did not rise to the level of exigent circumstances to allow a warrantless search, and the motion to suppress was properly granted. St. v. Lanegan, 2004 MT 134, 321 M 349, 91 P3d 578 (2004).

Reasonable Cause for Investigative Stop and Pat-Down Search — Motion to Suppress Evidence Properly Denied: An officer discovered a youth behind a car about 11 p.m., apparently working on the vehicle's license plate. The officer suspected that the youth was removing the plate, but when asked, the youth claimed to be installing it. The officer recognized the youth from prior law enforcement contacts and knew that the youth did not live at the residence or own a car. Based on these circumstances, the officer conducted a pat-down search and discovered a marijuana pipe. At about that time, the youth's girlfriend came out of the residence and told the officer that she had requested that the youth put the license plate on the vehicle. The youth later moved to suppress the drug paraphernalia on grounds that the officer did not have a particularized suspicion to make the investigative stop, exceeded the scope of the investigative stop, and did not have probable cause to conduct a frisk. The Supreme Court affirmed denial of the motion to suppress. Applying the two-part test from St. v. Gopher, 193 M 189, 631 P2d 293 (1981), the court held that the officer had sufficient objective data to form a particularized suspicion that the youth was engaged in wrongdoing to justify the investigative stop. Then, once the officer recognized the youth, suspicions were heightened, so the pat-down search remained within the context of the initial stop, and the officer did not exceed the scope of the stop. Finally, because of the officer's prior dealings with the youth and knowing that the youth did not live at the residence or own a car, the officer had reasonable cause: (1) to believe that the youth was committing an offense and might be armed; (2) for concern for the officer's safety; and (3) to conduct a frisk. The officer did not have to accept the youth's seemingly innocent explanation of why he was working behind the car late at night. In re D.R.B., 2004 MT 90, 320 M 516, 88 P3d 808 (2004). See also St. v. Collard, 286 M 185, 951 P2d 56 (1997), and St. v. Dawson, 1999 MT 171, 295 M 212, 983 P2d 916 (1999).

Probable Cause for Search Warrant for Vehicle Based on Warrantless Canine Search of Exterior of Vehicle, Outstanding Drug Warrant, and Officer's Experience: Officers went to Hart's home to execute an outstanding warrant for felony sale of dangerous drugs and noticed Hart driving away in his van in the opposite direction. The officers initiated a traffic stop and noticed furtive movements from Hart as he moved quickly toward the floorboard, indicating that he was attempting to retrieve a weapon or hide something in the van. Hart refused a request to search the van, but the officers had a particularized suspicion that Hart was in possession of drugs. The officers conducted a canine search of the exterior of the van, and the dog alerted to the presence of drugs. The officers then acquired a warrant to search the van and discovered methamphetamine and marijuana. On appeal, Hart contended that there was insufficient probable cause for a search warrant. The Supreme Court disagreed. Evaluated in light of an officer's knowledge and all relevant circumstances, probable cause to search exists if the facts and circumstances within the officer's personal knowledge are sufficient to warrant a reasonable person to believe that a suspect has committed an offense. In this case, there was sufficient probable cause based on the fact that the officers were attempting to execute an outstanding drug warrant, the officer's experience in using drug-detecting canines, the dog's positive alert, and Hart's furtive movements at the time of the stop. St. v. Hart, 2004 MT 51, 320 M 154, 85 P3d 1275 (2004).

Warrantless Search of Vehicle Exterior by Drug-Sniffing Dog — Expectation of Privacy in Vehicle Parked in Public Area — Particularized Suspicion Required: Following an anonymous tip that Tackitt was involved in drug trafficking and that he had a quantity of marijuana in the trunk of his car, a drug task force officer conducted an exterior canine search of Tackitt's car when it was parked outside Tackitt's residence. The dog alerted to the presence of drugs in the vehicle. The officer checked Tackitt's criminal record and verified some of the public information received in the tip and then obtained a warrant to search the vehicle and Tackitt's residence. The vehicle search revealed no evidence, but during the search of the residence, officers found drugs and paraphernalia. Tackitt moved to suppress on grounds that use of the dog violated the right to privacy. The District Court denied the motion, holding that Tackitt had no reasonable expectation of privacy in the odors emanating from his vehicle while it was parked in an area open to the public or, alternatively, that if particularized suspicion was required for use of the dog, the search in this case was supported by proper particularized suspicion. Tackitt appealed, and the Supreme Court reversed. Pursuant to St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), Tackitt had an expectation of privacy in the trunk of the vehicle, and the canine sniff did constitute a search. However, the expectation was in no way dependent on where the vehicle was parked, nor did the expectation necessitate a search warrant for the use of the canine to survey

the exterior of the vehicle. Federal law allows the use of drug-detecting dogs to sniff closed containers in public areas when police have a particularized suspicion to believe that a crime involving drugs is taking place. Under the greater protection afforded individual privacy under the Montana Constitution, the balance between governmental interests and individual interests is best struck by requiring particularized suspicion as a prerequisite for the use of a drug-sniffing dog. Particularized suspicion must be based on objective data from which an experienced police officer can make the inference that a person is engaged in wrongdoing, and an anonymous tip lacking appropriate corroboration simply cannot qualify as objective data to support a particularized suspicion any more than it can support probable cause. Therefore, because the District Court improperly concluded that there was a particularized suspicion for use of the dog to survey the exterior of Tackitt's vehicle and because the application for the search warrant failed to establish probable cause for the issuance of the warrant, the District Court's denial of the motion to suppress was reversible error. (Note: this holding is limited to the use of drug-sniffing dogs during police investigations and does not apply to the human detection of the odor of drugs.) St. v. Tackitt, 2003 MT 81, 315 M 59, 67 P3d 295 (2003), distinguishing St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), and followed in St. v. Hart, 2004 MT 51, 320 M 154, 85 P3d 1275 (2004).

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Involuntary Written Consent to Search — Suppression of Illegally Seized Evidence Under Exclusionary Rule: Olson was arrested when officers entered her home pursuant to a warrant for Olson's failure to appear at a Justice's Court hearing. While the arrest was taking place in the kitchen, an officer looked into the living room and observed drug paraphernalia. Officers then searched other rooms of the house and found drugs and paraphernalia in each room. An officer requested that Olson sign a form consenting to a further search of the residence, and Olson agreed. A further search revealed more drugs and paraphernalia. Olson later made a taped statement in jail. The District Court denied Olson's motion to suppress on grounds that the written consent was voluntary. The Supreme Court disagreed and reversed. Although the knowing and voluntary consent by a citizen to a search is a recognized exception to warrant requirements, consent is not voluntary when it is given only after law enforcement officers have already conducted an illegal search because the consent flows directly from the unlawful intrusion. Further, the taped statement should have also been suppressed under the exclusionary rule, because the incriminating statement was gathered as a result of the unlawful search. St. v. Olson, 2002 MT 211, 311 M 270, 55 P3d 935 (2002).

Warrantless Search of Home Subsequent to Lawful Arrest Unjustified Under Plain View Doctrine and Protective Sweep: Olson was arrested when officers entered her home pursuant to a warrant for Olson's failure to appear at a Justice's Court hearing. While the arrest was taking place in the kitchen, an officer looked into the living room and observed drug paraphernalia. Officers then searched other rooms of the house and found drugs and paraphernalia in each room. Olson moved to suppress the evidence and subsequent statement on grounds that the warrantless search was unreasonable. The District Court denied the motion pursuant to the plain view doctrine and concluded that the search was justified as a precautionary sweep. The Supreme Court reversed. Under Chimel v. Calif., 395 US 752 (1969), there is no comparable justification for routinely searching any room other than that in which the arrest occurs. Further, under Md. v. Buie, 494 US 325 (1990), a protective sweep is justified when there are articulable facts that, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual

posing a danger to those on the arrest scene. In this case, the arresting officers were informed that there was no one else in the house at the time of the arrest and had no indication to believe otherwise. Neither the plain view doctrine nor a protective sweep justified a further search of the residence without a warrant. St. v. Olson, 2002 MT 211, 311 M 270, 55 P3d 935 (2002).

Absence of Exigent Circumstances — Warrantless Search Unjustified: Logan was one of two passengers in a vehicle that was stopped for failure to have the rear license plate illuminated. The officer recognized the driver, who had a history of carrying weapons and of violence toward police officers, and called for backup. The officer then approached the vehicle but did not smell or observe any illegal drugs or drug paraphernalia or observe any behavior that led the officer to believe that anyone in the vehicle was under the influence of drugs. After obtaining identification from the driver and passengers, the officer ran a check for outstanding warrants on all the parties and learned that all three persons had past drug arrests and that an extreme officer caution alert was in effect for the driver. The officer then called for another officer who had a drug-sniffing dog. The dog alerted to the passenger-side door of the car, and the officer removed a purse from the back seat containing drug paraphernalia and a paper bindle. The dog entered the vehicle and indicated additional drugs. Logan was subsequently arrested for possession of dangerous drugs but moved to suppress the evidence on grounds that the officer did not have a particularized suspicion of the presence of drugs to support a canine sniff search of the vehicle. The Supreme Court agreed. In St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), the Supreme Court held that there is no automobile exception to constitutional search warrant requirements and that the mobility of a vehicle, without more, is not sufficient to justify a warrantless search. In addition to particularized suspicion, a warrantless search of a vehicle requires probable cause and a generally applicable exception to the warrant requirement, such as plain view search, a search incident to arrest, or exigent circumstances, which was the only applicable exception at issue here. The District Court held that the exigent circumstance in this case was that allowing Logan to reenter the vehicle to retrieve the purse would have provided the opportunity to destroy the evidence. However, the officer testified that there was nothing that prevented obtaining a search warrant, and that testimony itself belied the fact that exigent circumstances existed. Because the state failed to meet the heavy burden of proving exigent circumstances, the District Court erred in denying Logan's motion to suppress, so the case was reversed. St. v. Logan, 2002 MT 206, 311 M 239, 53 P3d 1285 (2002).

Reasonable Cause for Search of Probationer — Motion to Suppress Evidence of Search Properly Denied: As a condition of a suspended sentence for conviction of felony sale of drugs, Roper consented to warrantless searches of his person, vehicle, or residence. Roper was subsequently granted a conditional discharge from state supervision of his probation because he was serving a concurrent probation as a result of a federal criminal conviction. However, despite the conditional discharge, the state reserved the right to warrantless searches and drug checks during the term of the state probationary sentence, and Roper was relieved only of the requirement to report to the state probation officer monthly. After a few months, the state probation officer became concerned that Roper was both using and selling drugs when two clients reported Roper's continued involvement with drugs. An informant told investigators that Roper stored drugs in a black leather pouch. Based on the gathered information and the close proximity of Roper's workplace to a school, the probation officer believed that reasonable cause existed to search Roper and, with other police officers, went to Roper's workplace and observed him outside involved in what appeared to be a drug transaction. They searched Roper but found no drugs in his possession. The officers went into the workplace and conducted a urinalysis on Roper, which tested positive. While there, the officers noticed a black leather pouch next to Roper's work gloves, seized it, and discovered methamphetamine. Roper was arrested, and the officers went to his house where additional drug evidence was discovered and seized. Roper moved to suppress all the evidence found at both his workplace and residence, contending that the probation officer did not have the right to perform any type of warrantless search and that the evidence seized at the residence was the result of the illegal search of the workplace. The motion was denied, and the Supreme Court affirmed. The probation officer's authority to conduct warrantless searches was extended by the waiver of privacy to which Roper agreed as a condition of probation. The officers were lawfully at Roper's workplace because they had authority to request a urinalysis and to search Roper's person, and the seizure of the black pouch was proper based on the plain view doctrine and information that the pouch was where Roper kept drugs. Further, because the evidence at the workplace was lawfully gathered, the District Court did not err when it denied the motion to suppress evidence gathered during the subsequent search of Roper's home. St. v. Roper, 2001 MT 96, 305 M 212, 26 P3d 741 (2001).

Exigency Requirements for Warrantless Search of Vehicle Clarified — Automobile Exception to Search Warrant Requirement Inapplicable: In order to justify the warrantless search of an automobile, the state must show exigent circumstances under which it was not practical to obtain a warrant. Taking the opportunity to clarify the source of the exigency requirement, the Supreme Court noted that Montana's unique constitutional language affords citizens a greater right to privacy and broader protection than the federal constitution in cases involving searches of private property, and as a result, the category of warrantless searches that may be conducted under the Montana Constitution is narrower than the category of warrantless searches that may be conducted under the federal constitution. The Montana Constitution provides greater protection from warrantless search of automobiles, and such searches are restricted to the purpose of safeguarding articles within plain view of the officer. In this case, Elison had items stowed out of view behind the seat of his car, creating an actual and reasonable expectation of privacy, and the state needed a compelling interest beyond the mere existence of probable cause to search the car without a warrant. The warrantless search of an automobile also requires the existence of a generally applicable exception to the warrant requirement, such as a plain view search, a search incident to arrest, or exigent circumstances. Here, the District Court found exigent circumstances, including the mobility of the vehicle, the possibility that a confederate could move the vehicle, and the fact that it would have been difficult to obtain a warrant at the time that the stop was made at 12:05 a.m. The Supreme Court disagreed and held that the state failed to carry the heavy burden of proving exigent circumstances. Mere mobility of a vehicle, without more, is insufficient to justify a warrantless search. The possibility that a confederate could move the vehicle did not apply because Elison was alone and without means to contact a confederate. The validity of a warrantless search also does not turn solely on the time of day that the search is conducted. Although Montana magistrates may prefer not to be disturbed late at night, Montana's constitutional protections apply at all times and do not simply fade away with the setting sun. Absent exigency, the search of Elison's vehicle was unlawful, and Elison's motion to suppress the fruits of the warrantless search was improperly denied. The case was reversed. St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456, 57 St. Rep. 1206 (2000).

Officer's Knowledge of Vehicle Owner's Revoked License Sufficient Basis for Suspicion of Criminal Activity to Warrant Stopping Vehicle: Deputy Keintz observed a vehicle displaying a distinctive personalized license plate being driven by a female south of Missoula. The officer recognized the license plate, recalled the prior arrest and license suspension of the vehicle owner, and initiated a traffic stop. Halvorson was the owner and driver of the vehicle and was ticketed for driving with a suspended license. On appeal, Halvorson contended that the officer did not have sufficient information to form a particularized suspicion that the occupant of the vehicle was or had been engaged in criminal activity to justify stopping the vehicle. Applying the criteria in St. v. Gopher, 193 M 189, 631 P2d 293 (1981), the Supreme Court followed St. v. Pike, 551 NW 2d 919 (Minn. 1996), in holding that an officer's knowledge that the owner of a vehicle has a revoked driver's license is enough to form the basis of a reasonable suspicion of criminal activity when the officer observes the vehicle being driven, as long as the officer remains unaware of any facts that would render unreasonable an assumption that the owner is driving the vehicle. St. v. Halvorson, 2000 MT 56, 299 M 1, 997 P2d 751, 57 St. Rep. 270 (2000), followed in Billings v. Costa, 2006 MT 181, 333 M 84, 140 P3d 1070 (2006). Costa was followed in St. v. Neil, 2009 MT 128, 350 M 268, 207 P3d 296 (2009).

Warrantless Strip Search of Prison Visitor Permissible if Supported by Reasonable Suspicion: Deserly traveled to the state prison to visit her husband who was an inmate, but upon attempting to enter, her underwire bra set off the metal detector. She was informed that she could consent to a strip search and that if she refused, she would be denied contact visitation but would be allowed noncontact visitation. Deserly was a former jailer and knew what a strip search entailed, but nevertheless consented to the search. Later, Deserly sued the Department of Corrections, seeking unspecified damages for emotional distress allegedly caused when the prison officers required her to submit to the strip search, complaining that her privacy was invaded and that she was humiliated and visually raped as a result of the search. The District Court found that the search was justified and that no privacy invasion occurred and summarily dismissed the case. Deserly conceded on appeal that because the state has an interest in the security of its penal institutions, searches of inmate visitors are justifiable only on satisfying a reasonable suspicion standard, but maintained that the legitimate penalogical need to conduct the search could have been satisfied by more narrow means than a strip search. The Supreme Court acknowledged that one of the clearest forms of degradation in Western society is to strip a person of the person's clothes and that a strip search, regardless of how professionally and courteously conducted, is an embarrassing and humiliating experience. Further, a prison visitor

retains the constitutional right to be free from unreasonable searches and seizures. However, a prisoner does not have a due process right to unfettered visitation, nor does a citizen have a right to unfettered visitation of a prisoner that rises to a constitutional dimension. Moreover, in seeking entry into a controlled prison environment, a visitor simultaneously acknowledges a lesser expectation of privacy because of the insistence on access. Because prisons are dangerous places for employees, visitors, and inmates, the basic constitutional issue becomes one of balancing the legitimate governmental interest in and need for searching inmate and prison visitors against the intrusions into personal rights and residual privacy interests that such searches entail. Although prison visitors can be subjected to some searches, such as pat-downs or metal detector sweeps, merely as a condition of visitation, more intrusive searches, such as strip searches, are permissible as exceptions to the constitutional warrant requirements only if the search is supported by reasonable suspicion. Thus, the ultimate question was not simply whether there was some alternative means of conducting the search, but whether prison officials acted reasonably and used the least intrusive means under the circumstances. In Deserly's case, the strip search was supported by reasonable suspicion and was conducted in a manner that took into account Deserly's privacy interest and yet fulfilled the Department's penalogical need to ensure that Deserly was not carrying metal contraband in some article of her clothing. Deserly v. Dept. of Corrections, 2000 MT 42, 298 M 328, 995 P2d 972, 57 St. Rep. 199 (2000), following St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410, 56 St. Rep. 447 (1999), and distinguishing Hunter v. Auger, 672 F2d 668 (8th Cir. 1982), and Thorne v. Jones, 765 F2d 1270 (5th Cir. 1985).

Invalid Third-Party Consent to Warrantless Search of Private Residence — Consenting Party to Have Actual Authority to Consent to Search: A warrantless search conducted inside a home is per se unreasonable, subject to only a few exceptions, one of which is when the search is conducted pursuant to consent that is freely and voluntarily given. The state may justify a warrantless search by showing that permission was obtained from defendant or from a third party who possessed common authority over or other sufficient relationship to the premises or effect sought to be inspected, but the state has the burden of showing that consent was voluntary. However, for third-party consent to be valid, the consenting party must have actual authority to consent, as opposed to apparent authority. In the present case, McLees lived with his father, Scott, in an apartment owned by his grandfather, Earl, and investigating officers obtained Earl's voluntary consent before searching the residence. The District Court held that Earl had common authority to consent to the search and denied McLees' motion to suppress incriminating evidence found in the search. The Supreme Court disagreed. Under U.S. v. Matlock, 415 US 164, 39 L Ed 2d 249, 94 S Ct 988 (1974), common authority may not be implied from the mere property interest of a third party in the property to be searched. Rather, the authority that justifies third-party consent rests on the mutual use of the property by persons having joint access or control for most purposes. Here, the record was insufficient to show that Earl had common authority over McLees' apartment. Earl never went to the apartment unless Scott was there. Earl did not have free access to and was not a cohabitant of the apartment and did not share in its use. The fact that Earl owned the property was not dispositive when McLees had a reasonable expectation of privacy by living there. Earl therefore did not have a sufficient relationship with the apartment that would give him actual authority to consent to a warrantless search. While declining to address whether the seized evidence was admissible under the independent source rule or the inevitable discovery rule, the Supreme Court held that it was inadmissible under the third-party consent rule and reversed for further proceedings. St. v. McLees, 2000 MT 6, 298 M 15, 994 P2d 683, 57 St. Rep. 25 (2000), following St. v. Sorenson, 180 M 269, 590 P2d 136 (1979), St. v. Lopez, 896 P2d 889 (Hawaii 1995), and St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997), distinguishing Ill. v. Rodriguez, 497 US 177, 111 L Ed 2d 148, 110 S Ct 2793 (1990), and followed, with regard to third-party authority to consent to search, in St. v. Gilmore, 2004 MT 363, 324 M 488, 104 P3d 1051 (2004), and St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009).

No Evidence of Criminal Activity, Exigent Circumstances, or Emergency — Warrantless Entry Into Home in Search of Runaway Unjustified: While searching for a runaway teenager, police went to McBride's house, where the runaway was reportedly staying. Upon arrival, there was no sign of ongoing criminal activity. The officer was denied entry upon request, but entered anyway. McBride was arrested on an outstanding warrant, and evidence was seized. McBride moved to suppress the evidence, but the motion was denied. Although the facts and circumstances imparted to the officer were from a reliable source, they were insufficient to justify in a reasonable person a belief that McBride had committed any offense. Further, no exigent or emergency circumstances existed to support a compelling need for official action without first securing a warrant; therefore, warrantless entry into McBride's home was wrong. The Supreme

Court reversed the order of the trial court denying the motion to suppress the evidence and remanded. St. v. McBride, 1999 MT 127, 294 M 461, 982 P2d 453, 56 St. Rep. 512 (1999), following St. v. Dow, 256 M 126, 844 P2d 780, 49 St. Rep. 1168 (1992), and St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065, 55 St. Rep. 56 (1998).

Lawful Entry Into Home by Firefighter — Reasonable Expectation of Privacy Retained — Plain View Exception Inapplicable: A firefighter legally in Bassett's home performing mopup after a fire discovered apparent marijuana growing in a closet. The plants, visible because the closet door had burned away, were subsequently seized by a Deputy Sheriff without a warrant. When told that the plants had been discovered, Bassett waived Miranda rights and admitted growing marijuana but later moved to suppress the statement because it was the direct product of an unconstitutional search. The District Court admitted evidence from the search under the plain view exception and denied suppression of Bassett's confession. The court further held that Bassett no longer held a reasonable expectation of privacy in his closet because he did nothing to restrict entry into the home and because society would not view entry into a burned residence that was largely destroyed and open to the elements as an invasion of privacy. To determine the threshold question of whether the search was an unlawful intrusion into Bassett's privacy, the Supreme Court applied the criteria in St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997): (1) whether Bassett had an actual expectation of privacy; (2) whether society would recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion. Citing Mich. v. Tyler, 436 US 499, 56 L Ed 2d 486, 98 S Ct 1942 (1978), the court noted that a person retains a reasonable privacy interest in that person's home even when it has been damaged by fire. The court also followed U.S. v. Hoffman, 607 F2d 280 (9th Cir. 1979), for the proposition that the privacy expectation remains even when firefighters discover contraband. Although a firefighter is obviously justified and in fact expected by Montanans to enter a home to extinguish a fire, this does not mean that Montanans reasonably expect that the private sanctity of their homes will then be open to other government officials to search for evidence of unrelated criminal activity simply because the firefighter was already legitimately on the premises. The firefighter and the Deputy Sheriff each had separate reasons for entering the home. Therefore, two entirely separate justifications for each entry were required. There was no exigent circumstance, such as an immediate emergency, that justified the Deputy Sheriff's warrantless entry, nor did the plain view exception apply because the officer was not legally in the home when the evidence was seen. Further, Bassett did not need to take any affirmative steps to demonstrate that he retained his privacy interest. The warrantless search was unjustified, and Bassett's incriminating statement was the direct product of an illegal search and thus inadmissible by virtue of the exclusionary rule. St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410, 56 St. Rep. 447 (1999), distinguishing St. v. Bell, 737 P2d 254 (Wash. 1987), and St. v. Loh, 275 M 460, 913 P2d 592, 53 St. Rep. 226 (1996), and followed in Deserly v. Dept. of Corrections, 2000 MT 42, 298 M 328, 995 P2d 972, 57 St. Rep. 199 (2000). However, see St. v. Lewis, 2007 MT 295, 340 M 10, 171 P3d 731 (2007), in which the plain view doctrine did apply to the seizure and admissibility of potential evidence of arson seen by a Deputy Sheriff who initially entered a burning residence for fire suppression and who subsequently reentered the residence to secure the evidence.

Knowledge of Possible Burglary and Armed Threat to Officer by Shop Owner as Justifying Entering Shop and Conducting Sweep Search: At 3:30 a.m., a police officer noticed a pickup with its dome light on and a door open parked next to a pawn shop. A man whom the officer knew was under supervision of a probation officer walked out of the shop with several fishing gear items and told the officer that he was doing his laundry. Another officer arrived. The man appeared worried and near tears and told the officers that he worked at the shop and that he and the shop owner were doing inventory. An officer went to the door, loudly identified himself as a police officer, and entered the shop. The officer was justified in believing that a felony had been or was being committed and was therefore justified in entering the shop. When he entered the shop and the owner pointed a gun at him, shouted at the officer for several minutes, and told him to leave and when the officer talked him into putting the gun down, the officer was further justified in conducting a plain view protective sweep of the shop to look for other persons and weapons. Therefore, it was not error to deny a motion to suppress evidence found on a counter and on the shop owner's person and used to convict him of drug charges. St. v. Keating, 1998 MT 109, 288 M 447, 958 P2d 690, 55 St. Rep. 430 (1998).

Freedom From Unreasonable Search and Seizure in Hotel or Motel Room — Exigent Circumstances Exception to Warrant Requirement: The same protection against unreasonable search and seizure that applies to private residences extends to guests in hotel and motel rooms. One exception to the warrant requirement is when exigent circumstances and probable cause are

present. The exigent circumstances doctrine provides that a warrantless entry by law enforcement officials may be legal when there is a compelling need for official action and no time to secure a warrant. Exigent circumstances are circumstances that would cause a reasonable person to believe that entry or other relevant prompt action was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. The state can meet its heavy burden of showing the existence of exigent circumstances only by demonstrating specific and articulable facts to justify that the circumstances, as they appeared at the time of entry, would lead a reasonable officer to believe that someone in the house or hotel or motel room required immediate assistance. Exigent circumstances existed in the present case when: (1) the police responded to a dispatch that Wakeford was possibly suicidal and might harm himself; (2) after checking with the desk clerk, the officers heard two voices, male and female, arguing as the officers approached Wakeford's room, leading the officers to believe that they were about to confront a potential domestic abuse situation; (3) the officers spoke to Wakeford at the door and were unable to see inside the room or whether Wakeford was holding anything in his hands; (4) Wakeford was sweating and breathing heavily, and his eyes were dilated; and (5) the officers could reasonably believe that their immediate entry into the room was necessary to ensure the safety of the occupants and themselves. Under these circumstances, probable cause existed that Wakeford may have committed domestic abuse, justifying a warrantless search of the room. Evidence seized pursuant to the search was admissible. St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065, 55 St. Rep. 56 (1998), followed in St. v. Anderson, 1999 MT 60, 293 M 490, 977 P2d 983, 56 St. Rep. 252 (1999), followed, with regard to applicability of exigent circumstances, in St. v. McBride, 1999 MT 127, 294 M 461, 982 P2d 453, 56 St. Rep. 512 (1999), and followed, with regard to applicability of the exigent circumstances exception, in St. v. Gomez, 2007 MT 111, 337 M 219, 158 P3d 442 (2007). See also U.S. v. Gardner, 627 F2d 906 (9th Cir. 1980), St. v. Dow, 256 M 126, 844 P2d 780 (1992), and U.S. v. Gooch, 6 F3d 673 (9th Cir. 1993).

Constitutionality of Warrantless Police Search of Private Land Up to and Including Threshold of Residence — Concept of Curtilage Inapplicable: Hubbel sought to suppress evidence gathered by police from the common parking area, sidewalk, and porch of Hubbel's residence on grounds that the officers were not on the property legally when they first observed evidence, rendering the search and seizure unlawful. Rather than analyzing the facts in the context of curtilage, the Supreme Court applied St. v. Bullock, 272 M 361, 901 P2d 61 (1995), in deciding the extent to which Hubbel had a legitimate expectation of privacy on his private property. The police parked in a general parking area used by other visitors, and after observing blood evidence in the driveway, they walked along the sidewalk to the front porch and discovered bullet holes in the front door, as well as other evidence in plain view. The officers did not ignore any posted warnings, hop fences, open gates, or slip through bushes intended to screen the home from view. In fact, the officers did nothing other than what any casual visitor to the Hubbel home would do. Because the intrusion in this case was minimal, the entry onto Hubbel's property leading up to and including the threshold of the residence did not require a warrant. The concept of curtilage did not apply because there was no evidence that the area surrounding the home was put to any special use that would indicate that the surrounding area was intimately connected with the home itself or that Hubbel reasonably expected that the surrounding area should be treated the same as the home itself. St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997).

Retroactive Consent to Warrantless Search Disallowed: Hubbel voluntarily gave retroactive consent to a search of her property 5 months after police searched and seized evidence inside the Hubbel home. However, the requirement of advance justification, by virtue of a warrant or a carefully carved exception, is fundamental and inherent to all search and seizure cases. Applying the rationale in Terry v. Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968), the Supreme Court noted that exigent circumstances for conducting a warrantless search consist of circumstances that involve factors that exist when it is not practicable to secure a warrant, such as a mobile vehicle, the possible destruction of evidence, safety of police officers, or other emergency situations, and must be apparent at the inception of the search. Requiring prior consent is the only view that makes sense in light of the purposes behind the suppression rule, which serves to deter lawless police conduct by excluding illegally obtained evidence. Thus, retroactive consent may not be used to validate a search, and the evidence seized as a result of the unlawful search in this case was inadmissible. St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997).

Plain Feel Doctrine Adopted — Incidental to Investigatory Stop: Collard contended that ski goggles that were felt in his pant leg during a pat search conducted pursuant to an investigatory

stop were wrongfully seized because the goggles were not in plain view and their identity was not readily apparent, and therefore the goggles were improperly introduced into evidence. Applying Minn. v. Dickerson, 508 US 366, 124 L Ed 2d 334, 113 S Ct 2130 (1993), the Supreme Court adopted the "plain feel" corollary to the "plain view" doctrine. The plain feel doctrine states that if a police officer lawfully pats down a suspect's outer clothing and feels an object of a contour or mass that makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. If the object is contraband, its warrantless seizure is justified by the same practical considerations that inhere in the plain view context. In the present case, the ski goggles had a shape that could be immediately identifiable when touched, and the officer did not need to manipulate the object or touch it more than a few seconds to know what it was. The robbery suspect had reportedly worn ski goggles, and the officer's seizure of Collard's goggles was thus justified. St. v. Collard, 286 M 185, 951 P2d 56, 54 St. Rep. 1366 (1997).

Drugs Discovered in Response to House Fire — "Plain View" Seizure Upheld — "Plain View" Doctrine Clarified: Police officer Denham responded to a house fire and to the belief of bystanders that there were two people inside the home by kicking in the door of the home and crawling under thick smoke to a bedroom, where he discovered marijuana in spaghetti jars. When Loh came home from work, she was informed of the fire, was informed of her rights, and admitted that the marijuana was hers. The District Court denied Loh's motion to suppress the evidence of the marijuana plants. The Supreme Court affirmed and clarified the rules for the application of the "plain view" doctrine in Montana. The Supreme Court noted that many Montana cases have followed Coolidge v. N.H., 403 US 443 (1971), in determining that evidence in plain view be inadvertently discovered and that the seizure of evidence in plain view requires exigent circumstances (as opposed to requiring exigent circumstances for only the entry itself into the home). The Supreme Court noted that these requirements of Coolidge were not continued in the more recent case of Horton v. Calif., 496 US 128 (1990), and that the rationale of Horton was followed by the Ninth Circuit Court in G&G Jewelry, Inc. v. Oakland, 989 F2d 1093 (9th Cir. 1993). For these reasons, the Supreme Court overruled prior "plain view" cases to the extent that those cases were inconsistent with Horton and G&G Jewelry. Citing cases from other jurisdictions involving searches conducted in the course of responses to fire alarms, the Supreme Court then held that the seizure of the marijuana plants was lawful because the officers were lawfully in the house because of fire, the nature of the content of the jars was immediately apparent, and the officers had lawful access to the jars. St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996), followed in St. v. Doyle, 1998 MT 195, 286 M 185, 951 P2d 56, 55 St. Rep. 819 (1998), and St. v. Weaselboy, 1999 MT 274, 296 M 503, 989 P2d 836, 56 St. Rep. 1115 (1999), and distinguished in St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410, 56 St. Rep. 447 (1999).

Automobile Exception to Search Warrant Requirement — Probable Cause and Exigent Circumstances: A warrantless search of an automobile requires: (1) the existence of probable cause to search; and (2) the presence of exigent circumstances that make it impracticable to obtain a warrant under the circumstances. Defendant's daughter-in-law notified police that defendant was transporting a shipment of marijuana in the spare tire of his pickup truck and would arrive that evening. The information was consistent with reports from other informants regarding defendant's drug-related activity and, when coupled with defendant's appearance at the designated time in the described vehicle, established probable cause to stop the vehicle. The fact that there was neither enough time to obtain a warrant nor enough officers available to safely conduct the stakeout constituted appropriate exigent circumstances to conduct the search. The stop and search being legal, defendant's arguments regarding lack of consent and denial of a motion to suppress were immaterial. St. v. Allen, 256 M 47, 844 P2d 105, 49 St. Rep. 1130 (1992), followed in St. v. McCarthy, 258 M 51, 852 P2d 111, 50 St. Rep. 420 (1993), and St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456, 57 St. Rep. 1206 (2000). McCarthy was distinguished in St. v. Lott, 272 M 195, 900 P2d 306, 52 St. Rep. 696 (1995). See also Carroll v. U.S., 267 US 132, 69 L Ed 543, 45 S Ct 280 (1924), and Calif. v. Acevedo, 500 US 565, 114 L Ed 2d 619, 111 S Ct 1982 (1991).

Test for Search of Probationer — Knowledge of Drug Sales From Residence — Warrantless Search by Probation Officer Allowed: The test for a search by a probation officer in regard to one of the officer's probationers is reasonable grounds, which is less stringent than probable cause. The probation officer has a continued experience with the probationer, and the officer's expertise would be rendered meaningless by a warrant requirement. The delay and greater evidentiary burden of a warrant would substantially inhibit the effectiveness of probation. In this case, a warrantless search was reasonable when the probation officer was informed by the police that they had made a drug buy at the probationer's residence from a person who lived with the probationer. St. v. Hall, 249 M 366, 816 P2d 438, 48 St. Rep. 774 (1991).

Frisk Incident to Investigatory Stop: A peace officer may frisk an individual for weapons incident to making an investigatory stop. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), following Terry v. Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968).

Vehicular Stop Based on Information From Flyer or Bulletin: A law enforcement officer may make a vehicular stop if the officer has a reasonable suspicion, grounded in specific and articulable facts, that a person was involved in or is wanted in connection with a completed felony. This suspicion may be based on information obtained from a flyer or bulletin if the bulletin was issued on the basis of articulable facts supporting a reasonable suspicion. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), followed in St. v. Grimes, 1999 MT 145, 295 M 22, 982 P2d 1037, 56 St. Rep. 571 (1999). See also U.S. v. Hensley, 469 US 221, 83 L Ed 2d 604, 105 S Ct 675 (1985).

Existence of Exigent Circumstances — Warrantless Search: The Supreme Court applied the rule formulated in U.S. v. Kunkler, 679 F2d 187 (9th Cir. 1982), that holds that exigent circumstances exist to justify a warrantless entry, search, or seizure when police officers, acting on probable cause and in good faith, reasonably believe from the totality of circumstances that: (1) evidence of contraband will imminently be destroyed; or (2) the nature of the crime or character of the suspect poses a risk of danger to the arresting officers or third persons. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Valid Search of Wallet After Arrest: The District Court properly allowed into evidence the results of a postarrest, nonconsensual, warrantless search of defendant's wallet. The Supreme Court adopted the reasoning in U.S. v. Passaro, 624 F2d 938 (9th Cir. 1980), that a wallet is an element of clothing "which is, for a reasonable time following a legal arrest, taken out of the realm of protection from police interest". The search also satisfied the privacy guaranties of the Montana Constitution because the arrest reduced the arrestee's expectation of privacy. St. v. Holzapfel, 230 M 105, 748 P2d 953, 45 St. Rep. 53 (1988).

Delayed Seizure of Articles in Plain View: A seizure that is proper under the "plain view" exception may be delayed, so long as the delay is reasonable. St. v. Romero, 224 M 431, 730 P2d 1157, 43 St. Rep. 2309 (1986).

Warrantless Search of Girlfriend's Dwelling — Defendant's Expectation of Privacy: The defendant escaped from prison and hid in his girlfriend's nearby home. Police officers, who had a valid arrest warrant for the defendant, discovered him when they conducted a warrantless search of the dwelling. On appeal, the Supreme Court ruled that the defendant had a legitimate expectation of privacy in his girlfriend's home and has standing to challenge the constitutionality of the search based on an arrest warrant rather than a search warrant. Admission of the evidence obtained from the search was not harmless error even though the defendant had testified to the circumstances surrounding his escape. St. v. Kao, 215 M 286, 698 P2d 403, 42 St. Rep. 363 (1985).

Warrantless Search — Third-Party Right of Privacy: Police officers may not constitutionally enter the home of a third person in search of an escaped felon for whom they have a valid arrest warrant unless exigent circumstances exist and probable cause leads them to believe the suspect will be found on the premises. The duty of police officers to search for and arrest those who commit crimes must be balanced with the right of innocent citizens to be secure in the privacy of their homes against unreasonable police invasion. St. v. Kao, 215 M 277, 697 P2d 903, 42 St. Rep. 356 (1985).

Stop and Frisk Procedure Applicable to Automobiles: Where, upon investigating a possible burglary, the investigating officer stopped a suspicious looking automobile and noticed what appeared to be stolen property in the back seat of the car, which was driven off at a high rate of speed in the middle of the investigation, the District Court did not err in denying the defendant's motion to suppress the stolen property recovered from the automobile. The dictum in St. v. Rader, 177 M 252, 581 P2d 437 (1978), that stop and frisk principles do not apply to automobiles must be abandoned in light of the principle most recently announced in U.S. v. Cortez, 449 US 411, 66 L Ed 2d 621, 101 S Ct 690 (1981), that an assessment of whether a crime has been committed must be based upon all relevant circumstances and the evidence evaluated in light of the knowledge of a trained law enforcement officer. When a trained police officer has a particularized suspicion that the occupant of a vehicle is or has been engaged in criminal activity or is a witness thereto, a limited and reasonable investigatory stop and search is justified. St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981), followed in In re Blake, 220 M 27, 712 P2d 1338, 43 St. Rep. 143 (1986), St. v. Morris, 230 M 311, 749 P2d 1379, 45 St. Rep. 234 (1988), St. v. Lee, 232 M 105, 754 P2d 512, 45 St. Rep. 903 (1988), St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), St. v. Halvorson, 2000 MT 56, 299 M 1, 997 P2d 751, 57 St. Rep. 270 (2000), and St. v. Herbenson, 2001 MT 75, 305 M 68, 22 P3d 1128 (2001). See also Jess v.

St., 255 M 254, 841 P2d 1137, 49 St. Rep. 951 (1992), and In re Bauer v. St., 275 M 119, 910 P2d 886, 53 St. Rep. 65 (1996).

Probable Cause:

In a situation wherein police officers expect to make a warrantless arrest, the arrest must be based on probable cause. When that probable cause is based on a tip springing from an informant's personal observation, the informant's reliability becomes significant. If the reliability of the informant is based on someone else's statements, the police must make some further inquiry of the informant regarding the underlying circumstances of his conclusion that it is probable that an offense is being or has been committed. St. v. Ribera, 183 M 1, 597 P2d 1164 (1979).

A police officer's detection of the odor of marijuana emanating from inside an automobile, absent evidence of visible content, was insufficient probable cause for a warrantless search and subsequent arrest of the occupants on the basis of evidence seized in the search. St. v. Schoendaller, 176 M 376, 578 P2d 730 (1978).

Police detectives did not have probable cause to enter an upstairs room of an inn, arrest defendants for participating in a card game on unlicensed premises, and search the room because of the inability of the informant's tip to satisfy the two-pronged Aguilar test. St. v. Robey, 176 M 298, 577 P2d 1226 (1978).

Police officers who had been given a description of an automobile and its occupants, who were suspected of having recently robbed a pharmacy, had probable cause to believe the vehicle was carrying stolen property, and evidence obtained in a search of the automobile without a warrant was admissible. St. v. Spielmann, 163 M 199, 516 P2d 617 (1973), followed in St. v. Evjen, 234 M 516, 765 P2d 708, 45 St. Rep. 2096 (1988) (distinguishing U.S. v. Parr, 843 F2d 1228 (9th Cir. 1988)), and in St. v. McCarthy, 258 M 51, 852 P2d 111, 50 St. Rep. 420 (1993), and distinguished in St. v. Amor, 164 M 182, 520 P2d 773 (1974).

Automobile Search: The automobile exception to the warrant requirement requires two things: (1) the existence of probable cause to search; and (2) the presence of exigent circumstances, that is, it was not practicable under the circumstances to obtain a warrant. In the instant case there were no exigent circumstances. St. v. Cripps, 177 M 410, 582 P2d 312 (1978).

"Plain View" Doctrine:

A warrantless seizure of evidence under the "plain view" doctrine is justified only if the police officer had a prior justification for an intrusion in the course of which he inadvertently viewed contraband and exigent circumstances existed to render immediate seizure imperative. In this case the officer's valid visual observation merely furnished probable cause for issuance of a warrant; thus, the court was correct in granting a motion to suppress evidence. St. v. Lane, 175 M 225, 573 P2d 198 (1977), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Contraband found under a seat during an inventory of an automobile held in police custody was not in plain view, thus it was seized in violation of individual privacy and freedom from unreasonable searches. The inventory search was not justified by protection of the contents for the owner's benefit or protection of the police from claims for lost property beyond articles in plain view from outside the vehicle. St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), distinguished in St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994).

Marijuana and hashish found in a search of the defendant's purse were excluded since there was no valid reason for the officer to inspect the contents of defendant's purse and the "plain view" doctrine was not applicable. St. v. Hough, 163 M 47, 516 P2d 613 (1973).

The Sheriff, who was called to search for a prowler, was justified under this section in seizing items in plain view during such search. St. v. Gallagher, 162 M 155, 509 P2d 852 (1973), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Inadmissible Evidence in Alleged Bomb Threat: The trial court properly declared inadmissible that evidence which was seized in a warrantless search of the defendant's curtilage and secured by a wiretap of the defendant's phone and all testimony relating thereto. The State's reliance on the "plain view" doctrine and the theory that the telephone company personnel were authorized to secure the evidence was unsuccessful. St. v. Lewis, 173 M 1, 565 P2d 642 (1977).

Law Review Articles

The Fourth Amendment and Drug-Detecting Dogs, Even, 48 Mont. L. Rev. 101 (1987).

Search by Private Persons: State v. Long, Dobson, 47 Mont. L. Rev. 189 (1986).

Search and Seizure—Seizure of Purely Evidentiary Items Held Constitutional, (Warden, Maryland Penitentiary v. Hayden, 387 US 294, 18 L Ed 2d 782, 87 S Ct 1642), 29 Mont. L. Rev. 101 (1967).

The Constitutionality of Civil Inspections, 21 Mont. L. Rev. 195 (Spring 1960).

Marshall v. Barlow's, Inc. (98 Sup. Ct. 1816): Administrative Inspections and the Fourth Amendment, 9 Environmental Law 149 (Fall 1978).

Marshall v. Barlow's, Inc. (98 Sup. Ct. 1816) and the Warrant Requirement for OSHA "Spot Check" Inspections, 15 Idaho L. Rev. 187 (Fall 1978).

Collateral References

Validity of warrantless search of motor vehicle passenger based on odor of marijuana. 1 ALR 6th 371.

Validity of warrantless search of motor vehicle driver based on odor of marijuana—state cases. 123 ALR 5th 179.

Validity of warrantless search of other than motor vehicle or occupant of vehicle based on odor of marijuana—state cases. 122 ALR 5th 439.

Use of trained dog to detect narcotics or drugs as unreasonable search in violation of state constitutions. 117 ALR 5th 407.

Validity of warrantless search based in whole or in part on odor of narcotics other than marijuana, or chemical related to manufacture of such narcotics. 115 ALR 5th 477.

Validity of warrantless search of motor vehicle based on odor of marijuana—state cases. 114 ALR 5th 173.

Admissibility, in civil proceeding, of evidence obtained through unlawful search and seizure. 105 ALR 5th 1.

Constitutionality of secret video surveillance. 91 ALR 5th 585.

Federal and state constitutions as protecting prison visitor against unreasonable searches and seizures. 85 ALR 5th 261.

What constitutes compliance with knock-and-announce rule in search of private premises—state cases. 85 ALR 5th 1.

Validity of search or seizure of computer, computer disk, or computer peripheral equipment. 84 ALR 5th 1.

Permissibility and sufficiency of warrantless use of thermal imager or forward looking infra-red radar (F.L.I.R.). 78 ALR 5th 309.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant—state cases. 68 ALR 5th 343.

Validity of anticipatory search warrants—state cases. 67 ALR 5th 361.

Search and seizure: reasonable expectation of privacy in tent or campsite. 66 ALR 5th 373.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident)—state cases. 65 ALR 5th 407.

Belief that burglary is in progress or has recently been committed as exigent circumstance justifying warrantless search of premises. 64 ALR 5th 637.

Searches and seizures: reasonable expectation of privacy in contents of garbage or trash receptacle. 62 ALR 5th 1.

Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property—state cases. 61 ALR 5th 1.

Search and seizure: reasonable expectation of privacy in driveways. 60 ALR 5th 1, §11 superseded by 45 ALR 6th 643.

Observation through binoculars as constituting unreasonable search. 59 ALR 5th 615.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises. 51 ALR 5th 375.

Application of "plain-feel" exception to warrant requirements—state cases. 50 ALR 5th 581.

Sufficiency of description in warrant of person to be searched. 43 ALR 5th 1.

Propriety of execution of search warrant at nighttime. 41 ALR 5th 171.

Propriety of stop and search by law enforcement officers based solely on drug courier profile. 37 ALR 5th 1.

Search conducted by school official or teacher as violation of fourth amendment or equivalent state constitutional provision. 31 ALR 5th 229.

Search and seizure: lawfulness of demand for driver's license, vehicle registration, or proof of insurance pursuant to police stop to assist motorist. 19 ALR 5th 884.

Prisoner's rights as to search and seizure under state law or constitution—post-Hudson cases. 14 ALR 5th 913.

Lawfulness of search of person or personal effects under medical emergency exception to warrant requirement. 11 ALR 5th 52.

Search and seizure: reasonable expectation of privacy in public restroom. 74 ALR 4th 508.

Propriety of state or local government health officer's warrantless search—post-Camara cases. 53 ALR 4th 1168, §14[c].

Search and seizure: necessity that police obtain warrant before taking possession of, examining, or testing evidence discovered in search by private person. 47 ALR 4th 501.

Admissibility, in criminal case, of evidence discovered by warrantless search in connection with fire investigation—post-Tyler cases. 31 ALR 4th 194.

Lawfulness of warrantless search of purse or wallet of person arrested or suspected of crime. 29 ALR 4th 771.

Reasonable expectation of privacy in contents of garbage or trash receptacle. 28 ALR 4th 1219.

Photographic equipment: employment of photographic equipment to record presence and nature of items as constituting unreasonable search. 27 ALR 4th 532.

Knock and announce: sufficiency of showing of reasonable belief of danger to officers or others excusing compliance with "knock and announce" requirement—state criminal cases. 17 ALR 4th 301.

Electronic sensing device: use of electronic sensing device to detect shoplifting as unconstitutional search and seizure. 10 ALR 4th 376.

Cotenant: admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant—state cases. 4 ALR 4th 1050.

Adult relative: admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse—state cases. 4 ALR 4th 196.

Lessor: admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property—state cases. 2 ALR 4th 1173.

Husband and wife: admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident)—state cases. 1 ALR 4th 673.

Domestic employee or servant: admissibility of evidence discovered in search of defendant's property or residence authorized by domestic employee or servant. 99 ALR 3d 1232.

Children: admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child—state cases. 99 ALR 3d 598.

Blood tests: admissibility in criminal case of blood alcohol test where blood was taken from unconscious driver. 72 ALR 3d 325.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner. 57 ALR 3d 172.

Censorship and evidentiary use of unconvicted prisoners' mail. 52 ALR 3d 548.

Binoculars: observation through binoculars as constituting unreasonable search. 48 ALR 3d 1178.

"Furtive" movement or gesture as justifying police search. 45 ALR 3d 581.

"Fruit of poisonous tree": comment note on "fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search. 43 ALR 3d 385.

Private individual: admissibility, in criminal case, of evidence obtained by search by private individual. 36 ALR 3d 553.

Apartment or room to be searched in multiple-occupancy structure, search warrant: sufficiency of description of. 11 ALR 3d 1330.

Validity of consent to search given by one in custody of officers. 9 ALR 3d 858.

46-5-102. Scope of search incident to arrest.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter 38,] section 108-1.

The right to search a person incident to arrest has always been recognized in this country (Weeks v. U.S., 232 U.S. 383). What may be seized incident to an arrest has been set out by both federal and Montana cases. (See U.S. v. Rabinowitz, 339 U.S. 56; Gould v. U.S., 255 U.S. 298; State v. Benson, 91 Mont. 21, and State v. Wong You, 106 Mont. 347.) The above provision merely codifies the present law set forth in these decisions.

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GENERAL

Exigent Circumstances in Safety Sweep — Confession Related to Evidence Lawfully Seized Not Subject to Suppression: Officers arrested a suspect at Whisler's motel room, then entered the room in a safety sweep, where drugs were observed in plain view. Whisler was arrested and while at the detention center admitted possessing methamphetamine. Whisler contended that because the drugs were unlawfully seized at the motel room, the methamphetamine evidence should be suppressed as fruits of an unlawful search. However, exigent circumstances existed to warrant the safety sweep of the motel room, so the search was not unlawful, and because Whisler's admission did not stem from an unlawful search, the motion to suppress the methamphetamine evidence was properly denied. St. v. Whisler, 2008 MT 276, 345 M 292, 190 P3d 1098 (2008).

Inevitable Discovery Doctrine Exception to Exclusionary Rule on Inadmissibility of Evidence Obtained as Result of Unlawful Search — Sua Sponte Application by Supreme Court: Dickinson asserted that certain evidence discovered during a warrantless search of his motel room should be suppressed under the exclusionary rule as fruit of the poisonous tree because the discovery was not made during a search incident to arrest and because the search was not a justified protective sweep. The state contended that the search was conducted on grounds of safety and exigent circumstances. Although neither party raised the argument, the Supreme Court decided sua sponte to address the issue under the inevitable discovery doctrine exception to the exclusionary rule, which holds that fruit of the poisonous tree evidence is admissible if it is inevitable that the evidence would have been discovered apart from a defendant's confession. In this case, the officers were legally in the motel room, and there was more than sufficient evidence in plain sight to justify issuance of a warrant. Once the warrant was executed, the remainder of the evidence would have inevitably been discovered and was thus admissible under the inevitable discovery doctrine. St. v. Dickinson, 2008 MT 159, 343 M 301, 184 P3d 305 (2008). The Dickinson inevitable discovery doctrine was also applied in St. v. Hilgendorf, 2009 MT 158, 350 M 412, 208 P3d 401 (2009). See also St. v. Pearson, 217 M 363, 704 P2d 1056 (1985).

Particularized Suspicion Sufficient Justification for Request for Consent to Search Vehicle — No Illegal Detention — Motion to Suppress Properly Denied: Snell was stopped for speeding and was also cited for failure to carry proof of insurance. While writing out the citation in the patrol car, the officer asked Snell if he could search the vehicle, and Snell consented. The officer discovered drugs, and Snell was charged with possession and intent to distribute marijuana. Snell moved to suppress the evidence. Snell conceded that he had voluntarily consented to the search, and the state conceded that the officer did not have probable cause. The motion to suppress was denied, and Snell appealed. The Supreme Court considered both the consent and illegal detention issues. First, the court reasoned that the officer had particularized suspicion to stop the vehicle and that Montana law does not require additional justification for requesting consent, so Snell's voluntary consent was sufficient to justify the warrantless search of the vehicle (see St. v. Parker, 1998 MT 6, 287 M 151, 953 P2d 692 (1998)). Second, the court concluded that because the officer did not coerce or restrain Snell, order him to stay, or prevent Snell from exiting the patrol car, a reasonable person would have felt free to leave the patrol car upon completion of the traffic stop, so the poststop interaction between Snell and the officer was a voluntary exchange rather than an illegal detention or unlawful seizure (see St. v. Merrill, 2004 MT 169, 322 M 47, 93 P3d 1227 (2004), and St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004)). Snell's motion to suppress was properly denied. St. v. Snell, 2004 MT 269, 323 M 157, 99 P3d 191 (2004). See also St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Lack of Exigent Circumstances Justifying Warrantless Search of Fanny Pack — Motion to Suppress Evidence Properly Granted: After Lanegan was arrested for obstructing a peace officer and handcuffed, the officer proceeded to conduct a warrantless search of Lanegan's fanny pack and discovered drugs and drug paraphernalia. Lanegan was then charged with drug crimes. Lanegan moved to suppress the evidence, and the motion was granted. The state appealed, but the Supreme Court affirmed. A search incident to arrest may be conducted under the conditions in this section, but in this case, none of the conditions were present. The search would not have protected the officer or prevented Lanegan's escape because Lanegan was already handcuffed, nor would the search have resulted in discovery of anything that could have been used in or fruits of the crime of obstructing a peace officer. Warrantless searches are per se unreasonable, but one exception is when there are exigent circumstances that would cause a reasonable person to believe that prompt action is necessary to prevent physical harm, destruction of relevant evidence, escape, or some other consequence improperly frustrating legitimate law enforcement efforts. However, the search in this case did not rise to the level of exigent circumstances to allow

a warrantless search, and the motion to suppress was properly granted. St. v. Lanegan, 2004 MT 134, 321 M 349, 91 P3d 578 (2004).

Search of Clothing and Duffel Bag Near Arrestee Supported by Exigent Circumstances: Pursuant to a lawful warrant, Galpin was arrested while sleeping on a couch in a small house in the early morning hours and was found to be in possession of two bags of methamphetamine. His coat and a duffel bag were 4 to 6 feet away, and officers searched the clothing and bag and discovered keys that were subsequently found to open two storage facilities where additional drug manufacturing equipment was stored. Galpin moved to suppress the evidence, but the motion was denied. On appeal, the Supreme Court affirmed. The search was permissible both as a means of protecting the agents from attack as well as discovering and seizing the fruits of the crime. Additionally, the previous day, in another location, officers had found other equipment for manufacturing methamphetamine owned by Galpin in a similar duffel bag and reasonably suspected that the bag in Galpin's possession contained equipment and potentially toxic and explosive chemicals used in methamphetamine manufacturing, so the precautionary search of the bag was justified. Thus, the search was supported by exigent circumstances, and the denial of the motion to suppress was not in error. St. v. Galpin, 2003 MT 324, 318 M 318, 80 P3d 1207 (2003).

Invalid Warrantless Search of Defendant's Hands Absent Exigent Circumstances: Officers responding to a break-in found blood on doorknobs, light switches, broken glass, and other objects in the house and garage. Matching the description of the suspect, Hardaway was picked up near the scene and found to have blood on his hands. Hardaway was arrested for burglary, and during postarrest processing, blood was swabbed from his hands without permission or a warrant. The blood sample matched the blood evidence found at the scene. Hardaway moved to suppress blood swab evidence obtained from his hands after arrest, but the motion was denied. The District Court reasoned that the swabbing either was not a search, pursuant to St. v. Holzapfel, 230 M 105, 748 P2d 953 (1988), or was justified as a search incident to arrest, pursuant to St. v. Ulrich, 187 M 347, 609 P2d 1218 (1980). Hardaway appealed on grounds that the swabbing was clearly a search that was required to be justified by both probable cause and exigent circumstances and that no exigent circumstances existed because he was in custody at the time and a warrant could have been obtained. The Supreme Court agreed and reversed. The court adopted the analysis of what constitutes a search set out in Cupp v. Murphy, 412 US 291 (1973), holding that Hardaway had a reasonable expectation of privacy as to his person and personal security (overruling Holzapfel) and that the swabbing constituted a search subject to federal and Montana constitutional protections. Although his hands and the blood on them were exposed to the public for viewing, it was not the viewing that constituted a search, but rather the swabbing. Further, even though the swabbing could be considered a search incident to arrest pursuant to federal law and the bright-line rule in U.S. v. Robinson, 414 US 218 (1973), that requires no further justification than a lawful arrest for the search exception to apply, the Supreme Court opted to grant greater individual privacy rights protection to Hardaway based on the Montana Constitution, consistent with the prior holding in St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977). The court noted its consistent holdings that a warrantless search incident to an arrest must be commensurate with its underlying purpose of preventing an arrestee from using any weapons, escaping, or destroying incriminating evanescent evidence in the arrestee's possession, considered inherently anticipated exigent circumstances under subsections (1) through (3) of this section; however, to the extent that a warrantless search incident to a lawful arrest is conducted pursuant to subsection (4) of this section, which deals with discovering and seizing any persons, instruments, articles, or things that may have been used in the commission of or that may constitute evidence of the offense, specific and articulable exigent circumstances are also required to justify and render the search lawful (distinguishing and partially overruling Ulrich). Here, there were simply no exigent circumstances requiring a warrantless search. Hardaway was at the station house, under the full control of the police, with no present means of destroying the blood evidence. Hardaway could have consented to the swab or waited in discomfort until a warrant was obtained, but either way the evidence was going nowhere. Therefore, the swabbing of Hardaway's hands was not a valid search incident to arrest. St. v. Hardaway, 2001 MT 252, 307 M 139, 36 P3d 900 (2001), distinguished in St. v. Madplume, 2007 MT 11, 335 M 290, 150 P3d 956 (2007).

Reasonable Cause for Search of Probationer — Motion to Suppress Evidence of Search Properly Denied: As a condition of a suspended sentence for conviction of felony sale of drugs, Roper consented to warrantless searches of his person, vehicle, or residence. Roper was subsequently granted a conditional discharge from state supervision of his probation because he was serving a concurrent probation as a result of a federal criminal conviction. However, despite

the conditional discharge, the state reserved the right to warrantless searches and drug checks during the term of the state probationary sentence, and Roper was relieved only of the requirement to report to the state probation officer monthly. After a few months, the state probation officer became concerned that Roper was both using and selling drugs when two clients reported Roper's continued involvement with drugs. An informant told investigators that Roper stored drugs in a black leather pouch. Based on the gathered information and the close proximity of Roper's workplace to a school, the probation officer believed that reasonable cause existed to search Roper and, with other police officers, went to Roper's workplace and observed him outside involved in what appeared to be a drug transaction. They searched Roper but found no drugs in his possession. The officers went into the workplace and conducted a urinalysis on Roper, which tested positive. While there, the officers noticed a black leather pouch next to Roper's work gloves, seized it, and discovered methamphetamine. Roper was arrested, and the officers went to his house where additional drug evidence was discovered and seized. Roper moved to suppress all the evidence found at both his workplace and residence, contending that the probation officer did not have the right to perform any type of warrantless search and that the evidence seized at the residence was the result of the illegal search of the workplace. The motion was denied, and the Supreme Court affirmed. The probation officer's authority to conduct warrantless searches was extended by the waiver of privacy to which Roper agreed as a condition of probation. The officers were lawfully at Roper's workplace because they had authority to request a urinalysis and to search Roper's person, and the seizure of the black pouch was proper based on the plain view doctrine and information that the pouch was where Roper kept drugs. Further, because the evidence at the workplace was lawfully gathered, the District Court did not err when it denied the motion to suppress evidence gathered during the subsequent search of Roper's home. St. v. Roper, 2001 MT 96, 305 M 212, 26 P3d 741 (2001).

Random Recovery and Examination of Items Not Allowed Pursuant to Stop and Frisk — Premise of Plain Feel Doctrine: Heath was charged with possession of drugs and drug paraphernalia discovered during a warrantless pat-down search for weapons conducted during a stop and frisk. Heath moved for suppression of the evidence on grounds that a small leather coin purse and a 2-inch glass pipe could not reasonably have been mistaken for weapons, but the motion was denied. The state contended that the pat down was permissible and that the drug evidence found during the search was lawfully seized under the plain feel doctrine. Pursuant to St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), the state must satisfy two criteria for a stop and frisk to be valid at its inception: (1) the officer must have objective data from which an experienced officer can make certain inferences; and (2) the officer must have a resulting suspicion that the occupant of a vehicle was engaged in wrongdoing or was a witness to criminal activity. The frisk is to search for potential weapons, and the officer must suspect an object to be a weapon, or if the officer detects other contraband during the pat down for weapons, its incriminating character must be immediately apparent. The District Court determined that the small leather coin purse could not be mistaken for a weapon, but nevertheless concluded that it could have contained a weapon. However, that conclusion exceeded the permissible scope of a pat-down search, and the Supreme Court found no justification in removing the coin purse on the blanket assumption that it could contain a weapon. The court also found no basis for concluding that the glass pipe's incriminating nature was immediately apparent, and thus there was no basis for invoking the plain feel doctrine. An officer cannot randomly recover items from a suspect's clothing and proceed to examine them pursuant to a stop and frisk and then, after the fact, argue that the objects might have contained a weapon or were immediately apparent as contraband. Here, the warrantless search was per se unreasonable, and the state failed to prove that the search came within the reasonable scope of a stop and frisk. The Supreme Court reversed the District Court's denial of Heath's motion to suppress and remanded for further proceedings. St. v. Heath, 2000 MT 94, 299 M 230, 999 P2d 324, 57 St. Rep. 387 (2000), distinguishing St. v. Lamere, 226 M 323, 735 P2d 511 (1987).

Standing of Vehicle Passenger to Challenge Legality of Warrantless Search of Vehicle — Consent to Vehicle Search Extended to Closed Items in Vehicle: Parker was a passenger in a vehicle that was searched after the driver consented to a warrantless search. Parker's fanny pack was opened as part of the search, and suspected drug paraphernalia was found. Parker moved to suppress the evidence. The District Court determined that Parker lacked standing to challenge the search. Applying St. v. Bullock, 272 M 361, 901 P2d 61 (1995), the Supreme Court disagreed, noting that when the charge against the defendant includes an allegation of a possessory interest in the property that is seized, the defendant has standing to object to the prosecutorial use of that evidence, based on either the unlawful search of the location where it was found or its unlawful seizure. However, the District Court did not err in denying the motion

to suppress evidence seized during the search of the vehicle in this case because the officer could have reasonably believed that the driver's consent to search the vehicle extended to closed items in the vehicle. St. v. Parker, 1998 MT 6, 287 M 151, 953 P2d 692, 55 St. Rep. 16 (1998), following Fla. v. Jimeno, 500 US 248, 114 L Ed 2d 297, 111 S Ct 1801 (1991), and St. v. Rushton, 264 M 248, 870 P2d 1355 (1994), and followed in St. v. Wetzel, 2005 MT 154, 327 M 413, 114 P3d 269 (2005).

Evidence Taken From Purse Following Arrest Should Be Suppressed: Graham, a passenger in a car of which the driver was arrested, was arrested for outstanding warrants. The vehicle was to be retrieved by a neighbor, and Graham asked that her purse be left in the vehicle. Police brought the purse to the station where it was searched without a warrant and drugs were found. The District Court denied the motion to suppress the evidence. The Supreme Court held that none of the reasons for a warrantless search within the arrestee's immediate presence, as set forth in this section, are applicable in this case. The District Court erred in denying the motion to suppress. St. v. Graham, 271 M 510, 898 P2d 1206, 52 St. Rep. 541 (1995).

Plain View Doctrine Justifying Seizure of Contraband Pipe During Stop and Frisk Search for Weapons: After Stubbs was stopped on a reasonable suspicion of criminal activity, including speeding, reckless or careless driving, and eluding a peace officer, the officer noticed numerous weapons in the vehicle, providing a reasonable justification for searching Stubbs on the scene. During a pat-down search of Stubbs' clothing, the officer thought that a lump in Stubbs' pocket might be a deadly weapon. After removing the item to make sure that it was not a weapon, the item was in plain view and the incriminating character of the object, a brass pipe, was apparent. Absent any indication that the search was used as a pretext to discover illicit drugs or paraphernalia, the discovery of the pipe was inadvertent and seizure of the contraband was justified. St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Application of Inadvertent Discovery Rule: The cautious actions of law enforcement officials in seeking to protect the validity of a search warrant should not invalidate the inadvertent seizure of evidence or contraband when the officers conducting the search adhere to the intent contained in the warrant. St. v. Hembd, 235 M 361, 767 P2d 864, 46 St. Rep. 55 (1989), following U.S. v. $10,000 in U.S. Currency, 780 F2d 213 (2nd Cir. 1986). St. v. Hembd was overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Elements of Intimidation Present in Threat to Third Party — Probable Cause for Search: Defendant intimidated victims by pointing a gun at them in his car. Defendant also indicated the presence of another weapon in the trunk of the car and indicated his intention to use it to harm a third party. Victims viewed a second gun in the trunk but were not directly threatened with it. The District Court suppressed evidence found in the trunk after finding a sufficient nexus did not exist for probable cause because defendant gave no indication he intended to use the gun in the trunk to intimidate victims and because the second gun was not alleged to be contraband. The Supreme Court reversed, holding that defendant produced a fear in the victims that he intended and had the ability to harm the third party, constituting intimidation, and that viewing of the gun in the trunk established sufficient probability to authorize a search of the trunk. St. v. Hembd, 235 M 361, 767 P2d 864, 46 St. Rep. 55 (1989).

Area Within Immediate Presence or Control of Arrestee: The small confines of a trailer home bedroom and occupant's resistance to arrest dictate that the evidence seized from the bedroom was within the immediate presence or control of the occupant. Arresting officers were authorized to seize a rifle, knife, and other items without a warrant to protect themselves and to preserve evidence. St. v. Hammer, 233 M 101, 759 P2d 979, 45 St. Rep. 1326 (1988).

Officers Not Subject to Harm: Construing "area within such person's immediate presence" to mean the area from within which he might gain possession of a weapon or destructible evidence, the evidence seized from a car in this case was clearly beyond the permissible scope of a search incident to a lawful arrest. Defendants had been removed from their vehicles at gunpoint, told to lie face down on the ground, placed under arrest, given a pat-down search, and handcuffed. There was no conceivable way that any of them could have harmed the officers or gained possession of any evidence inside the car. St. v. Cripps, 177 M 410, 582 P2d 312 (1978).

Search Preceding Arrest: A search incident to a lawful arrest is not rendered illegal simply because it precedes rather than follows the arrest. This rule is subject to three limitations: (1) the officer must have been able to effect a lawful arrest at the time of making the search; (2) the actual arrest must be made substantially contemporaneously with the search; and (3) the search must satisfy the permissible scope and purposes of a search incident to a lawful arrest. St. v. Meadors, 177 M 100, 580 P2d 903 (1978).

Inventory Search — Not Justified: Contraband found under a seat during an inventory of an automobile held in police custody was not in plain view, thus it was seized in violation of

individual privacy and freedom from unreasonable searches. The inventory search was not justified by protection of the contents for the owner's benefit or protection of the police from claims for lost property beyond articles in plain view from outside the vehicle. St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), distinguished in St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994).

LAWFUL ARREST

Particularized Suspicion to Support Canine Sniff of Vehicle and Probable Cause for Warrant to Search Vehicle: Following arrest on outstanding warrants, a dog alerted on Stombaugh's vehicle, a warrant was obtained, and a drug search was conducted. Stombaugh contended that fruits of the search should have been suppressed because officers lacked particularized suspicion to conduct the canine sniff and lacked probable cause to obtain a warrant to search the vehicle. The Supreme Court disagreed and affirmed. Based on the facts that Stombaugh's family reported to police regarding Stombaugh's drug use and notified officers that Stombaugh would be visiting the family's home, Stombaugh's admission of pending drug charges in Washington and police confirmation of the pending felony drug charges, Stombaugh's urgency in seeking removal of the vehicle out of the county and an unusual desire to pay more than the vehicle was worth to do so, and discovery of a white pill on the vehicle dashboard and Stombaugh's evasiveness about the pill, the District Court did not err in holding that officers had particularized suspicion to conduct the canine sniff of the vehicle. In addition to the factors considered for particularized suspicion (except the white pill), the warrant application also described the alert of the drug dog on the vehicle, Stombaugh's admission that the vehicle contained drug paraphernalia, and the officers' experience and qualifications with regard to drug crime investigation. Under the totality of the circumstances, the District Court correctly concluded that probable cause existed for issuance of the search warrant. St. v. Stombaugh, 2007 MT 105, 337 M 147, 157 P3d 1137 (2007).

Search of Person for Weapons Incident to Lawful Arrest and Prior to Transport Not Unconstitutional — When Showing of Exigent Circumstances Required: While officers were executing a warrant at a Missoula residence, Cooney arrived and requested entry to retrieve his son who was a guest at the residence. Officers requested Cooney's identification before allowing entry and ran a routine check on Cooney for outstanding warrants. The officers discovered an outstanding warrant for Cooney on a traffic offense and placed Cooney under arrest. A pat-down search revealed that Cooney possessed a pipe and a small bag of marijuana. The officers requested a patrol officer to transport Cooney to Municipal Court. Upon transferring custody of Cooney to the patrol officer, the arresting officers indicated that their initial search had not been thorough, so the patrol officer conducted another pat-down search of Cooney before transport to ensure that Cooney had no hidden weapons. The patrol officer felt an object in Cooney's pocket that might have been a weapon, removed the object, and discovered that it was another pipe with methamphetamine residue, so Cooney was also charged with felony possession of methamphetamine. Cooney moved to suppress the methamphetamine pipe on grounds that the patrol officer exceeded the scope of search incident to Cooney's arrest and that the pipe was the fruit of an unconstitutional search and seizure, but the motion was denied. On appeal, the Supreme Court affirmed. Although warrantless searches are per se unreasonable under Montana law, one exception to the warrant requirement is a search conducted pursuant to a lawful arrest. The law does not require a showing of exigent circumstances when an officer conducts a warrantless search incident to arrest in order to protect the officer from attack, to prevent the person from escaping, or to discover and seize the fruits of the crime, but a showing of exigent circumstances is required if the search is conducted to discover and seize any persons, instruments, articles, or things that may have been used in the commission of or that may constitute evidence of the offense. In this case, the state justified the search as protecting the officer from attack and was therefore required to demonstrate that the search was commensurate with the purpose of preventing Cooney from using any weapon hidden on his person to attack the officer. In this case, the search was commensurate because the patrol officer presented substantial evidence of a reasonable belief that the object in Cooney's pocket might have been a weapon, and the patrol officer was not required to trust his personal safety to a perfunctory search performed by other officers who indicated that the initial search was insufficient to ensure the safe transport of a prisoner. St. v. Cooney, 2006 MT 318, 335 M 55, 149 P3d 554 (2006), followed in St. v. Whisler, 2008 MT 276, 345 M 292, 190 P3d 1098 (2008).

Search of Person Distinguished From Search of Possessions — Reduced Expectation of Privacy: The Supreme Court, citing U.S. v. Monclavo-Cruz, 662 F2d 1285 (9th Cir. 1981), distinguished between searches of person and searches of possessions, holding that once a person is lawfully seized and arrested, the reasonable expectation of privacy is diminished as to a

routine search of open personal property seized prior to incarceration since the state has a compelling interest in protecting prisoners from potential danger. Helena v. Lamping, 221 M 370, 719 P2d 1245, 43 St. Rep. 901 (1986), followed in St. v. Lamere, 226 M 323, 735 P2d 511, 44 St. Rep. 690 (1987). See also Colorado v. Bertine, 479 US 367, 93 L Ed 2d 739, 107 S Ct 738 (1987).

Apprehension of Felony Suspects — Compelling State Interest: Defendant issued 13 bad checks totaling $231.76 between July 17, 1981, and October 30, 1981. On November 23, 1981, a Justice of the Peace issued an arrest warrant on the charge of issuing a bad check. There were no previous efforts to secure defendant's presence to answer the charge or post bond. On December 4, 1981, a Sheriff arrested defendant at his home. During booking, a full search of defendant was conducted and a gram of hashish was discovered. Defendant pleaded guilty to the bad check charge. The District Court granted his motion to suppress the contraband as an invasion of privacy under St. v. Carlson, 198 M 113, 644 P2d 498 (1982). The State appealed, and the Supreme Court vacated and remanded, stating that Carlson was clearly limited to traffic-related misdemeanors. The court held that full custodial arrests supported by a warrant for felonies are proper, and that the apprehension of felony suspects is a compelling state interest which justifies a full custodial arrest pursuant to warrant. The right of privacy must yield to a compelling state interest. St. v. Wood, 205 M 141, 666 P2d 753, 40 St. Rep. 1173 (1983).

Seizure of Evidence in Defendant's Possession and in Plain View:

Because the officers' initial entry into the apartment and the subsequent warrantless arrest were valid, the seizure of the marijuana on the table was also proper under either a "plain view" theory or a seizure incident to a lawful arrest theory. St. v. Allen, 188 M 135, 612 P2d 199 (1980).

The facts and circumstances within the officers' personal knowledge at the time of the defendant's arrest would justify a man of reasonable caution to believe that an offense had been or was being committed, and there was sufficient probable cause to arrest the defendant. Thus, the seizure of a grocery sack in his possession and in plain view was made pursuant to a valid lawful arrest, justifying denial of a motion to suppress this evidence. St. v. Petko, 177 M 229, 581 P2d 425 (1978).

Neutron Activation Test for Gunpowder Residues: The defendant was arrested at the police station without a warrant, and the police administered a neutron activation test to determine if there were gunpowder residues on the defendant's hands. The defendant sought to suppress the results of the test on the grounds that his right to be secure against unreasonable searches and seizures was violated. The Supreme Court held that a search incident to a lawful arrest is an exception to the warrant requirement of the 4th amendment. The administration of a neutron activation test following the defendant's arrest was within the permissible scope of a search incident to a lawful arrest. Once the search incident to arrest is found to be reasonable the State has no further burden to show that the evidence is destructible. St. v. Ulrich, 187 M 347, 609 P2d 1218 (1980).

Marijuana Odor — Probable Cause for Warrantless Arrest and Search: Law enforcement officers had probable cause to believe an offense was being committed in the defendants' residence where, among other things, they smelled marijuana odor coming from the residence, and because of the presence of exigent circumstances, were justified in entering and arresting the defendants and searching the defendants and the premises immediately under their control. Thus, the constitutionality of the warrantless search and seizure condition of parole and probation status was irrelevant. St. v. Means, 177 M 193, 581 P2d 406 (1978).

What May Be Seized: When an arrest is lawfully made, the person arresting may take from the possession of the arrestee articles of property that reasonably would be of use in the trial. State ex rel. Wong You v. District Court, 106 M 347, 78 P2d 353 (1938).

UNLAWFUL ARREST

No Necessity for Arrest — Subtle Coercion for Consent to Enter Home — Subsequent Search Invalid: Defendant was involved in a minor traffic accident that was not his fault. He failed to produce his driver's license. The investigating officer later learned that the license was revoked. The officer made out "Notice to Appear and Complaint" forms for operating a vehicle while driver's license was revoked and for obstructing an officer, both misdemeanors. The officer gave the citations to the City Clerk for mailing to the defendant, but this was never done. A week later, the officer, thinking the citations had been mailed, requested and received an arrest warrant. Two officers went to defendant's house, awakened him, and informed him he was under arrest. Defendant requested he be allowed to get dressed. The officers told defendant they would have to accompany him and observed marijuana and bongs. They obtained a search warrant, returned and searched the house, and found small quantities of drugs and a stolen pistol. Defendant moved to suppress the evidence as obtained through an illegal search. The State

contended that full custodial arrest was reasonable, was not connected to any pretextual arrangement that the police suspected defendant as a drug user, and that the search warrant based on the "plain view" observation of the officers in the home was valid. The District Court declined to determine whether the arrest was a pretext but decided there was no necessity for a full custodial arrest and suppressed the evidence. The court held that under the totality of the circumstances, the defendant had not consented to the officers' entry. The validity of the officers' entry into the home is the fulcrum upon which the case turns. The State justified the entry on the claim of defendant's consent. The Supreme Court found that the subjective state of defendant, "half asleep" and in his underwear, and the unqualified statement of the officers that if defendant were to get dressed they would have to come into his house, without any other explanation of his rights, constituted subtle coercion, and the search was unconstitutional. The court found no prior justification or exigency for the entry by the officers. Their entry under the facts of the case was unreasonable, and it is that factor which converted their observation in the house into a warrantless search, which is always presumed unreasonable. This was especially true in light of the requirement of the State to establish a compelling interest in order to overcome defendant's reasonable expectation of privacy in his home. St. v. Carlson, 198 M 113, 644 P2d 498, 39 St. Rep. 802 (1982).

Visual Observation From Place Where Officer Has No Right to Be — Entry Into Home After Arrest: Defendant was involved in a minor traffic accident that was not his fault. He failed to produce his driver's license. The investigating officer later learned that the license was revoked. The officer made out "Notice to Appear and Complaint" forms for operating a vehicle while driver's license was revoked and for obstructing an officer, both misdemeanors. The officer gave the citations to the City Clerk for mailing to the defendant, but this was never done. A week later, the officer, thinking the citations had been mailed, requested and received an arrest warrant. Two officers went to defendant's house, awakened him, and informed him he was under arrest. Defendant requested he be allowed to get dressed. The officers told defendant they would have to accompany him and observed marijuana and bongs. They obtained a search warrant, returned and searched the house, and found small quantities of drugs and a stolen pistol. Defendant moved to suppress the evidence as obtained through an illegal search. The State contended that full custodial arrest was reasonable, was not connected to any pretextual arrangement that the police suspected defendant as a drug user, and that the search warrant based on the "plain view" observation of the officers in the home was valid. The District Court declined to determine whether the arrest was a pretext but decided there was no necessity for a full custodial arrest and suppressed the evidence. The court held that under the totality of the circumstances, the defendant had not consented to the officers' entry. The validity of the officers' entry into the home is the fulcrum upon which this case turns. The Supreme Court held that the distinctive factor which turns an observation into a search, in the constitutional sense, is whether the person making the observation has a right to be in the place where the observation is made. Evidence discovered in plain view from a place where officers are entitled to stand and where their claim to stand is not created as a pretext, solely to make legitimate otherwise impermissible intrusions, is not the subject of a "search". The court held that consent to enter the house was coerced and therefore the observations were a search and evidence seized was properly suppressed. St. v. Carlson, 198 M 113, 644 P2d 498, 39 St. Rep. 802 (1982).

Evidence Suppressed — Lack of Probable Cause: Evidence obtained when officers stopped a vehicle on the pretext of a traffic violation and arrested the defendant without probable cause was properly suppressed. Suspicion of an officer alone, unsubstantiated by some evidence upon which to base a belief that a crime is or has been committed, is not enough to establish probable cause, no matter what the subsequent search discloses. St. v. Rader, 177 M 252, 581 P2d 437 (1978).

Parking Meter Violation — Unlawful Search — Ordinance Unconstitutional: The search of the defendant's person under a warrant of arrest issued by a police magistrate for a parking meter violation was an unreasonable search since evidence at a suppression hearing did not disclose any basis for a mandatory custodial arrest. Furthermore, the city ordinance involved was unconstitutional to the extent that it precluded the defense that the defendant was not driving the vehicle when the parking violation occurred—depriving him of due process. St. v. Jetty, 176 M 519, 579 P2d 1228 (1978).

Law Review Articles

The Fourth Amendment and Drug-Detecting Dogs, Even, 48 Mont. L. Rev. 101 (1987).

Search of an Auto Pursuant to a Lawful Arrest, (St. v. Turner, 164 M 371, 523 P2d 1386 (1974)), Ellingson, 36 Mont. L. Rev. 350 (1975).

Collateral References

Arrest *key* 71, 71.1.

6A C.J.S. Arrest §§62 through 70.

5 Am. Jur. 2d Arrest §73.

Search warrant as authorizing search of structures on property other than main house or other building, or location other than designated portion of building. 104 ALR 5th 165.

After arrest: modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search. 19 ALR 3d 727.

Traffic violation: lawfulness of search of motor vehicle following arrest for traffic violation. 10 ALR 3d 314.

46-5-103. When search and seizure not illegal.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter 38,] section 108-14.

This section attempts to limit suppression of evidence to cases in which substantial rights have been infringed. It also attempts to codify the rule of State v. Nelson, 130 Mont. 466, pertaining to disclaimers and establishes a definite rule on the question of whether a defendant may plead the infringement of rights of a person other than himself as a ground for suppressing evidence.

Compiler's Comments

1991 Amendment: In (1)(a) substituted "evidence, contraband, or person" for "instruments, articles, or things"; inserted (2) concerning admissibility as evidence; and made minor changes in style.

Case Notes

Defendant Disclaimer 80
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DEFENDANT DISCLAIMER

No Privacy Interest in Rental Car by Unauthorized Driver Who Disavows Ownership of Contents: Hill was stopped for speeding and ticketed. After the stop was completed, the officer engaged Hill in small talk, inquiring where Hill was going and where his traveling clothes were. Hill replied that it was a quick trip, so no extra clothes were needed. Although no bags or clothes were in sight, the officer asked if Hill was carrying anything illegal. Hill said no, and the officer asked if Hill would consent to a search of the vehicle, to which Hill initially consented. In going over the terms of the consent form, Hill related that the car had been rented by a friend and that a search of the trunk was probably not a good idea because Hill did not know what the friend might have placed there. The officer then checked on the origin of the car and discovered that it had been acquired through a rental agency, but that the car was 2 days late in being returned, and that Hill was not an authorized driver. The agency asked that the car be impounded and gave permission for a search. The officers found two bags in the trunk, but Hill disclaimed ownership of the bags. A search of the bags revealed drugs and Hill's cell phone charger. Hill was then charged with drug crimes and later moved to suppress the evidence, but the motion was denied. On appeal, the Supreme Court affirmed. Hill had no reasonable expectation of privacy in the car's contents because he was not an authorized driver, had no relation to the car's owner or renter, and voluntarily disclaimed knowledge and ownership of anything in the car. Hill could not expect privacy in a car he illegally possessed, and once Hill waived control over the bags, he implicitly granted permission for the bags to be accessed. The search of the trunk was reasonable because permission was granted by the car owner, and the trunk contents were effectively surrendered by Hill, making the car owner's permission to search the vehicle sufficient to permit a full search of items found in the car. St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004), distinguishing St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), and St. v. Tackitt, 2003 MT 81, 315 M 59, 67 P3d 295 (2003).

Abandonment As Waiver of Right to Object: The Dumas Hotel in Butte was robbed. The police were notified, and an investigation was begun. Police officers observed LaMere's residence for 3 days, observing no activity. They contacted the landlord, who invited an officer to enter the apartment. The apartment appeared abandoned. Later that day the landlord signed a consent to search. During the search, police found what appeared to be a map of the Dumas Hotel and a piece of pantyhose that was apparently part of a mask. LaMere contended that the entry to the

apartment was illegal because no exigent circumstances existed which excused the lack of a warrant. He also contended that the requirement of filing an inventory and delivering a copy to the person from whose premises property was taken was not complied with. The Supreme Court held that because LaMere had abandoned the apartment he had disclaimed any right to object to the place being searched. On abandonment the landlord was in possession and had authority to consent to the search. There is no statutory requirement that items seized under a consent search be inventoried and reported to a magistrate. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983).

Scope and Validity of Disclaimer of Ownership — Automobile: The defendant had standing to contest the validity of a search of his automobile that resulted in the seizure of closed opaque bags of marijuana contained in the trunk even though, while under custodial interrogation, he had disclaimed ownership of the automobile. The disclaimer clause of this section must be interpreted in light of the fifth amendment privilege against self-incrimination. The disclaimer in this instance was not valid because it was given in the coercive atmosphere of custodial interrogation. Even if the disclaimer had been valid for the automobile, it would not necessarily operate as a disclaimer of closed containers in the automobile. St. v. Isom, 196 M 330, 641 P2d 417, 39 St. Rep. 137 (1982).

Disclaimer — Evidence Admitted: Evidence discovered during a search of the house occupied by the defendant's mother was properly admitted on a charge of burglary since the defendant disclaimed any interest in the property recovered from the search and had no possessory interest in his mother's home. St. v. Dess, 154 M 231, 462 P2d 186 (1969).

Disclaimer — Evidence Suppressed: Suppression of evidence found in the car in which the defendant was riding at the time of arrest was not error when the vehicle belonged to the defendant's companion and the defendant disclaimed any ownership or right to possession of it or any of the property taken from it. St. v. Nelson, 130 M 466, 304 P2d 1110 (1956).

NO RIGHT OF DEFENDANT INFRINGED

Seized Property Abandoned by Owner in Lawful Possession of State for Purposes Other Than Forfeiture — Subsequent Petition for Forfeiture Not Precluded: After Branam's vehicle was stopped by an officer following a report of an assault, Branam fled. The officer had the vehicle towed to a storage yard. An employee of the storage yard noticed cash and a weapon in the vehicle. A search of the vehicle yielded cash, a weapon, and drug paraphernalia, and a canine alerted to the smell of drugs on the cash but not on the vehicle. Branam was not charged with a drug-related offense, but numerous confidential informants stated that the vehicle had been used in drug transactions. The state petitioned for forfeiture of the property. Branam moved to dismiss the petition on grounds that the state did not have probable cause to seize the property. The District Court agreed and summarily dismissed the petition, and the state appealed. The Supreme Court reversed. Property is subject to forfeiture to the state if it is or has been used in connection with the manufacture, distribution, or sale of dangerous drugs, and property may be seized for the purpose of declaring it forfeit to the state if an officer has probable cause to believe that a conveyance has been or is intended to be used to unlawfully transport, keep, deposit, or conceal a controlled substance. Probable cause is required at the time of seizure if the state seizes property without a warrant solely for purposes of forfeiture. However, if property is lawfully seized for purposes other than forfeiture, nothing in 44-12-103 precludes a later petition for forfeiture when an investigation develops probable cause to believe that the property is subject to forfeiture. Search and seizure without a warrant may not be held illegal if a defendant has disclaimed any right or interest in the place or object searched or the evidence or contraband seized or if a right of the defendant has not been infringed by the search and seizure. Here, Branam's act of fleeing and leaving the vehicle and its contents on the street constituted abandonment sufficient to justify having the vehicle towed, and the warrantless discovery of the cash and weapon by the towing company employee did not infringe on Branam's right of privacy. Probable cause to seize property exists when an officer's knowledge is sufficient to warrant a reasonable person to believe that an offense has been committed, and when a vehicle is stopped and the occupants of the vehicle immediately flee, suspicions of an offense connected to the vehicle arise. Thus, when the officer took possession of the vehicle, sufficient probable cause existed to cause seizure of the property and allow further investigation. Additionally, nothing required that Branam be charged with a criminal offense to allow forfeiture of the property. St. v. Branam, 2006 MT 300, 334 M 457, 148 P3d 635 (2006).

Assistance for Search: Defendant signed a consent form for the search of his home. The consent form authorized the deputy to search. The Supreme Court, citing St. v. Yoss, 146 M 508, 409 P2d 452 (1965), held that the consent neither expressly nor by implication prohibited the

deputy from obtaining the assistance of burglary victims in the search. St. v. Rodgers, 257 M 413, 849 P2d 1028, 50 St. Rep. 335 (1993).

Privacy Section of Montana Constitution — Contemplates Invasion Only by State Action: Sheriff's officers, armed with a search warrant, gained entrance to the defendants' rented house after their landlord, who was trespassing at the time, discovered a large number of marijuana plants growing there and reported his discovery to the Sheriff. The narrow issue on appeal was whether the fruits of a search conducted by a private citizen, without any type of governmental involvement, are properly the subject of exclusion. The Supreme Court overruled the well-established line of cases, holding that private searches invade privacy rights protected by the privacy section of the Montana Constitution. The Supreme Court held that the privacy section of the constitution contemplates privacy invasion only by state action. Unless specifically provided otherwise, citizens' rights articulated in the constitution proscribe only state action. Therefore, if a private citizen, such as the landlord in this case, invades the privacy of another citizen, there is no violation of the constitution. The exclusionary rule is a rule of court procedure to deny admission of the fruits of illegally seized evidence to deter unlawful police activities and to preserve the integrity of the judiciary. In this case, judicial integrity does not require exclusion of the evidence. St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985), followed in St. v. Malkuch, 2007 MT 60, 336 M 219, 154 P3d 558 (2007).

No Warrantless Search Where Defendant Hands Over Murder Weapon: Where defendant was asked by police officers if a knife was involved in an altercation in which police officers were informed that defendant participated, and defendant answered "yes" and handed the knife to the police, no search by the police was involved and thus no warrantless search and seizure without consent was involved which would justify suppression of the knife. St. v. Graves, 191 M 81, 622 P2d 203, 38 St. Rep. 9 (1981), followed in St. v. Arthun, 274 M 82, 906 P2d 216, 52 St. Rep. 1133 (1995).

Standing to Challenge Constitutional Violations: The rule in Montana is that a defendant does not have standing to challenge violations of the constitutional rights of a codefendant or third party by law enforcement authorities. Furthermore, codefendant's consent to a search made it a lawful search. St. v. Coleman, 177 M 1, 579 P2d 732 (1978).

"Open Fields" Doctrine: Marijuana plants discovered in an old corral on unrestricted property were in an area not constitutionally protected from unreasonable search and seizure because of Montana's recognition of the "open fields" doctrine. St. v. Charvat, 175 M 267, 573 P2d 660 (1978).

SUBSTANTIAL RIGHTS NOT PREJUDICED

Search Warrant Procedural Irregularity Not Affecting Defendant's Substantial Rights: Defendant contended that because of a procedural error on the part of investigating officers who were executing a search warrant, the District Court erred when it did not suppress the seized evidence. The error was detected and corrected within 24 hours. An error in the manner in which notice of seized articles is given is an irregularity in the proceedings that does not affect the substantial rights of the accused and thus does not constitute reversible error. The corrected receipt effectively gave defendant notice of seized items. St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998).

Failure to Fill in Name of Officer Obtaining Warrant Not Grounds for Suppression of Evidence: The defendant appealed his conviction on the basis that the evidence obtained under a search warrant should have been suppressed because the space for the name of the officer applying for the warrant had been left blank in the heading of the warrant. The Supreme Court held that the omission did not substantially affect the defendant's rights and that to suppress evidence when the officer applied for the warrant, served the warrant, and executed the return of service for the warrant would be an irrational result. The Supreme Court also indicated that the requirement that the officer be named presumes that the officer will have knowledge of the area to be searched and is therefore more than a formality and that the nonconformity must be carefully examined to see if the interests of the defendant have been compromised. St. v. Pipkin, 1998 MT 143, 289 M 240, 961 P2d 733, 55 St. Rep. 567 (1998).

No Prejudice Suffered Through Typographical Error on Warrant: Defendant claimed that because a search warrant was dated June 19, 1991, but was executed on June 18, 1991, the warrant was invalid and law enforcement was without authority to execute the warrant. However, the discrepancy between the dates was adequately explained by the state and was merely technical; thus, the defendant's substantial rights were not affected or prejudiced through the typographical error. St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994).

Failure to Display and Leave Copy of Warrant: The defendant claimed that the evidence against him should be excluded because the arresting officers did not display the search warrant

upon entering his house nor did they leave a copy of the warrant. The Supreme Court, relying on Illinois precedent, held that the requirements that the warrant be displayed and a copy left on the premises were ministerial only and that the failure to comply with these requirements did not void an otherwise valid search. St. v. Chatriand, 243 M 375, 792 P2d 1107, 47 St. Rep. 1062 (1990).

Failure to Make Return: The defendant failed to demonstrate any prejudice to his substantial rights by an officer's failure to make a return of an item of evidence; therefore, it was not rendered inadmissible. St. v. Lenon, 174 M 264, 570 P2d 901 (1977).

Retention of Property — Mere Technical Error: When clothes were taken from the defendant incident to a lawful arrest, the retention of the property by the police upon the release of the defendant was a mere technical error which did not compel suppression of the evidence by means of a Writ of Supervisory Control. State ex rel. Mankin v. Wilson, 174 M 195, 569 P2d 922 (1977).

Fatally Defective Warrant: A search warrant erroneously directed to the judge and naming no particular peace officer to serve it was fatally defective, and the defect was not a technical mistake cured by this section. State ex rel. Stief v. District Court, 168 M 87, 540 P2d 968 (1975).

Notice of Origin of Warrant: Prejudicial error was found when a City Court Judge issued a warrant containing a District Court title (with supporting documents containing the title also). The petition for warrant did not supply notice to the subject of the warrant concerning its origin and to whom he could address his grievances. St. v. Tropf, 166 M 79, 530 P2d 1158 (1975).

ADMISSIBILITY IN OTHER PROCEEDINGS

Reasonable Relationship Between Items Seized and Motive for Crimes Charged — Scope of Warrant Not Exceeded: Bar-Jonah was charged with impersonating a police officer and carrying a stun gun. During a search of Bar-Jonah's residence, police seized cameras, photo albums, film negatives, and various other items that Bar-Jonah contended were not related to the charges in the search warrant. Bar-Jonah's motion to suppress the items was denied, and on appeal, the Supreme Court affirmed. Relying on U.S. v. Clark, 31 F3d 831 (9th Cir. 1994), Bar-Jonah contended that allowing the seizure of fruits and instrumentalities of the offense was overbroad; however, in St. v. Quigg, 155 M 119, 467 P2d 692 (1970), the Supreme Court held that items may be seized if there is a reasonable relationship between the items and the motive for the charged crime and that it is sufficient to establish a fair probability that items sought in a warrant application are connected to that crime. In this case, based on all the facts and circumstances, the items were reasonably related to the criminal behavior enumerated in the warrant application and to Bar-Jonah's motive for impersonating a police officer and carrying a stun gun. Additionally, under Andresen v. Md., 427 US 463 (1976), the fact that items seized may later be used to form an evidentiary basis of another charge does not require suppression of the evidence. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Use of DNA Sample From Unrelated Investigation Not Violative of Right to Privacy — Waiver of Privacy Upon Consent to Particular Search: Notti contended that the use of a DNA profile from an unrelated sexual assault case, in which he was convicted, violated the right to privacy on a subsequent charge of deliberate homicide. The argument failed because Notti had consented to the withdrawal of a blood sample to be used for DNA testing, and a defendant's voluntary consent to a search constitutes waiver of any reasonable expectation of privacy with respect to the place searched (or blood or DNA), and the permitted search is lawful. St. v. Notti, 2003 MT 170, 316 M 345, 71 P3d 1233 (2003). See also St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993).

Inventory Search Incident to a Lawful Arrest: Armstrong was arrested for shoplifting. Shoplifting is a misdemeanor for which bail bond schedules are established in Yellowstone County. The arresting officer however refused to accept the scheduled bond because he knew that Armstrong was a major suspect in the Lords homicide. During an inventory search of Armstrong after his arrest, a $100 bill was found which connected Armstrong to the Lords homicide. Armstrong argues that the police should have released him on bail and therefore the inventory search was illegal and the evidence should be suppressed. The court said that under the circumstances the police not only had the right to refuse the bail bond, but they had a duty to detain him. The arrest was lawful and the inventory search was incident to a lawful arrest. Since the $100 bill was lawfully seized, it is admissible in the homicide trial. St. v. Armstrong, 189 M 407, 616 P2d 341 (1980).

Admissibility of Suppressed Evidence in Proceedings Other Than Trial: Evidence of drugs seized in a search conducted under a defective warrant, although not admissible in any prosecution for possession of the drugs, may properly be considered in revoking a previously deferred sentence. St. v. Thorsness, 165 M 321, 528 P2d 692 (1974).

Collateral References

Search and seizure: what constitutes abandonment of personal property within rule that search and seizure of abandoned property is not unreasonable—modern cases. 40 ALR 4th 381.

Part 2
Search Warrants

Part Case Notes

Franks Hearing Not Warranted Absent Showing of Misstatements or Omissions in Search Warrant: Defendant moved to suppress all items seized under an allegedly insufficient search warrant or alternatively for an evidentiary hearing pursuant to Franks v. Del., 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1978), to establish claims of omission and misstatements of material fact contained in the search warrant application. The motion to suppress was denied. In a supplemental order, the District Court found that the application contained no deliberate falsehoods or material omissions that would require excising that information from the application for determination of probable cause pursuant to Franks. Upon review, the Supreme Court affirmed, holding that defendant's arguments of alleged omissions and misstatements, including the fact that the primary informant was a convicted felon and was paid for his tip, did not justify a Franks hearing. St. v. Garberding, 245 M 356, 801 P2d 583, 47 St. Rep. 2157 (1990), followed in St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997).

Same Officer Applying for and Serving Warrant — "Sanford" Inapplicable: Defendant claimed the undersheriff rather than a detective should have sworn to the information in a warrant application, and therefore evidence should be suppressed under State ex rel. Sanford v. District Court, 170 M 196, 551 P2d 1005 (1976). However, Sanford did not apply when the same officer applied for, was named in, and served the warrant. The mandate that a warrant be directed to a particular officer accords with the requirement that the warrant be served by one of the officers mentioned in its direction. St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989).

Inaccuracies in Application Not to Defeat Warrant When Probable Cause Established: Defendant contended that inaccuracies in an affidavit filed in support of a request for a search warrant rendered reliance on it void as a matter of law. Although the Supreme Court does not condone the presence of inaccuracies in search warrant applications, in this case, after excising the inaccurate portions of the statements, the affidavit still established sufficient probable cause to issue the warrant. St. v. Hembd, 235 M 361, 767 P2d 864, 46 St. Rep. 55 (1989). See also Franks v. Del., 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1977).

Application and Search Warrant in Combination Describing Thing to Be Seized — Same Officer Applying for and Serving Warrant: A search warrant, standing alone, would be invalid for its failure to particularly describe the thing to be seized, which thing was described only in the application for the search warrant. The application and the warrant when read in combination adequately described the thing to be seized. If the warrant had been directed to an officer other than the officer who made and signed the application, it would have been invalid; however, in this case the same officer signed the application, served the warrant, and seized the contraband. The District Court properly denied defendant's motion to suppress even though the warrant was constitutionally defective. St. v. Peterson, 227 M 503, 741 P2d 392, 44 St. Rep. 1268 (1987), followed in St. v. Broell, 249 M 117, 814 P2d 44, 48 St. Rep. 605 (1991), and St. v. Pipkin, 1998 MT 143, 289 M 240, 961 P2d 733, 55 St. Rep. 567 (1998).

Electronic Surveillance of Suspect — Place to Be Searched: An informant was fitted with an electronic device authorized by court order to monitor the conversations in a drug buy from a named individual, but the order did not contain a specific location to be searched under the provisions of 46-5-201 (now repealed). The Supreme Court held that the geographic location of an electronic surveillance of a particular person is tied to the whereabouts of the suspect. The phrase in 46-5-201 (now repealed) describing what may be searched ("the thing, place, or person") is disjunctive; thus, the person whose conversation is to be overheard when named in the surveillance order is sufficiently precise to meet constitutional requirements. St. v. Coleman, 189 M 492, 616 P2d 1090, 37 St. Rep. 1661 (1980).

Equity of Retroactive Application — Hurdle Not Made: Armstrong sought to suppress evidence obtained in two searches. To suppress the evidence, the court would have to retroactively apply State ex rel. Sanford v. District Court, 170 M 196, 551 P2d 1005 (1976), which invalidated search warrants directed to "any police officer in this state". There is a three-part test to determine whether a decision should be applied retroactively. The third part of the three-part test to determine whether to apply a rule retroactively requires the court to consider the equity of retroactive application. Armstrong fails to make the third hurdle. The Sanford rule

is intended to support and improve the integrity of the factfinding process. Retroactive application in this case would exclude relevant and reliable evidence. In addition, both the court issuing the search warrants and the police are entitled to rely on the rule in effect at the time the warrants were issued. The court declined to apply the Sanford rule retroactively. St. v. Armstrong, 189 M 407, 616 P2d 341 (1980).

Specificity of Warrant: All that was needed to meet the requirements of specificity was that an officer with reasonable effort could ascertain the auto intended to be searched and its owner, if possible. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

To Whom Warrant Directed:

Having previously disapproved the practice of directing search warrants "to any peace officer of this state", the court ordered the suppression of evidence seized under such a warrant in the present case. State ex rel. Sanford v. District Court, 170 M 196, 551 P2d 1005 (1976). See also St. v. Meidinger, 160 M 310, 502 P2d 58 (1972); St. v. Snider, 168 M 220, 541 P2d 1204 (1975).

When the same officer applied for the warrant and executed it, the fact that it was directed "to any peace officer of this State" was not a fatal defect since no prejudice resulted to the defendant; but the court again condemned the practice of issuing search warrants to any peace officer. St. v. Snider, 168 M 220, 541 P2d 1204 (1975).

A search warrant erroneously directed to the judge was defective since the judge is not a peace officer. State ex rel. Stief v. District Court, 168 M 87, 540 P2d 968 (1975).

A search warrant directed to "any peace officer of this state" was a valid warrant. St. v. Meidinger, 160 M 310, 502 P2d 58 (1972).

Notice of Origin of Warrant: Prejudicial error was found when a City Court Judge issued a warrant containing a District Court title (with supporting documents containing the title also). The petition for warrant did not supply notice to the subject of the warrant concerning its origin and to whom he could address his grievances. St. v. Tropf, 166 M 79, 530 P2d 1158 (1975).

Description of Place and Property:

Search warrants stating the street address of the house to be searched contained a sufficient description of the premises. St. v. Paschke, 165 M 231, 527 P2d 569 (1974).

A warrant which directed law enforcement personnel to search a certain described vehicle sufficiently described the object of the search. St. v. Meidinger, 160 M 310, 502 P2d 58 (1972), distinguished in St. v. Ballew, 163 M 257, 516 P2d 1159 (1973).

A search warrant must be complete in itself as to the description of the premises to be searched. State ex rel. King v. District Court, 70 M 191, 224 P 862 (1924).

When probable cause for issuance of a search warrant was shown, disclosing the time, place, and manner of an alleged violation of the liquor law, the warrant could validly issue, notwithstanding that the complaint did not set forth the time of commission of offense. St. v. Tesla, 69 M 503, 223 P 107 (1924).

General Warrant:

Search warrant which described the premises to be searched as "two cabins located near the Duck Creek 'Y', near West Yellowstone, Montana, near the office building at Koelzer's Duck Creek cabins" was of insufficient particularity where there were three cabins in the area of the office building and where police had good reason to believe that only one of the houses contained controlled substances. St. v. Ballew, 163 M 257, 516 P2d 1159 (1973), distinguished in St. v. Cope, 250 M 387, 819 P2d 1280, 48 St. Rep. 949 (1991).

Search warrants which incorporated the phrase "any .22 caliber pistol" and "any other property or evidence they might discover that may connect to the demise" of deceased was not a "general warrant", and therefore was not constitutionally invalid. St. v. Quigg, 155 M 119, 467 P2d 692 (1970), distinguished in St. v. Nanoff, 160 M 344, 502 P2d 1138 (1972).

Actions Which Do Not Lie Against Officer: Claim and delivery does not lie against Sheriff on theory of wrongful and negligent loss of possession; conversion does not lie where no facts are alleged that he instigated or assisted in the alleged wrongful taking; trespass and trespass on the case do not lie unless the injury is "proximate result" of Sheriff's wrongful or negligent acts or defaults. Harri v. Isaac, 111 M 152, 107 P2d 137 (1940).

Nature of Proceeding: The issuance of a search warrant by the District Court is a judicial proceeding. St. v. Tesla, 69 M 503, 223 P 107 (1924).

Part Law Review Articles

Consent Searches in Montana: Basic Elements of the Test for Voluntariness, Parish, 38 Mont. L. Rev. 327 (1977).

Authority to Issue Search Warrants, (St. v. Tropf, 166 M 79, 530 P2d 1158 (1975), and St. v. Snider, 168 M 220, 541 P2d 1204 (1975)), Spita, 37 Mont. L. Rev. 274 (1976).

Part Collateral References

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises. 51 ALR 5th 375.

Application of "plain-feel" exception to warrant requirements—state cases. 50 ALR 5th 581.

Sufficiency of description in warrant of person to be searched. 43 ALR 5th 1.

Propriety of execution of search warrant at nighttime. 41 ALR 5th 171.

Propriety of stop and search by law enforcement officers based solely on drug courier profile. 37 ALR 5th 1.

Description: sufficiency of description, in search warrant, of apartment or room to be searched in multiple-occupancy structure. 11 ALR 3d 1330.

46-5-212. Pawnbroker to surrender stolen property — warrant.

Compiler's Comments

1997 Amendment: Chapter 12 in (2)(a) substituted "administrative head, or the administrative head's designee, of the investigating agency" for "chief law enforcement officer"; in (2)(c), after "pawnbroker", inserted "or dealer"; and made minor changes in style.

1995 Amendment: Chapter 310 at end of first sentence in (1) substituted "upon issuance of an administrative warrant by a peace officer" for "unless demanded by a peace officer", at beginning of second sentence inserted "Following expiration of the 30-day period", and inserted last sentence authorizing pawnbroker or dealer to appeal validity of warrant in Justice Court or Municipal Court during 30-day period; inserted (2) defining administrative warrant; and made minor changes in style.

1993 Amendment: Chapter 344 near end of first sentence, after "30 days", inserted "unless demanded by a peace officer and, upon demand" and at end deleted "upon service of a search warrant by a peace officer pursuant to 31-1-401 through 31-1-406" and inserted second sentence requiring a receipt for surrendered property; and made minor changes in style.

46-5-220. Authority to issue search warrant.

Commission Comments

1991 Comment: This statute is an adaptation of the federal rule that specifically addresses who may issue and request a search warrant. See Rule 41(a), Fed. R. Crim. P. (1986). Montana's 1987 code authorized any judge to issue a warrant without limitation and also permitted any person to apply for a warrant. See 1987 MCA 46-5-202(1). This statute changes the 1987 code in two ways.

First, the statute limits those persons who may request a search warrant to the City or County Attorney, the Attorney General, or any peace officer. The 1987 code that allowed any person to request a search warrant was considered too broad. The limitation was imposed to reflect the general practice and to avoid questions of whether a private person may request a search warrant.

Second, this statute limits the authority of Municipal Court Judges or Justices of the Peace to issue search warrants outside their jurisdiction. This limitation reflects the general jurisdiction of these judges. The statute allows a District Court Judge to order a search and seizure anywhere in the state.

The statute also establishes a distinct rule concerning the authority to issue a warrant.

Case Notes

Validity of Search Warrant Issued by Previously Substituted Judge: A search warrant was issued by a judge who had previously been substituted from the case. Defendant contended that the warrant was void ab initio because the substituted judge had no jurisdiction to issue the warrant. The Supreme Court disagreed. Pursuant to this section, a search warrant may be issued by any District Judge within the state. The judge therefore had general authority to issue the warrant, and the warrant was not void. St. v. Dasen, 2007 MT 87, 337 M 74, 155 P3d 1282 (2007), distinguishing Erickson v. Hart, 231 M 7, 750 P2d 1089 (1988), and St. v. Vickers, 1998 MT 201, 290 M 356, 964 P2d 756 (1998).

Application for Search Warrant Signed by Deputy County Attorney of Another County — Search and Seizure Not Illegal if Any Irregularity Has Not Affected Substantial Rights of Accused — Exclusionary Rule Not Automatically Applied: The Deputy County Attorney of Lake County signed an application for a search warrant to be executed in Sanders County. The defendant moved to suppress all evidence seized as a result of the warrant. The District Court denied the motion. On appeal, the Supreme Court did not address the question of the authority of a Deputy County Attorney from one county to apply for a search warrant to be executed in another county. Because the warrant was sufficient under the constitution, the fact that the

application for the warrant was signed by the Deputy County Attorney of another county did not affect the defendant's substantial rights under the constitution, the search and seizure was not illegal, and the evidence should not have been suppressed. The exclusionary rule should not be automatically applied when there is a technical violation of a statutory requirement. St. v. West, 1998 MT 282, 291 M 435, 968 P2d 289, 55 St. Rep. 1155 (1998).

46-5-221. Grounds for search warrant.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter 38,] section 108-3.

This section is designed to set forth the requirements essential to obtain a search warrant: facts showing probable cause made under oath, particular description of the things to be seized. Further, it should be noted the section contemplates the actual presence, before the magistrate, of the individual making the application. The intention of this section is to follow U.S. Supreme Court decisions on this point (e.g., Jones v. U.S., 362 U.S. 257; Aguilar v. State of Texas, 84 S. Ct. 1509, 378 U.S. 108 (1964)).

Compiler's Comments

1991 Amendment: In introductory clause, after "judge", substituted "shall" for "may" and after "affirmation" deleted "before the judge"; in (1), after "states", inserted "facts sufficient to support probable cause to believe"; at end of (2) substituted "support probable cause to believe that evidence, contraband, or persons connected with the offense may be found" for "show probable cause for issuance of the warrant"; in (3) substituted "object" for "things"; in (4) substituted "who or what is" for "the things"; and deleted former (2) through (4) that read: "(2) Whenever the application is made by telephone, the applicant's telephonic oath or affirmation is considered to have been made before the judge, and the sworn or affirmed telephonic testimony must be electronically recorded by the judge on a recording device in the custody of the judge when the application is made. The recording must be retained in the court records and transcribed verbatim, including the time and date of recording, as soon as possible thereafter.

(3) Whenever a law enforcement officer wishes to obtain a search warrant by telephone, he shall first contact the county attorney or a deputy county attorney. If the county attorney or deputy county attorney is convinced that a warrant is justified and that the circumstances require its immediate issuance, he shall telephone the judge and state that he is convinced that the warrant should be issued by telephone. The judge shall then telephone the officer at the number provided by the county attorney or deputy county attorney, and the officer shall make his application as provided in subsection (2). If the judge approves a warrant, the officer shall sign the warrant with his own name and the judge's name. A search warrant issued upon the telephonic request of a person other than the county attorney or a deputy county attorney is not valid unless the procedure provided for in this subsection is followed.

(4) A search warrant issued upon any telephonic request is invalid unless it is subsequently signed by the issuing judge or his successor"; and made minor changes in style.

Applicability of Commission Comments: The applicability of the commission comments should be scrutinized in light of amendments made after 1967.

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GENERAL

Failure to Prove Falsity of Warrant Application — Motion to Suppress Properly Denied: Shelton moved to suppress evidence from a drug search based on the assertion that the warrant application mischaracterized statements upon which the application was based. The Supreme Court found that the alleged mischaracterization was merely a difference in semantics, not proof of a false statement in the application. The trial court gave Shelton the opportunity to challenge the veracity of the application but denied the motion to suppress, and the Supreme Court affirmed. St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008). Following conviction on drug charges in a different county but stemming from the same incident, Shelton raised an identical claim of the insufficiency of the search warrant based on false information. Having considered and dismissed the argument in Shelton, id., the Supreme Court denied review of the claim under res judicata. Further, there was no indication that the District Court in the

subsequent case considered information not contained in the warrant application, so Shelton's second conviction was also affirmed in St. v. Shelton, 2008 MT 321, 346 M 114, 193 P3d 943 (2008).

Authorization to Search Garage No Justification of Search of House, Even if Items in Garage Are Portable to House: A search warrant application that supported search of defendant's unattached garage did not justify a search of the house, and the fact that the suspected crime was operation of a meth lab and that materials for operating such a lab could be searched for under the search warrant and are easily portable and thus could be moved between a house and a garage did not justify the search of the house. St. v. Graham, 2004 MT 385, 325 M 110, 103 P3d 1073 (2004).

Reasonable Relationship Between Items Seized and Motive for Crimes Charged — Scope of Warrant Not Exceeded: Bar-Jonah was charged with impersonating a police officer and carrying a stun gun. During a search of Bar-Jonah's residence, police seized cameras, photo albums, film negatives, and various other items that Bar-Jonah contended were not related to the charges in the search warrant. Bar-Jonah's motion to suppress the items was denied, and on appeal, the Supreme Court affirmed. Relying on U.S. v. Clark, 31 F3d 831 (9th Cir. 1994), Bar-Jonah contended that allowing the seizure of fruits and instrumentalities of the offense was overbroad; however, in St. v. Quigg, 155 M 119, 467 P2d 692 (1970), the Supreme Court held that items may be seized if there is a reasonable relationship between the items and the motive for the charged crime and that it is sufficient to establish a fair probability that items sought in a warrant application are connected to that crime. In this case, based on all the facts and circumstances, the items were reasonably related to the criminal behavior enumerated in the warrant application and to Bar-Jonah's motive for impersonating a police officer and carrying a stun gun. Additionally, under Andresen v. Md., 427 US 463 (1976), the fact that items seized may later be used to form an evidentiary basis of another charge does not require suppression of the evidence. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Reasonable Expectation of Privacy in Lost Wallet — Evidence Obtained From Search of Lost Wallet Subject to Suppression: Hamilton's lost wallet was turned into the Bozeman police, who opened it to determine ownership. In doing so, the police discovered prescription drugs. Hamilton confessed that the drugs were not prescribed for her, and she was arrested and convicted. On appeal, Hamilton asserted that she retained an expectation of privacy in the lost wallet and that the fruits of the search of the wallet should be suppressed. The Supreme Court agreed. In determining whether an unlawful search of the wallet occurred, the court applied St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), looking at whether Hamilton had an actual expectation of privacy that society was willing to recognize as objectively reasonable and at the nature of the state's intrusion. When a person intentionally abandons property, the expectation of privacy is abandoned as well. However, when property is not intentionally or voluntarily abandoned, the expectation of privacy remains substantially intact. Thus, Hamilton's expectation of privacy was diminished only to the extent necessary for the police to determine ownership. The police search exceeded what was necessary to determine ownership of the wallet and was not justified by any exception to the warrant requirements. Therefore, the warrantless search was illegal, and the evidence obtained as a result of the search should have been suppressed. Hamilton's conviction was reversed. St. v. Hamilton, 2003 MT 71, 314 M 507, 67 P3d 871 (2003).

Evaluation of Reliability of Confidential Tip — Unreliable Tip as Only Grounds for Investigative Stop — Infringement of Right to Privacy: Following weeks of surveillance instigated by a confidential tip intimating drug activities, the Billings police observed no suspicious drug-related activities conducted by defendants, but after receiving a confidential tip that defendants would be driving from Billings to Bozeman to sell marijuana, officers stopped and searched defendants' vehicle and arrested defendants for drug possession. Defendants contended that insufficient objective data inferring criminality existed to justify the investigative stop. The Supreme Court applied the analysis in St. v. Pratt, 286 M 156, 951 P2d 37 (1997), to evaluate the reliability of the informant's tip. The court distinguished between a concerned citizen who reports a chance encounter with crime as a civic duty and a confidential informant who works with police by reporting on the illegal activities of others. A citizen informant is presumed to be telling the truth, but a confidential informant does not enjoy the same presumption of veracity. Further, for a tip to support a finding of probable cause, police must know the identity of the informant, trust from experience or presumption that the informant is telling the truth, and discern that the informant's information about the alleged crime derives from the informant's personal observations. Officers must then evaluate the veracity, reliability, and basis of knowledge of the informant to determine whether the report supports reasonable suspicion. If a tip is anonymous and lacks any indication of the basis for the

informant's opinion, the tip must be corroborated through the observation of suspicious activity that alerts officers to the possibility of a violation. Corroboration of a tip with innocent information may lend an unknown or untested tipster some credibility, but this indicia of reliability does not obviate the relevance of the tipster's basis of knowledge as a factor in the evaluation. In the context of particularized suspicion, because the quantum of suspicion is less, an unreliable tip requires corroboration that supports an inference of criminality by direct police observation of suspicious activity and consideration of the modes of patterns of operation of certain kinds of lawbreakers, and mere police corroboration of innocent facts is insufficient. Here, defendants engaged in no observed criminal activity, and their travel plans were equally consistent with innocent behavior. Although the traffic stop was initially made to check a temporary sticker on the vehicle, once the sticker was found to be valid, grounds for the stop ended and no further police intrusion was warranted. St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003), following St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), and distinguishing Ala. v. White, 496 US 325 (1990). See also St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000).

Failure by Investigating Officer to Preserve Record of Citizen Informant Statement Made in Controlled Environment — Judicial Distrust Extended to Truthfulness of Declarations: When a law enforcement officer, absent exigent circumstances or another compelling reason, fails to memorialize in some manner the statement of a witness or informant made at the station house or in a similarly controlled environment and when the statement forms the substantial basis for the issuance of a search warrant or otherwise provides the grounds for the state's invasion of a fundamental constitutional right or interest guaranteed to a defendant, that failure will be viewed with distrust in the judicial assessment of the truthfulness of the state's declarations made in the search warrant application, to the extent that those declarations are based on the citizen informant's statements. St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Modification of Franks Procedure for Challenging Veracity of Information in Application for Search Warrant: In deciding that a criminal defendant may challenge the truthfulness of factual statements in an application for a search warrant, the Supreme Court adopted the procedure set out in Franks v. Del., 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1978). The Franks procedure requires not only that the defendant show that the application contained false statements, but also that the defendant make a substantial showing that the false statements were made knowingly, intentionally, or with a reckless disregard for the truth, in the form of an offer of proof containing affidavits, sworn statements, or other reliable witness statements tending to prove that the false statements were deliberately made. Adopting the rationale set out by Justice Trieweiler in concurring with St. v. Feland, 267 M 112, 882 P2d 500, 51 St. Rep. 994 (1994), the court modified its use of the Franks procedure, holding that a better procedure would be to require the defendant to make a substantial preliminary showing that false information was included in the application for a warrant or in the affidavit in support of the application. If that showing is made, a hearing must be held wherein the defendant must prove by a preponderance of the evidence that the information is untrue. If proved untrue, that information must be excised from the application and a determination then made as to whether there is sufficient probable cause without the excised information. If there is not, the search warrant must be voided and the fruits of the search excluded. Thus, a defendant need not prove that the person providing false information did so knowingly, intentionally, or with a reckless disregard for the truth before the false statements may be excised from the application. If false information exists, it must be excised from the application regardless of whether the information was included mistakenly, unintentionally, or negligently because misstatements and inaccuracies, whether intentional or unintentional, might otherwise produce the same constitutionally impermissible result, of a search based on something other than probable cause. St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999), modifying St. v. Sykes, 194 M 14, 663 P2d 691 (1983), St. v. Mosley, 260 M 109, 860 P2d 69 (1993), and St. v. Feland, 267 M 112, 882 P2d 500, 51 St. Rep. 994 (1994), and followed in St. v. Minez, 2004 MT 115, 321 M 148, 89 P3d 966 (2004). On remand, after excising the officer's distrustful statements from the search warrant application, the District Court concluded that probable cause existed based on the facts from the application that were consistent with the boy's testimony and that the warrant to search Worrall's property was properly issued, so Worrall's motion to suppress the evidence of the search was dismissed. Worrall appealed. The Supreme Court noted that probable cause must be determined exclusively from the four corners of the application and must be based on a determination of whether, given all the circumstances set forth in the application, there is a fair probability that contraband or evidence of a crime will be found in a certain place. Worrall did not challenge the truthfulness of

any of the unexcised facts, and the boy's statements were presumed reliable in light of his sincerity, the fact that he had not previously been in trouble, and the fact that he voluntarily went to the Sheriff's office to report his observations. St. v. Worrall, 2001 MT 57, 304 M 341, 22 P3d 182 (2001), followed in St. v. Clifford, 2005 MT 219, 328 M 300, 121 P3d 489 (2005).

Search Warrant Based in Part on Illegal Information — Motion to Suppress Denied — Reviewing Court to Conduct De Novo Review of Search Warrant Application: Police officers went to defendants' trailer home to check out a tip about marijuana being grown in the home. Defendants were arrested after the officers saw a marijuana pipe on a shelf. An officer went down the hall and saw and seized marijuana plants growing in a bedroom. The officers then got a search warrant and seized additional drug evidence. Defendants moved to suppress the plants seized without a warrant and the additional evidence seized pursuant to the warrant on the basis that it was tainted. The District Court granted the motion to suppress the plants on the basis that no exception to a warrantless search excused the illegal search and denied the motion to suppress the evidence seized with a search warrant. The Supreme Court held that when the issuance of a search warrant is based in part on illegally obtained information, the reviewing court shall excise the illegally obtained information from the application for search warrant and review the remaining information de novo to determine whether probable cause supported the issuance of a search warrant, overruling the use of the "great deference" standard of review in such cases. The Supreme Court held that the marijuana pipe and the citizen tip established probable cause for the issuance of the search warrant. The test is not to determine whether each individual fact presented in the application for search warrant establishes probable cause, but to determine from the totality of the circumstances whether there is probable cause. St. v. Kuneff, 1998 MT 287, 291 M 474, 970 P2d 556, 55 St. Rep. 1173 (1998).

Facts Provided by Nonconfidential Informant Self-Authenticating — Omissions and Misstatements Raised by Defendant Held Immaterial for Purposes of Determining Necessity for Franks Hearing — Issues Not Raised on Appeal Held Nonreviewable: Dotts was arrested for assault and disorderly conduct and, in the course of an interview with a detective, offered information on a marijuana-growing operation that was being run by Adams, in exchange for leniency on the charges. Dotts subsequently disclosed, without any commitments from the police, that Adams ran the marijuana-growing operation at a certain location, which Dotts himself helped establish, and that Adams and his son drove certain vehicles described by Dotts. The house and the vehicles were subsequently confirmed by detectives, a search warrant was obtained, a marijuana-growing operation was discovered, and Adams was arrested. Adams sought to suppress the evidence, arguing that a detective's statement in the warrant application that "Mr. Dotts asked for nothing . . . and I have offered him nothing . . ." in the way of leniency was untrue and that certain facts contained statements that were made by Dotts and that turned out to be incorrect. The Supreme Court distinguished St. v. Valley, 252 M 489, 830 P2d 1255 (1992), and St. v. Kaluza, 272 M 404, 901 P2d 107 (1995), explaining that, unlike those cases, the case before it involved a nonconfidential informant whose identification was known to the police. Declining to follow a procedure urged by defendant Adams that would establish a policy of "zero tolerance" for intentional misstatements or omissions in applications for search warrants because the argument was raised for the first time on appeal, the Supreme Court followed the procedure outlined in Franks v. Del., 438 US 154 (1978), and applied in Montana in St. v. Sykes, 194 M 14, 663 P2d 691 (1983), which requires a defendant to make a substantial showing that false statements were knowingly or intentionally made, requires the reviewing court to disregard any such statements, and then requires the court to determine if the remaining facts demonstrate probable cause. Following St. v. Garberding, 245 M 356, 801 P2d 583 (1990), and other cases, the Supreme Court found that the misstatements and omissions in the warrant application raised by Adams did not, in light of Dotts' admission against interest that he helped set up the marijuana-growing operation, cast doubt on the credibility of the other information given by Dotts. For these reasons, the Supreme Court held that the misstatements and omissions were immaterial in determining Dotts' credibility and that, even if Dotts had been a confidential informant, the information that he gave was sufficiently corroborated to establish probable cause. Adams also raised the issue that the search warrant was overbroad, but relying upon St. v. Henderson, 265 M 454, 877 P2d 1013 (1994), the Supreme Court held that because the issue had been raised by Adams for the first time on appeal, the Supreme Court would not consider the issue. St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997), followed in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), and followed in St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Search of Defendant's Truck Invalid: The Beaverhead County Sheriff's Office was contacted and informed that Lott was going to receive a shipment of drugs in the mail. The officers obtained

a warrant to search Lott's house and his three vehicles on the basis that the vehicles might be used to distribute the drugs. When the package arrived, Lott was at work and asked a coworker to deliver the package to him at work. When Lott left work, he was stopped, his truck was searched, and the drugs were found. The Supreme Court held that the search of the truck was invalid because the warrant did not contain any specific facts demonstrating probable cause that the drugs would be located in the vehicle. The Supreme Court also held that the search of the truck did not come under the automobile exception to the warrant requirement based on probable cause and exigent circumstances because of the lack of exigent circumstances. St. v. Lott, 272 M 195, 900 P2d 306, 52 St. Rep. 696 (1995).

Warrant Proper for Seizure of Beer and Wine Served Without Valid License: Investigators complied with constitutional and statutory requirements for search and seizure when they: (1) knew a crime was being committed and were able to state of their own knowledge that defendant was serving beer without a valid license; (2) established reasonable cause; (3) were able to describe the place to be searched and articles to be seized; (4) showed the warrant to defendant while executing the search; and (5) provided defendant with a copy of the warrant and supporting paperwork. St. v. Barnes, 232 M 405, 758 P2d 264, 45 St. Rep. 1150 (1988).

Statutory Procedures Not Followed — Search Warrant Voidable, Not Void: Although the arresting officer and the Justice of the Peace did not follow the statutory procedures for telephonic search warrants, the procedural defects rendered the warrant voidable, not void ab initio. In light of sufficient grounds for issuance, the warrant was valid. As stated in Harri v. Issac, 111 M 152, 107 P2d 137 (1940), a ministerial officer is justified in the execution of, and must execute, all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued. Collins v. St., 232 M 703, 755 P2d 1373, 45 St. Rep. 878 (1988).

Speed With Which Affidavit Based on Past Activity Becomes "Stale": Generally speaking, when the affidavit in support of a search warrant recites a mere isolated violation, probable cause based on that violation dwindles rather quickly with the passage of time. However, when the affidavit recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984).

Affidavit Drawn in Anticipation of Offense Not Defective: Where an affidavit supporting an application for a warrant stated the facts of the delivery of a dangerous drug to the defendant and was prepared prior to such delivery, the Supreme Court held that the affidavit was not defective and did not show that the state intended to entrap the defendant. There is nothing inherently wrong in preparing an affidavit in anticipation of an expected violation; nor did the state, by preparing the affidavit, cause possession to happen, as the UPS package containing the drug would have been delivered to the defendant in any event. St. v. Kelly, 205 M 417, 668 P2d 1032, 40 St. Rep. 1400 (1983).

Marijuana in Unfenced Garden — Observation From Road by Police With Spotting Scope: When the State does not violate an individual's legitimate expectation of privacy, an unreasonable search has not taken place. Where no reasonable expectation of privacy exists, there is neither a search nor a seizure under the fourth amendment to the United States Constitution or Art. II, sec. 11, Mont. Const. There was no search when police stood on county road and used a spotting scope to look for marijuana in garden surrounded by open fields and the marijuana obtained pursuant to a warrant to search garden was properly used as direct evidence in prosecution for criminal possession of dangerous drugs. St. v. Bennett, 205 M 117, 666 P2d 747, 40 St. Rep. 1133 (1983).

Landlord's Inadvertent Observation as Basis for Search Warrant — Controlled Substances: The defendant, who had signed a lease allowing his landlord the right to enter the defendant's apartment, borrowed a vacuum cleaner from the landlord, who, upon entering the defendant's room to retrieve the vacuum, saw light coming from a closet and inadvertently discovered marijuana and drug paraphernalia. The District Court did not err in denying the defendant's motion to suppress the evidence taken after a search warrant was obtained. The landlord was justified in entering the room to show it to prospective lessees or to retrieve the vacuum. Once the landlord was in the apartment, he was justified in inspecting the closet to see if the cause of the light constituted a fire hazard. The landlord could, under the circumstances, permit the police officer to observe the items in the closet, and the officer's observation could be used as a basis for the warrant. St. v. Sayers, 199 M 228, 648 P2d 291, 39 St. Rep. 1309 (1982).

Search Warrant and Search Based on Marijuana Obtained by Trespassing Neighbor Illegal: The issuance of a search warrant and the subsequent search based solely on a sample of marijuana obtained by defendant's curious neighbor by means of an illegal trespass were

improper and illegal. The evidence obtained by the search was properly suppressed by the District Court. St. v. Helfrich, 183 M 484, 600 P2d 816 (1979).

Warrant Issued by Tribal Court: The Supreme Court declined to address the applicability of Montana law versus that of the Blackfeet Tribal Law and Order Code to the admissibility in a State prosecution of a non-Indian of evidence seized on the Blackfeet Indian Reservation by Blackfeet tribal police acting under authority of a search warrant issued by the Blackfeet Tribal Court because both the State and the defendant agreed that under either law the search warrant and affidavit were defective and the evidence must be suppressed. St. v. Stenson, 175 M 523, 575 P2d 72 (1978).

Limited by Statute: The use of search warrants is not to be extended by construction to any case not clearly covered by statute. State ex rel. Streit v. Justice Court, 45 M 375, 123 P 405 (1912).

ELECTRONIC SURVEILLANCE

Recording Face-to-Face Conversation With Consent of Informant Without Warrant Violates Defendant's Right to Privacy and Constitutes Unreasonable Search: In two separate cases, consolidated by the Supreme Court, the defendants Goetz and Hamper pleaded guilty to felony distribution of dangerous drugs but reserved their right to appeal the denial of their motions to suppress the warrantless monitoring and recording of their face-to-face conversations with an informant wearing a wire who had consented to the procedure. In the case of Goetz the recorded conversation had taken place in Goetz's residence, and in Hamper's case the recorded conversation had taken place in his vehicle. The Supreme Court stated that Art. II, sec. 10 and 11, Mont. Const., when taken together afford citizens a greater right to privacy that, in turn, provides broader protection than the Fourth Amendment of the United States Constitution in situations involving searches and seizures occurring in private settings. The Supreme Court overruled St. v. Brown, 232 M 1, 755 P2d 1364 (1988), to the extent that it relied only on federal law and held that warrantless electronic monitoring of face-to-face conversations with the consent of one party is lawful. The Supreme Court found that the recorded conversations between the defendants and the informant took place in the private residences or vehicles of the defendants and were not conducted where other individuals were present, and therefore the defendants had exhibited actual subjective expectations of privacy in the face-to-face conversations. The Supreme Court also found that the defendants' privacy expectations were expectations that society was willing to accept as reasonable, and the conversations therefore constituted searches within the contemplation of Art. II, sec. 10 and 11, Mont. Const. The Supreme Court further held that the consent of the informant did not fall under the consent exception to unlawful warrantless searches and that the state could not rely on the particularized suspicion standard rather than the probable cause requirement in Art. II, sec. 11, Mont. Const., for the issuance of a warrant because the state's intrusion into the defendants' privacy expectations by electronic monitoring and recording of their conversations was not a minimal intrusion not rising to a level requiring probable cause. The Supreme Court concluded that the electronic monitoring and recording of the defendants' conversations without a warrant or the existence of an established exception to the warrant requirement violated the defendants' rights under Art. II, sec. 10 and 11, Mont. Const. St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

Warrantless Use of Thermal Imaging as Unconstitutional Search: The use of thermal imaging in a criminal investigation to detect heat and infrared radiation from outside a structure, such as that generated by an indoor marijuana growing operation, constitutes a search under Art. II, sec. 11, Mont. Const. The privacy interests of Art. II, sec. 10, Mont. Const., are also implicated by the use of thermal imaging technology. In the present case, defendants housed activities that they wished to keep private in an enclosed structure on posted, fenced property behind locked gates. As such, defendants had a subjective expectation of privacy in the heat signatures of activities, intimate or otherwise, pursued within the confines of their private homes and enclosed structures, which they did not knowingly expose to the public. Montana's Constitution affords citizens broader protection from warrantless governmental intrusion in search and seizure cases than does the United States Constitution. This heightened expectation of privacy is one that society is willing to recognize as objectively reasonable. Therefore, use of thermal imaging technology by the government in the absence of a search warrant requires the demonstration of a compelling state interest closely tailored to effectuate only that compelling interest, not simply enforcement of the criminal statutes. In the absence of these factors, use of the technology violated defendants' right to privacy. St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997), following St. v. Solis, 214 M 310, 693 P2d 518 (1984), St. v. Young, 867 P2d 593

(Wash. 1994), U.S. v. Ishmael, 48 F3d 850 (5th Cir. 1995), U.S. v. Cusumano, 67 F3d 1497 (10th Cir. 1995), and St. v. Bullock, 272 M 361, 901 P2d 61 (1995).

Admissibility of Recording of Warrantless Face-to-Face Conversation by Police Use of Body Wire Transmitting Device: Warrantless consensual electronic monitoring of face-to-face conversations by the use of a body wire transmitting device, when performed by law enforcement officers while pursuing their official duties, does not violate the constitutional right to be free of unreasonable search and seizure or the right of privacy. Consent must be clearly obtained from at least one party to the conversation and must be freely made and without compulsion. As in telephone conversations, the consenting party may be an informant or police officer. Evidence obtained from such monitoring is admissible in a subsequent criminal trial. St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988), overruling St. v. Brackman, 178 M 105, 582 P2d 1216 (1978). Brown was overruled in St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

Electronic Surveillance of Suspect — Place to Be Searched: An informant was fitted with an electronic device authorized by court order to monitor the conversations in a drug buy from a named individual, but the order did not contain a specific location to be searched under the provisions of 46-5-201 (now repealed). The Supreme Court held that the geographic location of an electronic surveillance of a particular person is tied to the whereabouts of the suspect. The phrase in 46-5-201 (now repealed) describing what may be searched ("the thing, place, or person") is disjunctive; thus, the person whose conversation is to be overheard when named in the surveillance order is sufficiently precise to meet constitutional requirements. St. v. Coleman, 189 M 492, 616 P2d 1090, 37 St. Rep. 1661 (1980).

Electronic Surveillance of Suspect — Reliability of Informant: Where the defendant was arrested as the result of an electronically recorded conversation with an informant who had previously consented to carrying a transmitting device for police officers after providing them with detailed information on the time and circumstances of a proposed sale of drugs, the affidavit upon which the order for the electronic surveillance was issued was legally sufficient in that it properly informed the District Court of the underlying circumstances upon which the informant concluded that the drugs were where they were said to be located and the underlying circumstances from which the officer making the affidavit could conclude the informant was reliable, in spite of the fact that the informant was a convicted felon. St. v. Case, 616 P2d 1090, 37 St. Rep. 1661 (1980) (apparently not reported in Montana Reports).

Supporting Affidavit Showing Compelling State Interest: Where police officers obtained an order for electronic surveillance of the defendant, an affidavit supporting the request for the order which recited facts showing the defendant to be in possession of dangerous drugs satisfied the standard for issuance of electronic surveillance orders announced in St. v. Brackman, 178 M 105, 582 P2d 1216 (1978), in which the Supreme Court held that the state must show a compelling state interest to obtain this kind of order. The enforcement of criminal laws is essential to the preservation of an orderly society and is a compelling state interest sufficient to support the issuance of the order. St. v. Case, 616 P2d 1090, 37 St. Rep. 1661 (1980) (apparently not reported in Montana Reports).

Electronic Monitoring: Carrier, an undercover drug investigator, was outfitted with a concealed microphone and a body monitor during six meetings with the defendant. Court orders permitting the monitoring were obtained for the last three meetings but not for the first three. The transcripts of the last three meetings were admitted into evidence over the defendant's objection. On appeal, the Supreme Court said that the application for electronic monitoring authorization was based on Carrier's own personal observations which supplied adequate independent information. The application made no reference to the fact that the earlier conversations were monitored or recorded, and the later recordings were not tainted by the earlier unauthorized recordings. St. v. Bassett, 189 M 28, 614 P2d 1054 (1980).

Unauthorized Recording of Telephone Call — Third Person's Right to Privacy Invaded: Recording of telephone conversation by police undercover officer of a call received from an acquaintance of defendant setting up a drug sale did not taint all evidence against defendant even though the recording was not authorized by court order. The undercover officer personally contacted police regarding the setting up of the drug buy which resulted in defendant's conviction. Furthermore, a defendant cannot invoke a breach of right of privacy of his acquaintance; he must assert his own privacy rights. The recording was not introduced into evidence, but the undercover officer testified concerning it. St. v. Hanley, 186 M 410, 608 P2d 104 (1980).

Requirements for Electronic Surveillance: Under Title III of the Federal Omnibus Crime Control and Safe Streets Act, states are required to have a specific statutory scheme for electronic surveillance before public officials can lawfully monitor oral and wire communications

in the state. If a state chooses to allow electronic surveillance by adopting a statutory scheme, the scheme must be at least as or more restrictive than the regulations of Title III. Montana statutes 45-8-213, defining the offense of violating privacy in communications, and 46-5-202 (renumbered as this section), setting forth the grounds for issuance of a search warrant, fail to meet the minimum requirements of Title III or the standard enumerated by the U.S. Supreme Court in the Berger and Katz decisions. Among other things, Montana's statutes fail: (1) to require a showing of exigent circumstances to overcome the defect of not giving prior notice; (2) to state what items of information should be included in the application for a warrant; and (3) to outline the general procedures by which law enforcement officials obtain warrants for electronic surveillance. In St. v. Brackman (since overruled in St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988)), the court held that in view of Montana's constitutional right of privacy, law enforcement officials must first obtain a warrant before intercepting any communication. This will no longer suffice, since the requirements of Title III are not met. Any evidence seized by electronic surveillance must be suppressed since Montana's statutory scheme for allowing such surveillance does not meet the federal requirements. St. v. Hanley, 185 M 459, 605 P2d 1087 (1979), followed in St. v. Lynch, 1998 MT 308, 292 M 144, 969 P2d 920, 55 St. Rep. 1278 (1998). Lynch was followed in St. v. Pizzichiello, 1999 MT 123, 294 M 436, 983 P2d 888, 56 St. Rep. 499 (1999).

AUTHORITY TO ISSUE

Authority of Properly Appointed Substitute Justice of the Peace to Issue Search Warrant: A search warrant was issued by a substitute Justice of the Peace, and Beaupre contended that the fruits of the search should be suppressed because no attempt was made to call in another Justice of the Peace or City Judge and because the substitute was not properly appointed. The Supreme Court dismissed the claims. The regular Justice of the Peace had letters from judges in nearby cities indicating that they were not available should the Justice of the Peace be absent, and the letters were updated every 6 months in accordance with the Attorney General's recommendations in 48 A.G. Op. 11 (2000). Further, the substitute was timely designated during the second term of the regular Justice of the Peace, and incorrect wording on the waiver of training form was inconsequential and did not affect the authority of the substitute to act. St. v. Beaupre, 2004 MT 300, 323 M 413, 102 P3d 504 (2004). See also Potter v. District Court, 266 M 384, 880 P2d 1319 (1994), and St. v. Vickers, 1998 MT 201, 290 M 356, 964 P2d 756 (1998).

Issuing Magistrate Involved in Police Investigation — Subsequent Search Warrant Improper: Following a burglary and upon receiving a report of an empty safe being found in the water, the Sheriff, a deputy, and the Justice of the Peace traveled to the site, discussing the evidence and the investigation. Two days later, after additional evidence was gathered, the Justice of the Peace issued a search warrant to search Wilson's truck. Upon conviction, Wilson challenged the impartiality of the Justice of the Peace to issue a warrant. Once the magistrate became an active participant in the police investigation, his impartiality ceased and he could no longer make a neutral and detached evaluation of the evidence to determine whether probable cause existed and thus could no longer protect Wilson's right to be free from a search not based on probable cause. Because the warrant was invalid, the subsequent search was illegal and evidence from the search was suppressed. St. v. Wilson, 266 M 146, 879 P2d 683, 51 St. Rep. 697 (1994).

Affidavit Alleging Possession of Dangerous Drug After Shipment From Another State Held Sufficient: Where an affidavit made in application for a search warrant indicated the offense of possession of a dangerous drug and stated that the offense took place in Gallatin County, Montana, the District Court did not err in denying the defendant's motion to suppress the evidence of the offense, which had been shipped from Hawaii. No jurisdictional question existed for the magistrate who issued the warrant, as the affidavit showed that the crime of possession had been committed within the county. St. v. Kelly, 205 M 417, 668 P2d 1032, 40 St. Rep. 1400 (1983).

Issuance of Search Warrant by Justice of the Peace in Case Involving Dangerous Drugs: Justices' Courts are constitutionally created, and when the Legislature has had the opportunity to limit their jurisdiction and has not seen fit to do so, a legislative intent to authorize the practice of Justices' Courts issuing search warrants is presumed as a Justice of the Peace meets the United States constitutional standard of "a neutral and detached magistrate" to examine the application for a search warrant and determine whether reasonable cause exists for its issuance. St. v. Snider, 168 M 220, 541 P2d 1204 (1975).

Issuance of Warrant by City Judge: A City Court Judge does not have the statutory authority to issue search warrants, and the trial court correctly suppressed evidence obtained under color of a search warrant executed by a City Court Judge. St. v. Tropf, 166 M 79, 530 P2d 1158 (1975),

applied, with regard to substitute judges, in Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

PROBABLE CAUSE

Sufficient Probable Cause for Issuance of Search Warrant for Investigation of Hunting Activities: Cotterell asserted that there was insufficient probable cause to issue a search warrant for investigation of alleged illegal hunting activities. The Supreme Court reviewed the facts in the warrant application and concluded that the facts and circumstances described in the application were sufficient to indicate a fair probability that evidence of a crime existed on Cotterell's property, including Cotterell's possession of two-way communication devices for use in hunting big game animals and Cotterell's unlawful use of an amphibious off-highway vehicle to retrieve a deer from his neighbor's property. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008).

Sufficient Probable Cause for Search Warrant — Motion to Suppress on Grounds of Unreliable Sources Properly Denied: Tucker asserted that fruits of a search of his residence should be suppressed because the warrant application was insufficient to establish probable cause because police failed to corroborate information provided by two informants. The Supreme Court examined the information in light of St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), and St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006), to determine the reliability of the informants. The first test is whether corroboration was required because the informants were anonymous, and in this case both informants were known to officers. The second test is whether the informants' information was based on hearsay, which requires corroboration, or on personal information. Here both informants had personal information of Tucker's activities. The third test is whether the informants were reliable. Neither informant was a confidential informant, but rather acted as concerned citizens, and the warrant application contained the necessary information to establish the reason for the informants' personal exposure to the evidence as well as their motivation for going to the police. Both informants were thus considered reliable, and any necessity for corroboration was satisfied. Therefore, the warrant application demonstrated the necessary probable cause, and Tucker's motion to suppress was properly denied. St. v. Tucker, 2008 MT 273, 345 M 237, 190 P3d 1080 (2008).

Defendant's Drug Precursor Purchases and Officer's Experience — Sufficient Probable Cause for Search Warrant for Drug Lab Under Totality of Circumstances: Dutton moved to suppress the evidence from a search on grounds of staleness and lack of sufficient information to support the warrant. The Supreme Court dismissed the staleness argument after determining that a crimestopper's tip from 9 months before the warrant was issued was timely when coupled with information received 5 months earlier and considerable information that was only days or weeks old at the time of the warrant application. Additionally, when viewing the totality of the circumstances in a practical, common-sense manner, there was sufficient probable cause for the warrant based on an experienced officer's observations of Dutton's activity of purchasing numerous drug precursors used in methamphetamine production as inconsistent with the average consumer. Dutton's motion to suppress was properly denied. St. v. Dutton, 2007 MT 56, 336 M 192, 153 P3d 642 (2007).

Companion's Activity at Defendant's Residence Sufficient to Justify Search of Defendant's Property: Officers obtained a warrant to search Barnaby's residence based in large part on informants' tips that Barnaby's companion, Sheridan, was operating a clandestine drug laboratory at the residence. Barnaby moved to suppress the evidence on grounds that the search warrant was insufficient because evidence of Sheridan's involvement in methamphetamine production did not establish probable cause to search Barnaby's residence. The Supreme Court cited Zurcher v. Stanford Daily, 436 US 547 (1978), St. v. Gray 2001 MT 250, 307 M 124, 38 P3d 775 (2001), and St. v. St. Marks, 2002 MT 285, 312 M 468, 59 P3d 1113 (2002), for the proposition that the critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought. Thus, corroboration of criminal conduct by Barnaby's companion, Sheridan, could be imputed to Barnaby, even though Sheridan's mere presence at the residence did not amount to probable cause to search Barnaby's residence. However, Sheridan's involvement in the production of methamphetamine and continued presence at Barnaby's house, coupled with two independent reports that Sheridan operated a drug lab at the house and a report of suspicious activity at the house since Sheridan's arrival, amounted to a substantial basis for determining whether probable cause supported the issuance of a warrant under the totality of the circumstances. The fact that the warrant

application did not include a specific account of the circumstances under which some informants viewed the events or whether two citizens based their reports on personal observations did not preclude a court from finding probable cause. Sufficiency of the warrant was affirmed, and Barnaby's motion to suppress was properly denied. St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006).

Totality of Circumstances, Including Odor of Marijuana, Sufficient Probable Cause to Support Search Warrant: The Department of Public Health and Human Services received a call alleging that Morse was selling drugs in the presence of her juvenile daughter, and the local drug task force received two additional calls alleging that Morse was distributing drugs from her apartment. When police visited Morse's apartment, there were four other people there, all of whom had prior drug-related arrests, including Morse. The officers smelled marijuana and observed an empty electric digital scale in the living room. Morse refused a search of the apartment, so officers obtained a search warrant. In executing the warrant, the officers found drugs and paraphernalia. At trial, Morse moved to suppress the evidence based on lack of probable cause for the warrant. The motion was denied, and on appeal, the Supreme Court reviewed the totality of the circumstances and affirmed. The smell of marijuana did not in itself establish probable cause, nor did the telephone calls. However, when considered with Morse's drug history, the criminal backgrounds of the other four people, and the presence of the scale, the search warrant application established probable cause, and the motion to suppress was properly denied. St. v. Morse, 2006 MT 54, 331 M 300, 132 P3d 528 (2006).

Personal Possession of Pipe Insufficient Probable Cause to Search Vehicle — Evidence in Plain View in Vehicle Sufficient Probable Cause for Subsequent Search of Residence: When Griffin was lawfully arrested for driving without a license, the arresting officer found a pipe in Griffin's pocket that, in the officer's opinion, contained drug residue. The officer then obtained a search warrant for Griffin's truck. When approaching the truck, the officer observed items in plain view in the open truck bed that could be used to manufacture methamphetamine. Pursuant to another search warrant based on the evidence in the truck bed, officers searched Griffin's residence and found a drug lab that was booby-trapped with explosives. Griffin moved to suppress all the evidence because the first search warrant was issued without probable cause. The motion was denied, but on appeal, the Supreme Court agreed that the only evidence supporting the vehicle search warrant—the existence of a pipe on Griffin's person and the fact that Griffin recently exited the truck—provided insufficient probable cause for a warrant to search the truck. Just because a person has a pipe in a pocket that contains untested white residue does not mean that the person's vehicle will contain evidence of a drug offense. However, in this case, the majority of evidence seized from the truck was in plain view in the truck bed. Griffin had no expectation of privacy regarding items in plain view, nor was a warrant required to seize the items in the truck bed. Therefore, any error in issuing the search warrant for the truck was harmless and not prejudicial. Additionally, the lawfully seized evidence in the truck bed was sufficient to support a finding of probable cause for issuance of another warrant to search Griffin's residence. Denial of Griffin's motion to suppress was affirmed. St. v. Griffin, 2004 MT 331, 324 M 143, 102 P3d 1206 (2004).

Information Provided by Citizen Informant — Sufficient Warrant Application: Beaupre contended that the fruits of a search should be suppressed because the warrant application was based on uncorroborated information provided by a confidential informant unknown to the officer who applied for the warrant and that the application was based on impermissible hearsay. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. The informant was part of a cleaning crew hired by Beaupre to clean up damage after a fire at Beaupre's residence. During the cleanup, the informant observed drug paraphernalia and suspected drug lab materials, photographed the items, and gave the photographs to police. The informant remained confidential, but was not anonymous, and was acting as a concerned citizen. Questions regarding the informant's involvement and motivation were answered by the application and thus provided probable cause without further corroboration. The informant's information was not considered hearsay because the observations of fellow officers were a reliable basis for a warrant applied for by another officer. St. v. Beaupre, 2004 MT 300, 323 M 413, 102 P3d 504 (2004). See also St. v. Seaman, 236 M 466, 771 P2d 950 (1989), and St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000).

Admission of Unrelated Criminal Activity by Informant — Independent Corroboration Unnecessary: An informant who was known to police told the authorities that Meyer was in possession of illegal explosives after witnessing the explosives being delivered to Meyer. The informant admitted several instances of criminal activity, including use and possession of methamphetamine and being present when the explosives were delivered. Meyer sought to

suppress evidence of the explosives because the informant's statements were not corroborated, the informant was not charged with transporting illegal explosives, and the drug charges were unrelated to the explosives investigation. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. Independent corroboration is not required for a reliable informant whose identity is known to law enforcement and whose information is not based on hearsay, and an informant who gives an unequivocal admission against interest is considered reliable without further corroboration. Because corroboration was not necessary, the court declined to address whether admissions unrelated to the underlying offense may be classified as an admission against interest. St. v. Meyer, 2004 MT 272, 323 M 173, 99 P3d 185 (2004), following St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000).

Not Necessary to Allege Every Element of Offense to Support Finding of Probable Cause for Search Warrant: A search warrant application alleged that Meyer violated 45-8-335 by illegally possessing explosives. Meyer contended that the application was insufficient because it did not allege a violation of every element of 45-8-335, so probable cause did not exist. The Supreme Court disagreed. Probable cause to believe that an offense has been committed is a separate question from whether probable cause exists to search a suspect's residence, and evidence sufficient to support probable cause for a warrant is significantly less than that required to support a conviction. In this case, the warrant application stated facts supporting probable cause to believe that contraband connected with the offense of illegal possession of explosives would be found at Meyer's residence, described with particularity the place to be searched and what was to be seized, was based on observations of a reliable informant, and alleged a specific timeframe related by the informant as to when the continuing possession occurred. Under the totality of the circumstances, the application was sufficient when viewed on its four corners to support a finding of probable cause. St. v. Meyer, 2004 MT 272, 323 M 173, 99 P3d 185 (2004).

Suspect's Conduct and Officer's Knowledge of Suspect's Criminal History Sufficient Probable Cause for Warrant to Search Vehicle for Drugs: When officers arrested Frasure on an outstanding warrant, Frasure acted jittery and nervous, spoke with choppy, accelerated speech, and was sweating. Based on their training, the officers knew Frasure's actions were consistent with a person under the influence of methamphetamine. The officers also knew from previous contact that Frasure was a methamphetamine addict who had previously been arrested for methamphetamine offenses. A pat-down search incident to the arrest revealed a marijuana pipe in Frasure's pocket. Frasure denied consent to search the vehicle that he was in when arrested, but the vehicle was impounded and a warrant was obtained to search the vehicle. The search revealed drugs and paraphernalia, and Frasure moved to suppress the evidence on grounds that there was insufficient probable cause for the search warrant. The motion was denied, and on appeal, the Supreme Court affirmed. The officers' knowledge and Frasure's conduct constituted sufficient evidence to support the officers' belief that Frasure had committed an offense, so sufficient probable cause existed to support the vehicle search, and denial of Frasure's motion to suppress was not erroneous. St. v. Frasure, 2004 MT 242, 323 M 1, 97 P3d 1101 (2004).

Sufficient Corroboration of Tip in Application for Warrant to Demonstrate Probable Cause — Suppression Motion Improperly Granted: Based on a tip, Palmer was arrested for drugs following a search of his bus. The District Court subsequently granted Palmer's motion to suppress after concluding that: (1) the informant lacked reliability; (2) timeframes surrounding the information were unclear; (3) the informant's tip was not sufficiently corroborated; (4) associations between Palmer and drug activity were tenuous; and (5) evidence found in Palmer's trash could not be directly linked to Palmer. The state appealed the suppression, and the Supreme Court reversed. Applying St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), the court found it unnecessary to determine whether the informant should be treated as a confidential informant, requiring corroboration, or as an informant who made an unequivocal admission against interest in the course of providing the tip because the search warrant application itself sufficiently corroborated the tip and demonstrated probable cause. The fact that corroborative evidence in the form of video surveillance revealed no actual criminal activity did not necessarily lead to the conclusion that probable cause did not exist. St. v. Palmer, 2003 MT 129, 316 M 46, 68 P3d 809 (2003).

Sufficient Probable Cause for Search of Vehicle for Suspected Drug Lab: Officers received a tip from Olson's estranged husband that a methamphetamine lab was being operated in Olson's garage. The officers placed the garage under surveillance and saw equipment being loaded into Olson's car that same day. The officers stopped the car for an investigative stop, and an officer informed Olson that he knew that lab equipment was in the trunk. Olson initially denied it, but when the officer expressed concern for Olson and her son, she made incriminating statements and confessed that the lab was in the car. The officers then obtained a search warrant and

searched the vehicle and Olson's garage. Olson contended that the warrant application was not supported by probable cause. The Supreme Court applied the standards in Ill. v. Gates, 462 US 213 (1983), and St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), and concluded that Olson's husband was acting as a good citizen and was a reliable informant. The officers had sufficient probable cause to believe that a drug lab was relocated from Olson's garage to the vehicle to support the issuance of the search warrant. St. v. Olson, 2003 MT 61, 314 M 402, 66 P3d 297 (2003).

De Novo Review of Excised Search Warrant Application by Supreme Court — Standard of Review: Supreme Court review of an application for a search warrant grants great deference to the issuing magistrate's determination that probable cause existed for issuing the warrant. However, when information has been excised from an application after the fact, that deference will not be paid to the magistrate's probable cause determination and the court will review the excised application de novo to determine whether probable cause supported the issuance of the search warrant. The Supreme Court's standard of review has often been articulated as whether the magistrate had a substantial basis to issue the search warrant, while the court's conclusions tended to be focused on whether sufficient probable cause existed. For purposes of review, the phrase "substantial basis for probable cause" has the same meaning as the phrase "sufficient probable cause". St. v. St. Marks, 2002 MT 285, 312 M 468, 59 P3d 1113 (2002). See also St. v. Kuneff, 1998 MT 287, 291 M 474, 970 P2d 556 (1998).

Sufficient Independent Corroboration of Statements of Confidential Informant: A confidential informant told police that St. Marks was engaged in illegal drug distribution with another man. The informant gave details concerning St. Marks' distinctive license plate, where he parked his car in public places, and the fact that he was staying in a particular room in a local motel. Corroboration of these innocent facts alone failed to prove the necessary indicia of suspicious human conduct to substantiate the informant's statements. However, further independent police investigation revealed that St. Marks had been staying at the motel for over 2 months, paid the bill in cash every 2 weeks, and had a home address in the same town as the motel. In the officers' judgment, it was unusual for a person to stay in a motel for long periods when the person has a local address, but it was common for drug dealers to stay in places other than their home to avoid bringing attention to themselves or placing their residence at risk, and distributors of dangerous drugs often have significant amounts of cash on hand. The Supreme Court decided that credence should be given to the officers' judgment because their experience and training provided a reasonable basis for the conclusions regarding St. Marks' behavior. Also, the other man mentioned by the informant was subsequently arrested after being found with a significant quantity of drugs. Thus, after evaluating the totality of the circumstances within the four corners of the search warrant application and excluding certain information that was conceded as being stale, the Supreme Court concluded that the unredacted information supplied in the application, including the subsequent corroboration and investigation by law enforcement, provided sufficient probable cause to support the belief that an offense had been committed and that evidence, contraband, or persons connected with the offense could be found. St. Marks' motion to suppress was properly denied. St. v. St. Marks, 2002 MT 285, 312 M 468, 59 P3d 1113 (2002).

Common Sense Review of Four Corners of Warrant Application Using Totality of Circumstances Test — Sufficient Grounds for Warrant in Arson Case: The Markses were charged with arson in connection with a fire that burned their home. The investigating officer had obtained a search warrant based upon the fact that most of the Markses' furniture and belongings had been removed before the fire and based upon the fire marshal's statement that Mrs. Marks had to have been absent for more than 20 minutes before discovering the fire as she had stated. The Markses argued that the application for the warrant was invalid because it only established suspicion, not probable cause that the crime of arson was committed. The Supreme Court held that the issuing of the warrant was valid because probable cause exists when the facts presented would warrant an honest belief in the mind of a reasonable person that the offense has been committed. The Supreme Court held that a common sense review of the four corners of the application using the totality of circumstances test would justify the investigating officer's conclusion that evidence connected to the crime of arson would be found at the residence and that there was a fair probability that the items sought in the application were connected to the crime. St. v. Marks, 2002 MT 255, 312 M 169, 59 P3d 369 (2002).

Informants' Statements Based on First-Hand Evidence — Sufficient Probable Cause for Search Warrant: The Gramses' teenage daughter held a slumber party at the family home. During the party, the daughter procured marijuana from a filing cabinet in her father's bedroom, telling her friends that her father approved of her smoking marijuana and did not care if she

went into the bedroom to procure some. The children allegedly smoked marijuana at the party, and the daughter was later implicated in a marijuana distribution scheme at her middle school. During the school investigation, one of the girls who was at the slumber party recalled the incident, and based on the information, a warrant was obtained to search the Gramses' residence. Marijuana and paraphernalia were seized. The Gramses moved to suppress the evidence, contending that probable cause did not support the search warrant. The motion was denied, and the Gramses appealed, but the Supreme Court affirmed. The court applied the test in St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), for determining whether an informant's information is sufficient to establish probable cause. The informants here were not anonymous, so the question became whether the informants' testimony was hearsay or based on personal observation of the criminal activity. The statements were based on first-hand evidence, so the last element of the Reesman test was whether the informants were reliable. In this case, the informants admitted that they smoked marijuana, which was an unequivocal admission against their interests, so the information was considered reliable and the police were not required to independently corroborate the informants' information. The admissions provided sufficient probable cause to obtain the search warrant, and the motion to suppress was properly denied. St. v. Grams, 2002 MT 188, 311 M 102, 53 P3d 897 (2002).

Sufficient Probable Cause for Search Warrant Based on Tip From Confidential Informant — Corroboration Required — Defendant's Burden to Show False Information in Warrant Application: A confidential informant told police that Gray was conducting a marijuana growing operation in his home. Based on the allegations, officers surveyed the exterior of the home and discovered a newly installed chimney and vents consistent with such an operation. Known drug offenders were observed frequenting the residence. An investigative subpoena of Gray's utility records showed an increase in power consumption consistent with a growing operation. Based on this information, officers obtained a search warrant and discovered 77 marijuana plants and associated growing paraphernalia. Gray moved unsuccessfully to suppress the evidence on grounds of insufficient probable cause to support the warrant, arguing that the warrant application contained unreliable hearsay, insufficient detail, and unsupported conclusory statements. The Supreme Court affirmed. In St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), the court reiterated that corroboration of an informant's tip through other sources is necessary when the information is hearsay or the informant is anonymous. In this case, even though the informant was not anonymous, the informant lacked personal knowledge of the operation, so the information was hearsay and required corroboration. Nevertheless, the information could still be considered with other factors in determining probable cause under the totality of the circumstances test. The officers made several attempts to corroborate the information, including verification of the physical description of Gray and the residence, although that innocuous information alone provided no indicia of suspicious human conduct to substantiate the allegations, as required in St. v. Griggs, 2001 MT 211, 306 M 366, 34 P3d 101 (2001). However, the officers' other observations did provide sufficient corroboration to support probable cause, despite Gray's attempt to offer seemingly innocent explanations for the suspicious conduct. When a defendant challenges the veracity of information in a warrant application, the defendant must make a substantial preliminary showing that the application or affidavit in support of the application contained false information. If that showing is made, a hearing must be held and the defendant must prove by a preponderance of the evidence that the information is untrue, and if proved untrue, that information must be excised from the application and a determination made as to whether sufficient probable cause exists without the excised information (see St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968 (1999)). Here, Gray did challenge the veracity of some, but not all, of the information, but the Supreme Court declined to disturb the trial court's findings regarding the reasonableness and prudence of the investigation or its judgment regarding the credibility of the witnesses. The court found that at some point, credence must be lent to the judgment of law enforcement whose training and experience invoke common sense conclusions about human behavior, and as long as officers provide reasonable justifications for their conclusions, the court will not disturb a finding of probable cause for issuance of a search warrant. The information here was sufficiently corroborated, and in light of the totality of the circumstances, the conclusion that probable cause existed was affirmed. St. v. Gray, 2001 MT 250, 307 M 124, 38 P3d 775 (2001). See also St. v. Rinehart, 262 M 204, 864 P2d 1219 (1993).

Sufficiency of Law Enforcement Officer's Independent Corroboration of Anonymous Tip — Failure to Corroborate Probability of Criminal Activity — Evidence of Search Properly Suppressed: Bozeman police received an anonymous tip that Griggs was conducting a mushroom-growing operation in his home. The informant also included a physical description of

Griggs, his address, a description of his vehicle, the fact that Griggs had recently improved the wood trim on his residence, and the facts that he was a member of the armed forces, was a sharpshooter, and possessed several weapons. Detectives were able to corroborate all the personal information and incorporated it into a search warrant application, but did not corroborate that alleged criminal activity was occurring. Nevertheless, a warrant was issued by a District Court Judge and executed the following day, resulting in the seizure of contraband and Griggs's arrest. Griggs moved to suppress, arguing that the warrant was issued without sufficient probable cause, and a different District Court Judge granted the motion on grounds that because there was no independent police investigation that corroborated the caller's statements about the drug activity, sufficient probable cause for the warrant did not exist. The state appealed, contending that the further law enforcement investigation required under the standards in Ill. v. Gates, 462 US 213 (1983), and St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), do not necessarily require corroboration of any criminal activity at all and need not extend to any incriminating information regarding alleged criminal activity supplied by an informant. The Supreme Court disagreed. A defendant may challenge whether independent corroboration or investigation was sufficient within the context of a court's totality of the circumstances analysis. Upon review, an appellate court must look solely to the information given to the impartial magistrate and to the four corners of the entire warrant application, rather than examining the application sentence by sentence. An anonymous informant's information regarding criminal activity always requires law enforcement corroboration in order to supply a sufficient substantial basis for a probable cause determination, although information supplied by a "concerned citizen" whose identity is known, who personally observes the alleged criminal activity, and who openly risks liability by accusing another person of criminal activity may not need further law enforcement corroboration. What is critical in the corroboration of an informant's information, when corroboration is in fact required, is that innocent noncriminal activity or evidence subjected to further investigation by officers ripens into suspicious behavior in light of the tip concerning criminal activity. A warrant application must state facts sufficient to support probable cause to believe that a criminal offense has been committed, as well as facts supporting probable cause to believe that evidence, contraband, or persons connected with the offense may be found. The necessary indicia of suspicion that results from police corroboration of otherwise innocent information must reveal a pattern of human behavior associated with the alleged criminal activity or activity necessary to carry out the activity that, when viewed as a whole, is consistent with the criminal activity. It is possible that in order to reveal this indicia of suspicious conduct, officers may investigate and corroborate otherwise innocent, noncriminal activity with further observations of otherwise innocent, noncriminal activity, but in Griggs's case, none of the subsequent investigations served to supply the magistrate with any indicia of conduct even remotely associated with the criminal activity alleged by the informant. Thus, probable cause did not exist, and the fruits of the search were properly suppressed. St. v. Griggs, 2001 MT 211, 306 M 366, 34 P3d 101 (2001), distinguishing St. v. Deskins, 245 M 158, 799 P2d 1070 (1990), and St. v. Hook, 255 M 2, 839 P2d 1274 (1992), followed in Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001). See also U.S. v. Mendonsa, 989 F2d 366 (9th Cir. 1993).

Clarification of Corroboration Necessary to Verify Information Provided by Anonymous or Confidential Informant — Confidential Informant's Information Corroborated by Anonymous Tip Considered Insubstantial Basis for Determination of Probable Cause: A confidential informant provided police with firsthand information on alleged drug-related activities at a trailer home in Big Sky occupied by a person named Hoge, but there was no mention that Reesman lived at the trailer or was involved in any way. There was no indication that the informant had provided reliable information in the past. Police also received information from an anonymous citizen, who had reportedly provided reliable information in the past, regarding similar activity at the trailer home. However, there was no indication that the citizen's information came from personal observation or in what context prior reliable information had been received. Police took no further steps to corroborate the information supplied by either informant. Nevertheless, a warrant was issued for the entire trailer home and executed 2 days later. Police found Reesman and three other persons there and, upon searching Reesman's bedroom without his valid consent, discovered more than 100 doses of LSD. Reesman was charged with criminal possession of dangerous drugs with intent to sell, but he pleaded not guilty and moved to suppress the evidence on grounds that the warrant lacked probable cause and was overbroad. The District Court determined that corroboration of the confidential informant's firsthand, detailed information by an anonymous tip weighed heavily in favor of the informant's reliability and provided a substantial basis for a finding of probable cause; therefore,

the court refused to suppress the evidence. On appeal, the Supreme Court applied the totality of circumstances test set out in Ill. v. Gates, 462 US 213 (1983), to determine the sufficiency of the warrant application based on information supplied by anonymous or confidential informants, examining extensive case law. In obtaining a search warrant based on a tip from an anonymous informant or one based on hearsay, independent corroboration of the information is necessary. If an informant is not anonymous, but the information is not based on personal observation of the described criminal activity, independent corroboration is also required. In the case of a confidential informant with information based on personal observation, that person must have provided reliable and accurate information in the past in order for the information to serve as a basis for determining probable cause without further corroboration. If an informant makes an unequivocal admission against interest, further corroboration is unnecessary for warrant purposes. If an informant is motivated by good citizenship and the information demonstrates a sufficient degree of the nature of the circumstances under which the information became known, the informant's disclosures are considered a reliable basis for determining probable cause. A citizen informant is generally presumed reliable, and that reliability is shown by the very nature of the circumstances under which the incriminating evidence became known. Under the circumstances in Reesman's case, the confidential informant's information, which required further corroboration, could not serve as a source of independent corroboration or investigation that transformed the other informant's information into a basis for establishing probable cause. Thus, without further independent corroboration or investigation, the confidential informant's information in the search warrant application failed to supply the magistrate with the substantial basis for probable cause. The District Court erred in denying Reesman's motion to suppress the evidence, and the Supreme Court reversed. St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83, 57 St. Rep. 1017 (2000), distinguishing St. v. Rydberg, 239 M 70, 778 P2d 902 (1989), St. v. Deskins, 245 M 158, 799 P2d 1070 (1990), and St. v. Oleson, 1998 MT 130, 289 M 139, 959 P2d 503 (1998), and followed in St. v. Palmer, 2003 MT 129, 316 M 46, 68 P3d 809 (2003). See also St. v. Walston, 236 M 218, 768 P2d 1387 (1989), and St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003).

Staleness — Continuing Nature of Criminal Activity:

When criminal activity is continuing in nature, information that would be stale when considered individually carries greater weight in a probable cause determination when combined with more recent information. If information reveals "that the possession and distribution of dangerous drugs by a person is a protracted and continuing activity", the passage of time between prior conduct and the probable cause determination becomes less significant. Here, the informant's tips about Anderson's drug-related activities between 7 and 10 months prior to the search and seizure, drug-related arrests 5 years and again 7 months earlier, and discovery during the search of methamphetamine in the trailer where Anderson was staying demonstrated a pattern of continuous conduct and was not stale for purposes of determining probable cause. Thus, probable cause existed to believe that Anderson was committing an offense, but it was insufficient, standing alone, to justify a warrantless search. The case was reversed because the state failed to meet its burden of establishing that exigent circumstances existed to justify the warrantless search and, given the fact that although it may have been reasonable to detain Anderson under the circumstances, the search was conducted at midday, during regular business hours, and on a weekday, yet the officers did not approach one of the available judicial officers to obtain a warrant or to amend the existing warrant to properly authorize a search. St. v. Anderson, 1999 MT 60, 293 M 490, 977 P2d 983, 56 St. Rep. 252 (1999), following St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065, 55 St. Rep. 56 (1998), and followed in St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Informant indicated that he had observed a marijuana growing operation on several occasions over the previous 5 months. The investigating officer stated that in his experience, such an operation was highly likely to stay in one location for a long time. The Supreme Court held that if a criminal activity is continuing in nature, a greater amount of time may elapse between the observation of the activity and the application for a search warrant without negating probable cause. St. v. Walston, 236 M 218, 768 P2d 1387, 46 St. Rep. 309 (1989), followed in St. v. Crowder, 248 M 169, 810 P2d 299, 48 St. Rep. 376 (1991), St. v. Rinehart, 262 M 204, 864 P2d 1219, 50 St. Rep. 1517 (1993), St. v. Hulbert, 265 M 317, 877 P2d 25, 51 St. Rep. 526 (1994), and St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997).

Unproved Statements of Child Informant as Sole Basis for Issuance of Warrant: A child observed marijuana plants growing on Worrall's property and reported it to police. The child's observation was never corroborated by the police. Worrall averred that allowing a search of his property based on the uncorroborated claim of an unproved 11-year-old child, after only a

15-minute interview, was unreasonable and that the District Court erred in finding probable cause for the search warrant because unverified statements of an unproved informant, much less a child informant, could not serve as the sole basis for the issuance of the warrant. Citing St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997), the Supreme Court noted that corroboration of an informant's testimony through other sources is necessary only when the information is hearsay or the informant is anonymous. In this case, the child was not anonymous and the information was based on personal observation rather than hearsay, so corroboration was unnecessary. The court observed that information provided to police that is motivated by good citizenship is a reliable basis for determining probable cause and that nothing in the record indicated that the child's report should be viewed more critically than a similar report from an adult. Thus, the unproved statement of the child informant may serve as the sole basis for issuance of a search warrant. St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999). On remand, after excising the officer's distrustful statements from the search warrant application, the District Court concluded that probable cause existed based on the facts from the application that were consistent with the boy's testimony and that the warrant to search Worrall's property was properly issued, so Worrall's motion to suppress the evidence of the search was dismissed. Worrall appealed. The Supreme Court noted that probable cause must be determined exclusively from the four corners of the application and must be based on a determination of whether, given all the circumstances set forth in the application, there is a fair probability that contraband or evidence of a crime will be found in a certain place. Worrall did not challenge the truthfulness of any of the unexcised facts, and the boy's statements were presumed reliable in light of his sincerity, the fact that he had not previously been in trouble, and the fact that he voluntarily went to the Sheriff's office to report his observations. St. v. Worrall, 2001 MT 57, 304 M 341, 22 P3d 182 (2001).

Existence of Probable Cause for Search of Particular Location: Probable cause to believe that an offense has been committed by a suspect is a separate question from whether probable cause exists to search the suspect's residence; therefore, probable cause must exist for the search of the particular location for which the search warrant is obtained. The court issuing the search warrant is required to make a commonsense determination of whether, given the circumstances set forth in the warrant application, a fair probability exists that contraband or evidence related to a crime will be found in a particular place. Because a search warrant application did not establish the existence of that fair probability that evidence would be found in defendant's residence, even though a reliable informant provided information of defendant's suspected criminal activity, it was error to deny defendant's motion to suppress evidence obtained during the subsequent search of defendant's residence. St. v. Kaluza, 272 M 404, 901 P2d 107, 52 St. Rep. 795 (1995), following St. v. Crowder, 248 M 169, 810 P2d 299 (1991), and distinguished in St. v. Oleson, 1998 MT 130, 289 M 139, 959 P2d 503, 55 St. Rep. 517 (1998). See also St. v. Rinehart, 262 M 204, 864 P2d 1219 (1993), St. v. Kaluza, 262 M 360, 865 P2d 263 (1993), and St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997).

No Showing of Informants' Veracity and Reliability or Basis for Information — Search Warrant Improperly Issued: A search warrant application that failed to establish the veracity and reliability of the informants and that, in addition, failed to indicate the basis for any of the informants' knowledge regarding defendant's criminal activities in relation to the residence to be searched could not be said to corroborate or verify the information with regard to the residence and thus provided no value in establishing probable cause for the issuance of the search warrant. St. v. Kaluza, 272 M 404, 901 P2d 107, 52 St. Rep. 795 (1995), distinguished in St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997).

Search of Home for Marijuana Based on Informant's Knowledge and Police Suspicions of Marijuana-Growing Operation: Probable cause to search a home was established when there was a fair probability of finding incriminating evidence. The search warrant and affidavit stated that the affiant was trained and experienced in the field of drug crimes, that a confidential informant had seen marijuana-growing operations in the home a number of times and had spoken with the occupants about the operations, and that two other officers had been to the home's front door on other matters and suspected that the operations were ongoing. In addition, the information supporting the warrant, which consisted mainly of events occurring during the 3 months prior to the warrant, was not stale, especially in view of the continuing nature of a marijuana-growing operation. St. v. Sarbaum, 270 M 176, 890 P2d 1284, 52 St. Rep. 133 (1995).

Corroboration of Victim's Statements: Defendant contended that a search warrant was issued without probable cause because law enforcement did not corroborate or confirm the testimony of the sex crime victim upon which the warrant was based. Although under St. v. Kelly, 205 M 417, 668 P2d 1032 (1983), corroboration may be necessary in cases in which police

receive their information through an informant, a crime victim is not equivalent to an informant, and the same principles of corroboration do not apply. In this case, the issuance of a search warrant "upon application affirming the victim's statements to the police" was an adequate demonstration of probable cause. St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994).

General Overview of Probable Cause Requirements: An application for a search warrant must state facts sufficient to show probable cause for issuance of the warrant, following the "totality of the circumstances" test set out in Ill. v. Gates, 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317 (1983). Probable cause must be determined solely from the information contained within the four corners of the search warrant application. A determination of probable cause does not require a prima facie showing of criminal activity. Rather, the issuing magistrate must determine only that there is a probability of criminal activity. An affidavit supporting a search warrant is to be interpreted by the magistrate and examined by a reviewing court in a common sense, realistic fashion, avoiding hypertechnical interpretations. If a magistrate issues a search warrant after subjecting the application to the Gates test, a reviewing court must presume that decision to be correct. An application that provides a substantial basis for the probability that criminal activity is occurring is sufficient to establish probable cause. St. v. Rinehart, 262 M 204, 864 P2d 1219, 50 St. Rep. 1517 (1993), following St. v. O'Neill, 208 M 386, 679 P2d 760 (1984), St. v. Sundberg, 235 M 115, 765 P2d 736 (1988), St. v. Walston, 236 M 218, 768 P2d 1387 (1989), St. v. Seaman, 236 M 466, 771 P2d 950 (1989), St. v. Rydberg, 239 M 70, 778 P2d 902 (1989), and St. v. Baldwin, 242 M 176, 789 P2d 1215 (1990), and followed in St. v. Kaluza, 262 M 360, 865 P2d 263, 50 St. Rep. 1596 (1993), in which it was held that probable cause to search a residence does not follow simply from the existence of probable cause to believe a suspect is guilty, St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997), St. v. Oleson, 1998 MT 130, 289 M 139, 959 P2d 503, 55 St. Rep. 517 (1998), St. v. Anderson, 1999 MT 60, 293 M 490, 977 P2d 983, 56 St. Rep. 252 (1999), and St. v. Gray, 2001 MT 250, 307 M 124, 38 P3d 775 (2001), and St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006).

Totality of Circumstances — Search Sustained on Legally Obtained Evidence Supporting Search Warrant — Evidence Gathered by Ruse Irrelevant: Detectives were informed by a previously reliable confidential informant that Holstine conducted a marijuana growing operation in his house in the Big Sky area. The information provided by the informant about the location and description of Holstine's home was independently verified by detectives. Posing as a skier, one detective then gained entrance to Holstine's home, and smelled marijuana smoke inside the home. The same detective also smelled growing marijuana near an outside corner of Holstine's home and observed a boarded window near the place where the informant had said the growing operation was located inside Holstine's home. A search warrant was obtained based upon all of the information gathered by the detectives. Marijuana plants were confiscated from Holstine's home, and Holstine was convicted of felony possession of marijuana. The Supreme Court held that under the "totality of the circumstances" test adopted by St. v. Campbell, 254 M 425, 838 P2d 427 (1992), and St. v. Valley, 252 M 489, 830 P2d 1255 (1992), the information gained from the confidential informant, together with the testimony of the detective concerning the window and smell of marijuana from outside the residence, was sufficient information constituting probable cause to support the application for the search warrant. The information gained by the detectives by use of the skier ruse was of no value. St. v. Holstine, 260 M 310, 860 P2d 110, 50 St. Rep. 1063 (1993).

Stale Information, Lack of Informant Veracity, and Failure to Investigate as Insufficient Basis for Probable Cause — Motion to Suppress Proper: An application for a search warrant was based on five tips, including three that were stale, ranging in time and age from 11 months to over 7 years, and two that were anonymous and confidential Crimestoppers tips that did not allow for proper assessment of the credibility of the informant or his sources. None of the tips were subjected to prompt or adequate law enforcement investigation. The application did not contain sufficient facts and circumstances to meet the Gates test for probable cause, and a motion to suppress evidence seized as a result of the warrant should have been granted. St. v. Valley, 252 M 489, 830 P2d 1255, 49 St. Rep. 30 (1992), distinguished in St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997).

Personal Observation by Law Officer Sufficient to Establish Probable Cause: Defendants argued that the issuing judge went beyond the "four corners" of the warrant application to find probable cause for searching defendants' property for drugs because the application did not allege that the investigating officer had any training or experience in marijuana identification. However, questions of informant reliability and credibility were inapplicable because a law enforcement officer does not require the same accreditation as an unknown informant. In this

case, personal observation by the law enforcement officer was sufficient to establish probable cause for issuing the warrant. St. v. Cope, 250 M 387, 819 P2d 1280, 48 St. Rep. 949 (1991).

Consistency of Informants' Details Adding to Totality of Circumstances — Prior Criminal Activity as Enhancement of Informant's Tip: Defendant contended that a search warrant issued on three informants' tips, a prior drug-related conviction, and a deputy's recollection that he smelled marijuana at defendant's home on a previous unrelated visit failed to provide a basis to conclude that probable cause existed for issuance of the warrant. The state, relying on U.S. v. Harris, 403 US 573, 29 L Ed 2d 723, 91 S Ct 2075 (1971), maintained that prior criminal activity of a similar nature, even if unverified, enhances an informant's tip that a person is presently engaged in criminal conduct so that under the totality of circumstances test, the issuing Justice of the Peace was entitled to consider the information presented in the search warrant application as a whole, including past offenses, when assessing probable cause. The Supreme Court agreed, holding that the degree of consistent detail provided by the informants not only added to the totality of circumstances to establish probable cause but also substantiated their reliability. St. v. Garberding, 245 M 356, 801 P2d 583, 47 St. Rep. 2157 (1990).

Information Provided by Investigating Officer as Reliable Basis for Warrant: Observations of fellow officers engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. It is sufficient if the affidavit recites at the outset, or if it is clear from reading the affidavit as a whole, that it is based in part upon information obtained from other law enforcement officers. Therefore, the hearsay nature of the link between information provided by an undersheriff to a detective did not invalidate the finding of probable cause. St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989), following U.S. v. Ventresca, 380 US 102, 13 L Ed 2d 684, 85 S Ct 741 (1965), and U.S. v. Kirk, 781 F2d 1498 (11th Cir. 1986), and followed in St. v. Rinehart, 262 M 204, 864 P2d 1219, 50 St. Rep. 1517 (1993).

Reliability of Informants in Probable Cause Determination: An application for a warrant: (1) recounted informants' past production of reliable information; (2) stated that one informant had extensive knowledge of local drug trade; (3) contained explicit descriptions of defendant's drug dealings with informants; and (4) indicated one informant's knowledge of defendant's address. These facts demonstrated the veracity, reliability, and basis of knowledge of informants sufficient to show probable cause for the warrant. St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989).

Informant's Tip — Admissions Against Interest: An investigating officer obtained a search warrant based on information from a self-admitted marijuana user. Before obtaining the warrant, the officer corroborated all the information through public records. A search of the respondent's residence resulted in the seizure of marijuana plants and materials used to cultivate marijuana. The District Court granted respondent's motion to suppress the evidence. The Supreme Court reversed and held that there was probable cause to support the warrant. The affidavit supporting the warrant was sufficient not only under the "totality of the circumstances" test, but also because the informant admitted his marijuana use. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. St. v. Sundberg, 235 M 115, 765 P2d 736, 45 St. Rep. 2235 (1988), followed in St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997).

Probable Cause — Informant's Tip — "Totality of Circumstances" Test — "Four Corners of the Warrant Application": An investigating officer obtained a search warrant based on information from a self-admitted marijuana user. Before obtaining the warrant, the officer corroborated all the information through public records. A search of the respondent's residence resulted in the seizure of marijuana plants and materials used to cultivate marijuana. The District Court granted respondent's motion to suppress the evidence. The Supreme Court reversed and held that there was probable cause to support the warrant. To determine whether there is probable cause to issue a search warrant, one must look only at information contained in the four corners of the application. The test for determining probable cause for issuance of a search warrant is the "totality of the circumstances" test set forth in Ill. v. Gates, 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317. Legally unimpeachable findings of probable cause may rest upon evidence that is not legally admissible at the criminal trial itself. After-the-fact scrutiny by the reviewing court should not take the form of de novo review. St. v. Sundberg, 235 M 115, 765 P2d 736, 45 St. Rep. 2235 (1988), followed in St. v. Crowder, 248 M 169, 810 P2d 299, 48 St. Rep. 376 (1991), St. v. Van Voast, 247 M 194, 805 P2d 1380, 48 St. Rep. 160 (1991), and in St. v. Rinehart, 262 M 204, 864 P2d 1219, 50 St. Rep. 1517 (1993). See also St. v. Mosley, 260 M 109, 860 P2d 69, 50 St. Rep. 675 (1993), St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997), and St. v. Oleson, 1998 MT 130, 289 M 139, 959 P2d 503, 55 St. Rep. 517 (1998).

Officer's Persistence in Obtaining Blood Sample Pursuant to Search Warrant — Within Scope of Employment: Collins was arrested for DUI but refused to submit to a chemical test. Upon learning that Collins was on probation for a prior DUI and for other non-DUI offenses, the arresting officer obtained a search warrant authorizing extraction of a blood sample. Collins later filed an action alleging assault and battery and violation of his constitutional rights. The District Court found the officer acted outside the scope of his employment and that the blood sample was unauthorized and contrary to 61-8-402(3). The Supreme Court reversed, finding it was clear the officer acted as he did to preserve evidence relating to non-DUI offenses and acted within the scope of his employment. Where law enforcement authorities have probable cause to believe an offense other than an underlying DUI has occurred for which a blood test is required to preserve evidence, a blood sample may be taken pursuant to a search warrant. Collins v. St., 232 M 73, 755 P2d 1373, 45 St. Rep. 878 (1988).

Informant's Tip — Gates Test Replaces Aguilar-Spinelli Test: Crain was convicted of a drug offense after issuance of a search warrant to search his motel room led to the discovery and seizure of drugs, paraphernalia, and drug records. Crain appealed, contending that the application of the Gates "totality of the circumstances" test should not be applied to determine the sufficiency of the evidence to issue a warrant and that neither the Gates nor Aguilar-Spinelli test was met. The Supreme Court held that there was sufficient information in the application for a magistrate to determine that there was a probability that drugs and records would be found in Crain's room. Additionally, the Gates "totality of the circumstances" test for determining the sufficiency of the evidence to issue a search warrant completely replaces the more stringent two-pronged Aguilar-Spinelli test. St. v. Crain, 223 M 167, 725 P2d 209, 43 St. Rep. 1628 (1986).

Probable Cause Not Negated by Passage of Time — Staleness as Dependent on Nature of Property Sought: Defendant in a homicide case contended that the applications for search warrants did not state facts sufficient to show probable cause, that the applications did not establish a nexus between the items sought, and that the information in the applications was stale. The Supreme Court, noting its decision in St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984), to draw all reasonable inferences to support the magistrate's determination, found substantial basis for concluding probable cause existed at the time the warrants were issued, including the fact that since staleness depends largely on the nature of the property sought, the passage of time alone (in this case 53 days after discovery of the body) may not negate probable cause. St. v. Pease, 222 M 455, 724 P2d 153, 43 St. Rep. 1417 (1986).

Anonymous Tip: In dicta, the Supreme Court stated that as a general rule it does not disapprove of the use of anonymous tips as an element in the determination of probable cause for a search warrant. St. v. Cain, 220 M 509, 717 P2d 15, 43 St. Rep. 568 (1986).

Insufficient Findings by Trial Court: In considering a motion to suppress evidence discovered during a search of the defendant's motel room, the trial judge made inadequate findings of fact; therefore, the matter was remanded for a second evidentiary hearing. The trial judge made no finding of whether the defendant knowingly exposed his motel room to the police officer; whether the officer intruded beyond any invitation extended by the defendant; whether, if the officer did intrude, the intrusion had any effect on what the officer was able to observe in the motel room; or what the officer could observe from his position at the doorway of the motel room. St. v. Wilson, 218 M 359, 708 P2d 270, 42 St. Rep. 1647 (1985).

Substantial Preliminary Showing of False Affidavit: The defendant satisfied the test adopted by the Supreme Court in St. v. Sykes, 194 M 14, 663 P2d 691, 40 St. Rep. 690 (1983), for challenging the validity of an affidavit used by law enforcement officers to obtain a search warrant. The defendant made a substantial preliminary showing that the state's affidavit was based on deliberate falsehood or reckless disregard for the truth. Thus, the trial judge did not err in considering evidence on this issue at the probable cause hearing. St. v. Wilson, 218 M 359, 708 P2d 270, 42 St. Rep. 1647 (1985). The Sykes standard was modified, inasmuch as a defendant need no longer prove that the person providing false information did so knowingly, intentionally, or with a reckless disregard for the truth before the false statements may be excised from the application or affidavit, in St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Totality of Circumstances:

There was probable cause to issue a search warrant when the police officer's affidavit in support of the warrant indicated the following: (1) a citizen-informant reported that after some property had been stolen from her, she was approached by an individual who told her he had been involved in the theft and that he had traded some of her property for drugs at a trailer (the location for which the search warrant was later issued); (2) the citizen-informant told police that she had retrieved some of her stolen property at the trailer; (3) the police officer had known the

citizen-informant for a number of years and believed her to be reliable; (4) the citizen-informant had been told by another person that he had traded a rifle for drugs at the trailer; (5) a neighbor of the trailer's residents reported to police that he believed that drugs were being sold from the trailer; and (6) another neighbor had made similar complaints to the police, including a complaint of a high rate of traffic in the area of the trailer. St. v. Jensen, 217 M 272, 704 P2d 45, 42 St. Rep. 1191 (1985).

Chubb observed a vehicle on a single-lane road that provided access to a house. Since it was uncommon to see a vehicle on the road, Chubb stopped it to talk to the driver. It was later learned that the house had been burglarized. The vehicle was identified as belonging to the defendant, and a receipt with the defendant's name on it was found at the burglarized house. An investigation revealed that the defendant's residence had several tarps spread on the ground covering unknown personal property and a temporary structure had recently been constructed, apparently used for storage of personal property. The defendant was seen outside a tavern in Idaho known as a place for fencing stolen property. Based on the foregoing information, a search warrant was issued. The defendant made a motion to suppress the fruits of the search, asserting that there had been insufficient probable cause to search the defendant's premises. In the instant case, the totality of the circumstances as expressed in the application for search warrant supported the decision of the magistrate that there was a fair probability that evidence of a crime would be found in a particular place. St. v. Pierre, 208 M 430, 678 P2d 650, 41 St. Rep. 445 (1984).

Probable Cause Contained Within Four Corners of Officer's Affidavit: The information contained in Sergeant Harada's affidavit satisfied the probable cause test set forth in Ill. v. Gates, 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317 (1983). It included information concerning the time, date, and place where drugs could be found; the kind and intended use of drugs; and an accurate description of defendant's car and defendant's travel plans. It also stated that the informant had been present when defendant used drugs; that defendant personally told informant he was going to transport drugs to Great Falls on January 25, 1984; and that informant was believed to be reliable because of reliable information previously provided by him to the police. Finding probable cause, the Supreme Court reversed the District Court with an admonition to the Justice of the Peace who issued the search warrant to refrain from conducting conversations with the officer making application that elicit oral responses not recorded on the face of the affidavit and possibly tainting the warrant issued. St. v. Hendrickson, 217 M 1, 701 P2d 1368, 42 St. Rep. 981 (1985).

Probable Cause Established By Defendant's Record and Informant's Information: When the affidavit in support of an application for a search warrant indicated that: (1) defendant had allegedly been arrested in 1975 for possession of marijuana; (2) in 1977, 347 grams of marijuana had allegedly been found in defendant's laundry; (3) in 1978, an informant had advised law enforcement officers that defendant possessed a large quantity of cocaine and had distributed it to the informant; (4) in January and February of 1982, defendant had associated with Fitzgibbons, who became in May 1982 a fugitive on charges connected with distribution of cocaine; (5) in June 1982, law officers learned that defendant had distributed cocaine to several people at his residence; (6) 2 days before the search an informant advised a law officer that Fitzgibbons was coming to defendant's town; and (7) on the day of the search the same informant had seen Fitzgibbons at defendant's house twice and had smelled marijuana in the home, there was probable cause to issue a search warrant to search for Fitzgibbons or contraband. St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984).

Informant's Self-Verifying Tip — Aquilar-Spinelli and Gates Tests: A search warrant was based upon a tip from an informant (who was reliable in three previous tips), and part of the tip resulted in the seizure of marijuana from a car specifically described in the tip and that had apparently originated from the defendant's residence. There was sufficient probable cause to issue a search warrant for the search of the defendant's residence under the Aquilar-Spinelli test because there was sufficient "self-verifying" detail in the tip to inform the issuing magistrate of the circumstances underlying the informant's basis of knowledge and the informant's specific information, corroborated by the details concerning the automobile, was sufficient evidence of the informant's veracity. Since the stringent requirements of the Aquilar-Spinelli test were met, probable cause also existed under the "totality of the circumstances" test set forth in Illinois v. Gates, 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317, 51 U.S.L.W. 4709 (1983). St. v. Erler, 207 M 88, 672 P2d 624, 40 St. Rep. 1915 (1983).

Date and Knowing Commission of Offense — Omission of Allegations Not Fatal to Affidavit: Where a search warrant was issued upon an affidavit that failed to allege that the defendant "knowingly" committed the offense of possession of a dangerous drug and alleged a date of its commission only in the alternative, the District Court did not err in denying the defendant's

motion to suppress the evidence as gained from a search warrant for which there was no probable cause. The evidence sufficient to establish probable cause for a search warrant is significantly less than that required to support a conviction. The affidavit showed that the UPS package accepted by the defendant contained the drug in Hawaii and in Montana before it was delivered to the defendant. Thus, the failure of the affidavit to allege that the defendant knew his package contained hashish did not invalidate the search warrant. Because the affidavit alleged a time and dates in the alternative (12:10 p.m. on either April 6 or 7, 1981) on which the offense was committed, a doubtful basis of fact such as to defeat the affidavit was not created. St. v. Kelly, 205 M 417, 668 P2d 1032, 40 St. Rep. 1400 (1983).

Test for Determining Sufficiency of Affidavit Based on Hearsay — Affidavit Held Sufficient: Where the defendant challenged the sufficiency of an affidavit supporting an application for a search warrant on the basis that the affidavit contained hearsay based on hearsay statements of a federal inspector and a drug agent in Hawaii that were relayed to the affiant, the District Court did not err in denying the defendant's motion to quash the evidence as obtained under a warrant for which there was no probable cause. The facts alleged in the affidavit showed both the underlying circumstances as to how the affiant believed the hashish was where he believed it to be, and also showed the circumstances why the affiant believed his hearsay sources, in this case two federal officers, were reliable; and the affidavit therefore satisfied both the two-pronged test for use of hearsay statements established in Aguilar v. Texas, 378 US 108, 12 L Ed 2d 723, 84 S Ct 1509 (1964), and Spinelli v. U.S., 393 US 410, 21 L Ed 2d 637, 89 S Ct 584 (1969), and the more common sense "totality of the circumstances" test announced in Illinois v. Gates, 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317 (1983). St. v. Kelly, 205 M 417, 668 P2d 1032, 40 St. Rep. 1400 (1983).

Disclosure of Informant's Identity — Challenge to Informant's Statements: A defendant in a drug offense case moved to quash a search warrant and to produce the name of the informant whose statements were used in the affidavit in support of the search warrant. Defendant alleged that either the informant had made false statements or the informant had made an illegal entry into defendant's home. In a proceeding for Writ of Supervisory Control, the Supreme Court set forth the procedure to be used to challenge the validity of an affidavit on the basis of deliberate falsehood or of reckless disregard for the truth. First, the defendant must make a substantial preliminary showing that his rights have been violated. Second, if defendant makes the requisite preliminary showing, then the affidavit must be examined to determine if sufficient information remains after excising the challenged material to support a finding of probable cause. Only if the remaining content is insufficient is defendant entitled to an evidentiary hearing. Finally, at the hearing defendant must establish by a preponderance of the evidence that the affidavit was based on an illegal entry, false information, or insufficient probable cause. If defendant is successful, that evidence will be suppressed. Defendant is not entitled to disclosure of the informant's identity until he has made a substantial preliminary showing that the entry was illegal or the information was false. St. v. Sykes, 194 M 14, 663 P2d 691, 40 St. Rep. 690 (1983).

Matters Before District Court, but Not Magistrate at Issuance of Warrant: The District Court erred in upholding a search when it considered as probable cause matters testified to by police but not contained in the information available to the magistrate issuing the warrant. The only information given the Justice of the Peace was the search warrant and the search warrant application, which did not on their face contain probable cause for the issuance of the search warrant. St. v. Isom, 196 M 330, 641 P2d 417, 39 St. Rep. 137 (1982), followed with regard to applicability of the four corners of the warrant application in St. v. Van Voast, 247 M 194, 805 P2d 1380, 48 St. Rep. 160 (1991).

Insufficient Facts: A search warrant premised on two factors, photographs taken of defendant's yard by a Sheriff's detective and a sample of marijuana illegally obtained by an inquisitive neighbor, was not based on sufficient competent facts. Since it was virtually impossible by careful scrutiny of the photographs alone to either locate or identify any substance which would give credibility to the existence of marijuana, the search warrant was, in fact, based solely on an illegally obtained sample. St. v. Helfrich, 183 M 484, 600 P2d 816 (1979).

Writing Required — Hearsay: The information relied upon to establish probable cause must be in writing. Hearsay evidence may be sufficient to establish probable cause to support a search warrant, but the person making the application must provide the issuing magistrate with additional facts which will permit the magistrate to determine whether probable cause exists. The magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were and from which the applicant concluded that the informant was credible or his information reliable. Thomson v. Onstad, 182 M 119, 594 P2d 1137 (1979).

Odor of Marijuana Insufficient: The odor of burning marijuana does not by itself establish probable cause to issue a search warrant. Smell alone is not sufficient to justify the invasion of the privacy of one's home. St. v. Olson, 180 M 151, 589 P2d 663 (1979), distinguished in St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984).

Probability Sufficient: To constitute probable cause for arrest or issuance of a search warrant "only a probability of criminal conduct need be shown". St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978), quoting State ex rel. Garris v. Wilson, 162 M 256, 511 P2d 15 (1973).

Sworn Testimony Supporting Affidavit: The Supreme Court rejected the defendant's contention that search warrants were invalid for failure on the part of the County Attorney to swear or affirm and reduce the supporting testimony to writing, when there was, in effect, sworn testimony by the County Attorney and Deputy Sheriff in addition to an affidavit, the combination of which established probable cause. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978). See also St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

"Mere Informant" Distinguished From "Citizen Informant": An application for a search warrant based on hearsay is insufficient if it does not show the credibility of a "mere informant" or contain facts or circumstances showing the informant to be a disinterested eyewitness, motivated by good citizenship, openly in the aid of law enforcement as a "citizen informant". St. v. Flynn, 176 M 441, 578 P2d 1165 (1978); St. v. Leistiko, 176 M 434, 578 P2d 1161 (1978).

Facts Sufficient — Oral Examination to Establish Reliability: While the general rule is that an affidavit for a search warrant cannot be supplemented by oral statements to the issuing magistrate, the rule requires only that the affidavit allege facts which, if true, give probable cause to search; it does not prohibit the magistrate's oral examination of the informant to determine his reliability. St. v. Thomson, 169 M 158, 545 P2d 1070 (1976).

Informant's Oral Testimony to Establish Reliability: When an affidavit for a search warrant is wholly sufficient to establish probable cause but is based on hearsay from an untested informant, the reliability of that informant may be checked by a magistrate and informant's oral testimony to the magistrate is not considered as supplementing probable cause to support the affidavit, but merely as providing a direct test of the informant's reliability as to the hearsay contained in the affidavit. St. v. Thomson, 169 M 158, 545 P2d 1070 (1976).

Sufficiency of Affidavit for Warrant: Contemporaneous oral declarations to a magistrate cannot be used to bolster an insufficient affidavit in the attempt to establish probable cause, unless such declarations are sworn, signed, reduced to writing, and made a part of the affidavit for the issuance of the search warrant. An affidavit which omits reference to the time of the criminal event cannot establish probable cause and is therefore deficient. State ex rel. Townsend v. District Court, 168 M 357, 543 P2d 193 (1975).

Third-Hand Information — Credible: The affidavit of a police officer, who had acquired information from a military investigator, who had acquired his information from a known and reliable informer, was of sufficient credibility to constitute probable cause for a search warrant. Longsworth v. District Court, 165 M 539, 530 P2d 462 (1974).

Failure to State Why Credible: The statement in the affidavit that a source of known reliability had told police that the defendant would be traveling with cocaine and other drugs in his possession was not sufficient to establish probable cause since the magistrate must be informed of some of the underlying circumstances from which the officer could conclude that the testimony of the anonymous informant was credible and his information reliable. St. v. Thorsness, 165 M 321, 528 P2d 692 (1974).

Verification by Other Sources: The affidavit for a search warrant, which was based on the statements of an anonymous informer and did not establish the credibility of the informer but was verified by two other sources of information, established sufficient probable cause for the issuance of the search warrant. St. v. Paschke, 165 M 231, 527 P2d 569 (1974).

Connection Between Defendant and Activity Insufficient: The application for a search warrant was defective, notwithstanding it informed the issuing justice of criminal activity in a certain room of the house, since the only connection between the defendant and the activity described was that he had a room in the house. State ex rel. Garris v. Wilson, 162 M 256, 511 P2d 15 (1973), distinguished in St. v. Paschke, 165 M 231, 527 P2d 569 (1974).

Stolen Property in Plain Sight: Stolen property in plain sight which is discovered by police during the lawful impounding of a vehicle may be used as the basis of probable cause for issuance of a search warrant. State ex rel. Wilson v. District Court, 159 M 439, 498 P2d 1217 (1972).

Hearsay From Reliable Informants: An affidavit based on hearsay from reliable and credible informants with no felony convictions was sufficient. St. v. Troglia, 157 M 22, 482 P2d 143 (1971).

Judge's Personal Knowledge and Witnesses' Observations Insufficient: There was not probable cause for the issuance of a search warrant for burglar tools and illegal drugs based on the judge's personal knowledge of the accused's reputation and witnesses' observations of a pillow and bags in his car from which the accused drew a gun. St. v. Bentley, 156 M 129, 477 P2d 345 (1970).

Sufficient Facts: The evidence was held to establish probable cause for a search and seizure. In re Herter, 30 F2d 968 (9th Cir. 1929), modified in 33 F2d 400 (9th Cir. 1929).

Facts Necessary to Establish:

An application for a search warrant must set forth sufficient facts to enable a judicial officer to see that probable cause for its issuance exists. State ex rel. Baracker v. District Court, 75 M 476, 244 P 280 (1926); State ex rel. Thibodeau v. District Court, 70 M 202, 224 P 866 (1924); State ex rel. Samlin v. District Court, 59 M 600, 198 P 362 (1921).

The circumstances justifying the issuance of a search warrant must create a reasonable belief that probable cause exists and must be as strong as those which would warrant the institution of a criminal charge for an arrest on such a charge without warrant. State ex rel. Stange v. District Court, 71 M 125, 227 P 576 (1924).

PARTICULARITY

Seized Evidence Not Considered "Other Evidence of a Crime" Not Subject to Suppression: Cotterell moved to suppress evidence of illegal hunting activity that was seized under a search warrant that allowed seizure of numerous hunting-related items, but also allowed seizure of "any other evidence of a crime", on grounds that the warrant was overbroad. The motion was denied. On appeal, the state conceded that the phrase "any other evidence of a crime" was overbroad (see St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180 (1999), and Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001)) but asserted that journals and calendars found in searching Cotterell's property were directly related to the crimes being investigated and thus were not subject to suppression. The Supreme Court agreed with the state. Although the journals and calendars were not specifically mentioned in the warrant, they were found during execution of a validly executed warrant in places that could lawfully be searched, were found in the course of a search for items that were specifically set out in the warrant, and were related to hunting and fishing activities. Even if the overbroad phrase was excised from the warrant, the journals and calendars were within the scope of the warrant, so denial of the motion to suppress was affirmed. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008).

References in Search Warrant to Currency and Items Connected With Illegal Drug Activity in Violation of Chapter of Code Sufficient: Payne, who was driving a rental car, was stopped for speeding and subsequently arrested for driving under the influence. During the stop, based on observations, the officer asked Payne if he was carrying drugs or large amounts of cash, and Payne responded that he was not. Payne also stated that he was traveling from Pittsburgh to Seattle to visit his children and flying back. The officer was suspicious because Payne was driving thousands of miles to visit but flying back after only a few hours. Payne was transported to the Sheriff's office, the vehicle was towed, and the rental company was notified. The rental company immediately terminated its contract with Payne under terms of the agreement and requested that Payne's personal items be removed from the car so that the company could have someone retrieve the vehicle. Payne subsequently consented to a search of the car, but officers obtained a warrant covering Payne's property that was found in the car. When removing Payne's property, the officer found some drugs and paraphernalia in plain view and removed a toolbox from the trunk. The toolbox contained $129,970. A petition for forfeiture was filed for the funds in the toolbox, and Payne argued that the petition should be dismissed, claiming that the search of the vehicle was illegal because the search warrant was not particular enough with respect to items to be seized because it referred to currency and items connected to illegal drug activity in violation of Title 45, ch. 9. The Supreme Court held that there was sufficient probable cause to issue the search warrant and that the warrant was not overbroad because a more precise description of the items to be seized was not possible because officers could not know in advance the type or amounts of currency or the type or amounts of drugs that the search might uncover. St. v. $129,970.00 in U.S. Currency, 2007 MT 148, 337 M 475, 161 P3d 816 (2007).

Catchall Phrase in Warrant — Particularity Requirement — Suppression of Only Articles Seized Pursuant to Invalid Portions of Search Warrant: A lawful search warrant authorized officers to search Hauge's mobile home and seize drugs, drug paraphernalia, records of drug transactions, weapons, and the proceeds of drug transactions, including "anything else of value furnished or intended to be furnished in the exchange of controlled substances". Hauge argued that the catchall phrase "anything else of value" rendered the warrant overbroad and invalid and

that any evidence seized pursuant to the warrant must be suppressed. After initially citing the requirement that a search warrant must particularly describe who or what is to be seized, the Supreme Court noted that in St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180 (1999), warrant language authorizing seizure of anything else of value was a catchall phrase encompassing everything conceivable, giving officers unbridled discretion to engage in a general exploratory rummaging without any guidance in distinguishing between items that could and could not be seized and that the language rendered the warrant facially overbroad and all fruits of the search inadmissible. However, the court also noted the adoption of the doctrine of severance, explained in U.S. v. Gomez-Soto, 723 F2d 649 (9th Cir. 1984), which provides that invalid portions of a search warrant may be stricken and valid portions preserved and that only articles seized pursuant to the invalid portions of the warrant need be suppressed. In Hauge's case, officers acting pursuant to a lawfully issued and otherwise sufficiently particularized warrant did not seize any property related to the catchall phrase and no criminal charges resulted from the presence of the catchall language in the warrant. The overbroad catchall clause was thus severable, and because no evidence was seized pursuant to the clause, no evidence was subject to suppression. Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001). See also St. v. Kuneff, 1998 MT 287, 291 M 474, 970 P2d 556 (1998).

Warrant Authorizing Search for "Anything Else of Value" as Overbroad: Authorities suspected that Seader's van would contain drugs and drug-related evidence, and a search warrant was issued in part authorizing the seizure of "proceeds of drug sales whether in monies, precious metals, property or anything else of value furnished or intended to be furnished in the exchange for the evidence or contraband relating to the use, sale or manufacture of dangerous drugs". Seader moved to suppress the results of the search, including a stolen ATV discovered in the van. The Supreme Court noted that the specificity required of a search warrant may vary depending on the circumstances and the type of items involved and that generic categories or general descriptions of items are not necessarily invalid if a more precise description of items to be seized is not possible. However, the language in this warrant authorizing seizure of "anything else of value" was a catchall phrase encompassing everything conceivable, giving officers unbridled discretion to engage in a general exploratory rummaging in Seader's belongings without any guidance in distinguishing between items that could and could not be seized. The language rendered the warrant facially overbroad and all fruits of the search inadmissible. St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180, 56 St. Rep. 1165 (1999). See also Coolidge v. N.H., 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971), U.S. v. Leary, 846 F2d 592 (10th Cir. 1988), and St. v. Perrone, 834 P2d 611 (Wash. 1992). However, see Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001), in which it was held that when faced with a lawfully issued and otherwise sufficiently particularized warrant, the overbroad catchall phrase should be severed and only evidence seized under that clause need be suppressed.

Application and Search Warrant in Combination Describing Thing to Be Seized — Same Officer Applying for and Serving Warrant: A search warrant, standing alone, would be invalid for its failure to particularly describe the thing to be seized, which thing was described only in the application for the search warrant. The application and the warrant when read in combination adequately described the thing to be seized. If the warrant had been directed to an officer other than the officer who made and signed the application, it would have been invalid; however, in this case the same officer signed the application, served the warrant, and seized the contraband. The District Court properly denied defendant's motion to suppress even though the warrant was constitutionally defective. St. v. Peterson, 227 M 503, 741 P2d 392, 44 St. Rep. 1268 (1987).

Sufficient Description of Premises to Be Searched: The search warrant was of insufficient particularity. St. v. Ballew, 163 M 257, 516 P2d 1159 (1973).

Law Review Articles

Discussion of State v. Tropf and State v. Snider, 37 Mont. L. Rev. 274 (1976).

Collateral References

Searches and Seizures *key* 3.6, 3.7.

79 C.J.S. Searches and Seizures §§188 through 193.

68 Am. Jur. 2d Searches and Seizures §180, et seq.

When are facts relating to marijuana, provided by police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of controlled substance—state cases. 114 ALR 5th 235.

When are facts relating to drug other than cocaine or marijuana so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of controlled substance—state cases. 113 ALR 5th 517.

When are facts relating to marijuana, provided by one other than police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of a controlled substance—state cases. 112 ALR 5th 429.

When are facts offered in support of search warrant for evidence of sexual offense so untimely as to be stale—state cases. 111 ALR 5th 239.

When are facts offered in support of search warrant for evidence of sale or possession of cocaine so untimely as to be stale—state cases. 109 ALR 5th 99.

Odor detectable by unaided person as furnishing probably cause for search warrant. 106 ALR 5th 397.

Error, in either search warrant or application for warrant, as to address of place to be searched as rendering warrant invalid. 103 ALR 5th 463.

Validity of, and admissibility of evidence discovered in, search authorized by judge over telephone. 38 ALR 4th 1145.

Disputation of truth of matters stated in affidavit in support of search warrant—modern cases. 24 ALR 4th 1266.

Probable cause for issuance of search warrant, propriety of considering hearsay or other incompetent evidence in establishing. 10 ALR 3d 359.

46-5-222. Search warrants issued by telephone.

Commission Comments

1991 Comment: This statute is an adaptation of the federal rule concerning the issuance of warrants upon oral testimony. See Rule 41(c)(2), Fed. R. Crim. P.

Compiler's Comments

2007 Amendment: Chapter 434 in (3)(a) in two places after "judge" inserted reference to peace officer; in (3)(b) at beginning of first sentence inserted "If the recording is made by the judge"; inserted (3)(c) providing for the recording and transcription of a telephonic application for a search warrant by a peace officer; and made minor changes in style. Amendment effective October 1, 2007.

46-5-223. To whom search warrant directed.

Commission Comments

1991 Comment: This statute preserves the former requirement that a search warrant specify the peace officer who will conduct the search. The Commission discussed this provision at length and decided it should be retained. The provision that an executing officer be named in the warrant reflects a desire to limit the search to the discovery of the thing that is the object of the search. The requirement that the officer be named presumes that the officer will have knowledge of the place to be searched and the object to be seized.

Case Notes

Failure to Fill in Name of Officer Obtaining Warrant Not Grounds for Suppression of Evidence: The defendant appealed his conviction on the basis that the evidence obtained under a search warrant should have been suppressed because the space for the name of the officer applying for the warrant had been left blank in the heading of the warrant. The Supreme Court held that the omission did not substantially affect the defendant's rights and that to suppress evidence when the officer applied for the warrant, served the warrant, and executed the return of service for the warrant would be an irrational result. The Supreme Court also indicated that the requirement that the officer be named presumes that the officer will have knowledge of the area to be searched and is therefore more than a formality and that the nonconformity must be carefully examined to see if the interests of the defendant have been compromised. St. v. Pipkin, 1998 MT 143, 289 M 240, 961 P2d 733, 55 St. Rep. 567 (1998).

46-5-224. What may be seized with search warrant.

Commission Comments

1991 Comment: This statute reflects both 1987 MCA 46-5-203 and Rule 41(b) of the Federal Rules of Criminal Procedure. Both the 1987 code and the federal rule provide for the search and seizure of evidence of criminal activity and of contraband, other things criminally possessed, and items used in committing a criminal offense. The 1987 code and this statute are substantially similar except for subsection (3).

Montana's 1987 code did not provide for the search and seizure of a criminal offender. Subsection (3) permits a search warrant to issue for a person for whom there is probable cause for arrest and for a person against whom an arrest warrant has already been issued. Under this statute, practice and procedure should not change but the authorization for such a search warrant will be express.

The 1987 code allowed a warrant to issue whereby officers could search for and seize a kidnap victim. See 1987 MCA 46-5-203(3). This statute allows similar search warrants for persons who are unlawfully restrained. While this statute broadens the applicability of the search warrant, it should not affect established procedure because unlawful restraint is an element of kidnapping.

Source: Illinois Code of Criminal Procedure, [Chapter 38,] section 108-3(a) and (b).

The intent of this provision is to set out as expansively as possible the items which may be seized under a search warrant. This section basically codifies present law established by federal and state cases. (See State v. Bisaccia, 213 A.2d 185.)

This provision does not eliminate the necessity of "particularly describing" the place to be searched or the things to be seized as is required by [46-5-201 (now repealed)], the Montana Constitution [1889], Art. III, section 7 [now Art. II, sec. 11, 1972 Mont. Const.], and the United States Constitution, Amendment 4.

The courts are not clear and exacting as to the requirement of description. Describing an apartment building generally, and not an explicit apartment is not sufficient. People v. Estrada, 44 Cal. Rptr. 165. Where books are to be seized the most "scrupulous exactitude" must be used when the basis for their seizure is ideas which they contain. Stanford v. Texas, 85 S. Ct. 506. Thus a determination of particular description necessary to meet the statutory and constitutional requirements may be made only in view of the facts and circumstances of the particular case.

Compiler's Comments

1991 Amendment: Substituted introductory clause that reads: "A warrant may be issued under this section to search for and seize any" for "A search warrant may authorize the seizure of the following"; inserted (1) listing "evidence"; deleted former (2) that read: "(2) any instruments, articles, or things which are the fruits of, have been used in the commission of, or may constitute evidence of any offense"; in (3) substituted present language concerning person subject to arrest for "any person who has been kidnapped in violation of the laws of this state or who has been kidnapped in another jurisdiction and is now concealed within this state"; and made minor changes in style.

Case Notes

Seized Evidence Not Considered "Other Evidence of a Crime" Not Subject to Suppression: Cotterell moved to suppress evidence of illegal hunting activity that was seized under a search warrant that allowed seizure of numerous hunting-related items, but also allowed seizure of "any other evidence of a crime", on grounds that the warrant was overbroad. The motion was denied. On appeal, the state conceded that the phrase "any other evidence of a crime" was overbroad (see St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180 (1999), and Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001)) but asserted that journals and calendars found in searching Cotterell's property were directly related to the crimes being investigated and thus were not subject to suppression. The Supreme Court agreed with the state. Although the journals and calendars were not specifically mentioned in the warrant, they were found during execution of a validly executed warrant in places that could lawfully be searched, were found in the course of a search for items that were specifically set out in the warrant, and were related to hunting and fishing activities. Even if the overbroad phrase was excised from the warrant, the journals and calendars were within the scope of the warrant, so denial of the motion to suppress was affirmed. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008).

Reasonable Relationship Between Items Seized and Motive for Crimes Charged — Scope of Warrant Not Exceeded: Bar-Jonah was charged with impersonating a police officer and carrying a stun gun. During a search of Bar-Jonah's residence, police seized cameras, photo albums, film negatives, and various other items that Bar-Jonah contended were not related to the charges in the search warrant. Bar-Jonah's motion to suppress the items was denied, and on appeal, the Supreme Court affirmed. Relying on U.S. v. Clark, 31 F3d 831 (9th Cir. 1994), Bar-Jonah contended that allowing the seizure of fruits and instrumentalities of the offense was overbroad; however, in St. v. Quigg, 155 M 119, 467 P2d 692 (1970), the Supreme Court held that items may be seized if there is a reasonable relationship between the items and the motive for the charged crime and that it is sufficient to establish a fair probability that items sought in a warrant application are connected to that crime. In this case, based on all the facts and circumstances, the items were reasonably related to the criminal behavior enumerated in the warrant application and to Bar-Jonah's motive for impersonating a police officer and carrying a stun gun. Additionally, under Andresen v. Md., 427 US 463 (1976), the fact that items seized may later be used to form an evidentiary basis of another charge does not require suppression of the evidence. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Catchall Phrase in Warrant — Particularity Requirement — Suppression of Only Articles Seized Pursuant to Invalid Portions of Search Warrant: A lawful search warrant authorized officers to search Hauge's mobile home and seize drugs, drug paraphernalia, records of drug transactions, weapons, and the proceeds of drug transactions, including "anything else of value furnished or intended to be furnished in the exchange of controlled substances". Hauge argued that the catchall phrase "anything else of value" rendered the warrant overbroad and invalid and that any evidence seized pursuant to the warrant must be suppressed. After initially citing the requirement that a search warrant must particularly describe who or what is to be seized, the Supreme Court noted that in St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180 (1999), warrant language authorizing seizure of anything else of value was a catchall phrase encompassing everything conceivable, giving officers unbridled discretion to engage in a general exploratory rummaging without any guidance in distinguishing between items that could and could not be seized and that the language rendered the warrant facially overbroad and all fruits of the search inadmissible. However, the court also noted the adoption of the doctrine of severance, explained in U.S. v. Gomez-Soto, 723 F2d 649 (9th Cir. 1984), which provides that invalid portions of a search warrant may be stricken and valid portions preserved and that only articles seized pursuant to the invalid portions of the warrant need be suppressed. In Hauge's case, officers acting pursuant to a lawfully issued and otherwise sufficiently particularized warrant did not seize any property related to the catchall phrase and no criminal charges resulted from the presence of the catchall language in the warrant. The overbroad catchall clause was thus severable, and because no evidence was seized pursuant to the clause, no evidence was subject to suppression. Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001). See also St. v. Kuneff, 1998 MT 287, 291 M 474, 970 P2d 556 (1998).

Nude Photographs Within Scope of Tax Evasion Search Warrant: Agents of the Department of Revenue obtained a search warrant for the search of the home of John and Jane Doe for the purpose of obtaining evidence of failure to report income derived from insurance and firearms sales. In executing the warrant, agents found an envelope that they opened. They discovered nude photos of John and Jane Doe, some of which led to an investigation for child abuse of the parties' children. The Does brought an action for invasion of privacy, claiming that the search of the envelope was outside the scope of the search warrant. The Supreme Court held that under the rationale of U.S. v. Ross, 456 US 798 (1982), and Stanley v. Ga., 394 US 557 (1969), the state's motion to dismiss the complaint was properly granted. The envelope could have contained photographic evidence of illegal dealing in firearms, of which the Does were suspected. The search of the envelope was therefore within the scope of the warrant. Doe v. St., 256 M 348, 846 P2d 1018, 50 St. Rep. 105 (1993).

Application of Inadvertent Discovery Rule: The cautious actions of law enforcement officials in seeking to protect the validity of a search warrant should not invalidate the inadvertent seizure of evidence or contraband when the officers conducting the search adhere to the intent contained in the warrant. St. v. Hembd, 235 M 361, 767 P2d 864, 46 St. Rep. 55 (1989), following U.S. v. $10,000 in U.S. Currency, 780 F2d 213 (2nd Cir. 1986). St. v. Hembd was overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Seizure of Items Not Described in Search Warrant: Based on an informant's tip, a search warrant was issued for respondent's home, and marijuana plants and materials used to cultivate marijuana were seized. The District Court granted respondent's motion to suppress, and the Supreme Court reversed, holding that there was probable cause to support the warrant. Items or things other than those described in the warrant may be seized so long as a reasonable relationship is demonstrated between the search authorized by the warrant and the seizure of the thing not described. St. v. Sundberg, 235 M 115, 765 P2d 736, 45 St. Rep. 2235 (1988).

Officer's Persistence in Obtaining Blood Sample Pursuant to Search Warrant — Within Scope of Employment: Collins was arrested for DUI but refused to submit to a chemical test. Upon learning that Collins was on probation for a prior DUI and for other non-DUI offenses, the arresting officer obtained a search warrant authorizing extraction of a blood sample. Collins later filed an action alleging assault and battery and violation of his constitutional rights. The District Court found the officer acted outside the scope of his employment and that the blood sample was unauthorized and contrary to 61-8-402(3). The Supreme Court reversed, finding it was clear the officer acted as he did to preserve evidence relating to non-DUI offenses and acted within the scope of his employment. Where law enforcement authorities have probable cause to believe an offense other than an underlying DUI has occurred for which a blood test is required to preserve evidence, a blood sample may be taken pursuant to a search warrant. Collins v. St., 232 M 73, 755 P2d 1373, 45 St. Rep. 878 (1988).

Federal Constitutional Requirement of Search Warrant Prior to Entry Into Home to Conduct Search or Make Arrest: A search warrant cannot be obtained under 46-5-203 (renumbered as this section) for the purpose of searching for and seizing a person unless that person has been kidnapped. Although 46-6-104(3) and 46-6-401(3) (renumbered 46-6-210) would have permitted entry into respondent's home to arrest a fugitive without a search warrant, entry into a home to conduct a search or make an arrest has been held by the U.S. Supreme Court in Steagald v. U.S., 451 US 204, 68 L Ed 2d 38, 101 S Ct 1642 (1981), to be unreasonable under the fourth amendment to the United States Constitution unless done pursuant to a warrant. Therefore, compliance with 46-6-104(3) or 46-6-401(3) (renumbered 46-6-210) would not be sufficient to satisfy the requirements of the fourth amendment. St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984).

Seizure of "Mere Evidence" Not Described in Warrant: Given a lawful search, some items may be seized in connection with the search which are not described in the warrant. The seizure of two license plates bearing the defendant's nickname and a letter addressed to the defendant at the place illegal drugs were found was permissible because the items tended to show the defendant's dominion and control over the premises and were therefore reasonably related to the search authorized by the warrant. St. v. Meader, 184 M 32, 601 P2d 386 (1979).

Items Reasonably Related to Search: All that is needed to meet the requirements of specificity is that the officer with reasonable effort can ascertain, if possible, the automobile intended to be searched and its owner. Items other than those specifically described in the search warrant may be seized as long as a reasonable relationship is demonstrated between the search authorized in the warrant and seizure of the items not specifically described therein. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Description of Place and Property: The search warrant sufficiently described the objects to be seized. St. v. Meidinger, 160 M 310, 502 P2d 58 (1972), distinguished in St. v. Ballew, 163 M 257, 516 P2d 1159 (1973).

Collateral References

Seizure of books, documents, or other papers under search warrant not describing such items. 54 ALR 4th 391.

46-5-225. When warrant may be served.

Commission Comments

1991 Comment: This statute preserves 1987 MCA 46-5-207. The provision is placed here because it concerns the execution of a warrant.

Source: Illinois Code of Criminal Procedure, [Chapter 38,] sections 108-6 and 108-13; and R.C.M. 1947, sections 94-101-11 and 94-101-12.

The section does not change the present law. The 10-day limit was retained because it was thought to give the officer sufficient leeway as a practical matter, and at the same time deny him unbridled discretion.

Compiler's Comments

1991 Amendment: In four places substituted "served" for "executed"; and made minor changes in style.

Case Notes

Search Warrant Executed within Ten Days of Issuance Not Stale: Neely argued that the warrant authorizing the search of her home was stale because it described a party at which drugs were present and the warrant was executed 2 days after the party. The Supreme Court held that the warrant described the premises at which drugs were present not the event where they were used and that a search warrant executed within 10 days of issuance as required by statute could not be stale. St. v. Neely, 261 M 369, 862 P2d 1109, 50 St. Rep. 1363 (1993).

Collateral References

68 Am. Jur. 2d Searches and Seizures §§179, 291, 292, 298 through 300.

Nighttime: propriety of execution of search warrant at nighttime. 26 ALR 3d 951.

46-5-226. Service of search warrant.

Commission Comments

1991 Comment: This statute is a restatement of 1987 MCA 46-5-205. The phrase "on his requiring it" has been stricken from the code as being superfluous. The adoption of this statute provides no change in the law.

Source: R.C.M. 1947, section 94-301-8.

No change.

Compiler's Comments

1991 Amendment: After "served by" substituted "the peace officer specifically named" for "any of the officers mentioned in its direction but", after "aid of the officer" deleted "on his requiring it", and at end substituted "service" for "execution"; and made minor changes in style.

Case Notes

Warrant Directed to "Any Peace Officer": When the same officer applied for the warrant and executed it, the fact that it was directed "to any peace officer of this State" was not a fatal defect. St. v. Snider, 168 M 220, 541 P2d 1204 (1975), but see State ex rel. Sanford v. District Court, 170 M 196, 551 P2d 1005 (1976).

Collateral References

Searches and Seizures *key* 3(9).

79 C.J.S. Searches and Seizures §§246 through 255.

68 Am. Jur. 2d Searches and Seizures §288, et seq.

Civilian participation in execution of search warrant as affecting legality of search. 68 ALR 5th 549.

46-5-227. Service and return of search warrant.

Commission Comments

1991 Comment: This statute combines some elements of 1987 MCA 46-5-206 and Rule 41(d) of the Federal Rules of Criminal Procedure. The substance of the code is essentially unchanged. The phrase "or a duplicate original warrant" is added to the first sentence to reflect the procedure for issuing a search warrant by telephone. The second sentence, which provides for presenting the warrant and a receipt for property seized, is adopted from the federal rule. See Rule 41(d), Fed. R. Crim. P. The substance of the federal rule is favored because it is less verbose. The statute preserves the principle that the failure to leave a receipt does not render the evidence inadmissible.

Source: Illinois Code of Criminal Procedure, [Chapter 38,] section 108-6; and R.C.M. 1947, section 94-301-13.

This provision provides for specific directions as to the manner in which the search is made and specifies that failure to give a receipt is not a defect which will render the evidence inadmissible. The intent of this provision is to provide for adequate notice to the possessor of the goods or premises by requiring a copy to be left with him or at the place where the articles or things are seized.

Compiler's Comments

1991 Amendment: In second sentence, after "from whom", substituted "or from whose premises the property is taken" for "any instruments, articles, or things are seized" and at end substituted "property was taken" for "instruments, articles, or things were seized" and in last sentence substituted "property seized" for "evidence"; and made minor changes in style.

Case Notes

No Brady Violation When Petitioner Could Have Obtained Evidence by Other Available Means: Ellenburg asserted that the state committed a Brady violation (see Brady v. Md., 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963)) and violated his due process rights by the state's loss or destruction of potentially exculpatory documents seized from his office without a warrant while Ellenburg was in prerelease status in the intensive supervision program following his imprisonment at the state prison. Applying Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395 (1999), the Supreme Court noted that one element of proving a Brady violation is that the petitioner did not possess the evidence and could not have obtained it with reasonable diligence. In this case, the court affirmed, finding no Brady violation because Ellenburg did not demonstrate that he was unable to obtain comparable evidence by other reasonably available means. St. v. Ellenburg, 2000 MT 232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000).

Search Warrant Procedural Irregularity Not Affecting Defendant's Substantial Rights: Defendant contended that because of a procedural error on the part of investigating officers who were executing a search warrant, the District Court erred when it did not suppress the seized evidence. The error was detected and corrected within 24 hours. An error in the manner in which notice of seized articles is given is an irregularity in the proceedings that does not affect the substantial rights of the accused and thus does not constitute reversible error. The corrected receipt effectively gave defendant notice of seized items. St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998).

Testimony of Arresting Officer That Copy Given to Defendants — Suppression Denied: Defendants did not meet their burden of impeaching the testimony of the arresting officer, who

stated that he exhibited the original search warrant to defendants and left a duplicate copy on their premises. The testimony, although not perfect, was sufficient for the District Court's reliance in denying a motion to suppress the fruits of the search based on failure to serve the warrant at the time of the search. St. v. Cope, 250 M 387, 819 P2d 1280, 48 St. Rep. 949 (1991).

46-5-228. Procedures assisting in execution of service of search warrant.

Commission Comments

1991 Comment: This statute combines two 1987 code sections that allowed certain actions during the execution of a warrant. Subsection (1) reflects 1987 MCA 46-5-208, describing the force that may be used in executing a warrant. Subsection (2) preserves 1987 MCA 46-5-209, permitting the temporary detention of a person present during the execution of a warrant. The adoption and consolidation of these statutes should create no changes in established procedure.

Source: [Former 46-5-208] Illinois Code of Criminal Procedure, [Chapter 38,] section 108-8; and R.C.M. 1947, sections 94-301-9 and 94-301-10.

This section uses language employed by the modern courts and is consistent with the amount of force allowed in effecting an arrest (e.g., U.S. v. Lord, 184 F. Supp. 923).

[Former 46-5-209] Illinois Code of Criminal Procedure, [Chapter 38,] section 108-9.

There is no counterpart to this section in the present Montana sections. It provides a necessary safeguard for the court issuing the warrant and the officer executing it to see that the officer's safety is assured and the purpose of the warrant is carried out without interference. The case law in this area is confused and unclear and statutory clarification seems both necessary and desirable. The word "reasonably" applies to both time and manner.

Compiler's Comments

2005 Amendment: Chapter 153 in (1) at end inserted "but any restraint or detention of the person served must be in the least restrictive manner that is consistent with the safety of the person serving the warrant and anyone assisting that person"; in (2) at end of first sentence after "search" inserted "but must do so in the least restrictive manner that is consistent with the safety of the person serving the warrant and anyone assisting that person. The search of persons on the premises is"; in (2)(a) at beginning after "for" substituted "protection of the person serving the warrant and anyone assisting that person" for "self-protection"; and made minor changes in style. Amendment effective October 1, 2005.

1991 Amendment: (46-5-208) In two places substituted "serve" for "execute" and after "property, or" substituted "object" for "part thereof"; and made minor change in style.

(46-5-209) In (2), at beginning, deleted "In the execution of the warrant", after "person" substituted "serving" for "executing", and near end substituted "on the premises being searched" for "in the place"; in (2)(b) substituted "evidence, contraband, or persons" for "instruments, articles, or things"; and made minor changes in style.

Case Notes

Requisite Objective Data and Resulting Suspicion for Lawful Stop and Frisk in Motel Room: Officers were lawfully searching Roehr's motel room when Dawson knocked on the door. An officer opened the door, and Dawson entered, asking for Roehr. The officer told Dawson that he was going to conduct a pat-down search for weapons and asked Dawson if he possessed any weapons, drugs, or needles. Dawson said that he had no weapons. The officer repeated the question. Dawson motioned toward his coat pocket and said that he had some "smoke" in there. The "smoke" turned out to be methamphetamine and drug paraphernalia. Dawson sought to suppress the evidence, contending that the search was illegal because the officer had no articulable, reasonable suspicion that Dawson had engaged in criminal activity. On appeal, the Supreme Court noted that Roehr was a known criminal and that his room had been under surveillance for suspected drug activity. The officer had probable cause to believe that Roehr was conducting transactions involving dangerous drugs and stolen property in the room. When Dawson appeared, asking for Roehr, the officer had a particularized suspicion, based on the totality of the circumstances, to believe that Dawson had committed or was about to commit an offense. Thus, sufficient cause existed to detain Dawson. Further, in the officer's experience, people involved in drug offenses frequently carry weapons. The officer had no prior dealings with Dawson to help him determine whether Dawson was armed and did not know whether Dawson presented a danger to the officers conducting the search of the room, so reasonable cause existed to suspect that Dawson was armed and dangerous. Therefore, the officer possessed the requisite objective data and resulting suspicion to lawfully stop and frisk Dawson, and denial of the motion to suppress the fruits of the search was not error. St. v. Dawson, 1999 MT 171, 295 M 212, 983 P2d 916, 56 St. Rep. 668 (1999), distinguishing St. v. Anderson, 1999 MT 60, 293 M 490, 977 P2d 983, 56 St. Rep. 252 (1999).

Taking of Blood Sample Not Offensive Conduct: The taking of a blood sample pursuant to a valid search warrant did not constitute harmful or offensive conduct and was insufficient to support charges of assault and battery. Collins v. St., 232 M 73, 755 P2d 1373, 45 St. Rep. 878 (1988).

Collateral References

68 Am. Jur. 2d Searches and Seizures §§295 through 297.

Part 3
Procedure in Regard to Property Seized

Case Notes

Search and Seizure — Complaint for Return of Photographs Not Properly Pleaded: John and Jane Doe brought an action for invasion of privacy stemming from execution of a search warrant. They claimed that the search was overbroad in that agents searched an envelope and found nude photos when they were searching for evidence of tax evasion. The complaint contained a statement that three of the photographs were missing. The parties' brief referred only to a single count for invasion of privacy. The Supreme Court held that these references were insufficient to put the defendants and the District Court on notice that Does were alleging a specific seizure by one of the named defendants and did not constitute an independent basis for a claim for invasion of privacy. Doe v. St., 256 M 348, 846 P2d 1018, 50 St. Rep. 105 (1993).

46-5-301. Return.

Commission Comments

1991 Comment: This statute reflects 1987 MCA 46-5-301, which provided for the return of a warrant. This code provision was amended to permit the return of the warrant and an inventory of the things seized to the appropriate court. The 1987 code required that the actual items seized be returned to the court. The Commission noted that such a procedure is unnecessary and that established procedure has not followed the code provision.

Subsection (2) adopts the last sentence of 1987 MCA 46-5-301. This code provision was amended to include the phrase "and the order of custody or disposition". Under this statute, the aggrieved party is entitled to an inventory and a copy of the order showing the disposition of that property.

Subsection (3) reflects 1987 MCA 46-5-302. The statute amends the code to require only that an order of custody or disposition be entered. The amendment follows the change provided in subsection (1) to require a return of only the warrant and inventory, not the items seized.

Source: Illinois Code of Criminal Procedure, [Chapter 38,] section 108-10; and R.C.M. 1947, sections 94-301-16 and 94-301-17.

This section not only requires a return to the magistrate issuing the warrant, if available, but in addition provides for a copy of the inventory to be given to the deprived possessor of the goods to insure an adequate record of what was taken for the protection of both parties.

Compiler's Comments

1991 Amendment: In (1), at beginning of first sentence, substituted "A return must be made promptly" for "The return of the warrant and all instruments, articles, and things seized shall be made promptly before the judge who issued the warrant or, if he is absent or unavailable, before the nearest available judge", near middle substituted "evidence or contraband" for "property", and near end of sentence substituted "serving" for "executing" and inserted second sentence concerning return of the warrant; in (2), after "inventory", inserted "and the order of custody or disposition"; inserted (3) concerning custody or disposition of evidence or contraband; and made minor changes in style.

Case Notes

Suppression of Stolen Truck Not Due Process Violation: Defendant appealed his conviction for theft, contending that the failure to provide a jury view of the allegedly stolen truck and the state's subsequent disposition of the truck constituted an illegal suppression of physical evidence prejudicing his defense and violating his due process rights. The court affirmed the conviction, ruling that the defendant failed to show the suppressed evidence was exculpatory. Negligent suppression requires a reversal of conviction where the result would have been different had the evidence been disclosed. St. v. Amaya, 227 M 390, 739 P2d 955, 44 St. Rep. 1173 (1987).

Failure to Make Return — Effect: The defendant failed to demonstrate any prejudice to his substantial rights by an officer's failure to make a return of an item of evidence; therefore, it was not rendered inadmissible. St. v. Lenon, 174 M 264, 570 P2d 901 (1977).

Collateral References

Searches and Seizures *key* 3(9), 5.

79 C.J.S. Searches and Seizures §275, et seq.

68 Am. Jur. 2d Searches and Seizures §§227, 228, 301 through 304.

Impounded vehicle: lawfulness of "inventory search" of motor vehicle impounded by police. 48 ALR 3d 537.

Forfeiture action: lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding. 8 ALR 3d 473.

46-5-305. Disposition of unclaimed property.

Commission Comments

Source: New. See R.C.M. 1947, section 94-9705.

This section provides for disposition of unclaimed property of any type.

Compiler's Comments

1989 Amendment: Substituted "it must be disposed of pursuant to the provisions of 46-5-306 through 46-5-309" for "and if after proper inquiry the judge cannot ascertain or locate any person entitled to its possession, he must order the property to be sold by the sheriff. The proceeds from the sale, after deduction of the costs of storage, preservation of the property, and the sale, must be paid into the county treasury."

46-5-307. Petition for destruction, disposal, or use of evidence.

Compiler's Comments

1997 Amendment: Chapter 186 inserted (3) requiring the County Attorney to provide the victim with a copy of the petition and advise the court whether the victim wishes to be heard on the petition; and made minor changes in style. Amendment effective July 1, 1997.

Case Notes

Person Claiming Right to Seized Property Entitled to Hearing on Right to Possession: If a person who claims a right to seized property claims an interest in the property, the District Court must hold a hearing to determine if the person has a right to possession of the property. Notice must be given to all persons who have or may have an interest in the property. St. v. Torgerson, 2009 MT 402, 353 M 463, 221 P3d 1182 (2009).

Grant of Petition to Dispose of Evidence Held No Denial of Constitutional Rights — Inclusion of Additional Property for Restitution — Order to Dispose of Property Held Not to Impose Restitution Obligation: Woods was convicted of writing a bad check for $3,830. However, Woods continued to write other bad checks totaling over $30,000, even as of the time that his probation officer was preparing his presentence investigation. The investigation showed that the bad checks had been used to purchase merchandise and to obtain cash. After sentencing, which included a requirement for restitution, the state filed a petition for destruction of evidence, requesting that it be allowed to return the merchandise to the rightful owners, to apply the value of that property to satisfy Woods's obligation to make restitution, and to destroy other property that had been seized as evidence. The District Court granted the petition but stayed enforcement pending appeal. Woods contended that the District Court order granting the petition violated his rights under Art. II, sec. 3, 4, 15, 17, and 22, Mont. Const., and under the 5th, 8th, and 14th amendments to the United States Constitution. The Supreme Court held that Woods had waived his right to object to restitution, even restitution in an amount greater than $3,830, because Woods promised to make restitution in response to the recommendation of his probation officer that Woods make restitution in an amount in the "tens of thousands of dollars". The Supreme Court held, contrary to Woods's claim that the state misinterpreted the District Court order as to the amount of restitution, that the District Court had ordered Woods to make "full restitution" and that the order included the amounts over and above the $3,830 involved in the underlying conviction for writing a bad check. Woods also objected to the timing of the state's petition, arguing that he was not required to make restitution until he was released from jail. In response, the Supreme Court pointed out that Woods misconstrued the purpose of the state's petition; all the state wanted to do was receive permission from the District Court to return the merchandise to its rightful owners and apply the value to Woods's obligation for restitution. For this reason, the Supreme Court held that the District Court did not err when it granted the state's petition. St. v. Woods, 286 M 355, 951 P2d 981, 54 St. Rep. 1445 (1997).

No Right to Counsel in Petition to Dispose of Evidence — Issue Held Res Judicata: Woods was convicted of writing a bad check. After the state filed a petition to dispose of certain evidence pursuant to 46-5-306 through 46-5-309, Woods argued to the District Court that he was entitled to appointed counsel, pursuant to 46-8-104, for the purpose of responding to the petition. The

District Court held that Woods was not entitled to appointed counsel because the granting of the state's petition would not result in a conviction of an offense for which Woods could be punished. Woods appealed that decision to the Supreme Court, and the Supreme Court affirmed the District Court. After the District Court granted the petition to dispose of evidence, Woods again raised the issue of his entitlement to appointed counsel to the District Court. The District Court denied the request for the same reason that it had previously. Woods then appealed to the Supreme Court. The Supreme Court held that because of its earlier decision in the matter of Woods's right to counsel, the issue was now res judicata, and the Supreme Court therefore affirmed the holding of the District Court. St. v. Woods, 286 M 355, 951 P2d 981, 54 St. Rep. 1445 (1997).

46-5-308. Order.

Compiler's Comments

1997 Amendment: Chapter 186 in (1) inserted second and third sentences allowing the victim to be heard in open court and requiring consideration of the victim's statements prior to issuing an order; and made minor changes in style. Amendment effective July 1, 1997.

46-5-310. Filing of return.

Commission Comments

1991 Comment: This statute concerns the time and manner in which the application for and return of an executed warrant may be made. Subsection (1) preserves the 1987 code that identified the proper time in which an application for a warrant must be filed. See 1987 MCA 46-5-204. Subsection (2) adopts the provision from the federal rules that requires the court to file a copy of the return and other associated documents with the court that issued the warrant. See Rule 41(g), Fed. R. Crim. P.

Source: Illinois Code of Criminal Procedure, [Chapter 38,] section 108-4.

The purpose is to provide for safekeeping of the original documents (by stating the application "shall be retained by the magistrate"), while not making it mandatory to file the warrant until after execution. This procedure keeps the proceeding from becoming a matter of public record and prevents leaks of information from the clerk's office until the warrant is executed, and it also protects the person being searched from harmful publicity.

Compiler's Comments

1991 Amendment: In (1), in two places near end, substituted "served" for "executed"; inserted (2) concerning attachments to and filing of warrant; and made minor changes in style.

Case Notes

Failure to Leave Warrant Application With Issuing Judge — Motion to Suppress Denied: Authorities did not leave the warrant application with the issuing judge or file it with the Clerk of Court until 6 days after execution of the search warrant. Defendants contended that under the rationale of St. v. Tropf, 166 M 79, 530 P2d 1158 (1975), failure to leave the application with the issuing judge constituted prejudicial error necessitating suppression of the search results. However, the pertinent *Tropf* language was merely dicta, which was never subsequently relied on by the Supreme Court on suppression issues. Denial of the suppression motion was proper because the filing oversight did not affect any substantial rights of defendants. St. v. Cope, 250 M 387, 819 P2d 1280, 48 St. Rep. 949 (1991).

Law Review Articles

Discussion of State v. Tropf and State v. Snider, 37 Mont. L. Rev. 274 (1976).

46-5-311. Custody and disposition — seizure without search warrant.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-5-303. Subsection (1) preserves 1987 MCA 46-5-303(3) to the extent that it allows the peace officer to possess the items seized for the purpose of an investigation. The statute is intended to have effect without regard to whether an arrest has been made. Subsection (2) follows 46-5-227 and requires an inventory receipt of all items seized to be given to the owner or the person from whose possession the items had been seized. Like those instances in which items are seized under a warrant, the failure to give a receipt does not make the seized items inadmissible.

Source: Illinois Code of Criminal Procedure, [Chapter 38,] section 108-2.

The first paragraph of this section is intended to act as a safeguard for the person from whom property has been taken and is consistent with seizure of property under warrant [46-5-226]. The intent of this section is to conform the procedure for handling things seized on an incidental search to that prescribed for things seized on a warrant. Any "taking" by a police officer amounts to a seizing.

Compiler's Comments

1991 Amendment: Inserted (1) concerning custody of evidence or contraband during an investigation; in (2) substituted first sentence concerning notice of and receipt for evidence or contraband seized for "Any peace officer seizing any instruments, articles, or things must give a receipt to the person from whose possession they are taken"; deleted former (2) and (3) that read: "(2) If an arrest has been made, all instruments, articles, or things seized on a search without warrant shall be delivered to the judge before whom the person arrested is taken and thereafter handled and disposed of in accordance with 46-5-301, 46-5-302, and 46-5-304. If the person arrested is released without a charge being preferred against him, all instruments, articles, or things seized from him other than contraband shall be returned to him upon release.

(3) If no arrest has been made, such instruments, articles, or things may be retained in the custody of the officer making the seizure for a time sufficient for investigation of the supposed crime, after which they must be delivered to the proper judge for disposition in accordance with 46-5-301, 46-5-302, and 46-5-304 or returned to the person from whom they were taken"; and made minor changes in style.

Case Notes

No Brady Violation When Petitioner Could Have Obtained Evidence by Other Available Means: Ellenburg asserted that the state committed a Brady violation (see Brady v. Md., 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963)) and violated his due process rights by the state's loss or destruction of potentially exculpatory documents seized from his office without a warrant while Ellenburg was in prerelease status in the intensive supervision program following his imprisonment at the state prison. Applying Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395 (1999), the Supreme Court noted that one element of proving a Brady violation is that the petitioner did not possess the evidence and could not have obtained it with reasonable diligence. In this case, the court affirmed, finding no Brady violation because Ellenburg did not demonstrate that he was unable to obtain comparable evidence by other reasonably available means. St. v. Ellenburg, 2000 MT 232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000).

Retention of Property — Mere Technical Error: When clothes were taken from defendant incident to a lawful arrest, the retention of the property by the police upon the release of the defendant was a mere technical error which did not compel suppression of the evidence by means of a Writ of Supervisory Control. State ex rel. Mankin v. Wilson, 174 M 195, 569 P2d 922 (1977).

Collateral References

Criminal Law *key* 1221.

Propriety of state or local governmental health officer's warrantless search—post-Camara cases. 53 ALR 4th 1168.

46-5-312. Return of property seized — right to possess.

Commission Comments

1991 Comment: This statute reflects 1987 MCA 46-5-304. Some of the terms have been amended to make the statute compatible with other statutes. The second part of 1987 MCA 46-5-304(2)(a), allowing for subsequent return of evidence, has been deleted. Deletion of that provision does not substantially alter procedure practiced under the 1987 code and avoids any chain-of-custody problems.

Source: New.

This section is intended to assist people whose property has been seized and held for extended periods without any fault on their part. It sets up machinery whereby they can demand and obtain the return of their property.

Compiler's Comments

1991 Amendment: In (1), in first sentence after "judge", deleted "to whom it has been delivered" and in second sentence substituted "prosecutor" for "county attorney" and at end substituted "determine the right to possession" for "hear all claims to its true ownership"; in (2), after "possession is", substituted "established, the judge" for "proved to the judge's satisfaction"; and made minor changes in style.

Case Notes

Person Claiming Right to Seized Property Entitled to Hearing on Right to Possession: If a person who claims a right to seized property claims an interest in the property, the District Court must hold a hearing to determine if the person has a right to possession of the property. Notice must be given to all persons who have or may have an interest in the property. St. v. Torgerson, 2009 MT 402, 353 M 463, 221 P3d 1182 (2009).

Seized Property Abandoned by Owner in Lawful Possession of State for Purposes Other Than Forfeiture — Subsequent Petition for Forfeiture Not Precluded: After Branam's vehicle was stopped by an officer following a report of an assault, Branam fled. The officer had the vehicle towed to a storage yard. An employee of the storage yard noticed cash and a weapon in the vehicle. A search of the vehicle yielded cash, a weapon, and drug paraphernalia, and a canine alerted to the smell of drugs on the cash but not on the vehicle. Branam was not charged with a drug-related offense, but numerous confidential informants stated that the vehicle had been used in drug transactions. The state petitioned for forfeiture of the property. Branam moved to dismiss the petition on grounds that the state did not have probable cause to seize the property. The District Court agreed and summarily dismissed the petition, and the state appealed. The Supreme Court reversed. Property is subject to forfeiture to the state if it is or has been used in connection with the manufacture, distribution, or sale of dangerous drugs, and property may be seized for the purpose of declaring it forfeit to the state if an officer has probable cause to believe that a conveyance has been or is intended to be used to unlawfully transport, keep, deposit, or conceal a controlled substance. Probable cause is required at the time of seizure if the state seizes property without a warrant solely for purposes of forfeiture. However, if property is lawfully seized for purposes other than forfeiture, nothing in 44-12-103 precludes a later petition for forfeiture when an investigation develops probable cause to believe that the property is subject to forfeiture. Search and seizure without a warrant may not be held illegal if a defendant has disclaimed any right or interest in the place or object searched or the evidence or contraband seized or if a right of the defendant has not been infringed by the search and seizure. Here, Branam's act of fleeing and leaving the vehicle and its contents on the street constituted abandonment sufficient to justify having the vehicle towed, and the warrantless discovery of the cash and weapon by the towing company employee did not infringe on Branam's right of privacy. Probable cause to seize property exists when an officer's knowledge is sufficient to warrant a reasonable person to believe that an offense has been committed, and when a vehicle is stopped and the occupants of the vehicle immediately flee, suspicions of an offense connected to the vehicle arise. Thus, when the officer took possession of the vehicle, sufficient probable cause existed to cause seizure of the property and allow further investigation. Additionally, nothing required that Branam be charged with a criminal offense to allow forfeiture of the property. St. v. Branam, 2006 MT 300, 334 M 457, 148 P3d 635 (2006).

Conflict Between Civil and Criminal Statutes: When property is taken from a pawnbroker and held as evidence for an underlying criminal prosecution, the provisions of the criminal procedure statutes governing return of property apply rather than the civil pawnbroker statutes. The criminal statutes are the particular and specific statutes and the pawnbroker statutes are general. The pawnbroker statutes control the situation where a private citizen discovers his property at a pawnbroker's shop and no criminal prosecution grows out of the incident. In re Williams, 219 M 6, 709 P2d 1008, 42 St. Rep. 1800 (1985).

Collateral References

Searches and Seizures *key* 4, 5.

79 C.J.S. Searches and Seizures §§280 through 289.

68 Am. Jur. 2d Searches and Seizures §301, et seq.

46-5-313. Firearm not to be destroyed.

Compiler's Comments

Preamble: The preamble attached to Ch. 332, L. 2009, provided: "WHEREAS, the Legislature declares that:

(1) the right of Montanans to defend their lives and liberties, as provided in Article II, section 3, of the Montana Constitution, and their right to keep or bear arms in defense of their homes, persons, and property, as provided in Article II, section 12, of the Montana Constitution, are fundamental and may not be called into question;

(2) the use of firearms for self-defense is recognized within the right reserved to the individual people of Montana in Article II, section 12, of the Montana Constitution;

(3) self-defense is a natural right under section 1-2-104, MCA, and is included in sections 49-1-101 and 49-1-103, MCA;

(4) the lawful use of firearms for self-defense is not a crime or an offense against the people of the state;

(5) in a criminal case in which self-defense is asserted, the burden of proof is as provided in [section 10] [actually section 9, Ch. 332, L. 2009, enacting 46-16-131];

(6) in self-defense, the use of justifiable force discourages violent crime and prevents victimization; and

(7) the purpose of [sections 1 through 3] [enacting 45-3-110 through 45-3-112] is to clarify and secure the ability of the people to protect themselves."

Effective Date: Section 11, Ch. 332, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 27, 2009.

Part 4
Stop and Frisk

Part Commission Comments

1991 Part Comments: The amendments to this part reflect case law. The statutes do not make any significant change in established procedure. Perhaps the most significant change in the stop and frisk provisions is the deletion of 1987 MCA 46-5-401(2) and (3). The Commission noted that those subsections were repetitive and that they struck an unnecessary and confusing distinction between felony and misdemeanor offenses.

There are no comparable provisions directly reflecting the stop and frisk procedure in either the Federal Rules of Criminal Procedure or the Uniform Rules of Criminal Procedure.

Part Case Notes

Sufficient Objective Police Data to Warrant Investigative Stop of Burglary Suspect — Motion to Suppress Evidence Properly Denied: Following a tip from a former parole officer and a background check, Eixenberger became a potential suspect in a string of burglaries in Kalispell area casinos. Eixenberger had received two citations while driving a red Thunderbird in the area and became a primary suspect when the car was seen about 200 yards from a casino about 9 minutes before the casino was burglarized. The car was subsequently spotted several times, with either Eixenberger or a friend driving, during early morning hours when the burglaries occurred. One early morning, a casino was burglarized. Police checked Eixenberger's friend's residence and found neither Eixenberger nor the car and then stopped Eixenberger in the car a short distance from and within minutes of another casino burglary. Police found rocks and tools consistent with the burglaries. Eixenberger moved to suppress the evidence on grounds that the police lacked a particularized suspicion to make the investigative stop, but the motion was denied. On appeal, the Supreme Court affirmed. Under the totality of circumstances in this case, the police had sufficient objective data to support a suspicion that Eixenberger was or had engaged in wrongdoing, so the investigative stop was appropriate. St. v. Eixenberger, 2004 MT 127, 321 M 298, 90 P3d 453 (2004), distinguishing St. v. Lafferty, 1998 MT 247, 291 M 157, 967 P2d 363 (1998).

Officer's Knowledge of Vehicle Owner's Revoked License Sufficient Basis for Suspicion of Criminal Activity to Warrant Stopping Vehicle: Deputy Keintz observed a vehicle displaying a distinctive personalized license plate being driven by a female south of Missoula. The officer recognized the license plate, recalled the prior arrest and license suspension of the vehicle owner, and initiated a traffic stop. Halvorson was the owner and driver of the vehicle and was ticketed for driving with a suspended license. On appeal, Halvorson contended that the officer did not have sufficient information to form a particularized suspicion that the occupant of the vehicle was or had been engaged in criminal activity to justify stopping the vehicle. Applying the criteria in St. v. Gopher, 193 M 189, 631 P2d 293 (1981), the Supreme Court followed St. v. Pike, 551 NW 2d 919 (Minn. 1996), in holding that an officer's knowledge that the owner of a vehicle has a revoked driver's license is enough to form the basis of a reasonable suspicion of criminal activity when the officer observes the vehicle being driven, as long as the officer remains unaware of any facts that would render unreasonable an assumption that the owner is driving the vehicle. St. v. Halvorson, 2000 MT 56, 299 M 1, 997 P2d 751, 57 St. Rep. 270 (2000), followed in Billings v. Costa, 2006 MT 181, 333 M 84, 140 P3d 1070 (2006). Costa was followed in St. v. Neil, 2009 MT 128, 350 M 268, 207 P3d 296 (2009).

Stop and Frisk Procedure Applicable to Automobiles: Where, upon investigating a possible burglary, the investigating officer stopped a suspicious looking automobile and noticed what appeared to be stolen property in the back seat of the car, which was driven off at a high rate of speed in the middle of the investigation, the District Court did not err in denying the defendant's motion to suppress the stolen property recovered from the automobile. The dictum in St. v. Rader, 177 M 252, 581 P2d 437 (1978), that stop and frisk principles do not apply to automobiles must be abandoned in light of the principle most recently announced in U.S. v. Cortez, 449 US 411, 66 L Ed 2d 621, 101 S Ct 690 (1981), that an assessment of whether a crime has been committed must be based upon all relevant circumstances and the evidence evaluated in light of the knowledge of a trained law enforcement officer. When a trained police officer has a particularized suspicion that the occupant of a vehicle is or has been engaged in criminal activity

or is a witness thereto, a limited and reasonable investigatory stop and search is justified. St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981), followed in In re Blake, 220 M 27, 712 P2d 1338, 43 St. Rep. 143 (1986), St. v. Lee, 232 M 105, 754 P2d 512, 45 St. Rep. 903 (1988), St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), St. v. Halvorson, 2000 MT 56, 299 M 1, 997 P2d 751, 57 St. Rep. 270 (2000), and St. v. Herbenson, 2001 MT 75, 305 M 68, 22 P3d 1128 (2001). See also Jess v. St., 255 M 254, 841 P2d 1137, 49 St. Rep. 951 (1992), In re Bauer v. St., 275 M 119, 910 P2d 886, 53 St. Rep. 65 (1996), St. v. Angeline, 1998 MT 139, 289 M 222, 961 P2d 1251, 55 St. Rep. 556 (1998), requiring the presence of the arresting officer at a suppression hearing to prove particularized suspicion, and St. v. Lafferty, 1998 MT 247, 291 M 157, 967 P2d 363, 55 St. Rep. 1019 (1998).

46-5-401. Investigative stop and frisk.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-5-401(1). The statute defines those instances in which an investigative stop may be properly conducted.

Two amendments were made, both of which reflect the case of St. v. Gopher, 38 St. Rep. 1078 (1981). The first change replaced the phrase "reasonable cause to suspect" with "a particularized suspicion". In *Gopher*, the court decided that a particularized suspicion, and not probable cause, was the appropriate standard. The standard is subjective and viewed with respect to the totality of the circumstances.

The second amendment inserted the phrase "or occupant of the vehicle" in recognition of the fact that the stop and frisk procedure does apply to individuals in a vehicle. See *Gopher* at 1082.

Compiler's Comments

2003 Amendment: Chapter 343 in (1) at end inserted second sentence that read: "If the stop is for a violation under Title 61, unless emergency circumstances exist or the officer has reasonable cause to fear for the officer's own safety or for the public's safety, the officer shall as promptly as possible inform the person of the reason for the stop"; inserted (2) outlining procedures that a peace officer who makes a lawful stop may undertake; inserted (3) requiring that a peace officer who makes a lawful stop while not in uniform inform the person who is stopped that the officer is a peace officer; and made minor changes in style. Amendment effective October 1, 2003.

1991 Amendment: At beginning inserted "In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person", after "any person" inserted "or vehicle", after "circumstances that" substituted "create a particularized suspicion" for "give him reasonable cause to suspect", after "the person" inserted "or occupant of the vehicle", and after "offense" deleted "involving the use or attempted use of force against a person or theft, damage, or destruction of property if the stop is reasonably necessary to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person"; and deleted (2) and (3) that read: "(2) A peace officer may stop any person he finds near the scene of an offense that he has reasonable cause to suspect has just been committed if:

(a) he has reasonable cause to suspect that the person has knowledge of material aid to the investigation of the offense; or

(b) the stop is reasonably necessary to obtain or verify the person's identity or an account of the offense.

(3) A peace officer may stop any person in connection with an offense that he has probable cause to believe has been committed if:

(a) the offense is a felony involving the use or the attempted use of force against a person or theft, damage, or destruction of property;

(b) he has reasonable cause to suspect the person committed the felony; and

(c) (i) the stop is reasonably necessary to obtain or verify the person's identity to determine whether to arrest the person for the felony; or

(ii) the peace officer has reasonable cause to suspect that the person was present at the scene of the offense, and the stop is reasonably necessary to obtain or verify the person's identity"; and made minor changes in style.

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GENERAL

Disclaimer of Authority to Grant Permission to Search Vehicle Constituting Waiver of Right to Privacy: After stopping Hurlbert for speeding, officers noticed additional behavior that led them to believe that Hurlbert might be engaged in illegal activity. The officers asked Hurlbert for permission to search the vehicle, but Hurlbert declined because the vehicle belonged to his wife. The officers then called the wife, who gave permission to search the vehicle, although Hurlbert initially declined permission for a warrantless search of his personal items in the vehicle. No contraband was found in the vehicle, but while the search was underway, Hurlbert spontaneously admitted that there was drug paraphernalia in his personal possessions in the vehicle. Hurlbert then consented to a search of his possessions, and a search of his backpack indeed revealed drugs and paraphernalia. Hurlbert contended on appeal that because he lawfully possessed the vehicle at the time of the stop, he had a reasonable expectation of privacy in it and was entitled to protection from unlawful searches and seizures. Hurlbert also maintained that his wife's consent to search the vehicle was not valid because she was not in possession of the vehicle at the time of the search and she was coerced into consenting to the search. The Supreme Court affirmed. Hurlbert could not demonstrate that he was prejudiced in any way from the search of the vehicle, because the search revealed nothing unlawful. Additionally, when Hurlbert disclaimed that he had any authority to grant permission to search the vehicle, he thereby conceded that he did not have a reasonable expectation of privacy in the vehicle and waived the right to object to a search of the vehicle. St. v. Hurlbert, 2009 MT 221, 351 M 316, 211 P3d 869 (2009).

No Reason to View With Distrust Failure of Officer to Record Events Creating Particularized Suspicion for Traffic Stop: An officer observed Deines drive through two red lights without stopping, but the officer failed to record either act. Deines was subsequently stopped for a traffic violation and was then arrested for DUI as a result of the traffic stop. Following conviction, Deines appealed on grounds that because the officer failed to record the events that created a particularized suspicion for the traffic stop, the officer's testimony should be viewed with distrust in the judicial assessment of particularized suspicion. The Supreme Court noted a line of cases that "view with distrust" the failure of law enforcement officers to preserve a record of particular evidentiary matters, but the court declined to extend those cases to the circumstances of this case. The prior cases were related primarily to officers gathering evidence in the controlled environment of a police station, and the court recognized that circumstances in the field may preclude the creation of a tangible record. Additionally, the court noted the passage of HB 534 (Ch. 214, L. 2009), which requires the electronic recording of custodial interrogations in most felony cases and essentially renders the "view with distrust" line of cases moot, so future application of the view with distrust precedent is doubtful. Therefore, there is no reason to view with distrust the failure of a police officer to record events creating particularized suspicion for a traffic stop. St. v. Deines, 2009 MT 179, 351 M 1, 208 P3d 857 (2009).

Officer's Voluntary Exchange With Person in Parked Vehicle in Public Place Not Considered Seizure: Wilkins was parked in a public industrial area late on a cold night in a running vehicle with the lights on. An officer noticed the car and, being concerned that the vehicle was in an area where recent burglaries had occurred and concerned for the welfare of the driver, stopped to investigate. While speaking with Wilkins, the officer smelled the odor of an alcoholic beverage and noticed that Wilkins' speech was slurred, and after further investigation Wilkins was arrested for DUI. Wilkins contended that the arrest was unlawful because the officer had no particularized suspicion and because the community caretaker doctrine was inapplicable. Without reaching either of Wilkins' arguments, the Supreme Court affirmed because the officer's contact with Wilkins did not amount to a seizure. The officer was alone and did not activate emergency lights or a spotlight, display a weapon, or use threatening tones during the conversation, but rather simply approached Wilkins to see why she was parked on a dark, remote street late at night in cold weather. A reasonable person in Wilkins' place would not have concluded that she was not free to leave following the voluntary contact. Wilkins was parked in a public place, and the officer did not need a particularized suspicion to justify the contact. St. v. Wilkins, 2009 MT 99, 350 M 96, 205 P3d 795 (2009).

Defendant Stopped on Basis of Deputy's Report of Domestic Disturbance and Report of Lack of Driver's License Held Sufficient: Clark was stopped by highway patrol officer Gleich after Gleich

received a report from his brother, a Deputy Sheriff, that the two persons in the car had just been involved in a domestic disturbance and that neither of them possessed a valid driver's license. The Supreme Court affirmed the District Court's decision that officer Gleich had a sufficient particularized suspicion, based upon the call from his brother, that warranted a stop to see if the passenger was in any danger and to see which of the unlicensed drivers was illegally operating the vehicle. Deputy Gleich's provision of the description and license number of the vehicle added sufficient facts to justify the stop under the standards set forth in St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003). St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Particularized Suspicion for Investigative Stop Established Despite Failure to Issue Traffic Violation Citation: Officer Kitchin observed Waite swerving across the centerline, crossing the fog line, and following the truck in front of her too closely. After Kitchin smelled alcohol on Waite and observed her inability to smoothly perform a horizontal gaze nystagmus test, Waite was charged with DUI. Waite moved to suppress the evidence, alleging that the stop was invalid because there were insufficient facts to support a particularized suspicion that she was committing an offense. On appeal from a Justice's Court guilty verdict, the District Court granted Waite's motion to suppress, concluding that swerving within a lane, touching the fog line, and following too closely were insufficient to establish a particularized suspicion because Kitchin did not cite Waite with a traffic violation. On appeal, the Supreme Court reversed and distinguished Waite from St. v. Reynolds, 272 M 46, 899 P2d 540 (1995) (driving that was "bordering on too fast" and waiting too long at an intersection with no traffic laws broken were insufficient for particularized suspicion), St. v. Lafferty, 1998 MT 247, 291 M 157, 967 P2d 363 (1998) (crossing the fog line twice was insufficient, without other relevant circumstances, for particularized suspicion), and Morris v. St., 2001 MT 13, 304 M 114, 18 P3d 1003 (2001) (merely "drifting over" the fog line with no other evidence of speeding or erratic driving was insufficient for particularized suspicion), by ruling that by the totality of circumstances, Waite's crossing of the fog line, continuously swerving within the lane, crossing over the centerline twice, and following too closely, all late at night, were sufficient to establish a particularized suspicion despite the officer's failure to issue a citation. St. v. Waite, 2006 MT 216, 333 M 365, 143 P3d 116 (2006).

Failure to Give Investigative Stop Advisory Following DUI-Related Accident — No Error: Zakovi was involved in a motorcycle accident, and when the investigating officer arrived, Zakovi was being loaded into an ambulance. Prior to transport to the hospital, the officer noticed that Zakovi's breath smelled of alcohol. Following further investigation at the hospital, Zakovi was arrested for DUI. At trial, Zakovi moved to suppress the DUI evidence because the officer failed to give the investigative stop advisory required under former 46-5-402 and St. v. Krause, 2002 MT 63, 309 M 174, 44 P3d 493 (2002). The motion was denied, and on appeal, the Supreme Court affirmed. Under the former statute, an officer was required to give an investigative stop advisory only when making an investigative stop upon observing circumstances that created a particularized suspicion. Here, the officer did not observe circumstances creating a particularized suspicion because Zakovi was already stopped. Absent initiation of an investigative stop, no advisory was required. St. v. Zakovi, 2005 MT 91, 326 M 475, 110 P3d 469 (2005).

Justifiable Stop for Daytime Check of Temporary Window Sticker Warranted — Further Police Intrusion Not Warranted Once Limited Purpose of Stop Accomplished: Following weeks of surveillance instigated by a confidential tip intimating drug activities, the Billings police observed no suspicious drug-related activities conducted by defendants, but after receiving a tip that defendants would be driving from Billings to Bozeman to sell marijuana, officers stopped defendants' vehicle because there were no license plates displayed, although a temporary sticker could be seen but not read in the tinted rear window. When the officers approached the vehicle, they noticed that the temporary sticker properly displayed in the window was current. Nevertheless, in a short time, additional officers arrived with a drug-sniffing dog. The dog indicated the presence of drugs, the vehicle was searched, marijuana was found, and defendants were arrested. Defendants contended that the evidence should be suppressed because there was no particularized suspicion to make the stop. The Supreme Court agreed that the investigative stop was warranted because the officers' inability to read the expiration date on the temporary sticker provided an objective basis to infer that the sticker was not valid. However, a quick check of the properly displayed sticker in bright daylight confirmed the sticker's validity. Defendants had committed no traffic offense or violated any other criminal law of which the officers were aware. An investigative stop is a temporary detention that may not last longer than necessary to effectuate the purpose of the stop. Once the limited purpose of the investigative stop was accomplished, no further police intrusion was warranted, and the investigative stop related to

drug possession was not justified. The District Court committed reversible error in refusing to suppress the evidence of the subsequent vehicle search. St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003), following St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998).

Use of Force in Resisting Arrest Committed After Investigative Stop — Exclusionary Rule Inapplicable: Courville was stopped by an officer who had reports of underage drinking in the area. When the officer tried to arrest Courville, Courville assaulted the officer. Courville moved to suppress the evidence under the exclusionary rule because the officer did not have a particularized suspicion to make the stop in the first place. The motion was denied, and Courville appealed, but the Supreme Court affirmed. An officer must have a particularized suspicion to conduct an investigatory stop, and if no particularized suspicion exists, the exclusionary rule precludes introduction of evidence gathered from the illegal stop. However, the rule does not apply in every case. If the evidence is so attenuated or dissipated from the government's constitutional violation that the evidence loses its primary constitutional taint, then the evidence is admissible. To allow a person whose right to be free from unreasonable searches and seizures was allegedly violated to respond with unlimited violence would create intolerable results. Here, the evidence of Courville's criminal conduct committed against the officer was so attenuated from the claimed improper investigatory stop that it lost its primary constitutional taint, if any existed. Thus, the exclusionary rule did not apply, and the motion to suppress was properly denied. St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002), following St. v. Ottwell, 240 M 376, 784 P2d 402 (1989).

Shining of Police Spotlight Into Vehicle Not Considered Seizure: After Clayton left a Bozeman bar, he noticed that he was being followed by a police car, so he pulled to the right side of the road and stopped. As the police car pulled in behind Clayton's vehicle, the officer shined a spotlight into Clayton's vehicle to see how many people were in it. Before the police car came to a stop, Clayton got out of his vehicle, looked at the police car, and began to run. The officer immediately recognized Clayton from a prior involvement and knew that Clayton's driver's license had been revoked, so the officer gave chase, eventually catching Clayton and placing him under arrest for obstructing an officer. Clayton was subsequently also charged with fourth offense felony DUI and driving with a suspended license. Clayton argued that he was seized when the officer pulled in behind his vehicle and shined the spotlight into it, because the officer did not have a particularized suspicion to effect a stop, and contended that he felt restrained and reasonably believed that he was not free to leave. The District Court concluded that the police acted reasonably and that when Clayton turned and faced the officer and gave away his identity, the police had particularized suspicion. The question for the Supreme Court was whether the police had effected a stop prior to that time and whether a seizure occurred. The state relied on Calif. v. Hodari D., 499 US 621 (1991), for the proposition that a seizure requires either a physical restraint or a submission to an assertion of authority, arguing that even if a stop did occur, the police had particularized suspicion to effect the stop and that the police action was reasonable in nature and scope. The Supreme Court rejected Hodari D., holding that it does not comport with Montana constitutional requirements, and instead affirmed the test in St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974 (1999), that no seizure occurs unless, in view of all the circumstances surrounding the incident, a reasonable person would have felt that the person was not free to leave. In this case, the fact of the police slowing down and coming to a stop behind Clayton's vehicle, and shining a spotlight into the vehicle, did not amount to such a show of authority to meet the Roberts test. The police did not use a siren or emergency lights, the encounter took place on a public street, and the police did not exit the police car and approach Clayton. Thus, no stop occurred prior to Clayton exiting his vehicle, and the District Court was affirmed. St. v. Clayton, 2002 MT 67, 309 M 215, 45 P3d 30 (2002).

Requirement That Officer Provide Certain Information to Person Lawfully Stopped for Investigation or Stop and Frisk: Prior to a hearing on his petition for reinstatement of his driver's license, which was revoked after his refusal to take a Breathalyzer test, Krause moved to suppress various statements made to the arresting officer. Krause argued that under Montana's stop and frisk statute, before asking where Krause had been and whether he had been drinking, the officer was required pursuant to 46-5-402(4) (now repealed) to inform Krause that he was a peace officer, that the stop was not an arrest but rather a temporary detention for investigative purposes, and that, unless arrested, Krause would be released upon completion of the investigation. The motion to suppress was denied, and Krause appealed. The state argued that 46-5-402(4) (now repealed) applied only if the officer had reason to suspect that Krause was armed and dangerous, as provided by 46-5-402(1) (now repealed), asserting that this was an investigative stop governed by this section rather than a stop and frisk governed by 46-5-402 (now repealed), and that because this section does not contain the same information requirement

as 46-5-402 (now repealed), it was not necessary that the officer inform Krause as required in 46-5-402(4) (now repealed). The Supreme Court agreed with Krause. By it terms, the stop and frisk statute clearly and unambiguously applies to the investigative stop statute as well. Therefore, a peace officer is also required to give the warning contemplated in 46-5-402(4) (now repealed) when a person is stopped for a DUI investigation, even when there is no intention to frisk, and the District Court erred when it did not suppress statements made by Krause prior to the officer giving the warning. (See 2003 amendment.) St. v. Krause, 2002 MT 63, 309 M 174, 44 P3d 493 (2002).

Insufficient Particularized Suspicion of Crime to Justify Investigative Stop — To Pee or Not to Pee: On the night of November 16, 1999, officers came up behind a vehicle parallel parked legally beside a frontage road. As they passed the vehicle, they noticed a man standing by the passenger door on the side farthest from the road, apparently urinating. The man had taken steps so as not to expose himself to passers-by. The officers proceeded on, but decided to return and warn the man about the impropriety of his conduct. Upon reaching the vehicle, there was no longer anyone standing by it, but Kleinsasser was in the driver's seat making a call on a cell phone, another person was in the passenger seat, and another was lying down on the back seat. All three denied standing by the vehicle and denied knowing who had been doing so. The officers also smelled alcohol emanating from the vehicle, and asked Kleinsasser to perform field sobriety tests, which he failed. Kleinsasser was arrested for DUI, but refused to take a breath test, so his driver's license was seized and suspended. The District Court denied Kleinsasser's petition challenging the license suspension, and Kleinsasser appealed. The only relevant issue for the District Court to consider was whether the officer had reasonable grounds to believe that Kleinsasser was driving under the influence. The reasonable grounds requirement in 61-8-403 is equivalent to the requirement for particularized suspicion to make an investigative stop in this section, which requires the state to show objective data from which an experienced officer could make certain inferences, and a resulting suspicion that the occupant of a certain vehicle is or has been engaged in wrongdoing or was a witness to criminal activity. When the totality of the circumstances does not support a particularized suspicion, an investigative stop is not justified. The state argued that the observed activity constituted disorderly conduct. The Supreme Court disagreed. Kleinsasser's act did not create a hazardous condition, and the court found it hard to imagine any act that serves a more legitimate purpose than answering nature's call. Further, the behavior was not considered physically offensive in this case because it occurred at night, in a rural location where there were no overhead lights or other traffic at the time. There was no evidence that the act disturbed anyone other than the officers, and neither officer was so disturbed that he considered giving the individual a citation; therefore, an allegation of disorderly conduct was unfounded. Absent a particularized suspicion to justify an investigative stop, the subsequent seizure of Kleinsasser's driver's license was invalid. The Supreme Court reversed the District Court's error in denying Kleinsasser's petition for reinstatement of his license. Kleinsasser v. St., 2002 MT 36, 308 M 325, 42 P3d 801 (2002).

Authority of Game Warden to Approach Boat to Promote Safety — Particularized Suspicion Unnecessary: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden looked into the live well of Boyer's boat and in the process found unlawfully killed game fish. Boyer contended that the warden had initiated an investigatory stop without the requisite particularized suspicion of wrongdoing, as required in this section, and that the evidence was therefore unlawfully seized. The Supreme Court disagreed. The warden was acting within his express authority to enforce outdoor recreation laws, including the safety of persons and property connected with the use of watercraft, and thus the warden's approach of Boyer's boat was lawful. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

Particularized Suspicion of Wrongdoing Not Required for Game Warden to Step on Boat Transom in Effort to Inspect Angler's Catch When Reasonable Suspicion Exists for Investigatory Stop: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden discovered that Boyer was fishing and asked to see Boyer's license and catch. Boyer produced several fish, and the warden requested to see what else was in Boyer's live well. Boyer suggested that the warden could look later when Boyer came to shore, but the warden declined, and after tethering the boats together, the warden stepped onto the transom of Boyer's boat to look into the open live well, and found several unlawfully killed game fish. Boyer suggested that the warden's act of stepping onto the boat transom constituted an illegal search in violation of Boyer's reasonable expectation of privacy. The Supreme Court disagreed. Boyer had no legitimate expectation of privacy in the rear platform of his boat, and the act of stepping on the transom—an exterior platform readily accessible to the public—did not constitute a search. The nature of the intrusion was so minimal as not to violate any privacy expectation that Boyer might

have had. Whether or not probable cause existed at that point was irrelevant, because Boyer's behavior gave the warden a reasonable suspicion that an offense had occurred, and it is the presence of reasonable suspicion that allowed the warden to proceed with the investigative stop. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002), distinguishing St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000).

Driver Stopped at Flashing Red Light Over Twenty-Five Seconds Sufficient to Warrant Investigative Stop: About 1 a.m. on a Sunday morning, an officer observed a vehicle stopped at a flashing red light. The officer performed a U-turn and pulled in behind the vehicle. Although there was no other traffic, the vehicle remained stopped for at least 10 more seconds, then the officer honked his horn in an effort to get the vehicle to proceed. The vehicle remained stopped for an additional 10 to 15 seconds and then proceeded through the intersection. By that point, the officer was concerned that the driver was impaired by alcohol, so an investigative stop was made. Cook was tested and arrested for DUI and convicted. Cook moved for suppression of the evidence on grounds that the only information that the officer had upon which to base the stop was that Cook stopped at the light for what the officer believed to be an unusual length of time and that, pursuant to St. v. Reynolds, 272 M 46, 899 P2d 540 (1995), the information was not sufficient to create a particularized suspicion that a criminal offense was being committed to justify an investigative stop. On the other hand, the officer testified that an officer is more likely to encounter an impaired driver during weekend time, such as when Cook was observed, and that a driver's observably slow response to traffic signals is one of a number of visual indicators that a driver may be impaired. The Supreme Court applied the test for particularized suspicion in St. v. Anderson, 275 M 344, 912 P2d 801 (1996), and affirmed. The court distinguished Reynolds, noting that Cook was stopped more than twice as long as Reynolds and that nothing in Reynolds indicated that the officer in that case relied on training and experience to interpret the pause at the intersection as indicative of impaired driving. Based on the totality of the circumstances, the officer had sufficient objective data from which to make inferences regarding Cook's possible impairment that created a particularized suspicion that Cook was committing an offense and to conduct the investigative stop. Missoula v. Cook, 2001 MT 237, 307 M 39, 36 P3d 414 (2001).

Failure to Use Turn Signal Not Grounds for Traffic Stop: An officer responded to an anonymous complaint reporting a careless driver and observed a vehicle matching the description in a restaurant parking lot, but observed no activity that would justify a stop. The officer followed the vehicle when it departed and stopped it after the driver failed to signal a right-hand turn at an intersection, in violation of 61-8-336. Grindeland was subsequently arrested for DUI, but petitioned for reinstatement of his driving privileges on grounds that his failure to use turn signals did not violate the law and that the stop was thus not supported by a particularized suspicion of a criminal offense. The District Court agreed and reinstated Grindeland's driving privileges. The state appealed. The Supreme Court noted that under 61-8-336(1), a driver is required to use a turn signal only when there is other traffic that might be affected by the turn. Although there were other vehicles in the area, there was insufficient objective data by which the officer could infer that the other vehicles may have been affected by Grindeland's turn, so the turn could not be considered illegal. Absent that objective data, the officer lacked a particularized suspicion upon which to make the stop, so the stop was illegal, and reinstatement of Grindeland's driving privileges was affirmed. Grindeland v. St., 2001 MT 196, 306 M 262, 32 P3d 767 (2001), distinguished in St. v. Meza, 2006 MT 210, 333 M 305, 143 P3d 422 (2006).

Introduction of Results of Horizontal Gaze Nystagmus Test — Explanation of Underlying Scientific Basis of Correlation Between Alcohol Consumption and Nystagmus Required: At Van Kirk's DUI trial, the District Court allowed the arresting officer to testify regarding Van Kirk's performance on a horizontal gaze nystagmus (HGN) test. Van Kirk contended that the state failed to lay the proper foundation for admitting the test results. The Supreme Court agreed. Pursuant to Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998), in order to lay the proper foundation, the state must establish a scientific basis for the reliability of the test results and in addition show that the test was properly administered. This requires that a qualified expert explain the underlying scientific basis of the correlation between alcohol consumption and nystagmus. In this case, the arresting officer had a bachelor's degree in medical technology, had worked as a lab supervisor and technician at the state hospital, was certified to administer the HGN test, and testified that the test was properly administered to Van Kirk. However, nothing in the evidence established that the officer was specially trained or educated or had adequate knowledge to qualify as an expert able to explain the underlying scientific basis of the HGN test. Thus, the District Court erred in permitting the officer to offer the test results into evidence without the state first establishing the requisite foundation. However, the error was not

prejudicial to Van Kirk, so the DUI conviction was affirmed. St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001).

Search of Probationer's Residence or Vehicle — Reasonable Grounds and Probable Cause Distinguished: One condition of Kriesel's probation was a provision that Kriesel be subject to search and seizure of his residence, person, or vehicle upon the request of his probation officer at any time with or without a warrant and with or without probable cause. Kriesel was arrested for violating probation and released to await revocation proceedings but failed to report to his probation officer, so a bench warrant was issued for his arrest. Following a vehicle stop based on an informant's description of his car, Kriesel was arrested on the outstanding warrant and methamphetamine and drug paraphernalia were found in the car. Kriesel tested positive for marijuana and amphetamine. On appeal, Kriesel moved to suppress the evidence found in the search, alleging that the informant supplied information that was not sufficiently corroborated and that there was thus insufficient particularized suspicion to stop his vehicle, as required under this section. However, in this case, the stop was initiated to detain Kriesel under the authority of a valid outstanding warrant, satisfying the probable cause requirement of 46-6-201, and as a result, the particularized suspicion requirement was satisfied. Further, under St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154 (1998), a search of a probationer's residence or vehicle does not require probable cause, but rather reasonable grounds as determined by the totality of the circumstances. The reasonable grounds standard requires substantially less than the probable cause standard because of a probationer's diminished expectation of privacy and the superior position of the probation officer to determine what level of supervision is necessary to provide rehabilitation and community safety. The District Court found that given Kriesel's status as a probationer, the search of his vehicle was properly executed. Given the evidence that there was probable cause for the stop and reasonable grounds for the search, the court's findings were not clearly erroneous, were correctly applied as a matter of law, and thus were affirmed. St. v. Kriesel, 2000 MT 144, 300 M 44, 2 P3d 831, 57 St. Rep. 564 (2000).

Test for Sufficient Cause for Investigative Stop: Because an investigative stop of a person must be justified by some objective manifestation that the person stopped might be engaged in some criminal activity, the test for determining whether an officer had sufficient cause to stop a person is that the state must show objective data from which an experienced officer could make certain inferences and must show a resulting suspicion that the person is or has been engaged in wrongdoing or was a witness to criminal activity. Anderson v. St., 275 M 259, 912 P2d 212, 53 St. Rep. 125 (1996), followed in Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75, 55 St. Rep. 415 (1998). See also Rupp v. St., 279 M 247, 927 P2d 1, 53 St. Rep. 1136 (1996). The test was applied in St. v. Gilder, 1999 MT 207, 295 M 483, 985 P2d 147, 56 St. Rep. 808 (1999).

Vehicular Stop Based on Information From Flyer or Bulletin: A law enforcement officer may make a vehicular stop if the officer has a reasonable suspicion, grounded in specific and articulable facts, that a person was involved in or is wanted in connection with a completed felony. This suspicion may be based on information obtained from a flyer or bulletin if the bulletin was issued on the basis of articulable facts supporting a reasonable suspicion. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), followed in St. v. Grimes, 1999 MT 145, 295 M 22, 982 P2d 1037, 56 St. Rep. 571 (1999). See also U.S. v. Hensley, 469 US 221, 83 L Ed 2d 604, 105 S Ct 675 (1985).

Inapplicability of Stop and Frisk Statutes: Where the defendant in a criminal case was stopped by police and asked investigatory questions designed to identify him as a witness or a suspect and was not frisked or searched, the stop and frisk statutes did not apply. St. v. Graves, 191 M 81, 622 P2d 203, 38 St. Rep. 9 (1981).

Hearsay Admissible to Establish Probable Cause: Testimony of a police officer regarding a radio dispatch received regarding a motorcycle theft, introduced to establish the officer's probable cause for stopping the vehicle in which defendant was riding and subsequently arresting him, was not hearsay in this context and was properly admitted. St. v. White, 185 M 213, 605 P2d 191 (1980).

TOTALITY OF CIRCUMSTANCES AND OBJECTIVE FACTS

Stopping Short of and Subsequent Failure to Stop at Game Check Station — Particularized Suspicion Justifying Traffic Stop: A game warden observed Clark stopping short of a game check station, exiting the vehicle, then reentering the vehicle and driving past the check station. Based on Clark's actions, the warden suspected that Clark might have stopped to hide or change something before reaching the check station, so wardens stopped Clark's vehicle. Clark exhibited signs of intoxication and was subsequently arrested by the Highway Patrol for DUI. Clark contended that wardens had no particularized suspicion to stop the vehicle for a possible

fish and game violation and that evidence from the vehicle search should be suppressed. The District Court denied Clark's suppression motion, and on appeal the Supreme Court affirmed. The game warden possessed a reasonable suspicion based on articulable facts and experience from which to draw an inference that Clark might have committed a game violation sufficient to warrant stopping Clark's vehicle. St. v. Clark, 2009 MT 327, 353 M 1, 218 P3d 483 (2009).

Criteria of Particularized Suspicion or Reasonable Grounds for Peace Officer to Make Investigative Stop — Officer's Experience and Training as Factor in Totality of Circumstances: For a peace officer to have particularized suspicion or reasonable grounds for an investigatory stop, the officer must be possessed of (1) objective data and articulable facts from which to make certain reasonable inferences; and (2) a resulting suspicion that the person to be stopped is committing or is about to commit an offense. Although the peace officer's experience and training may be a factor in determining what sort of reasonable inferences the officer is entitled to make based on the officer's observations, experience, and training, they are not necessarily the defining element of the test. Rather, courts should look at the facts and the totality of the circumstances of each case. Here, the officer was possessed of objective data and articulable facts that Brown's vehicle was barely moving along a public highway at 2:51 a.m. with its lights on and that it suddenly pulled over, came to a stop, and shut off its lights. Given that this sort of conduct can be indicative of intoxicated driving, the officer could reasonably suspect that the driver was DUI. On approaching the vehicle, the officer detected the odor of alcohol coming from Brown's vehicle, and observed Brown's slurred and slow speech, slow and staggered exit from the vehicle, and explanation of a recently absent passenger when no other person was in the vicinity, and these objective observations allowed the officer's particularized suspicion to escalate into probable cause for a DUI arrest. Brown v. St., 2009 MT 64, 349 M 408, 203 P3d 842 (2009), clarifying St. v. Gopher, 193 M 189, 631 P2d 293 (1981), St. v. Schatz, 194 M 59, 634 P2d 1193 (1981), and St. v. Morsette, 201 M 233, 654 P2d 503 (1982), and followed in St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009). See also U.S. v. Cortez, 449 US 411 (1981), and St. v. Hilgendorf, 2009 MT 158, 350 M 412, 208 P3d 401 (2009).

Particularized Suspicion Under Totality of Circumstances to Justify Traffic Stop: Ditton contended that there was no particularized suspicion justifying a traffic stop because his driving behavior did not violate any laws, he stayed within his lane, and he was not speeding. The Supreme Court disagreed. Particularized suspicion is based on the totality of the circumstances. In this case, Ditton's car was parked late at night at an odd angle in a bar parking lot with its lights on and engine running. When Ditton drove away, the car was observed weaving within its lane and crossing both the right fog line and the center line. Ditton signaled for a right turn but missed the intersection and drove partially off the roadway onto the shoulder, at which point Ditton backed up, drove forward and struck a stop sign post, then backed up again and drove forward about one car length before coming to a stop. Even if Ditton's driving was technically legal, the totality of circumstances provided a sufficient basis for particularized suspicion to justify a traffic stop. St. v. Ditton, 2009 MT 57, 349 M 306, 203 P3d 806 (2009).

Sufficient Particularized Suspicion for Investigative Stop: Defendant was swerving within her lane so as to touch dividing and fog lines, cross the dividing line, and strike the curb when executing a right-hand turn. Thus the court's conclusions of law in denial of the motion to suppress evidence in a DUI case were correct. St. v. Ross, 2008 MT 369, 346 M 460, 197 P3d 937 (2008).

Driving Without Properly Functioning Brake Lights Constitutes Sufficient Particularized Suspicion for Investigative Stop: Operating a motor vehicle that is not equipped with functional brake lights is a misdemeanor offense, and thus deputy's decision to pull over defendant's vehicle was supported by a particularized suspicion. St. v. Faber, 2008 MT 368, 346 M 449, 197 P3d 941 (2008).

Sufficient Probabilities Supporting Particularized Suspicion to Justify Investigative Stop — Motion to Suppress Properly Denied: McMaster was stopped for investigation after an officer observed apparent traffic violations and erratic driving. The officer was called to make the stop following a police officer's observations of McMaster's possible drug trafficking activities at the Conrad Town Pump. McMaster moved to suppress the fruits of the search on grounds that the officer lacked particularized suspicion to make the investigative stop. The motion was denied, and on appeal the Supreme Court affirmed. The determination whether particularized suspicion supports an investigative stop does not deal with hard certainties, but rather with probabilities. In this case, McMaster was known by officers to be involved in drug deals, and his furtive conduct at the Town Pump led officers to believe that a possible drug deal was in progress. McMaster was identified as the probable driver of the vehicle through a personalized license plate and by physical description. This evidence, coupled with McMaster's apparent traffic

violations and erratic driving, constituted sufficient particularized suspicion that McMaster was involved in criminal activity to justify the investigative stop. St. v. McMaster, 2008 MT 294, 345 M 408, 191 P3d 443 (2008). See also St. v. Gopher, 193 M 189, 631 P2d 293 (1981).

Sufficient Objective Data to Justify Particularized Suspicion Warranting Investigative Stop on Remote Mountain Road Following Burglary: Deputies investigated a break-in and burglary at a cabin in a remote mountain area in winter. There were several cabins in the area, none of which were occupied, but the deputies discovered that another cabin had also been burglarized. The deputies confirmed that all access roads but one in the area were closed by snow. Items left outside the cabin indicated that the burglar would likely return to retrieve the items, so the deputies surmised that the burglar was probably still in the area. When Flemings was observed driving the only vehicle on the only accessible road later that night, a deputy stopped Flemings' vehicle. Flemings was arrested on an outstanding warrant in another county and subsequently made incriminating statements regarding the burglaries. With a warrant, officers searched Flemings' vehicle and residence and seized evidence related to the burglaries, and Flemings was charged with 10 counts of felony burglary, 7 counts of felony theft, 4 counts of misdemeanor theft, and 2 counts of misdemeanor mischief. At trial, Flemings moved to suppress all evidence and statements on grounds that the deputy lacked a particularized suspicion to make the investigative stop. The trial court denied the motion, and Flemings was convicted and appealed. The Supreme Court considered the totality of the circumstances and affirmed. Based on their experience and training, the deputies reasonably inferred that the burglary suspect was still in the area and would return to complete the theft. The deputies observed no other vehicles on the only accessible road. There were no businesses or occupied homes in the area, and there was no reason for persons to be in the area at night at that time of year. Thus, a deputy had sufficient objective data from which to infer that the driver coming down the road at 2 a.m. was or had been engaged in wrongdoing, resulting in a particularized suspicion justifying the investigative stop of Flemings' vehicle. St. v. Flemings, 2008 MT 229, 344 M 360, 188 P3d 1020 (2008), distinguishing St. v. Jarman, 1998 MT 277, 291 M 391, 967 P2d 1099 (1998), and St. v. Fisher, 2002 MT 335, 313 M 274, 60 P3d 1004 (2002).

Particularized Suspicion to Confirm Identity of Vehicle Owner Based on Information From License Plate Search on Probationer's Vehicle: A Deputy Sheriff noticed a woman sitting in a vehicle parked in front of the residence of a known drug dealer who was on probation for drug violations. When the woman acted suspiciously, the deputy ran the vehicle's license plate through dispatch. Dispatch confirmed that the vehicle belonged to Thomas, who was also on probation. After 5 minutes, the deputy drove past the vehicle again, and the woman acted furtively. The deputy tried unsuccessfully to contact Thomas's probation officer to inquire about Thomas's status and then approached the vehicle to question the woman. The woman confirmed that she was Thomas and that she was on probation. The deputy returned to his car and successfully reached Thomas's probation officer, who informed the deputy that Thomas was not to have contact with any other person on probation and had recently failed a urinalysis test. The probation officer requested that the deputy search Thomas's vehicle, and the deputy found a drug pipe that later tested positive for methamphetamine. Thomas was charged with felony drug possession but moved to suppress the evidence on grounds that the search was illegal because the deputy lacked particularized suspicion. The motion was denied, Thomas was convicted and appealed, and the Supreme Court affirmed. As an experienced officer, the deputy could reasonably infer that Thomas was engaged in some sort of criminal activity based on the fact that the deputy knew Thomas was on probation and that Thomas was observed parked in front of the residence of another probationer whom the deputy knew to be a drug dealer. This information, coupled with the deputy's knowledge of the drug history of the resident, comprised the totality of the circumstances and supported the determination that particularized suspicion existed for the deputy's initial investigatory stop of Thomas. Denial of the motion to suppress was affirmed. St. v. Thomas, 2008 MT 206, 344 M 150, 186 P3d 864 (2008), followed in St. v. Neil, 2009 MT 128, 350 M 268, 207 P3d 296 (2009).

No Particularized Suspicion for Stop to Investigate Couple Engaged in Romantic but Not Criminal Behavior — Community Caretaker Doctrine Inapplicable Absent Indication of Citizen in Peril: While on routine patrol, an officer observed a vehicle parked on a pullout adjacent to a public road. The officer thought perhaps the driver was experiencing vehicle problems and drove by to investigate. However, the occupants were not having vehicle problems but were kissing, and the female passenger was observed attempting to "mount" the male driver. Concerned that the occupants were engaged in inappropriate sexual behavior, the officer circled back, parked behind the vehicle and activated the emergency lights, and approached the vehicle with the intent to discourage the couple from engaging in their behavior and to move them along. The

officer discovered a cold, sweaty beer can outside the driver's door and also discovered the couple in various states of undress. Upon questioning the couple about what they were doing, the officer noticed that they both appeared intoxicated. The driver, Graham, was tested and subsequently arrested for DUI. Graham moved to suppress the evidence of the DUI on grounds that the officer did not have authority to make an investigative stop or, if that authority did exist, that the officer exceeded the scope of an investigative stop. The District Court agreed that the officer did not have a sufficient particularized suspicion to make an investigative stop, but nevertheless allowed the DUI evidence on grounds that the community caretaker doctrine provided a legal justification for the stop. On appeal, the Supreme Court first noted that if particularized suspicion was absent and no other exception to the warrant requirement applied, the search and seizure were unconstitutional. In this case, once the officer activated the emergency lights, Graham would not have felt free to walk away, so a seizure occurred. The Supreme Court agreed that the totality of the circumstances did not give rise to a particularized suspicion that a crime was occurring or was about to occur. Graham committed no traffic offense, and the couple's conduct was not criminal and did not indicate that a crime was about to occur. Any particularized suspicion occurred only after Graham was seized. The officer did not approach the vehicle because of a belief that a crime was being committed, but rather to discourage the couple from engaging in their behavior and to move them along, so the requisite particularized suspicion of a crime was absent. The Supreme Court also held that the community caretaker doctrine did not apply because under the criteria developed in St. v. Lovegren, 2002 MT 153, 310 M 358, 51 P3d 471 (2002), the first step in determining whether the doctrine applies is whether there are objective, specific, and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril. No such facts existed in this case, and the court declined to extend the doctrine to allow law enforcement officers equipped with nothing more than personal dissatisfaction of a person's otherwise lawful conduct to detain that person without any intention of providing community care or assistance. Dismissal of Graham's motion to suppress the evidence was reversed, and the case was remanded. St. v. Graham, 2007 MT 358, 340 M 366, 175 P3d 885 (2007), distinguishing St. v. Nelson, 2004 MT 13, 319 M 250, 84 P3d 25 (2004), St. v. Seaman, 2005 MT 307, 329 M 429, 124 P3d 1137 (2005), and St. v. Litschauer, 2005 MT 331, 330 M 22, 126 P3d 456 (2005).

Truant Smelling of Alcohol — Particularized Suspicion for Arrest — Motion to Suppress Properly Denied: A 14-year-old boy's mother called his school, reported that he had not returned home the previous night, and requested that he be picked up. The school resource officer notified police and asked that the boy be brought to school if found. An officer later found the boy on the street smelling of alcohol and took the boy to the police station where it was discovered that several town businesses had been burglarized during the night, including a bowling alley where money and liquor had been stolen. Money and liquor were found on the youth, and his shoes were taken as evidence to see if they matched prints found at the bowling alley. The youth moved that all evidence be suppressed, but the motion was denied. On appeal, the Supreme Court affirmed. Based on the fact that the officer smelled alcohol on the youth, the officer's particularized suspicion that the youth had been drinking developed into probable cause to believe that the youth committed the offense of consuming or possessing alcohol. Because the officer had probable cause to make an immediate arrest, including the fact that the boy had been reported missing from home and was truant from school, it was constitutionally permissible to take the boy into custody pursuant to 41-5-321 and reasonable to conduct a search pursuant to that arrest for the youth's safety. In re Z.M., 2007 MT 122, 337 M 278, 160 P3d 490 (2007).

Sufficient Particularized Suspicion for Investigative DUI Stop Under Totality of Circumstances: Luckett asserted that the officer who arrested him for DUI did not have sufficient particularized suspicion to make an investigative stop. The Supreme Court disagreed. Luckett contended that the various circumstances surrounding the stop, when considered separately, did not provide adequate suspicion, but the court considers the totality of the circumstances. The officer, who had over 4 years' experience and had completed numerous training courses, including DUI detection, observed Luckett and several other persons drinking beer at a truck stop, watched Luckett enter a vehicle, and followed the vehicle onto the interstate. The driver, who turned out to be Luckett, drove abnormally slow for the conditions, and the vehicle weaved along the highway and crossed the fog line twice. Under the totality of these circumstances, the officer had a reasonable suspicion that Luckett was engaged in wrongdoing, and the District Court's finding that the officer had a particularized suspicion for conducting an investigative stop was not erroneous. St. v. Luckett, 2007 MT 47, 336 M 140, 152 P3d 1279 (2007).

Erratic U-Turn Sufficient Particularized Suspicion for Investigative Stop: After an officer observed Trombley make an erratic U-turn, drift over the fog line, fail to signal when switching lanes, and straddle the center line, Trombley was stopped and cited for DUI. Trombley contended, and the District Court agreed, that state law did not prohibit the U-turn, but under the totality of the circumstances, Trombley's actions rose to the level of particularized suspicion sufficient to warrant the investigative stop. On appeal, the Supreme Court agreed. Trombley's erratic driving was enough for the officer to suspect that Trombley was engaged in wrongdoing and gave the officer a particularized suspicion to justify the investigative stop under the totality of the circumstances. Trombley's motion to dismiss was properly denied. St. v. Trombley, 2005 MT 174, 327 M 507, 116 P3d 771 (2005), following St. v. Steen, 2004 MT 343, 324 M 272, 102 P3d 1251 (2004).

Erratic Driving and Occupants Switching Drivers — Sufficient Particularized Suspicion to Justify Investigative Stop: The fact that an officer observed that the occupants had switched drivers during the time that the officer lost sight of a vehicle and that the vehicle was driving in the center of a gravel road constituted a sufficient particularized suspicion under the totality of the circumstances, including the officer's 27 years of experience, to warrant an investigative stop. St. v. Britt, 2005 MT 101, 327 M 1, 111 P3d 217 (2005).

Investigatory Stop Based on Suspicion of Impersonation of Police Officer: Police stopped Bar-Jonah in the early hours of the morning near a school wearing a police-style jacket and stocking cap. The officer had prior knowledge of Bar-Jonah's history of crimes against children. Bar-Jonah asserted that he was simply walking a few blocks from his home, minding his own business, that the officer lacked a particularized suspicion of criminal activity to warrant the investigatory stop in violation of Bar-Jonah's right against unreasonable search and seizure, and that any evidence should thus be suppressed. The District Court denied the motion to suppress, and the Supreme Court affirmed. Relying on Fla. v. Bostick, 501 US 429 (1991), the District Court found that the initial stop was not an investigatory stop but merely a police-citizen encounter, but the Supreme Court held that the stop was not a mere police-citizen encounter because Bar-Jonah had no reason to believe that he could leave. Nevertheless, the officer reasonably suspected that Bar-Jonah had impersonated or was about to impersonate a police officer, and coupled with the officer's knowledge of Bar-Jonah's criminal history, the officer had a particularized suspicion of criminal activity warranting the investigative stop. Once Bar-Jonah was lawfully detained, a search of Bar-Jonah's person was justified based on Bar-Jonah's statement that he was carrying a stun gun. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Improper Left Turn Sufficient Particularized Suspicion for Investigative Stop: At about 1:10 a.m., an officer observed Steen make a wide left-hand turn at an intersection and swerve to straddle the center of two eastbound lanes. The officer stopped Steen for violating 61-8-333 and subsequently arrested Steen for DUI. Steen contended that the officer lacked a particularized suspicion to make an investigative stop and moved to suppress the evidence. The motion was denied, and Steen was convicted. On appeal, the Supreme Court affirmed. Steen's erratic driving was enough for the officer to suspect that Steen was engaged in wrongdoing and gave the officer a particularized suspicion to justify the investigative stop under the totality of the circumstances. Steen's motion to suppress was properly denied. St. v. Steen, 2004 MT 343, 324 M 272, 102 P3d 1251 (2004). See also Moore v. St., 2002 MT 315, 313 M 126, 61 P3d 746 (2002).

Particularized Suspicion for Investigative Stop of Suspect Vehicle in Area of Crime Under Totality of Circumstances: Following a theft at a grocery store, officers observed a blue Camaro circling the area. Given that almost an hour had elapsed since the reported theft and that the Camaro had the same county license plates as the robbers' suspected truck, officers conducted an investigative stop of the Camaro. Based on inconsistent stories presented by the Camaro's occupants and the fact that a theft had recently occurred in the area, officers requested to search Fellers' Camaro. Fellers signed a written consent to search, and officers discovered drugs and paraphernalia in Fellers' possession. Fellers appealed his conviction on grounds that the officers lacked a particularized suspicion to make the investigative stop. Pursuant to St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001), for an investigative stop to be reasonable, an officer must have objective data from which to make certain inferences and a resulting suspicion that the person stopped is or has been engaged in wrongdoing. The officer need not actually personally observe illegal activity in order to have a particularized suspicion to justify an investigatory stop, but support for a particularized suspicion must be viewed in light of the totality of the circumstances. Here, the officer had sufficient objective data from which to infer that the occupants of the Camaro were engaged in wrongdoing and a resulting suspicion of illegal

activity. Under the totality of the circumstances, the investigative stop was justified, and Fellers' conviction was affirmed. St. v. Fellers, 2004 MT 321, 324 M 62, 101 P3d 764 (2004).

Lack of Exigent Circumstances Justifying Warrantless Search of Fanny Pack — Motion to Suppress Evidence Properly Granted: After Lanegan was arrested for obstructing a peace officer and handcuffed, the officer proceeded to conduct a warrantless search of Lanegan's fanny pack and discovered drugs and drug paraphernalia. Lanegan was then charged with drug crimes. Lanegan moved to suppress the evidence, and the motion was granted. The state appealed, but the Supreme Court affirmed. A search incident to arrest may be conducted under the conditions in 46-5-102, but in this case, none of the conditions were present. The search would not have protected the officer or prevented Lanegan's escape because Lanegan was already handcuffed, nor would the search have resulted in discovery of anything that could have been used in or fruits of the crime of obstructing a peace officer. Warrantless searches are per se unreasonable, but one exception is when there are exigent circumstances that would cause a reasonable person to believe that prompt action is necessary to prevent physical harm, destruction of relevant evidence, escape, or some other consequence improperly frustrating legitimate law enforcement efforts. However, the search in this case did not rise to the level of exigent circumstances to allow a warrantless search, and the motion to suppress was properly granted. St. v. Lanegan, 2004 MT 134, 321 M 349, 91 P3d 578 (2004).

Sufficient Objective Police Data to Warrant Investigative Stop of Burglary Suspect — Motion to Suppress Evidence Properly Denied: Following a tip from a former parole officer and a background check, Eixenberger became a potential suspect in a string of burglaries in Kalispell area casinos. Eixenberger had received two citations while driving a red Thunderbird in the area and became a primary suspect when the car was seen about 200 yards from a casino about 9 minutes before the casino was burglarized. The car was subsequently spotted several times, with either Eixenberger or a friend driving, during early morning hours when the burglaries occurred. One early morning, a casino was burglarized. Police checked Eixenberger's friend's residence and found neither Eixenberger nor the car and then stopped Eixenberger in the car a short distance from and within minutes of another casino burglary. Police found rocks and tools consistent with the burglaries. Eixenberger moved to suppress the evidence on grounds that the police lacked a particularized suspicion to make the investigative stop, but the motion was denied. On appeal, the Supreme Court affirmed. Under the totality of circumstances in this case, the police had sufficient objective data to support a suspicion that Eixenberger was or had engaged in wrongdoing, so the investigative stop was appropriate. St. v. Eixenberger, 2004 MT 127, 321 M 298, 90 P3d 453 (2004), distinguishing St. v. Lafferty, 1998 MT 247, 291 M 157, 967 P2d 363 (1998).

Reasonable Cause for Investigative Stop and Pat-Down Search — Motion to Suppress Evidence Properly Denied: An officer discovered a youth behind a car about 11 p.m., apparently working on the vehicle's license plate. The officer suspected that the youth was removing the plate, but when asked, the youth claimed to be installing it. The officer recognized the youth from prior law enforcement contacts and knew that the youth did not live at the residence or own a car. Based on these circumstances, the officer conducted a pat-down search and discovered a marijuana pipe. At about that time, the youth's girlfriend came out of the residence and told the officer that she had requested that the youth put the license plate on the vehicle. The youth later moved to suppress the drug paraphernalia on grounds that the officer did not have a particularized suspicion to make the investigative stop, exceeded the scope of the investigative stop, and did not have probable cause to conduct a frisk. The Supreme Court affirmed denial of the motion to suppress. Applying the two-part test from St. v. Gopher, 193 M 189, 631 P2d 293 (1981), the court held that the officer had sufficient objective data to form a particularized suspicion that the youth was engaged in wrongdoing to justify the investigative stop. Then, once the officer recognized the youth, suspicions were heightened, so the pat-down search remained within the context of the initial stop, and the officer did not exceed the scope of the stop. Finally, because of the officer's prior dealings with the youth and knowing that the youth did not live at the residence or own a car, the officer had reasonable cause: (1) to believe that the youth was committing an offense and might be armed; (2) for concern for the officer's safety; and (3) to conduct a frisk. The officer did not have to accept the youth's seemingly innocent explanation of why he was working behind the car late at night. In re D.R.B., 2004 MT 90, 320 M 516, 88 P3d 808 (2004). See also St. v. Collard, 286 M 185, 951 P2d 56 (1997), and St. v. Dawson, 1999 MT 171, 295 M 212, 983 P2d 916 (1999).

Sufficient Particularized Suspicion to Justify Investigative Stop of Vehicle Containing Suspected Drug Lab: Officers received a tip from Olson's estranged husband that a methamphetamine lab was being operated in Olson's garage. The officers placed the garage

under surveillance and saw equipment being loaded into Olson's car that same day. The officers stopped the car for an investigative stop. Olson contended that the stop was not supported by a particularized suspicion. The Supreme Court applied the two-part test in Grindeland v. St., 2001 MT 196, 306 M 262, 32 P3d 767 (2001), to determine whether a particularized suspicion existed to make the stop. Although the behavior observed by the officers did not, by itself, raise a particularized suspicion of criminal activity, when combined with the informant's report that a drug lab had been observed in Olson's garage the same day, the behavior may have given rise to a particularized suspicion when examined in the totality of the circumstances. Because probable cause existed to search the vehicle, it was axiomatic that a particularized suspicion existed to stop the same vehicle. St. v. Olson, 2003 MT 61, 314 M 402, 66 P3d 297 (2003).

Display of License Plate in Windshield Rather Than on Bumper in Compliance With Law — Suppression of Evidence Proper Based on Illegal Investigatory Stop: A Deputy Sheriff observed a truck that appeared to have no front license plate pulling onto the highway, and the officer performed an investigatory stop based on a suspected violation of 61-3-301, which requires that license plates be conspicuously displayed and securely fastened on the front and rear of a vehicle. Lacasella's front license plate was secured with duct tape to the inside lower driver's side corner of the windshield, rather than fastened to the bumper. As a result of the stop, Lacasella was arrested for DUI and for driving with a suspended or revoked license. Lacasella pleaded guilty, but reserved the right to appeal the denial of his motion to suppress evidence based on the allegation that the arresting officer had no particularized suspicion to make the stop. The District Court held that the inside of the front windshield did not constitute the front of the vehicle and that the license plate was not unobstructed from plain view when displayed in the window because glare could prevent the license plate from being viewed at night. The court also concluded that even if the officer had seen the license plate in the window, the officer was still permitted to make an investigatory stop to ensure that the license plate was securely fastened to the vehicle. The Supreme Court considered the issue and reversed. Under the plain language of 61-3-301, Lacasella's license plate was clearly and conspicuously displayed and unobstructed from plain view. In believing that the license plate must be secured to the bumper, the officer misconstrued 61-3-301, and observations made by an officer who does not understand the law are not objectively grounded in law and cannot be the basis of a particularized suspicion. Thus, the officer did not have the objective data necessary to justify the investigatory stop, and the evidence obtained subsequent to the illegal stop should have been suppressed. Further, the District Court's conclusion that even if the officer had seen the license plate in the window, the officer was still permitted to make an investigatory stop to ensure that the license plate was securely fastened to the vehicle was also erroneous. Such a holding would justify an investigatory stop of every vehicle in Montana. Law enforcement is not permitted to make an investigatory stop unless an officer observes objective data that gives rise to an inference that an individual is engaged in wrongdoing, and that objective data did not exist in this case. St. v. Lacasella, 2002 MT 326, 313 M 185, 60 P3d 975 (2002).

Sufficient Evidence to Support Particularized Suspicion to Justify Investigatory Stop — Petition for Reinstatement of Driver's License Properly Denied: A highway patrol officer observed a vehicle swerve and hit the guardrail. The vehicle did not stop, so the officer followed the vehicle as it exited the freeway. The officer believed, in part, that the driver violated 61-7-108, failing to report an accident causing damage of $500 or more, so the officer stopped the vehicle and subsequently arrested Moore for DUI. When Moore refused a breath test, the officer seized Moore's driver's license. Moore petitioned for reinstatement of the license, arguing that the officer could formulate no suspicion that Moore was involved in wrongdoing that would warrant an investigative stop because the officer could not have known whether Moore was going to report the accident by the quickest means, which was for Moore to drive home and call. The District Court denied the petition, and the Supreme Court affirmed. The officer testified that the damage to the guardrail alone exceeded $500 and that Moore passed up at least two opportunities to stop and use a pay telephone to report the accident before the investigatory stop. Although the evidence conflicted, it was within the province of the District Court to determine the weight of the evidence and credibility of the witnesses. The officer testified credibly, and there was sufficient evidence in the record to indicate that the officer had the requisite particularized suspicion to justify the investigatory stop. Therefore, denial of Moore's petition to reinstate the driver's license was properly denied. Moore v. St., 2002 MT 315, 313 M 126, 61 P3d 746 (2002), followed in St. v. Schulke, 2005 MT 77, 326 M 390, 109 P3d 744 (2005).

Lack of Physical Description Not Precluding Particularized Suspicion Warranting Investigatory Stop — Defendant in Proximity to Suspects at Crime Scene: A convenience store clerk called police to report a possible theft and gave physical descriptions of two suspects. When

a police officer arrived at the scene, he observed three people nearby, two of whom matched the physical description. Niles did not match the description, but was standing with those who did. The officer cornered one of the persons described by the clerk, after which Niles and the other person began walking away. When ordered to stop, the two tried to flee but were apprehended and arrested. Niles was charged with obstructing a peace officer and with possession of alcohol by a minor. During criminal proceedings, Niles moved to suppress evidence based on the contention that the officer lacked a particularized suspicion to detain. The motion was denied. On appeal, the Supreme Court affirmed. Although Niles was not physically described in the police report, he nevertheless was clearly associated with the two described suspects near the area of the crime, and although Niles did not initially run away from the officer, he did walk away in the presence of a suspect and in a manner that, under the totality of the circumstances, the officer could form a particularized suspicion that Niles was engaged in or had been engaged in criminal wrongdoing. St. v. Niles, 2002 MT 282, 312 M 453, 59 P3d 1129 (2002), distinguishing St. v. Broken Rope, 278 M 427, 925 P2d 1157 (1996), and St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001).

Absence of Exigent Circumstances — Warrantless Search Unjustified: Logan was one of two passengers in a vehicle that was stopped for failure to have the rear license plate illuminated. The officer recognized the driver, who had a history of carrying weapons and of violence toward police officers, and called for backup. The officer then approached the vehicle but did not smell or observe any illegal drugs or drug paraphernalia or observe any behavior that led the officer to believe that anyone in the vehicle was under the influence of drugs. After obtaining identification from the driver and passengers, the officer ran a check for outstanding warrants on all the parties and learned that all three persons had past drug arrests and that an extreme officer caution alert was in effect for the driver. The officer then called for another officer who had a drug-sniffing dog. The dog alerted to the passenger-side door of the car, and the officer removed a purse from the back seat containing drug paraphernalia and a paper bindle. The dog entered the vehicle and indicated additional drugs. Logan was subsequently arrested for possession of dangerous drugs but moved to suppress the evidence on grounds that the officer did not have a particularized suspicion of the presence of drugs to support a canine sniff search of the vehicle. The Supreme Court agreed. In St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), the Supreme Court held that there is no automobile exception to constitutional search warrant requirements and that the mobility of a vehicle, without more, is not sufficient to justify a warrantless search. In addition to particularized suspicion, a warrantless search of a vehicle requires probable cause and a generally applicable exception to the warrant requirement, such as plain view search, a search incident to arrest, or exigent circumstances, which was the only applicable exception at issue here. The District Court held that the exigent circumstance in this case was that allowing Logan to reenter the vehicle to retrieve the purse would have provided the opportunity to destroy the evidence. However, the officer testified that there was nothing that prevented obtaining a search warrant, and that testimony itself belied the fact that exigent circumstances existed. Because the state failed to meet the heavy burden of proving exigent circumstances, the District Court erred in denying Logan's motion to suppress, so the case was reversed. St. v. Logan, 2002 MT 206, 311 M 239, 53 P3d 1285 (2002).

Few People in Area of Early Morning Complaint, Coupled With Flight by Suspect, Sufficient to Warrant Investigative Stop: A Havre police officer responded to a 2:47 a.m. complaint that two people were "messing around with cars" and were running toward the post office, but no physical description was provided. While searching the post-office area, the officer noticed a person walking down the street. Upon seeing the police car, the person began running. Bauer was eventually found and arrested for minor in possession, second offense. During booking, Bauer was also found to be in possession of drugs but moved to suppress on grounds that the officer had no particularized suspicion to make the investigative stop. The District Court found that the stop was warranted, and the Supreme Court agreed, based on these facts: (1) it was early in the morning and there were few people walking on the streets; (2) Bauer was in close proximity to the location of the complaint; (3) there was no physical description of the two individuals available in the complaint; (4) the patrol vehicle was clearly marked with reflective striping and top lights and could be plainly seen under the street lights; and (5) Bauer ran and attempted to hide upon seeing the patrol vehicle. St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001).

Gravamen of Particularized Suspicion Standard — Totality of Circumstances Giving Rise to Basis for Suspecting Criminal Activity: Van Kirk pulled into a parking lot and spotted an officer and then left immediately in an apparent attempt to avoid the officer. Upon realizing that the officer had followed him, Van Kirk slowed to 7 to 10 miles an hour in a 25-mile-per-hour zone and continuously watched the officer in the rearview mirror. Van Kirk's vehicle shifted from the edge

of the road to across the midpoint several times in a manner that would have impeded any oncoming traffic. The officer initiated a traffic stop, and Van Kirk was arrested for DUI. Van Kirk contended that the officer lacked a particularized suspicion to conduct the stop. The Supreme Court disagreed. Particularized suspicion does not require that an officer possess proof beyond a reasonable doubt that a crime has been or is about to be committed before initiating an investigatory stop. The gravamen of the particularized suspicion standard is that the totality of the circumstances confronting the officer at the time of the stop must give rise to a particularized and objective basis for suspecting criminal activity. In evaluating the totality of the circumstances, the Supreme Court considers the quantity or content and the quality or degree of reliability of the information available to the officer. Particularized suspicion is quantitatively different from and less stringent than probable cause to arrest or conduct a search. As set out in St. v. Gilder, 1999 MT 207, 295 M 483, 985 P2d 147 (1999), in order to show sufficient cause to stop a vehicle, the state must show both objective data from which an experienced officer can make certain inferences and a resulting suspicion that the vehicle occupant is or has been engaged in wrongdoing or was a witness to criminal activity. In this case, Van Kirk's behavior was sufficiently suspicious to give the officer a particularized suspicion to initiate an investigatory stop. St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001).

Erratic Driving at Night in Proximity to Bars — Totality of Circumstances Justifying Traffic Stop: Shortly after midnight, an officer observed Loiselle's vehicle drifting across the right traffic lane, crossing the white fog line, making several turns without signaling, and weaving. The officer pulled Loiselle over for an investigative stop, which resulted in a DUI charge. At trial, Loiselle moved to suppress evidence obtained during the stop, but the motion was denied, and Loiselle appealed. To make an investigatory stop, an officer must have a particularized and objective basis for suspecting criminal activity, and whether particularized suspicion exists is a question of fact determined by considering the totality of the circumstances. In this case, the totality of the circumstances justified the stop. Loiselle did not merely touch the fog line, but actually drove over it and proceeded on the shoulder of the road for at least 3 seconds. The behavior was preceded by erratic driving that caught the officer's attention and that occurred late at night in the proximity of several nearby bars. Irrespective of Loiselle's failure to use turn signals, to a 5-year veteran of the Sheriff's office, there was sufficient objective data from which the officer could suspect that the occupant of the vehicle had engaged in wrongdoing and commence an investigatory stop. St. v. Loiselle, 2001 MT 174, 306 M 166, 30 P3d 1097 (2001).

Grounds for Investigative Stop of Vehicle — Knowledge Owner Is Unlicensed Is Sufficient — No Need to Determine Owner Not Licensed Elsewhere: To make an investigative stop of a pickup, the officer needed only a reasonable or particularized suspicion, based on objective data, that an offense was being committed. After the officer observed that a pickup was oscillating between 50 and 60 miles an hour on a freeway and that the plate was new and shiny, in contrast to the rest of the pickup, he had dispatch do a license check and was informed that the pickup owner's license was expired. Knowledge that the pickup owner's license was expired was enough to validate the officer's stop of the pickup because it gave the officer a particularized suspicion that an offense was being committed. The officer did not have to also ascertain, before the stop, that the pickup owner did not have a valid license from another state. St. v. Hatler, 2001 MT 38, 304 M 211, 19 P3d 822A (2001).

Missing Vehicle Headlight Constituting Objective and Particularized Suspicion of Wrongdoing to Justify Investigative Stop: Officers conducting surveillance of a house where drug activities were suspected noticed that a vehicle leaving the area was missing a headlight. The officers believed that the driver, Farabee, may have just completed a drug transaction at the house and pulled over the vehicle, based on the fact that the vehicle appeared to be in violation of 61-9-104, which requires two working headlights. Upon receiving permission and searching the vehicle, the officers discovered marijuana and paraphernalia. On appeal, Farabee argued that the officer who stopped him did not have a particularized suspicion that Farabee was committing an offense because the stop occurred at 1:30 p.m., in broad daylight, and Farabee's headlights were turned off, so the officers could only speculate that the headlight was inoperable. The Supreme Court disagreed, holding that the officers' suspicions were particularized. From the objective and particularized data that the vehicle appeared to be missing a headlight, the officers made the reasonable inference that the headlight was inoperable. Particularized suspicion does not require certainty on the part of an officer; thus, the District Court's conclusion that Farabee was engaged in wrongdoing that justified an investigative stop was not clearly erroneous. St. v. Farabee, 2000 MT 265, 302 M 29, 22 P3d 175, 57 St. Rep. 1106 (2000), distinguishing Grinde v. St., 249 M 77, 813 P2d 473 (1991), and St. v. Reynolds, 272 M 46, 899 P2d 540 (1995).

Traffic Stop of Illegally Operated Vehicle Not Considered Pretext for Search of Vehicle for Narcotics: Officers conducting surveillance of a house where drug activities were suspected noticed that a vehicle leaving the area was missing a headlight. The officers believed that the driver, Farabee, may have just completed a drug transaction at the house and pulled over the vehicle, based on the fact that the vehicle appeared to be in violation of 61-9-104, which requires two working headlights. Upon receiving permission and searching the vehicle, the officers discovered marijuana and paraphernalia. On appeal, Farabee argued that the evidence should be suppressed because the officers used the equipment violation as a pretext to stop him and investigate their hunch, in violation of Art. II, sec. 10 and 11, Mont. Const. The Supreme Court disagreed, applying the rationale in Whren v. U.S., 517 US 806 (1996), that an officer's motive for a traffic stop does not render an objectively reasonable stop invalid. The constitutional reasonableness of a traffic stop does not depend on the subjective motivations of the individual officers involved. In this case, based on the objective and particularized data that the vehicle appeared to be missing a headlight, the officers made the reasonable inference that the headlight was inoperable, so the totality of the circumstances justified the investigative stop. Farabee's motion to suppress was properly denied. St. v. Farabee, 2000 MT 265, 302 M 29, 22 P3d 175, 57 St. Rep. 1106 (2000), distinguishing St. v. Lahr, 172 M 32, 560 P2d 527 (1977).

Random Recovery and Examination of Items Not Allowed Pursuant to Stop and Frisk — Premise of Plain Feel Doctrine: Heath was charged with possession of drugs and drug paraphernalia discovered during a warrantless pat-down search for weapons conducted during a stop and frisk. Heath moved for suppression of the evidence on grounds that a small leather coin purse and a 2-inch glass pipe could not reasonably have been mistaken for weapons, but the motion was denied. The state contended that the pat down was permissible and that the drug evidence found during the search was lawfully seized under the plain feel doctrine. Pursuant to St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), the state must satisfy two criteria for a stop and frisk to be valid at its inception: (1) the officer must have objective data from which an experienced officer can make certain inferences; and (2) the officer must have a resulting suspicion that the occupant of a vehicle was engaged in wrongdoing or was a witness to criminal activity. The frisk is to search for potential weapons, and the officer must suspect an object to be a weapon, or if the officer detects other contraband during the pat down for weapons, its incriminating character must be immediately apparent. The District Court determined that the small leather coin purse could not be mistaken for a weapon, but nevertheless concluded that it could have contained a weapon. However, that conclusion exceeded the permissible scope of a pat-down search, and the Supreme Court found no justification in removing the coin purse on the blanket assumption that it could contain a weapon. The court also found no basis for concluding that the glass pipe's incriminating nature was immediately apparent, and thus there was no basis for invoking the plain feel doctrine. An officer cannot randomly recover items from a suspect's clothing and proceed to examine them pursuant to a stop and frisk and then, after the fact, argue that the objects might have contained a weapon or were immediately apparent as contraband. Here, the warrantless search was per se unreasonable, and the state failed to prove that the search came within the reasonable scope of a stop and frisk. The Supreme Court reversed the District Court's denial of Heath's motion to suppress and remanded for further proceedings. St. v. Heath, 2000 MT 94, 299 M 230, 999 P2d 324, 57 St. Rep. 387 (2000), distinguishing St. v. Lamere, 226 M 323, 735 P2d 511 (1987).

Particularized Suspicion That Suspect Involved in Burglary Sufficient to Justify Investigatory Stop: Based on the objective data and totality of the circumstances, the District Court did not err in concluding that an investigating officer had a particularized suspicion to stop Collard. The officer's experience and training led him to believe that Collard may have been connected to a robbery, based on the following facts: (1) the officer knew that the crime had been committed by a male who was acting alone; (2) Collard was first observed only a few blocks from the crime scene; (3) Collard's vehicle was the only vehicle moving about just after the crime was committed; (4) Collard was the only person in the vehicle; (5) Collard was driving in a hurried manner away from the crime scene; and (6) Collard surprised the officer by pulling over unexpectedly. St. v. Collard, 286 M 185, 951 P2d 56, 54 St. Rep. 1366 (1997).

INVESTIGATIVE STOP OF ANOTHER DURING LAWFUL SEARCH

Standard of Review of Denial of Motion to Suppress Evidence of Investigatory Stop: The Supreme Court reviews the denial of a motion to suppress evidence from an investigatory stop to determine whether the trial court's finding that the officer involved had a particularized suspicion to justify the investigatory stop was clearly erroneous. The trial court's conclusions of law are reviewed to determine whether the court's interpretation of the law was correct. St. v.

Lovegren, 2002 MT 153, 310 M 358, 51 P3d 471 (2002), followed in St. v. Nelson, 2004 MT 13, 319 M 250, 84 P3d 25 (2004).

Requisite Objective Data and Resulting Suspicion for Lawful Stop and Frisk in Motel Room: Officers were lawfully searching Roehr's motel room when Dawson knocked on the door. An officer opened the door, and Dawson entered, asking for Roehr. The officer told Dawson that he was going to conduct a pat-down search for weapons and asked Dawson if he possessed any weapons, drugs, or needles. Dawson said that he had no weapons. The officer repeated the question. Dawson motioned toward his coat pocket and said that he had some "smoke" in there. The "smoke" turned out to be methamphetamine and drug paraphernalia. Dawson sought to suppress the evidence, contending that the search was illegal because the officer had no articulable, reasonable suspicion that Dawson had engaged in criminal activity. On appeal, the Supreme Court noted that Roehr was a known criminal and that his room had been under surveillance for suspected drug activity. The officer had probable cause to believe that Roehr was conducting transactions involving dangerous drugs and stolen property in the room. When Dawson appeared, asking for Roehr, the officer had a particularized suspicion, based on the totality of the circumstances, to believe that Dawson had committed or was about to commit an offense. Thus, sufficient cause existed to detain Dawson. Further, in the officer's experience, people involved in drug offenses frequently carry weapons. The officer had no prior dealings with Dawson to help him determine whether Dawson was armed and did not know whether Dawson presented a danger to the officers conducting the search of the room, so reasonable cause existed to suspect that Dawson was armed and dangerous. Therefore, the officer possessed the requisite objective data and resulting suspicion to lawfully stop and frisk Dawson, and denial of the motion to suppress the fruits of the search was not error. St. v. Dawson, 1999 MT 171, 295 M 212, 983 P2d 916, 56 St. Rep. 668 (1999), distinguishing St. v. Anderson, 1999 MT 60, 293 M 490, 977 P2d 983, 56 St. Rep. 252 (1999).

LEGAL BUT UNUSUAL DRIVING OR OTHER BEHAVIOR OR CIRCUMSTANCES

Slow Operation of Vehicle and Buildup of Traffic Behind Vehicle Establishing Particularized Suspicion That Driver Impeding Traffic — Stop Warranted: Benders was driving between 25 and 40 miles an hour in a 50-mile-an-hour zone and continued to drive at the reduced speed when the speed limit increased to 70 miles an hour. No vehicles were in front of Benders, but at least four vehicles were following, and additional vehicles were quickly approaching. An officer was concerned that Benders' slow driving was creating a dangerous situation even though there was nothing to indicate a need to drive at a reduced speed. The officer stopped Benders for impeding traffic pursuant to 61-8-311, and Benders was subsequently arrested for DUI. Benders moved to suppress all evidence relating to the initial stop, but the motion was denied. On appeal, Benders asserted that the motion should have been granted because the officer did not have a particularized suspicion to justify the stop. The Supreme Court affirmed. The combination of slow speed and the buildup of vehicles provided the officer with sufficient information that Bender was impeding traffic, justifying the stop. Benders also argued that the state failed to establish the minimum speed required under 61-8-311 and thus failed to show that his speed was slow enough to violate the law. However, the relevant determination under 61-8-311 is not the speed of the vehicle, but the effect of the slow speed on the flow of traffic. Benders also claimed that a violation of 61-8-311 requires a showing that a defendant has created unsafe driving conditions and an increased risk of an accident. However, such a showing is not required under the statute, and it would be inappropriate to conclude that an officer must wait for an unsafe driving condition to arise before concluding that traffic was being impeded. St. v. Benders, 2006 MT 275, 334 M 231, 146 P3d 751 (2006).

Objective Manifestation to Support Investigation Following Traffic Stop — Time of Stop Extended: Following a traffic stop and observation of Nelson's behavior, officers conducted a DUI investigation, performed field sobriety tests and arrested Nelson for DUI, and then searched Nelson's car and discovered drugs and paraphernalia. Nelson contended that the fruits of the search should be suppressed because the officers did not give the stop advisory required in former 46-5-402 (repealed 2003) or a Miranda advisory and because the DUI investigation at the scene exceeded the scope of the investigative stop. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. The stop advisory issue was not contested, and the Supreme Court declined to address it. Nelson was not entitled to a Miranda warning because the Miranda protections are afforded during a custodial interrogation but do not apply to an investigative stop. In addition, as in St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), the initial investigatory stop took on the quality of an escalating situation in which

additional information gave rise to further suspicions and enlarged the scope of the investigation to that of a possible DUI. The officers had a particularized suspicion to conduct the DUI investigation, properly extending the time of the stop. Although the Supreme Court has not established specific time parameters to which an officer must adhere when conducting an investigative stop, the 24 minutes taken to conduct the investigative stop in this case was reasonable and not excessive. St. v. Nelson, 2004 MT 310, 323 M 510, 101 P3d 261 (2004).

Unusual but Legal Driving and Unsupported Tip Insufficient Grounds for Particularized Suspicion to Make Investigative Stop: An officer received a tip concerning suspicious activity in a high crime area of Billings. The officer observed Fisher's car in the area and followed the car. The officer observed that the vehicle had a temporary sticker, which could not be read, but no license plate. The vehicle made several turns and ended up on the street where the officer originally saw it. The officer then stopped the vehicle, and Fisher was subsequently arrested for possession of drugs and drug paraphernalia. Fisher moved to suppress the evidence on grounds that the officer had no particularized suspicion to make the stop. The motion was denied, and Fisher was convicted and appealed. The state initially claimed that the officer had a particularized suspicion that Fisher was in violation of vehicle registration laws, but the state waived that argument when the officer did not testify to that effect. Further, none of the information in the anonymous tip was connected to Fisher; rather, the officer stated that he wanted to obtain the identity of the vehicle occupants for later investigation of the tip. However, under St. v. Anderson, 258 M 510, 853 P2d 1245 (1993), an investigative stop is not justified in order to corroborate a tip. Last, Fisher maintained an appropriate speed, violated no traffic laws, and made no unusual turns, and Fisher's driving was not headlong flight or evasive. The simple fact that Fisher drove back to the original street where the officer saw the vehicle, absent more objective data, was insufficient for the officer to form a particularized suspicion that Fisher was engaged in criminal activity based on operation of the vehicle. Thus, the stop violated Fisher's right to be free from unreasonable search and seizure, and the Supreme Court reversed. St. v. Fisher, 2002 MT 335, 313 M 274, 60 P3d 1004 (2002), distinguishing St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), and Ill. v. Wardlow, 528 US 119 (2000), and distinguished in St. v. Flemings, 2008 MT 229, 344 M 360, 188 P3d 1020 (2008).

One Taillight Brighter Than Other — Not Grounds for Investigative Stop: An investigative stop of a motor vehicle was not justified by the fact that one taillight burned brighter than the other when both lights, including the running lights, brake lights, and turn signals, worked. A variance in the illuminating qualities of taillights on a vehicle is not a violation of Montana law if each emits a red light plainly visible from a distance of 1,000 feet to the rear. The Supreme Court held that all evidence gathered as a result of the stop must be suppressed. St. v. Kaufman, 2002 MT 294, 313 M 1, 59 P3d 1166 (2002).

Insufficient Particularized Suspicion of Crime to Justify Investigative Stop — To Pee or Not to Pee: On the night of November 16, 1999, officers came up behind a vehicle parallel parked legally beside a frontage road. As they passed the vehicle, they noticed a man standing by the passenger door on the side farthest from the road, apparently urinating. The man had taken steps so as not to expose himself to passers-by. The officers proceeded on, but decided to return and warn the man about the impropriety of his conduct. Upon reaching the vehicle, there was no longer anyone standing by it, but Kleinsasser was in the driver's seat making a call on a cell phone, another person was in the passenger seat, and another was lying down on the back seat. All three denied standing by the vehicle and denied knowing who had been doing so. The officers also smelled alcohol emanating from the vehicle, and asked Kleinsasser to perform field sobriety tests, which he failed. Kleinsasser was arrested for DUI, but refused to take a breath test, so his driver's license was seized and suspended. The District Court denied Kleinsasser's petition challenging the license suspension, and Kleinsasser appealed. The only relevant issue for the District Court to consider was whether the officer had reasonable grounds to believe that Kleinsasser was driving under the influence. The reasonable grounds requirement in 61-8-403 is equivalent to the requirement for particularized suspicion to make an investigative stop in this section, which requires the state to show objective data from which an experienced officer could make certain inferences, and a resulting suspicion that the occupant of a certain vehicle is or has been engaged in wrongdoing or was a witness to criminal activity. When the totality of the circumstances does not support a particularized suspicion, an investigative stop is not justified. The state argued that the observed activity constituted disorderly conduct. The Supreme Court disagreed. Kleinsasser's act did not create a hazardous condition, and the court found it hard to imagine any act that serves a more legitimate purpose than answering nature's call. Further, the behavior was not considered physically offensive in this case because it occurred at night, in a rural location where there were no overhead lights or other traffic at the time. There was no evidence

that the act disturbed anyone other than the officers, and neither officer was so disturbed that he considered giving the individual a citation; therefore, an allegation of disorderly conduct was unfounded. Absent a particularized suspicion to justify an investigative stop, the subsequent seizure of Kleinsasser's driver's license was invalid. The Supreme Court reversed the District Court's error in denying Kleinsasser's petition for reinstatement of his license. Kleinsasser v. St., 2002 MT 36, 308 M 325, 42 P3d 801 (2002).

Petitioner's Driver's License Reinstated on Basis That No Grounds Existed to Justify Officer's Particularized Suspicion for Stopping Petitioner's Vehicle: Officer Van Every observed Morris's vehicle drift and touch the fog line. Believing that Morris might be driving under the influence, the officer stopped Morris and ultimately arrested him when he refused to provide a sample of his breath. The lower court reinstated Morris's license on the basis that there was no particularized suspicion for the traffic stop. The Supreme Court affirmed the lower court's decision, ruling that merely touching or crossing the fog line while driving is not a traffic infraction and in itself is insufficient to create a particularized suspicion of wrongdoing that would justify a traffic stop. The Supreme Court in dicta clarified that the present case and St. v. Lafferty, 1998 MT 247, 291 M 157, 967 P2d 363 (1998), were not to be construed as requiring a traffic violation as necessary to create a particularized suspicion prior to a traffic stop. Morris v. St., 2001 MT 13, 304 M 114, 18 P3d 1003 (2001).

Slow Driving Not Grounds for Stop: Driving slowly, about 15 miles an hour in a 25-mile-an-hour zone, did not justify a stop by a Deputy Sheriff, and evidence arising from the stop should have been suppressed. St. v. Gilder, 1999 MT 207, 295 M 483, 985 P2d 147, 56 St. Rep. 808 (1999).

No Particularized Suspicion — Stop Illegal — Evidence Suppressed: At 3:30 a.m. on a cold morning in a high-crime area, a police officer who was searching for a participant in a domestic disturbance observed defendant talking on a pay phone. When the police officer drove back by the phone, the phone was off the hook and defendant was gone. When he spotted defendant leaving a parking lot in the area, the police officer made a traffic stop and discovered a knife in plain view on the front seat of the car and illegal drugs and a gun on defendant's person. Defendant moved to suppress all the evidence. The District Court denied the motion. The Supreme Court reversed. A person's presence in a high-crime area does not alone give the police a particularized suspicion to stop the person. The facts did not rise to the level of a reasonable and articulable suspicion that defendant was, had been, or was about to engage in criminal activity. Because the stop was illegal, all evidence must be suppressed. St. v. Jarman, 1998 MT 277, 291 M 391, 967 P2d 1099, 55 St. Rep. 1133 (1998), distinguished in St. v. Flemings, 2008 MT 229, 344 M 360, 188 P3d 1020 (2008).

Inability to Verify Temporary Vehicle Purchase Sticker and Failure to Promptly Respond to Signal to Stop — Particularized Suspicion to Stop Vehicle: An officer observed Henderson driving a motor vehicle without license plates, noticed what appeared to be a temporary tag in the rear window, but was unable to verify the validity of the tag from a distance because of dark window tinting. For two and one-half blocks, Henderson failed to respond to the officer's signal to pull over. Once the vehicle was stopped, one of the passengers attempted to exit, further raising the officer's suspicions. Rather than immediately checking the tag, the officer proceeded to the driver side window and asked Henderson for license, registration, and proof of insurance. The officer then became aware of a strong odor of alcohol emanating from the vehicle and observed that Henderson's speech was slurred and thick. The officer performed field sobriety tests and a breath test, which Henderson failed. Henderson was arrested, and a subsequent search of the vehicle revealed alcohol and drugs in the passenger compartment. Following the arrest, the officer discovered that the temporary tag was valid. The District Court suppressed the evidence on the grounds that the officer lacked a particularized suspicion to stop the vehicle. The Supreme Court held that the inability to identify the tag gave rise to a particularized suspicion as to the proper registration of the vehicle. The suspicion was further bolstered by Henderson's unusual behavior in failing to promptly respond to the signal to pull over, by the attempt of a passenger to exit, and by the officer's inability to see into the vehicle. At that point, the officer's suspicion was reasonably broadened to include a particularized suspicion that the driver might be impaired. From the moment that the officer noted the smell of alcohol and Henderson's slurred speech, the initial investigatory stop took on the quality of an escalating situation in which the additional information gave rise to further suspicions and enlarged the scope of the investigation to that of a possible DUI. The District Court erred in suppressing the evidence on grounds that the officer exceeded the scope of the investigation, and the case was reversed. St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137, 55 St. Rep. 980 (1998), distinguishing St. v. Farley, 775 P2d 835 (Oreg. 1989), and People v. Redinger, 906 P2d 81 (Colo. 1995).

Evidence Insufficient to Support Finding of Particularized Suspicion of Engagement in Criminal Activity — Suppression of Evidence Seized in Investigative Search: Belgarde and Broken Rope were observed traveling in a vehicle registered to Belgarde. A records check revealed an outstanding warrant on Belgarde for fish and game violations. When the two stopped at a convenience store, the officer observed them acting nervous, using the telephone, moving around the store parking lot, watching the officer, and putting their hands in their pockets. Following the subsequent arrest of Belgarde on the outstanding warrant, the officer also searched Broken Rope, finding weapons and drugs. In light of the requirement that some objective manifestation must exist to support a particularized suspicion that a person is engaged in criminal activity before a stop may be made, the Supreme Court held that the evidence seized in the search of Broken Rope should have been suppressed because, despite the officer's training and experience, Broken Rope did nothing inherently suspicious to form the basis for inferences resulting in a particularized suspicion that he was engaged in criminal activity. St. v. Broken Rope, 278 M 427, 925 P2d 1157, 53 St. Rep. 987 (1996). See also St. v. Reynolds, 272 M 46, 899 P2d 540 (1995), and St. v. Carlson, 2000 MT 320, 302 M 508, 15 P3d 893, 57 St. Rep. 1348 (2000).

Particularized Suspicion Not Supported by Totality of Circumstances — Investigatory Stop Unjustified: An investigatory stop must be justified by some objective manifestation that the person stopped is or is about to be engaged in criminal activity, and the totality of the circumstances must give the police a particularized and objective basis for suspecting the person of criminal activity. The issue of whether a particularized suspicion exists in order to justify an investigative stop is factually driven. When the totality of the circumstances does not support a particularized suspicion, the investigatory stop is unjustified. Citing numerous applicable Montana cases, the Supreme Court, in this instance, noted the fact that Reynolds had moved through an intersection "bordering on traveling too fast" for conditions, but not necessarily breaking the law critically or technically and exhibiting no patterns consistent with a person driving under the influence of alcohol or erratically. The possible traffic violation could not be combined with any other objective data to support a particularized suspicion that Reynolds was engaged in wrongdoing. Therefore, the subsequent investigatory stop was unwarranted. Reynolds' motion to dismiss DUI charges based on the unlawful stop was granted. St. v. Reynolds, 272 M 46, 899 P2d 540, 52 St. Rep. 600 (1995), followed in In re Bauer v. St., 275 M 119, 910 P2d 886, 53 St. Rep. 65 (1996), and St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974, 56 St. Rep. 245 (1999), and distinguished in Seyferth v. St., 277 M 377, 922 P2d 494, 53 St. Rep. 698 (1996), and Missoula v. Cook, 2001 MT 237, 307 M 39, 36 P3d 414 (2001). See also St. v. Gilder, 1999 MT 207, 295 M 483, 985 P2d 147, 56 St. Rep. 808 (1999).

Unprivileged Use of Force: When the plaintiff claimed to have knowledge material to an investigation and was at the scene of the crime 20 hours after the crime was committed, a law enforcement officer was not privileged to use force to stop the plaintiff. Luciano v. Ren, 180 M 187, 589 P2d 1005 (1979).

FREEDOM TO LEAVE

Legal Detention Following Traffic Stop — Voluntary Consent to Search Vehicle — Motion to Suppress Properly Denied: Case was stopped for a traffic violation, and drugs were found in Case's car after Case allegedly consented to a search of the vehicle. Following conviction, Case appealed on grounds that evidence of the search should have been suppressed because the officer exceeded the scope of the initial stop by detaining Case and continuing to question him after issuing traffic citations. The Supreme Court concluded that under the circumstances, Case remained under police control during questioning and could not have reasonably concluded that he was free to leave. Because Case was not involved in a voluntary exchange, Case was in fact "seized" when he gave permission to search the vehicle. The court then examined whether particularized suspicion existed to continue the investigatory stop past the issuance of traffic citations and whether Case's consent to the search was voluntary. In this case, Case was legally detained because additional information, including Case's questionable behavior, his multiple connections with drugs, and confusion whether Case was in fact another person named Case who had skipped town, gave rise to further suspicions that served to properly enlarge the scope of the investigation. The only circumstance that Case claimed affected the voluntariness of his consent to search the vehicle was that the detention was illegal. Having concluded that the detention was legal, the court further concluded that Case's consent was voluntary and that the motion to suppress the fruits of the search was properly denied. St. v. Case, 2007 MT 161, 338 M 87, 162 P3d 849 (2007). See also St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974 (1999), and St. v. Hurlbert, 2009 MT 221, 351 M 316, 211 P3d 869 (2009).

Particularized Suspicion Sufficient Justification for Request for Consent to Search Vehicle — No Illegal Detention — Motion to Suppress Properly Denied: Snell was stopped for speeding and was also cited for failure to carry proof of insurance. While writing out the citation in the patrol car, the officer asked Snell if he could search the vehicle, and Snell consented. The officer discovered drugs, and Snell was charged with possession and intent to distribute marijuana. Snell moved to suppress the evidence. Snell conceded that he had voluntarily consented to the search, and the state conceded that the officer did not have probable cause. The motion to suppress was denied, and Snell appealed. The Supreme Court considered both the consent and illegal detention issues. First, the court reasoned that the officer had particularized suspicion to stop the vehicle and that Montana law does not require additional justification for requesting consent, so Snell's voluntary consent was sufficient to justify the warrantless search of the vehicle (see St. v. Parker, 1998 MT 6, 287 M 151, 953 P2d 692 (1998)). Second, the court concluded that because the officer did not coerce or restrain Snell, order him to stay, or prevent Snell from exiting the patrol car, a reasonable person would have felt free to leave the patrol car upon completion of the traffic stop, so the poststop interaction between Snell and the officer was a voluntary exchange rather than an illegal detention or unlawful seizure (see St. v. Merrill, 2004 MT 169, 322 M 47, 93 P3d 1227 (2004), and St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004)). Snell's motion to suppress was properly denied. St. v. Snell, 2004 MT 269, 323 M 157, 99 P3d 191 (2004).

No Privacy Interest in Rental Car by Unauthorized Driver Who Disavows Ownership of Contents: Hill was stopped for speeding and ticketed. After the stop was completed, the officer engaged Hill in small talk, inquiring where Hill was going and where his traveling clothes were. Hill replied that it was a quick trip, so no extra clothes were needed. Although no bags or clothes were in sight, the officer asked if Hill was carrying anything illegal. Hill said no, and the officer asked if Hill would consent to a search of the vehicle, to which Hill initially consented. In going over the terms of the consent form, Hill related that the car had been rented by a friend and that a search of the trunk was probably not a good idea because Hill did not know what the friend might have placed there. The officer then checked on the origin of the car and discovered that it had been acquired through a rental agency, but that the car was 2 days late in being returned, and that Hill was not an authorized driver. The agency asked that the car be impounded and gave permission for a search. The officers found two bags in the trunk, but Hill disclaimed ownership of the bags. A search of the bags revealed drugs and Hill's cell phone charger. Hill was then charged with drug crimes and later moved to suppress the evidence, but the motion was denied. On appeal, the Supreme Court affirmed. Hill had no reasonable expectation of privacy in the car's contents because he was not an authorized driver, had no relation to the car's owner or renter, and voluntarily disclaimed knowledge and ownership of anything in the car. Hill could not expect privacy in a car he illegally possessed, and once Hill waived control over the bags, he implicitly granted permission for the bags to be accessed. The search of the trunk was reasonable because permission was granted by the car owner, and the trunk contents were effectively surrendered by Hill, making the car owner's permission to search the vehicle sufficient to permit a full search of items found in the car. St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004), distinguishing St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), and St. v. Tackitt, 2003 MT 81, 315 M 59, 67 P3d 295 (2003).

Search Incident to Conversation After Traffic Stop Concluded Considered Voluntary — Motion to Suppress Properly Denied: Officers stopped Merrill for investigation following an improper lane change. A license plate check showed that Merrill was not the vehicle owner. However, the vehicle was owned by a person suspected by one of the officers to be involved with dangerous drugs. The officer told Merrill that he was just giving her a verbal warning and that she was free to go. Stepping away from the vehicle, the officer noticed that Merrill seemed unusually nervous. Suspicious about the report regarding the vehicle owner, the officer again approached the vehicle and asked Merrill if he could talk to her. Merrill answered affirmatively. The officer then asked if he could search the vehicle. Merrill again answered affirmatively. Merrill stepped out of the car, and the officer asked if he could search her person, including her pockets. Merrill again answered affirmatively, and the officer discovered drugs in her pocket. Merrill contended that she had been unlawfully detained subsequent to an investigatory stop and that the evidence should be suppressed. The trial court concluded that the search was voluntary and denied the suppression motion. On appeal, the Supreme Court affirmed. Once the officer completed the investigation of the improper lane change, the investigatory stop was concluded and Merrill was free to leave. What followed was neither a subsequent investigatory stop nor an extension of the first stop, but rather a voluntary exchange, and nothing prevents an officer from engaging a citizen in a voluntary conversation. A purely voluntary conversation

intrudes on no constitutionally protected interest, so Merrill was accorded no constitutional protection related to the search and seizure, and denial of the motion to suppress was appropriate. St. v. Merrill, 2004 MT 169, 322 M 47, 93 P3d 1227 (2004), followed in St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004).

Voluntary Encounter Versus Investigative Stop: Officers received a report from a citizen that a vehicle had been observed being driven erratically on the interstate and that the driver had pulled over at a convenience store and staggered into the building. When officers arrived, they found an unoccupied vehicle that matched the informant's description and observed Wagner inside on the telephone. The officers initiated contact with Wagner, noticing immediately that he appeared intoxicated, and requested that Wagner speak with them outside. Wagner acceded, voluntarily admitted that he had been drinking, failed field sobriety tests, and was arrested for DUI. Wagner subsequently asserted that the officers lacked a particularized suspicion to make the investigative stop because the informant's report was not sufficiently corroborated and moved to dismiss. The motion was denied, and Wagner appealed. The Supreme Court noted that if the telephone encounter constituted an investigative stop, it would be necessary to determine whether the officers obtained the requisite particularized suspicion, but if the encounter did not constitute a stop, it must be determined whether officers obtained the requisite particularized suspicion after initiating contact but prior to conducting a stop. Here, the court cited U.S. v. Mendenhall, 446 US 544 (1980), and held that Wagner was not "seized" because in view of all the circumstances surrounding the incident, Wagner would not have believed that he was not free to leave. Following the initial approach, the officers then obtained the evidence of Wagner's intoxication through consensual means, providing the requisite particularized suspicion to conduct the ensuing investigative stop. St. v. Wagner, 2003 MT 120, 315 M 498, 68 P3d 840 (2003). See also St. v. Jenkins, 192 M 539, 629 P2d 761 (1981), St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974 (1999), and St. v. Clayton, 2002 MT 67, 309 M 215, 45 P3d 30 (2002).

Traffic Stop Based on Drug Tip Considered Custodial Interrogation — Miranda Warning Required: Officers received a tip from Olson's estranged husband that a methamphetamine lab was being operated in Olson's garage. The officers placed the garage under surveillance and saw equipment being loaded into Olson's car that same day. The officers stopped the car for an investigative stop, and an officer informed Olson that he knew that lab equipment was in the trunk. Olson initially denied it, but when the officer expressed concern for Olson and her son, she made incriminating statements and confessed that the lab was in the car. Olson later sought to suppress the statements because she was not read her Miranda rights before she made the statements. The question was whether Olson was subject to a custodial interrogation that entitled her to receive the Miranda warnings. The District Court held that an interrogation did not occur because Olson was not asked any direct questions. The Supreme Court concluded that although Olson was not under arrest at the time that the statements were made, she was nevertheless subjected to a custodial interrogation. Olson was not free to leave during the conversation, the officer's questions were directed specifically at Olson, no other party was privy to the conversation, and the officer should have known that under the circumstances, his statements were reasonably likely to elicit an incriminating response. Because Olson did not receive Miranda warnings before she was interrogated, the statements that she made were in violation of her constitutional right against self-incrimination and should have been suppressed. St. v. Olson, 2003 MT 61, 314 M 402, 66 P3d 297 (2003), followed in St. v. McKee, 2006 MT 5, 330 M 249, 127 P3d 445 (2006). See also St. v. Staat, 251 M 1, 822 P2d 643 (1991), and St. v. Flack, 260 M 181, 860 P2d 89 (1993).

Person's Belief in Inability to Leave Constituting Seizure: Roberts was reported to be driving under the influence and was followed home by an officer who pulled into Roberts' driveway behind Roberts' car, effectively blocking Roberts' exit. Even though Roberts voluntarily pulled into the driveway and could have simply ignored the officer's presence and walked into his house, in this instance, the officer's actions nevertheless constituted an investigatory stop. Citing U.S. v. Mendenhall, 446 US 544, 64 L Ed 2d 497, 100 S Ct 1870 (1980), and U.S. v. Kerr, 817 F2d 1384 (9th Cir. 1987), the Supreme Court held that a person has been "seized" within the context of the constitution only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that the person was not free to leave. When the officer blocked Roberts' means and direction of travel, the officer precipitated an investigative stop amounting to a seizure of Roberts. St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974, 56 St. Rep. 245 (1999), following St. v. Pratt, 286 M 156, 951 P2d 37, 54 St. Rep. 1349 (1997), and distinguishing St. v. Lee, 282 M 391, 938 P2d 637 (1997).

UNSUPPORTED TIP

Unusual but Legal Driving and Unsupported Tip Insufficient Grounds for Particularized Suspicion to Make Investigative Stop: An officer received a tip concerning suspicious activity in a high crime area of Billings. The officer observed Fisher's car in the area and followed the car. The officer observed that the vehicle had a temporary sticker, which could not be read, but no license plate. The vehicle made several turns and ended up on the street where the officer originally saw it. The officer then stopped the vehicle, and Fisher was subsequently arrested for possession of drugs and drug paraphernalia. Fisher moved to suppress the evidence on grounds that the officer had no particularized suspicion to make the stop. The motion was denied, and Fisher was convicted and appealed. The state initially claimed that the officer had a particularized suspicion that Fisher was in violation of vehicle registration laws, but the state waived that argument when the officer did not testify to that effect. Further, none of the information in the anonymous tip was connected to Fisher; rather, the officer stated that he wanted to obtain the identity of the vehicle occupants for later investigation of the tip. However, under St. v. Anderson, 258 M 510, 853 P2d 1245 (1993), an investigative stop is not justified in order to corroborate a tip. Last, Fisher maintained an appropriate speed, violated no traffic laws, and made no unusual turns, and Fisher's driving was not headlong flight or evasive. The simple fact that Fisher drove back to the original street where the officer saw the vehicle, absent more objective data, was insufficient for the officer to form a particularized suspicion that Fisher was engaged in criminal activity based on operation of the vehicle. Thus, the stop violated Fisher's right to be free from unreasonable search and seizure, and the Supreme Court reversed. St. v. Fisher, 2002 MT 335, 313 M 274, 60 P3d 1004 (2002), distinguishing St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), and Ill. v. Wardlow, 528 US 119 (2000).

Citizen Information Lacking Objective Data — No Particularized Suspicion of Wrongdoing to Warrant Investigative Traffic Stop: An anonymous citizen informant telephoned to notify police that a purple Chevrolet Camaro with a tan convertible top, driven by David Lee, was heading north toward Glasgow on the Fort Peck highway. The informant stated the belief that Lee was speeding and driving under the influence of alcohol. Officer Collins located the described vehicle on the indicated route and checked the vehicle's speed with radar. Lee was driving 52 miles an hour in a 55-mile-an-hour zone. Collins made a U-turn and speeded up behind the Camaro, at which point Lee slowed down to 35 miles an hour. Collins stopped the Camaro, determined that the driver was the person described in the dispatch report, and arrested Lee for driving under the influence. Relying on St. v. Gopher, 193 M 189, 631 P2d 293 (1981), the Supreme Court noted that while an anonymous citizen tip can establish a basis for a particularized suspicion of wrongdoing when corroborated by independent observation of wrongdoing or illegality by an officer, in the absence of other objective data, an anonymous tip alone does not support a particularized suspicion. Lee was not speeding and did not show obvious signs of driving under the influence. Merely slowing down after observing a police car make a U-turn and speed up to come within a few car lengths behind one's vehicle is not illegal and provides no evidence of wrongdoing. Because the investigative stop was not justified, the Supreme Court reversed Lee's conviction and dismissed the case. St. v. Lee, 282 M 391, 938 P2d 637, 54 St. Rep. 401 (1997), followed in St. v. Williamson, 1998 MT 199, 290 M 321, 965 P2d 231, 55 St. Rep. 843 (1998), and St. v. Reiner, 2003 MT 243, 317 M 304, 77 P3d 210 (2003).

Uncorroborated Tip Not Basis for Particularized Suspicion for Traffic Stop: After the Lincoln County Sheriff's Office received a tip that Anderson would be traveling from Idaho to Montana with a large amount of marijuana, officers stopped Anderson's truck and conducted a pat-down search of Anderson's passenger. After finding a marijuana pipe, the passenger was arrested, the vehicle was impounded, a warrant was obtained, and additional marijuana was discovered in the truck. Anderson was convicted of possession with intent to sell. The Supreme Court reversed, citing St. v. Gopher, 193 M 189, 631 P2d 293 (1981), and holding that the officers who stopped the truck had no particularized suspicion that Anderson was engaged in illegal activity. The tip received by the Sheriff's office could not serve as the basis for the stop because an uncorroborated and unreliable tip is not the objective data contemplated by the Gopher case. Because the initial stop was unlawful, the Supreme Court ordered that all of the evidence seized be suppressed. St. v. Anderson, 258 M 510, 853 P2d 1245, 50 St. Rep. 637 (1993).

Probable Cause to Stop: The stop of the defendant's automobile and subsequent events were without probable cause when based solely on conjecture and speculation of another officer transmitted by radio to the arresting officer not present at the scene of the "suspicious" activity. St. v. Marshall, 174 M 278, 570 P2d 909 (1977).

GROUNDS FOR BELIEF IN DUI

Defendant's Prior DUI Conviction Properly Used for Sentencing Enhancement Purposes: Regularity of an earlier proceeding was proven by the state by a preponderance of the evidence when defendant's certified driving record of all his convictions, a signed waiver of rights form from defendant's 2000 conviction, and a signed waiver of rights form from defendant's 2002 conviction were entered into evidence and the court took testimony from the same justice of the peace who took defendant's pleas in 2000, 2001, and 2002 that her course and practice in 2001 was to advise DUI defendants of their right to counsel and have them sign forms acknowledging the same even though defendant's 2001 form could not be located. St. v. Faber, 2008 MT 368, 346 M 449, 197 P3d 941 (2008).

Officer's Observations Sufficient to Establish Particularized Suspicion of DUI Following Caretaker Stop: Vaughn pulled part way off the road, and an officer stopped to see if assistance was needed. The District Court concluded that under the community caretaker doctrine, the officer was justified in stopping to make sure Vaughn was all right. However, Vaughn asserted that once he assured the officer that no assistance was needed, the scope of the doctrine ended and that because the officer had no other justification for the stop, the officer's further questioning and request for field sobriety tests constituted an unlawful seizure, requiring suppression of all evidence gathered. The Supreme Court disagreed. When the officer approached the vehicle, he noticed an open can of beer between the front seats, and when asking about Vaughn's situation, he observed that Vaughn's speech was slurred and that his eyes were bloodshot and watery. Thus, the officer's observations were sufficient to establish a particularized suspicion that Vaughn may have been DUI, justifying further investigation once the purpose of the initial stop was accomplished. It was not error for the trial court to dismiss Vaughn's motion to suppress the evidence. St. v. Vaughn, 2007 MT 164, 338 M 97, 164 P3d 873 (2007).

Observation of Traffic Violation Constituting Objective Data of Wrongdoing — Investigative Stop Justified: Thompson contended that because an officer did not observe Thompson speeding, driving erratically, or causing an accident or near accident and because the officer did not charge Thompson with any driving offense other than DUI, the officer did not have reasonable cause to justify an investigative stop. The Supreme Court disagreed. The officer testified that Thompson's vehicle made a wide turn and crossed over the centerline into the oncoming lane of traffic and that after Thompson overcorrected, Thompson continued to swerve in his own driving lane, rode the centerline, and swerved off the right side of the road, which led the officer to believe that Thompson might be intoxicated. The officer's observations constituted objective data from which an experienced officer could infer that the occupant of the vehicle was engaged in wrongdoing that was sufficient to justify the investigative stop. St. v. Thompson, 2006 MT 274, 334 M 226, 146 P3d 756 (2006), following St. v. Steen, 2004 MT 343, 324 M 272, 102 P3d 1251 (2004), and distinguishing St. v. Lafferty, 1998 MT 247, 291 M 157, 967 P2d 363 (1998), and Morris v. St., 2001 MT 13, 304 M 114, 18 P3d 1003 (2001).

Admissibility of DUI Suspect's Spontaneous Statements: An officer stopped Damon for investigatory purposes, but the officer failed to recite the advisories for investigative stops. Damon answered several questions and then spontaneously said "Just give me a DUI" and "I'm already drunk." Damon contended that all of his statements should be disallowed because the officer failed to give the advisories. The District Court disallowed all of Damon's statements that were given in response to the officer's questions, but allowed Damon's spontaneous statements. The Supreme Court noted that under St. v. Nelson, 2004 MT 310, 323 M 510, 101 P3d 261 (2004), it is an officer's questioning that triggers the advisories. Damon's spontaneous utterances were not in response to specific questioning and were therefore admissible. St. v. Damon, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005).

Violation of City Ordinances Constituting Particularized Suspicion for Investigative Stop: An officer saw Todd drive into a closed city park and exit his vehicle with an open beer. When the officer approached Todd's vehicle to inform him that the park was closed and that the city had an open container ordinance, the officer observed that Todd appeared to be intoxicated, and Todd was arrested for DUI. Todd moved to dismiss on grounds that the officer lacked a particularized suspicion to investigate because Todd had not broken any driving laws. The Supreme Court disagreed. A particularized suspicion exists if an officer believes that a person or occupant of a vehicle has committed, is committing, or is about to commit an offense, including a violation of a city ordinance. Thus, Todd's violation of the city ordinances was sufficient to provide the officer with a particularized suspicion of an offense to obtain or verify an account of Todd's presence or conduct, and based on the officer's subsequent observations of objective data indicating Todd's

intoxication, the investigative stop was justified. Todd's motion to dismiss was properly denied, and Todd's DUI conviction was affirmed. St. v. Todd, 2005 MT 108, 327 M 65, 111 P3d 677 (2005).

Officer's Testimony and Videotape Sufficient Evidence of Reasonable Grounds for DUI Stop: Clark's driver's license was suspended after he refused to take a breath test when arrested for DUI. In petitioning for reinstatement of the license, Clark contended that the arresting officer lacked a particularized suspicion to make a stop and failed to articulate a reason for the stop at the hearing on the license suspension. The Supreme Court applied the reasonable grounds test in St. v. Brander, 2004 MT 150, 321 M 484, 92 P3d 1173 (2004), and held that the trial court properly concluded, on the basis of the officer's testimony that Clark hit a curb and swerved across lanes, coupled with a videotape of the stop, that the officer had reasonable grounds to investigate Clark for DUI. The trial court properly analyzed the factors in 61-8-403, and the analysis was not clearly erroneous. Denial of the petition to reinstate Clark's license was affirmed. Clark v. State ex rel. Driver Improvement Bureau, 2005 MT 65, 326 M 278, 109 P3d 244 (2005).

Crossing Centerline Sufficient Particularized Suspicion for Investigative Stop: An officer observed Loney crossing the centerline several times, and Loney was stopped for a traffic violation and subsequently charged with DUI. The District Court granted Loney's motion to dismiss for lack of particularized suspicion, citing Morris v. St., 2001 MT 13, 304 M 114, 18 P3d 1003 (2001). The state appealed, and the Supreme Court reversed. Morris was distinguishable because in that case, defendant was stopped only for DUI and not for driving in a manner justifying a traffic stop, while Loney violated 61-8-321. Crossing the centerline constituted a sufficient particularized suspicion to justify the stop, and the case was remanded for further proceedings. St. v. Loney, 2004 MT 204, 322 M 305, 95 P3d 691 (2004), following Widdicombe v. State ex rel. LaFond, 2004 MT 49, 320 M 133, 85 P3d 1271 (2004), and followed in St. v. Otto, 2004 MT 338, 324 M 217, 102 P3d 522 (2004).

Sufficient Reasonable Cause to Suspect DUI Following Justified Traffic Stop — Refusal to Reinstate License Proper: Muri was initially stopped for expired license plates and then failed DUI field tests. Upon refusal to submit to a blood alcohol test, Muri's driver's license was seized and suspended. Muri petitioned for reinstatement of the license on grounds that the totality of circumstances occurring after the stop did not support a finding of reasonable cause for the officer to believe that Muri was DUI because the only indication of intoxication was the odor of alcohol emanating from the vehicle and the officer could not state with certainty whether the odor came from Muri or from a passenger. The petition was denied, and on appeal, the Supreme Court affirmed. Contrary to Muri's assertions, the odor was not the only indication of possible intoxication. Muri swerved in the driving lane at least once; the officer smelled a strong odor of alcohol when speaking with Muri; Muri could not produce a driver's license upon request, and when asked to recite her Social Security number, Muri could not do so at first and then recited it with slurred speech; the stop occurred at the approximate time when bars were closing; and Muri admitted consuming some alcohol. Given the officer's numerous observations, the officer had reasonable grounds to believe, prior to requesting field sobriety tests, that Muri was DUI, and the petition to reinstate Muri's license was properly denied. Muri v. St., 2004 MT 192, 322 M 219, 95 P3d 149 (2004), following Anderson v. St., 275 M 259, 912 P2d 212 (1996), and distinguishing Bramble v. St., 1999 MT 132, 294 M 501, 982 P2d 464 (1999). See also Brewer v. St., 2004 MT 193, 322 M 225, 95 P3d 163 (2004).

Sufficient Particularized Suspicion for DUI Stop Based on Anonymous Tip and Officer's Observations: An officer received an anonymous tip that Brander was driving while intoxicated. The tipster named Brander, described the vehicle, including a license number and model, and gave Brander's direction of travel and suspected destination. The officer encountered a vehicle that mostly matched the description and followed, observing that the vehicle was moving slowly, meandering in its lane, crossing the fog line, partially crossing into the left lane without signaling, and then moving back into the right lane. The officer initiated a stop and noticed a number of cases of beer in the back of the truck that were both opened and unopened. Brander failed field sobriety tests and was arrested. Brander contended that the officer did not have reasonable grounds for making the stop based on the anonymous tip and moved to suppress the DUI evidence. The suppression motion was denied, and on appeal, the Supreme Court affirmed. Brander's argument failed because the stop was not based solely on the tip with no independent observation of suspicious activity. In fact, the officer was not even initially sure if the vehicle that he was stopping was the one described in the tip, but based on the officer's training and experience, the erratic driving supported a particularized suspicion that the driver was under the influence sufficient to warrant the stop and the administration of field sobriety tests. St. v. Brander, 2004 MT 150, 321 M 484, 92 P3d 1173 (2004), followed in St. v. Schulke, 2005 MT 77,

326 M 390, 109 P3d 744 (2005). See also Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998), and St. v. Waite, 2006 MT 216, 333 M 365, 143 P3d 116 (2006).

Reliability of Citizen's Tip — Totality of Circumstances Justifying Investigative Stop: A citizen called in a suspected DUI, giving a detailed description of Hall and his vehicle. The report by the named informant was bolstered by a store clerk who personally observed Hall's behavior. An officer spotted Hall's vehicle minutes after receiving the report, matched it to the detailed description, and corroborated the report after observing Hall's actions. Hall contended that the officer nevertheless had insufficient information to support a particularized suspicion of DUI and that the subsequent investigative stop was illegal. The Supreme Court applied the factors in St. v. Pratt, 286 M 156, 951 P2d 37 (1997), to evaluate the totality of the circumstances. The court noted that an officer in the field must be able to rely on reports and dispatches from other officers without having to conduct a cross-examination as to the basis of the report, but when an officer has acted on dispatched information, it is appropriate to include information known to the dispatching or reporting officer. Here, the initial tip and the corroboration gave a high indicia of reliability that, when coupled with the officer's observations, satisfied the Pratt factors for a justified investigative stop made pursuant to a tip. St. v. Hall, 2004 MT 106, 321 M 78, 88 P3d 1273 (2004).

Issues for Consideration in Petition for Review of Seizure of Driver's License: As established in Bush v. Dept. of Justice, 1998 MT 270, 291 M 359, 968 P2d 716 (1998), the three issues to be determined by a District Court in a petition for review of a seizure of a driver's license are whether: (1) the arresting officer had a particularized suspicion that a person was driving or in actual control of a vehicle on the ways of this state while under the influence of alcohol or drugs; (2) the petitioner was lawfully under arrest, including the existence of probable cause; and (3) the petitioner in fact declined to submit to a breath test. In this case, Widdicombe contested the first two determinations, but the Supreme Court affirmed. While leaving town on a two-lane highway, the arresting officer and another officer in the patrol car observed Widdicombe crossing the center lane three times, in violation of 61-8-321, and this fact was corroborated by videotape evidence. Thus, Widdicombe failed to meet the burden of proving a lack of particularized suspicion for the initial stop. Further, it was not necessary for the arresting officer to testify to probable cause when another officer witnessed the event and testified. Thus, Widdicombe failed to prove that the officers did not have probable cause for the arrest. Widdicombe v. State ex rel. LaFond, 2004 MT 49, 320 M 133, 85 P3d 1271 (2004), distinguishing St. v. Lafferty, 1998 MT 247, 291 M 157, 967 P2d 363 (1998).

DUI Reasonable Grounds Test Equivalent to Search and Seizure Law Investigative Stop Particularized Suspicion Test: The reasonable grounds test for the issue of whether a peace officer had reasonable grounds to believe that a person was driving or in actual physical control of a vehicle while under the influence of alcohol or drugs is the equivalent of particularized suspicion, as defined in this section, which provides that in order to verify an account of a person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or an occupant of a vehicle has committed, is committing, or is about to commit an offense. Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75, 55 St. Rep. 415 (1998), followed in Bramble v. St., 1999 MT 132, 294 M 501, 982 P2d 464, 56 St. Rep. 532 (1999).

Field Sobriety Tests Constitute Search — Particularized Suspicion Needed: Field sobriety tests are not merely observations of a person's physical behavior but constitute a search under the fourth amendment to the United States Constitution and Art. II, sec. 11, Mont. Const., because an individual's constitutionally protected privacy interests are implicated in both the process of conducting the tests and in the information disclosed by the tests. An officer observes certain aspects of an individual's physical and psychological condition that would not otherwise be observable. A compelling state interest is needed to invade privacy interest. Montana has a compelling state interest in removing drunk drivers from the road. The officer's observation of such traits as the manner of walking to and from the squad car, height and weight, speech, appearance, and smell is distinguished and does not constitute a search because an individual has no reasonable expectation of privacy as to the traits. An investigatory stop and field sobriety tests are constitutional if based upon particularized suspicion. The particularized suspicion for the investigatory stop may also serve as the particularized suspicion for the field sobriety tests if the basis for the stop leads the officer to believe that the driver is intoxicated. Part or all of the grounds for the particularized suspicion for the field sobriety tests may arise after the investigatory stop when the officer, in the present case, observed defendant drive from a bar at night with her headlights off, he activated his overhead lights, she did not respond, he activated his siren, she stopped in half a block, he smelled alcohol on her breath and saw bloodshot eyes,

she had difficulty in producing her license, and he asked her to perform three field sobriety tests. Administration of the tests was a constitutionally permissible search arising from a particularized suspicion that was based on the officer's observations after the investigatory stop. The lower court properly found that the officer had reasonable grounds to believe that defendant was driving under the influence. Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75, 55 St. Rep. 415 (1998), followed in St. v. Steinmetz, 1998 MT 114, 288 M 527, 961 P2d 95, 55 St. Rep. 450 (1998), and Bramble v. St., 1999 MT 132, 294 M 501, 982 P2d 464, 56 St. Rep. 532 (1999).

Three-Part Test Adopted to Determine Whether Officer's Reliance on Informant's Tip Justified: Pratt argued that the officer who stopped him did not have a sufficient basis to form a particularized suspicion to justify an investigative stop to see if Pratt was driving under the influence. The arresting officer stopped Pratt after receiving a call from the radio dispatcher who relayed that he had been called by the manager of a convenience store who reported that Pratt had just stopped at the store and appeared to be intoxicated. The convenience store manager gave a description of Pratt's vehicle and the name of the street that Pratt had driven away on. The Supreme Court stated that it was adopting the test used by the Oregon Court of Appeals in St. v. Villegas-Varela, 887 P2d 809 (Oreg. 1994). In determining whether an officer has the basis for a particularized suspicion to justify an investigative stop based on information provided by a third person, a court should consider: (1) whether the citizen informant identifies the informant to law enforcement and thus exposes the informant to criminal and civil liability if the report is false; (2) whether the report is based on personal observations of the informant; and (3) whether the officer's own observations corroborate the informant's information. In the present case, the Supreme Court held that the stop was justified based on the totality of the facts and also held that the facts relayed to the dispatcher by the informant could appropriately form a basis for a particularized suspicion for the arresting officer even if the arresting officer was not fully aware of all those facts. St. v. Pratt, 286 M 156, 951 P2d 37, 54 St. Rep. 1349 (1997), following St. v. Gopher, 193 M 189, 631 P2d 293 (1981), with respect to the knowledge of one officer held to be the knowledge of the arresting officer, and distinguishing St. v. Lee, 282 M 391, 938 P2d 637, 54 St. Rep. 401 (1997). Pratt was followed in St. v. White Clay, 1998 MT 244, 291 M 147, 967 P2d 370, 55 St. Rep. 1014 (1998), St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974, 56 St. Rep. 245 (1999), St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456, 57 St. Rep. 1206 (2000), St. v. Hall, 2004 MT 106, 321 M 78, 88 P3d 1273 (2004), St. v. Gouras, 2004 MT 329, 324 M 130, 102 P3d 27 (2004), St. v. Myhre, 2005 MT 278, 329 M 210, 124 P3d 126 (2005), St. v. Rutherford, 2009 MT 154, 350 M 403, 208 P3d 389 (2009), and St. v. Clawson, 2009 MT 228, 351 M 341, 212 P3d 1056 (2009). See also St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003).

LACK OF PROOF BY PROSECUTION

Presence of Arresting Officer Needed to Prove Particularized Suspicion: A highway patrol officer stopped Angeline on suspicion of violating the basic rule and subsequently arrested him for driving under the influence. Angeline moved to suppress any evidence obtained after the stop on the basis that the arresting officer had no grounds to make the initial stop. At the suppression hearing, the state presented no witnesses, not even the arresting officer. Angeline presented evidence as to why he believed that his actions in passing two cars at 80 miles an hour on a two-way road did not violate the basic rule. The lower court held that Angeline's testimony was sufficient to demonstrate the facts that the arresting officer relied upon to achieve a particularized suspicion that Angeline had violated the basic rule. The Supreme Court reversed, holding that without the arresting officer's testimony, the lower court could only speculate as to the objective data that the officer may have observed before the investigatory stop and further that no evidence was introduced regarding the officer's experience and training that would allow the court to evaluate his observations, inferences, and resulting suspicions that led to the stop. St. v. Angeline, 1998 MT 139, 289 M 222, 961 P2d 1251, 55 St. Rep. 556 (1998), followed in St. v. Gilder, 1999 MT 207, 295 M 483, 985 P2d 147, 56 St. Rep. 808 (1999).

STOP OUTSIDE OFFICER'S JURISDICTION

City Police Officer Making Arrest Outside Territorial Jurisdiction — Probable Cause Required: A city police officer, investigating a phone call reporting a suspected drunk driver, pursued Williamson outside city limits and arrested him, although the officer observed no erratic driving or other indicators of alcohol impairment prior to stopping Williamson's truck. Williamson moved to suppress all the evidence on the basis that the officer did not have probable cause to make the stop, contending that probable cause was necessary because the officer was acting outside his territorial jurisdiction as a city police officer and that the information within the officer's knowledge at the time of the stop did not rise to the level of probable cause. Williamson's motion was denied. Clarifying the difference between the probable cause necessary

to effectuate a valid arrest and the particularized suspicion necessary to justify an investigative stop, the Supreme Court noted that although an officer ordinarily needs only a particularized suspicion for a traffic stop, under these circumstances, the officer was outside his jurisdiction when the stop was made and was thus not acting within the scope of his authority as a peace officer. The criminal procedures in 46-6-311 and this section were not available to the officer. Rather, as a peace officer acting outside his territorial jurisdiction, his authority was limited to that provided to private citizens under 46-6-502, so probable cause was required. The citizen informant's telephone report was not sufficient to establish probable cause because the relayed report was devoid of information as to why the informant believed that Williamson was intoxicated and the officer did not inquire into the basis of the report before stopping Williamson's truck. The report created, at most, a suspicion that an offense was being committed, but that suspicion alone was insufficient to establish probable cause. Even if the informant had sufficient information to establish probable cause for a citizen's arrest of Williamson, that information was not relayed to the officer, who thus did not possess sufficient information to make the stop. The judgment was reversed because the District Court erred in refusing to suppress the evidence. St. v. Williamson, 1998 MT 199, 290 M 321, 965 P2d 231, 55 St. Rep. 843 (1998), distinguishing St. v. Schoffner, 248 M 260, 811 P2d 548 (1991), and followed in St. v. Reiner, 2003 MT 243, 317 M 304, 77 P3d 210 (2003), and St. v. Ellington, 2006 MT 219, 333 M 411, 143 P3d 119 (2006).

COMMUNITY CARETAKER DOCTRINE

No Negligence in Officers' Response to Robbery Call or in Brief Detention of Robbery Victim: Plaintiff worked at a convenience store when a person entered the store, held a knife to plaintiff's throat, and robbed the store. Plaintiff managed to dial 9-1-1, but could not speak with police. Officers determined where the call came from and surrounded the store. However, even though officers could see two people inside, it was not possible to determine who was involved in the robbery. Meanwhile, plaintiff was taken to a back room and raped. Officers arrested the perpetrator immediately after he left the store and then ordered any other persons inside to exit. Plaintiff then left the store and was subdued and handcuffed for about 30 seconds before officers determined that she was an employee and had been raped. Plaintiff subsequently sued the county, law enforcement agencies, and several individual officers for negligently responding to the situation, allowing plaintiff to be raped, and improperly arresting plaintiff when she left the store. The District Court granted summary judgment for defendants and plaintiff appealed, but the Supreme Court affirmed. Under the circumstances, the officers responded quickly and professionally and got plaintiff to a safe position and to medical care as immediately as possible. The officers did not have custody or control of either the plaintiff or the robber at the time the rape occurred and therefore were in no position to undertake specific actions to protect the plaintiff until she came out of the store and her identity and role in the events were established. Additionally, the brief detention of plaintiff was justified and provided no cause of action against defendants. Gonzales v. Bozeman, 2009 MT 277, 352 M 145, 217 P3d 487 (2009).

No Particularized Suspicion for Stop to Investigate Couple Engaged in Romantic but Not Criminal Behavior — Community Caretaker Doctrine Inapplicable Absent Indication of Citizen in Peril: While on routine patrol, an officer observed a vehicle parked on a pullout adjacent to a public road. The officer thought perhaps the driver was experiencing vehicle problems and drove by to investigate. However, the occupants were not having vehicle problems but were kissing, and the female passenger was observed attempting to "mount" the male driver. Concerned that the occupants were engaged in inappropriate sexual behavior, the officer circled back, parked behind the vehicle and activated the emergency lights, and approached the vehicle with the intent to discourage the couple from engaging in their behavior and to move them along. The officer discovered a cold, sweaty beer can outside the driver's door and also discovered the couple in various states of undress. Upon questioning the couple about what they were doing, the officer noticed that they both appeared intoxicated. The driver, Graham, was tested and subsequently arrested for DUI. Graham moved to suppress the evidence of the DUI on grounds that the officer did not have authority to make an investigative stop or, if that authority did exist, that the officer exceeded the scope of an investigative stop. The District Court agreed that the officer did not have a sufficient particularized suspicion to make an investigative stop, but nevertheless allowed the DUI evidence on grounds that the community caretaker doctrine provided a legal justification for the stop. On appeal, the Supreme Court first noted that if particularized suspicion was absent and no other exception to the warrant requirement applied, the search and seizure were unconstitutional. In this case, once the officer activated the emergency lights, Graham would not have felt free to walk away, so a seizure occurred. The Supreme Court agreed

that the totality of the circumstances did not give rise to a particularized suspicion that a crime was occurring or was about to occur. Graham committed no traffic offense, and the couple's conduct was not criminal and did not indicate that a crime was about to occur. Any particularized suspicion occurred only after Graham was seized. The officer did not approach the vehicle because of a belief that a crime was being committed, but rather to discourage the couple from engaging in their behavior and to move them along, so the requisite particularized suspicion of a crime was absent. The Supreme Court also held that the community caretaker doctrine did not apply because under the criteria developed in St. v. Lovegren, 2002 MT 153, 310 M 358, 51 P3d 471 (2002), the first step in determining whether the doctrine applies is whether there are objective, specific, and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril. No such facts existed in this case, and the court declined to extend the doctrine to allow law enforcement officers equipped with nothing more than personal dissatisfaction of a person's otherwise lawful conduct to detain that person without any intention of providing community care or assistance. Dismissal of Graham's motion to suppress the evidence was reversed, and the case was remanded. St. v. Graham, 2007 MT 358, 340 M 366, 175 P3d 885 (2007), distinguishing St. v. Nelson, 2004 MT 13, 319 M 250, 84 P3d 25 (2004), St. v. Seaman, 2005 MT 307, 329 M 429, 124 P3d 1137 (2005), and St. v. Litschauer, 2005 MT 331, 330 M 22, 126 P3d 456 (2005).

Elements of Community Caretaker Doctrine — Particularized Suspicion Not Required in Case of Safety Stop: About 3:05 a.m., an officer on routine patrol stopped to investigate a vehicle parked beside a highway with its lights out but with its motor running. Lovegren was in the driver's seat and appeared to be asleep, but he did not respond when the officer knocked on the window. When the officer opened the door, Lovegren awoke and stated, "I was drinking." The officer noticed that Lovegren's eyes were bloodshot and smelled alcohol. The officer had Lovegren perform field sobriety tests, which Lovegren failed, and arrested Lovegren for DUI. Lovegren moved to suppress all evidence, claiming that the search was illegal because the officer had no particularized suspicion of any wrongdoing. The District Court denied the motion on grounds that a particularized suspicion was not necessary because the officer had a duty to investigate for Lovegren's own safety. Lovegren appealed, but the Supreme Court affirmed pursuant to the community caretaker doctrine. The court applied the following test to determine whether an officer's actions fall under the doctrine: (1) as long as there are objective, specific, and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, the officer has a right to stop and investigate; (2) if the citizen is in need of aid, the officer may take appropriate action to render assistance or mitigate the peril; and (3) once the officer is assured that the citizen is not in peril and is not in need of assistance or that the peril has been mitigated, any actions beyond that constitute a seizure implicating constitutional protections afforded by the right of privacy and the right against illegal search and seizure. In this case, when the officer opened the door to check on Lovegren's well-being and Lovegren awoke and voluntarily stated that he had been drinking, the officer then noticed other signs of intoxication that constituted a particularized suspicion to make a further investigative stop that eventually developed into probable cause for an arrest. It would have been a dereliction of the officer's duty if, after knocking on the window and receiving no response, the officer had walked away and continued on patrol. Thus, the escalation of events leading to Lovegren's arrest was proper, and denial of the motion to suppress the evidence of the investigation was not erroneous. St. v. Lovegren, 2002 MT 153, 310 M 358, 51 P3d 471 (2002), following Grinde v. St., 249 M 77, 813 P2d 473 (1991), and Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998), and followed in St. v. Reiner, 2003 MT 243, 317 M 304, 77 P3d 210 (2003), St. v. Litschauer, 2005 MT 331, 330 M 22, 126 P3d 456 (2005), St. v. Wheeler, 2006 MT 38, 331 M 179, 134 P3d 38 (2006), and St. v. Vaughn, 2007 MT 164, 338 M 97, 164 P3d 873 (2007). The Lovegren community caretaker doctrine was also applied in St. v. Seaman, 2005 MT 307, 329 M 429, 124 P3d 1137 (2005). See also Henry v. U.S., 361 US 98 (1959), Terry v. Ohio, 392 US 1 (1968), and Cady v. Dombrowski, 413 US 433 (1973).

Plain Feel Doctrine Adopted — Incidental to Investigatory Stop: Collard contended that ski goggles that were felt in his pant leg during a pat search conducted pursuant to an investigatory stop were wrongfully seized because the goggles were not in plain view and their identity was not readily apparent, and therefore the goggles were improperly introduced into evidence. Applying Minn. v. Dickerson, 508 US 366, 124 L Ed 2d 334, 113 S Ct 2130 (1993), the Supreme Court adopted the "plain feel" corollary to the "plain view" doctrine. The plain feel doctrine states that if a police officer lawfully pats down a suspect's outer clothing and feels an object of a contour or mass that makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. If the object is

contraband, its warrantless seizure is justified by the same practical considerations that inhere in the plain view context. In the present case, the ski goggles had a shape that could be immediately identifiable when touched, and the officer did not need to manipulate the object or touch it more than a few seconds to know what it was. The robbery suspect had reportedly worn ski goggles, and the officer's seizure of Collard's goggles was thus justified. St. v. Collard, 286 M 185, 951 P2d 56, 54 St. Rep. 1366 (1997).

Plain View Doctrine Justifying Seizure of Contraband Pipe During Stop and Frisk Search for Weapons: After Stubbs was stopped on a reasonable suspicion of criminal activity, including speeding, reckless or careless driving, and eluding a peace officer, the officer noticed numerous weapons in the vehicle, providing a reasonable justification for searching Stubbs on the scene. During a pat-down search of Stubbs' clothing, the officer thought that a lump in Stubbs' pocket might be a deadly weapon. After removing the item to make sure that it was not a weapon, the item was in plain view and the incriminating character of the object, a brass pipe, was apparent. Absent any indication that the search was used as a pretext to discover illicit drugs or paraphernalia, the discovery of the pipe was inadvertent and seizure of the contraband was justified. St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Frisk Incident to Investigatory Stop: A peace officer may frisk an individual for weapons incident to making an investigatory stop. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), following Terry v. Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968), and followed in St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995).

When Probable Cause to Arrest May Occur: A founded suspicion to stop for investigative detention may ripen into probable cause to arrest through the occurrence of facts or incidents after the stop (citing U.S. v. Medina-Gasca, 739 F2d 1451 (9th Cir. 1984)). St. v. Sharp, 217 M 40, 702 P2d 959, 42 St. Rep. 1009 (1985), followed in St. v. Morris, 230 M 311, 749 P2d 1379, 45 St. Rep. 234 (1988).

46-5-403. Duration of stop.

Commission Comments

1991 Comment: This statute establishes a new rule for the duration of an investigative stop. As previously codified, an investigative stop should be no longer than necessary and not more than 30 minutes. See 1987 MCA 46-5-402(4) [now repealed]. The statute adopts a more general statement providing that the stop last no longer than is necessary to effectuate the purpose of the stop. The statute is better suited to the nature of an investigative stop and reflects recent Supreme Court decisions. See Fla. v. Royer, 460 US 491, 500 (1983). What is important is whether the length of the stop is reasonable under the circumstances. See U.S. v. Sharpe, 105 S Ct 1568, 1575, 1576 (1985). The statute removes the 30-minute limitation but should not create any significant changes in established procedure.

Case Notes

Legal Detention Following Traffic Stop — Voluntary Consent to Search Vehicle — Motion to Suppress Properly Denied: Case was stopped for a traffic violation, and drugs were found in Case's car after Case allegedly consented to a search of the vehicle. Following conviction, Case appealed on grounds that evidence of the search should have been suppressed because the officer exceeded the scope of the initial stop by detaining Case and continuing to question him after issuing traffic citations. The Supreme Court concluded that under the circumstances, Case remained under police control during questioning and could not have reasonably concluded that he was free to leave. Because Case was not involved in a voluntary exchange, Case was in fact "seized" when he gave permission to search the vehicle. The court then examined whether particularized suspicion existed to continue the investigatory stop past the issuance of traffic citations and whether Case's consent to the search was voluntary. In this case, Case was legally detained because additional information, including Case's questionable behavior, his multiple connections with drugs, and confusion whether Case was in fact another person named Case who had skipped town, gave rise to further suspicions that served to properly enlarge the scope of the investigation. The only circumstance that Case claimed affected the voluntariness of his consent to search the vehicle was that the detention was illegal. Having concluded that the detention was legal, the court further concluded that Case's consent was voluntary and that the motion to suppress the fruits of the search was properly denied. St. v. Case, 2007 MT 161, 338 M 87, 162 P3d 849 (2007). See also St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974 (1999), and St. v. Hurlbert, 2009 MT 221, 351 M 316, 211 P3d 869 (2009).

Objective Manifestation to Support Investigation Following Traffic Stop — Time of Stop Extended: Following a traffic stop and observation of Nelson's behavior, officers conducted a

DUI investigation, performed field sobriety tests and arrested Nelson for DUI, and then searched Nelson's car and discovered drugs and paraphernalia. Nelson contended that the fruits of the search should be suppressed because the officers did not give the stop advisory required in former 46-5-402 (repealed 2003) or a Miranda advisory and because the DUI investigation at the scene exceeded the scope of the investigative stop. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. The stop advisory issue was not contested, and the Supreme Court declined to address it. Nelson was not entitled to a Miranda warning because the Miranda protections are afforded during a custodial interrogation but do not apply to an investigative stop. In addition, as in St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), the initial investigatory stop took on the quality of an escalating situation in which additional information gave rise to further suspicions and enlarged the scope of the investigation to that of a possible DUI. The officers had a particularized suspicion to conduct the DUI investigation, properly extending the time of the stop. Although the Supreme Court has not established specific time parameters to which an officer must adhere when conducting an investigative stop, the 24 minutes taken to conduct the investigative stop in this case was reasonable and not excessive. St. v. Nelson, 2004 MT 310, 323 M 510, 101 P3d 261 (2004).

Particularized Suspicion Sufficient Justification for Request for Consent to Search Vehicle — No Illegal Detention — Motion to Suppress Properly Denied: Snell was stopped for speeding and was also cited for failure to carry proof of insurance. While writing out the citation in the patrol car, the officer asked Snell if he could search the vehicle, and Snell consented. The officer discovered drugs, and Snell was charged with possession and intent to distribute marijuana. Snell moved to suppress the evidence. Snell conceded that he had voluntarily consented to the search, and the state conceded that the officer did not have probable cause. The motion to suppress was denied, and Snell appealed. The Supreme Court considered both the consent and illegal detention issues. First, the court reasoned that the officer had particularized suspicion to stop the vehicle and that Montana law does not require additional justification for requesting consent, so Snell's voluntary consent was sufficient to justify the warrantless search of the vehicle (see St. v. Parker, 1998 MT 6, 287 M 151, 953 P2d 692 (1998)). Second, the court concluded that because the officer did not coerce or restrain Snell, order him to stay, or prevent Snell from exiting the patrol car, a reasonable person would have felt free to leave the patrol car upon completion of the traffic stop, so the poststop interaction between Snell and the officer was a voluntary exchange rather than an illegal detention or unlawful seizure (see St. v. Merrill, 2004 MT 169, 322 M 47, 93 P3d 1227 (2004), and St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004)). Snell's motion to suppress was properly denied. St. v. Snell, 2004 MT 269, 323 M 157, 99 P3d 191 (2004). See also St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Search Incident to Conversation After Traffic Stop Concluded Considered Voluntary — Motion to Suppress Properly Denied: Officers stopped Merrill for investigation following an improper lane change. A license plate check showed that Merrill was not the vehicle owner. However, the vehicle was owned by a person suspected by one of the officers to be involved with dangerous drugs. The officer told Merrill that he was just giving her a verbal warning and that she was free to go. Stepping away from the vehicle, the officer noticed that Merrill seemed unusually nervous. Suspicious about the report regarding the vehicle owner, the officer again approached the vehicle and asked Merrill if he could talk to her. Merrill answered affirmatively. The officer then asked if he could search the vehicle. Merrill again answered affirmatively. Merrill stepped out of the car, and the officer asked if he could search her person, including her pockets. Merrill again answered affirmatively, and the officer discovered drugs in her pocket. Merrill contended that she had been unlawfully detained subsequent to an investigatory stop and that the evidence should be suppressed. The trial court concluded that the search was voluntary and denied the suppression motion. On appeal, the Supreme Court affirmed. Once the officer completed the investigation of the improper lane change, the investigatory stop was concluded and Merrill was free to leave. What followed was neither a subsequent investigatory stop nor an extension of the first stop, but rather a voluntary exchange, and nothing prevents an officer from engaging a citizen in a voluntary conversation. A purely voluntary conversation intrudes on no constitutionally protected interest, so Merrill was accorded no constitutional protection related to the search and seizure, and denial of the motion to suppress was appropriate. St. v. Merrill, 2004 MT 169, 322 M 47, 93 P3d 1227 (2004), followed in St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004).

Evaluation of Reliability of Confidential Tip — Unreliable Tip as Only Grounds for Investigative Stop — Infringement of Right to Privacy: Following weeks of surveillance instigated by a confidential tip intimating drug activities, the Billings police observed no suspicious drug-related activities conducted by defendants, but after receiving a confidential tip

that defendants would be driving from Billings to Bozeman to sell marijuana, officers stopped and searched defendants' vehicle and arrested defendants for drug possession. Defendants contended that insufficient objective data inferring criminality existed to justify the investigative stop. The Supreme Court applied the analysis in St. v. Pratt, 286 M 156, 951 P2d 37 (1997), to evaluate the reliability of the informant's tip. The court distinguished between a concerned citizen who reports a chance encounter with crime as a civic duty and a confidential informant who works with police by reporting on the illegal activities of others. A citizen informant is presumed to be telling the truth, but a confidential informant does not enjoy the same presumption of veracity. Further, for a tip to support a finding of probable cause, police must know the identity of the informant, trust from experience or presumption that the informant is telling the truth, and discern that the informant's information about the alleged crime derives from the informant's personal observations. Officers must then evaluate the veracity, reliability, and basis of knowledge of the informant to determine whether the report supports reasonable suspicion. If a tip is anonymous and lacks any indication of the basis for the informant's opinion, the tip must be corroborated through the observation of suspicious activity that alerts officers to the possibility of a violation. Corroboration of a tip with innocent information may lend an unknown or untested tipster some credibility, but this indicia of reliability does not obviate the relevance of the tipster's basis of knowledge as a factor in the evaluation. In the context of particularized suspicion, because the quantum of suspicion is less, an unreliable tip requires corroboration that supports an inference of criminality by direct police observation of suspicious activity and consideration of the modes of patterns of operation of certain kinds of lawbreakers, and mere police corroboration of innocent facts is insufficient. Here, defendants engaged in no observed criminal activity, and their travel plans were equally consistent with innocent behavior. Although the traffic stop was initially made to check a temporary sticker on the vehicle, once the sticker was found to be valid, grounds for the stop ended and no further police intrusion was warranted. St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003), following St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), and distinguishing Ala. v. White, 496 US 325 (1990). See also St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000).

Justifiable Stop for Daytime Check of Temporary Window Sticker Warranted — Further Police Intrusion Not Warranted Once Limited Purpose of Stop Accomplished: Following weeks of surveillance instigated by a confidential tip intimating drug activities, the Billings police observed no suspicious drug-related activities conducted by defendants, but after receiving a tip that defendants would be driving from Billings to Bozeman to sell marijuana, officers stopped defendants' vehicle because there were no license plates displayed, although a temporary sticker could be seen but not read in the tinted rear window. When the officers approached the vehicle, they noticed that the temporary sticker properly displayed in the window was current. Nevertheless, in a short time, additional officers arrived with a drug-sniffing dog. The dog indicated the presence of drugs, the vehicle was searched, marijuana was found, and defendants were arrested. Defendants contended that the evidence should be suppressed because there was no particularized suspicion to make the stop. The Supreme Court agreed that the investigative stop was warranted because the officers' inability to read the expiration date on the temporary sticker provided an objective basis to infer that the sticker was not valid. However, a quick check of the properly displayed sticker in bright daylight confirmed the sticker's validity. Defendants had committed no traffic offense or violated any other criminal law of which the officers were aware. An investigative stop is a temporary detention that may not last longer than necessary to effectuate the purpose of the stop. Once the limited purpose of the investigative stop was accomplished, no further police intrusion was warranted, and the investigative stop related to drug possession was not justified. The District Court committed reversible error in refusing to suppress the evidence of the subsequent vehicle search. St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003), following St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998).

Requisite Objective Data and Resulting Suspicion for Lawful Stop and Frisk in Motel Room: Officers were lawfully searching Roehr's motel room when Dawson knocked on the door. An officer opened the door, and Dawson entered, asking for Roehr. The officer told Dawson that he was going to conduct a pat-down search for weapons and asked Dawson if he possessed any weapons, drugs, or needles. Dawson said that he had no weapons. The officer repeated the question. Dawson motioned toward his coat pocket and said that he had some "smoke" in there. The "smoke" turned out to be methamphetamine and drug paraphernalia. Dawson sought to suppress the evidence, contending that the search was illegal because the officer had no articulable, reasonable suspicion that Dawson had engaged in criminal activity. On appeal, the Supreme Court noted that Roehr was a known criminal and that his room had been under

surveillance for suspected drug activity. The officer had probable cause to believe that Roehr was conducting transactions involving dangerous drugs and stolen property in the room. When Dawson appeared, asking for Roehr, the officer had a particularized suspicion, based on the totality of the circumstances, to believe that Dawson had committed or was about to commit an offense. Thus, sufficient cause existed to detain Dawson. Further, in the officer's experience, people involved in drug offenses frequently carry weapons. The officer had no prior dealings with Dawson to help him determine whether Dawson was armed and did not know whether Dawson presented a danger to the officers conducting the search of the room, so reasonable cause existed to suspect that Dawson was armed and dangerous. Therefore, the officer possessed the requisite objective data and resulting suspicion to lawfully stop and frisk Dawson, and denial of the motion to suppress the fruits of the search was not error. St. v. Dawson, 1999 MT 171, 295 M 212, 983 P2d 916, 56 St. Rep. 668 (1999), distinguishing St. v. Anderson, 1999 MT 60, 293 M 490, 977 P2d 983, 56 St. Rep. 252 (1999).

Part 5
Roadblocks

Part Commission Comments

1991 Part Comments: The 1987 code governing the establishment of a roadblock by any law enforcement agency attempted to provide specific requirements for roadblocks. See 1987 MCA 46-5-501, et seq. The Commission determined that these requirements were too restrictive and recommended the adoption of two general statutes to govern the roadblock procedure. The key to the proper roadblock under this part is the satisfaction of due process and the safety of the motorist.

Part Case Notes

Officer's Knowledge of Vehicle Owner's Revoked License Sufficient Basis for Suspicion of Criminal Activity to Warrant Stopping Vehicle: Deputy Keintz observed a vehicle displaying a distinctive personalized license plate being driven by a female south of Missoula. The officer recognized the license plate, recalled the prior arrest and license suspension of the vehicle owner, and initiated a traffic stop. Halvorson was the owner and driver of the vehicle and was ticketed for driving with a suspended license. On appeal, Halvorson contended that the officer did not have sufficient information to form a particularized suspicion that the occupant of the vehicle was or had been engaged in criminal activity to justify stopping the vehicle. Applying the criteria in St. v. Gopher, 193 M 189, 631 P2d 293 (1981), the Supreme Court followed St. v. Pike, 551 NW 2d 919 (Minn. 1996), in holding that an officer's knowledge that the owner of a vehicle has a revoked driver's license is enough to form the basis of a reasonable suspicion of criminal activity when the officer observes the vehicle being driven, as long as the officer remains unaware of any facts that would render unreasonable an assumption that the owner is driving the vehicle. St. v. Halvorson, 2000 MT 56, 299 M 1, 997 P2d 751, 57 St. Rep. 270 (2000), followed in Billings v. Costa, 2006 MT 181, 333 M 84, 140 P3d 1070 (2006). Costa was followed in St. v. Neil, 2009 MT 128, 350 M 268, 207 P3d 296 (2009).

Seizure of Evidence in Auto After Arrest on a "Particularized Suspicion": Seizure of evidence that was in plain view in defendant's car as he was arrested after a "particularized suspicion", meeting the test adopted in St. v. Gopher, 193 M 189, 631 P2d 293 (1981), was valid because the arrest was a lawful arrest. St. v. Schatz, 194 M 59, 634 P2d 1193, 38 St. Rep. 1687 (1981).

Stop and Frisk Procedure Applicable to Automobiles: Where, upon investigating a possible burglary, the investigating officer stopped a suspicious looking automobile and noticed what appeared to be stolen property in the back seat of the car, which was driven off at a high rate of speed in the middle of the investigation, the District Court did not err in denying the defendant's motion to suppress the stolen property recovered from the automobile. The dictum in St. v. Rader, 177 M 252, 581 P2d 437 (1978), that stop and frisk principles do not apply to automobiles must be abandoned in light of the principle most recently announced in U.S. v. Cortez, 449 US 411, 66 L Ed 2d 621, 101 S Ct 690 (1981), that an assessment of whether a crime has been committed must be based upon all relevant circumstances and the evidence evaluated in light of the knowledge of a trained law enforcement officer. When a trained police officer has a particularized suspicion that the occupant of a vehicle is or has been engaged in criminal activity or is a witness thereto, a limited and reasonable investigatory stop and search is justified. St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981), followed in St. v. Lee, 232 M 105, 754 P2d 512, 45 St. Rep. 903 (1988), St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), St. v. Halvorson, 2000 MT 56, 299 M 1, 997 P2d 751, 57 St. Rep. 270 (2000), and St. v. Herbenson, 2001 MT 75, 305 M 68, 22 P3d 1128 (2001).

Part Collateral References

Validity of routine roadblocks by state or local police for purpose of discovery of driver's license, registration, and safety violations. 116 ALR 5th 479.

Validity of police roadblocks or checkpoints for purpose of discovery of alcoholic intoxication—post-Sitz cases. 74 ALR 5th 319.

Validity of routine roadblocks by state or local police for purpose of discovery of vehicular or driving violations. 37 ALR 4th 10, §3 superseded by 116 ALR 5th 479, §4 superseded by 74 ALR 5th 319.

46-5-502. Authority to establish roadblocks.

Commission Comments

1991 Comment: This statute reflects, with some amendment, 1987 MCA 46-5-502. The introductory clause has been changed to read: "Any law enforcement agency of this state". This amendment is solely for clarification and is not intended to be a change in established procedure. The phrase "vehicle registration and insurance" has been added to reflect established procedure. Any indication that the roadblock is to be conducted for the apprehension of criminals has been deleted. The Commission felt that in emergency situations, other statutes would apply and that the roadblock should not be used for routine searches for apprehension of criminal offenders.

Source: R.C.M. 1947, section 94-6030.

No change in the law [as it existed in 1967].

Compiler's Comments

1991 Amendment: At beginning substituted "Any law enforcement agency of this state is authorized to establish within its jurisdiction" for "The duly elected or appointed law enforcement officers of this state and their deputies are hereby authorized to establish, in their respective jurisdictions or in other jurisdictions within the state" and at end inserted "vehicle registration, and insurance"; and made minor changes in style.

Collateral References

Validity of police roadblocks or checkpoints for purpose of discovery of illegal narcotics violations. 82 ALR 5th 103.

Validity of police roadblocks or checkpoints for purpose of discovery of alcoholic intoxication—post-Sitz cases. 74 ALR 5th 319.

46-5-510. Establishing roadblock.

Commission Comments

1991 Comment: This statute is intended to designate the principal factors to be considered in establishing roadblocks. The provisions recognize that each agency should tailor roadblocks to its specific needs. Some considerations in developing specific rules for roadblocks are present in Commonwealth v. Trumble, 483 NE 2d 1102, 1108-10 (Mass. 1985).

CHAPTER 6
ARREST

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the

Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

Chapter Case Notes

No Reasonable Grounds to Believe Defendant DUI — Sole Testimony of Defendant Sufficient to Prove No DUI Occurred: Eustance drove to the airport to pick up his daughter and grandson who were arriving on a flight. Because of hip pain, it was more comfortable to wait in his car. Eustance parked in the lot of a nearby car rental agency and fell asleep. Eustance was later awakened by a Deputy Sheriff who requested that Eustance perform field sobriety tests and a breath test, but Eustance refused to perform both tests, so his license was seized and suspended. At a hearing on a petition for reinstatement of his license, Eustance was the only witness. He testified that he had been operating his vehicle in a safe and legal manner prior to arrest, that his ability to drive was not impaired, and that he did not believe there was reasonable suspicion or probable cause to justify his arrest. The District Court agreed and granted the petition reinstating the license. On appeal, the state cited Hunter v. St., 264 M 84, 869 P2d 787 (1994), contending that Eustance had not met the burden of establishing that suspension of the license was improper because without the deputy's testimony, Eustance's own testimony was self-serving and insufficient to meet the burden. The Supreme Court disagreed. The testimony of one witness is sufficient to prove any fact. Nowhere in Hunter was it held that a petitioner in a license reinstatement hearing cannot meet the burden of proof without testimony from the arresting officer or that a petitioner's testimony, without more, is insufficient to meet the burden of proof. Thus, the District Court was entitled to accept Eustance's uncontradicted testimony as true. Absent evidence supporting the state's position, Eustance met the burden of proof and his license was properly reinstated. Eustance v. St., 2005 MT 34, 326 M 77, 107 P3d 478 (2005).

Warrantless Entry and Arrest Not Bar to Criminal Prosecution: Where a defendant suspected of robbery was arrested at his home without a warrant 4 days after committing the robbery, the District Court did not err in denying the defendant's motion to dismiss the charges against him. Payton v. N.Y., 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371 (1980), relied on by the defendant, dealt only with the issue of whether evidence seized incidental to an unlawful arrest was admissible and not whether the defendant must stand trial. In this case, the defendant concedes that evidence seized at his home under a search warrant was properly admitted. St. v. Ritchson, 193 M 112, 630 P2d 234, 38 St. Rep. 1015 (1981).

Identification Shortly After Commission of Crime — Defendant in Police Car — Not Unlawfully Suggestive: The identification of defendant while in custody and sitting in the rear seat of a police car by the victim of a robbery that occurred the same night is not a showup that is unlawfully suggestive. If the identification occurs shortly after the commission of a crime, it is not an unnecessarily suggestive confrontation; hence, its introduction at a trial does not deny the defendant due process. Spurlock v. Crist, 188 M 449, 614 P2d 498 (1980).

Jury Instruction — Presumption of Innocence: In a criminal prosecution based on theft of an automobile in which the defendant timely requested and was twice denied an instruction on presumption of innocence, it was per se reversible error to deny the instruction. The purpose of the instruction is to caution the jury against conclusions based only on the arrest and prosecution of the defendant, and an instruction on the State's burden of proof can therefore not supplant the instruction requested. St. v. Williams, 184 M 111, 601 P2d 1194 (1979).

Chapter Law Review Articles

Probable Cause: Merchant Detentions, Everly & Mullowney, 42 Mont. L. Rev. 371, 374 (1981).

The Exclusionary Rule and Acts of Private Persons: State v. Helfrich, Reep, 41 Mont. L. Rev. 281 (1980).

A Growing Awareness of Privacy in America: Paragraph F discusses arrest records and criminal justice data banks. Towe, 37 Mont. L. Rev. 55 (1976).

Part 1
General Provisions

Part Commission Comments

1991 Part Comments: This part sets forth the general provisions that apply in all instances in which an individual is arrested, whether with or without a warrant. Section 46-6-104 preserves the 1987 code's standards concerning the method of arrest. Section 46-6-105 describes when an

arrest may be made, reflecting the restrictions previously found in 1987 MCA 46-6-105. The exemptions from arrest are constitutional matters that need not be restated in statutory form.

As with all statutes governing arrest, all definitions have been moved to the general definition section. For example, "arrest", as defined in 1987 MCA 46-6-101(1), is found in 46-1-202.

Part Case Notes

No Negligence in Officers' Response to Robbery Call or in Brief Detention of Robbery Victim: Plaintiff worked at a convenience store when a person entered the store, held a knife to plaintiff's throat, and robbed the store. Plaintiff managed to dial 9-1-1, but could not speak with police. Officers determined where the call came from and surrounded the store. However, even though officers could see two people inside, it was not possible to determine who was involved in the robbery. Meanwhile, plaintiff was taken to a back room and raped. Officers arrested the perpetrator immediately after he left the store and then ordered any other persons inside to exit. Plaintiff then left the store and was subdued and handcuffed for about 30 seconds before officers determined that she was an employee and had been raped. Plaintiff subsequently sued the county, law enforcement agencies, and several individual officers for negligently responding to the situation, allowing plaintiff to be raped, and improperly arresting plaintiff when she left the store. The District Court granted summary judgment for defendants and plaintiff appealed, but the Supreme Court affirmed. Under the circumstances, the officers responded quickly and professionally and got plaintiff to a safe position and to medical care as immediately as possible. The officers did not have custody or control of either the plaintiff or the robber at the time the rape occurred and therefore were in no position to undertake specific actions to protect the plaintiff until she came out of the store and her identity and role in the events were established. Additionally, the brief detention of plaintiff was justified and provided no cause of action against defendants. Gonzales v. Bozeman, 2009 MT 277, 352 M 145, 217 P3d 487 (2009).

Defendant's Volunteering of Information Inconsistent With Request for Attorney — Miranda Claims Properly Denied: Stombaugh contended that she was never read her Miranda rights and did not waive the right to an attorney. The arresting officer and a witness both testified that the officer read Stombaugh's Miranda rights from a card at the time of the arrest. The District Court resolved the conflicting testimony by noting that Stombaugh would not have requested an attorney at the same time that she was volunteering information about drug paraphernalia in her vehicle. The Supreme Court concluded that Stombaugh's Miranda claims were properly denied. St. v. Stombaugh, 2007 MT 105, 337 M 147, 157 P3d 1137 (2007).

Reasonable Mistake in Arrest of Misidentified Person and Subsequent Seizure of Incriminating Evidence — Admissibility of Evidence: The landlady of a rental apartment asked police to come and talk to her about her tenant, whom she identified as Thomas Bateman, and gave the officers Bateman's physical description, approximate age, and a description of Bateman's suspicious activity. The officer radioed in for an outstanding warrant check on Thomas Bateman and discovered that Thomas Bateman had an outstanding warrant for misdemeanor possession of dangerous drugs. The warrant information matched the description provided by the landlady. When officers knocked on Bateman's door and asked if he was Thomas Bateman, Bateman replied affirmatively. The officers said they had a warrant for his arrest and attempted to handcuff Bateman, and Bateman dropped a bag of Gummy Bears and what appeared to be a marijuana pipe. Bateman then told the officers that there was another Thomas Bateman and that there had been police confusion regarding them in the past. Officers checked Bateman's identification, radioed to dispatch for further information, and determined that although their ages and physical descriptions were similar, the arrestee was indeed not the Thomas Bateman with the outstanding warrant. Because the officers saw Bateman drop the marijuana pipe and noticed the odor of smoke and other drug paraphernalia in the living room, they had probable cause at that point to arrest him. Also in the apartment was another man who did have an outstanding warrant. Officers then obtained a warrant to search the apartment and discovered a methamphetamine lab in the crawl space. Bateman moved to dismiss the charges because the evidence resulted from an illegal arrest. The motion was denied, and Bateman appealed. Citing Hill v. Calif., 401 US 797 (1971), the Supreme Court affirmed. The officers acted reasonably, albeit mistakenly, in arresting Bateman. Because the arrest was reasonable, the subsequent discovery of incriminating evidence was legal and admissible. St. v. Bateman, 2004 MT 281, 323 M 280, 99 P3d 656 (2004).

Elements of Thornton Reasonable Person Test Met — Arrest Unlawful: An officer received a report that the driver of a vehicle similar to Van Dort's had failed to pay for gasoline before leaving a service station. The officer pulled over Van Dort's vehicle and ran a warrant check on Van Dort and his passenger, discovering that the passenger had an outstanding warrant. By

mistake, the officer arrested Van Dort but then released him and arrested the passenger. The officer called for backup for assistance in securing the vehicle so that a search could be conducted for contraband. While conducting a pat-down search of the passenger, drugs and paraphernalia were discovered. The passenger was placed in one patrol car, and Van Dort, still in handcuffs, was placed in a second patrol car. Van Dort was told that he was not under arrest, but the vehicle occupants were nevertheless transported to the Sheriff's office, and Van Dort was placed in an interview room. An officer told Van Dort that he was free to go, but that the officer wanted to ask Van Dort a few questions. Van Dort was then read his Miranda rights and questioned for 2 hours, at which time he admitted using methamphetamine earlier in the day. Van Dort was then charged with drug possession and subsequently moved to suppress the confession and evidence on grounds that his detention amounted to an unlawful arrest, but the motion was denied, and Van Dort appealed. The Supreme Court applied the test in St. v. Thornton, 218 M 317, 708 P2d 273 (1985), to determine whether an arrest occurred. The test involves three elements: (1) authority to arrest; (2) assertion of that authority to effect an arrest; and (3) restraint of the person arrested. The District Court found that because the officer informed Van Dort that he was not under arrest, the second element of the test was not satisfied. The Supreme Court found this reasoning too restrictive, focusing solely on the officer's words to the exclusion of the officer's conduct and the circumstances of Van Dort's detention. In U.S. v. Bravo, 295 F3d 1002 (9th Cir. 2002), it was held that an officer cannot negate a custodial situation simply by telling a suspect that the suspect is not under arrest because such an affirmation is only one factor within the totality of the circumstances to be considered in the analysis of an arrest. Further, under Thornton, an arrest has been accorded a broad definition that applies if a reasonable person, innocent of any crime, would have felt free to walk away under the circumstances. In this case, a reasonable person would have believed that the person was under arrest, despite the officer's statement to the contrary. All the Thornton factors being met, Van Dort was in fact placed under arrest. The court then considered whether the arrest was lawful based on probable cause and concluded that the facts and circumstances were insufficient for the officer to believe that Van Dort was committing or had committed an offense. The officer may have suspected that Van Dort had used drugs and used that suspicion to take Van Dort in for purposes of eliciting a confession, but at the time of the arrest, there was no evidence to support a reasonable belief of Van Dort's drug use sufficient to establish probable cause, so Van Dort's arrest was unlawful. St. v. Van Dort, 2003 MT 104, 315 M 303, 68 P3d 728 (2003), followed in St. v. Ellington, 2006 MT 219, 333 M 411, 143 P3d 119 (2006).

Sufficient Evidence to Support Finding That Fleeing Suspect in Detention for Purpose of Proving Escape: Martin was convicted of escape after shooting a police officer who was in pursuit following Martin's attempt to cash a forged check. Martin contended that the evidence was insufficient to support the conviction because he was never placed in official detention and thus could not have formed the requisite mental state for escape. The Supreme Court noted that, pursuant to St. v. Thornton, 218 M 317, 708 P2d 273 (1985), actual restraint does not require physical restraint. It was inconceivable that Martin did not recognize the officer's command to halt or stop as an assertion of the officer's authority to effect Martin's arrest or that Martin believed that he was free to walk away. Therefore, the evidence was sufficient to support the jury's finding that Martin was placed in official detention and to support Martin's conviction for escape. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Public Duty Doctrine as Applied to Law Enforcement Personnel — Exception in Cases of Special Relationship: Trina admitted that she had been drinking when stopped in her vehicle by Officer Driscoll, who nevertheless believed that sufficient probable cause did not exist to arrest the woman. Instead, thinking Trina might be impaired, the officer suggested a ride home or that Trina walk the 2-mile distance and warned Trina about returning to the vehicle. Trina decided instead to walk to a phone and call for a ride and was killed in traffic. Trina's husband brought suit for civil damages under 42 U.S.C. 1983, claiming that the officer breached the duty to protect, in violation of Trina's due process rights. The District Court summarily dismissed the claim, holding that because no probable cause existed for Trina's arrest, the officer had no duty to protect Trina from harm and that without a duty, the action failed. The public duty doctrine provides that a police officer's duty to protect and preserve the peace is owed to the public at large rather than to a particular person, unless a special relationship exists, thus giving rise to a special duty that is more particular than that owed to the public. A special relationship is established: (1) by a statute intended to protect a specific class of persons, of which the plaintiff is a member, from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances when the

agency has actual custody of the plaintiff or of a third person who harms the plaintiff. Relying on Stewart v. Standard Publishing Co., 102 M 43, 55 P2d 694 (1936), the Supreme Court agreed that although the officer may not have initially owed Trina a duty to protect, that duty was assumed as a matter of law when the officer prevented the woman from driving her car and ensured that she did not attempt to drive. The question of whether the duty to protect was breached is a question of fact for the jury, so summary dismissal was improper. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999), clarifying and distinguishing Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), and followed in Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004). Nelson was followed, as to elements of exception to the public duty doctrine (nonlaw enforcement case), in Orr v. St., 2004 MT 354, 324 M 391, 106 P3d 100 (2004), and Prosser v. Kennedy Enterprises, Inc., 2008 MT 87, 342 M 209, 179 P3d 1178 (2008). See also Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989), and Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996).

Intent to Arrest Formed After Person Physically Restrained After Failing to Stop as Requested — Investigative Stop, Not Arrest: An officer had authority to arrest Anderson, whose walking and driving led her to believe that he was DUI. The officer restrained him with a "gooseneck hold" when he failed to stop as requested. She testified without contradiction that it was not until after he resisted her hold and she could clearly identify the odor of intoxicants that she decided to arrest him for DUI. The request to stop and use of the gooseneck hold constituted an investigative stop, not an arrest. Anderson v. St., 275 M 259, 912 P2d 212, 53 St. Rep. 125 (1996).

Three Elements of Arrest: An arrest occurs when there is authority to arrest, when that authority is asserted with the intention to effect an arrest, and when the person is restrained. Anderson v. St., 275 M 259, 912 P2d 212, 53 St. Rep. 125 (1996).

Actual Restraint of Suspect Necessary for Arrest: The defendant had opened the door to his home and had one foot inside when the officer told him to stop. The Supreme Court held that this constituted an arrest because a reasonable person would not have felt free to walk away under the circumstances. Billings v. Whalen, 242 M 293, 790 P2d 471, 47 St. Rep. 706 (1990).

Undisputed Facts Surrounding Arrest — Question of Law: Defendant argued that the question of whether probable cause existed for his arrest was a question of fact entitling him to a jury trial and precluding summary judgment. However, where facts were undisputed, the question of whether an arrest was legal or illegal became a question of law for the court. Wright v. St., 231 M 324, 752 P2d 748, 45 St. Rep. 652 (1988).

Escape From Arresting Officer — Physical Restraint Not Prerequisite of Arrest: A valid arrest is an underlying element of "official detention" as that term is used in 45-7-306 and is therefore also an underlying element of the offense of escape. A valid arrest occurred when a Department of Highways (now Department of Transportation) enforcement officer stopped a truck to weigh it and a passenger began to unload it, threatened the officer when he was told to stop unloading, and was twice told he was under arrest. Actual physical restraint of the passenger is not a prerequisite to a valid arrest. The standard for an arrest when there is no physical restraint is whether a reasonable person, innocent of any crime, would have felt free to walk away under the circumstances. The passenger was properly charged with and convicted of the offense of escape. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985).

Privileged Entry — No Arrest Warrant: The opening of the defendant's apartment door to the limit of the night latch to determine what had caused a raging man to fall silent was a privileged entry. St. v. Lukus, 149 M 45, 423 P2d 49 (1967).

Part Collateral References

Criminal Law *key* 218(1) through (5).

22 C.J.S. Criminal Law §451.

5 Am. Jur. 2d Arrest §§1 through 3.

46-6-102. Persons exempt from arrest.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 107-7 and R.C.M. 1947, section 23-308.

Paragraph [(1)] is a statement and the traditional statutory exemption formerly stated in R.C.M. 1947, section 23-308, but placed here for purposes of centralization and codification. Paragraph [(2)] is a codification of Montana Constitution [1889], Article V, section 15 [now Art. V, sec. 8, 1972 Mont. Const.]. The word "militia" as used in paragraph [(3)] is intended to include the state militia (see section 77-1213(b) [repealed]). The language as to the home guard is not changed. Paragraph [(4)] is a new provision and should cover an officer with a prisoner in his custody (see R.C.M. 1947, section 94-5918 which referred to arrest by civil process).

Collateral References

Arrest *key* 60.

6A C.J.S. Arrest §5.

5 Am. Jur. 2d Arrest §§103 through 119.

46-6-104. Method of arrest.

Commission Comments

1991 Comment: This statute retains the substance of 1987 MCA 46-6-104. Subsection (1) states how an arrest may be effected—either through actual restraint or submission to custody. Subsection (2) reflects the need, at times, for reasonable force to effect an arrest. Subsection (3) allows that entry onto private property may be made to effect an arrest.

These provisions adopt the 1987 code almost verbatim. The 1967 Commission's comments are appropriate:

[Subsections (1) and (2)] . . . purport to establish standards for making an arrest for determining if an arrest has been made in a reasonable manner. . . . The officer may use all necessary means to effect the arrest if the person to be arrested either flees or forcibly resists, if he unnecessarily assaults him he is criminally liable for assault. (State v. Prlja, 57 Mont. 461, 189 Pac. 64.)

[Subsection (3)] is a restatement of the existing law, except no distinction is made between a private person and a peace officer as is the case under the present code. The only requirement is that the arrest be "authorized" . . . .

Source: A.L.I., section 19, and Illinois Code of Criminal Procedure, [Chapter] 38, section 107-5(d).

[Subsections (1) and (2)] continue the present law (see R.C.M. 1947, sections 94-6002 and 94-6010[)] and purport to establish standards for making an arrest for determining if an arrest has been made in a reasonable manner. These standards must ultimately guide the courts, attorneys and arresting officers. The officer may use all necessary means to effect the arrest if the person to be arrested either flees or forcibly resists, if he unnecessarily assaults him he is criminally liable for assault. (State v. Prlja, 57 Mont. 461, 189 Pac. 64.)

[Subsection (3)] is a restatement of the existing law, except no distinction is made between a private person and a peace officer as is the case under the present code. The only requirement is that the arrest be "authorized" as provided by [46-6-210, 46-6-402, 46-6-502, and 46-6-503 (now repealed)]. It is contemplated that the same amount of force to gain entry or exit is permissible as under the old code.

Compiler's Comments

1991 Amendment: Made minor changes in style.

Case Notes

Elements of Thornton Reasonable Person Test Met — Arrest Unlawful: An officer received a report that the driver of a vehicle similar to Van Dort's had failed to pay for gasoline before leaving a service station. The officer pulled over Van Dort's vehicle and ran a warrant check on Van Dort and his passenger, discovering that the passenger had an outstanding warrant. By mistake, the officer arrested Van Dort but then released him and arrested the passenger. The officer called for backup for assistance in securing the vehicle so that a search could be conducted for contraband. While conducting a pat-down search of the passenger, drugs and paraphernalia were discovered. The passenger was placed in one patrol car, and Van Dort, still in handcuffs, was placed in a second patrol car. Van Dort was told that he was not under arrest, but the vehicle occupants were nevertheless transported to the Sheriff's office, and Van Dort was placed in an interview room. An officer told Van Dort that he was free to go, but that the officer wanted to ask Van Dort a few questions. Van Dort was then read his Miranda rights and questioned for 2 hours, at which time he admitted using methamphetamine earlier in the day. Van Dort was then charged with drug possession and subsequently moved to suppress the confession and evidence on grounds that his detention amounted to an unlawful arrest, but the motion was denied, and Van Dort appealed. The Supreme Court applied the test in St. v. Thornton, 218 M 317, 708 P2d 273 (1985), to determine whether an arrest occurred. The test involves three elements: (1) authority to arrest; (2) assertion of that authority to effect an arrest; and (3) restraint of the person arrested. The District Court found that because the officer informed Van Dort that he was not under arrest, the second element of the test was not satisfied. The Supreme Court found this reasoning too restrictive, focusing solely on the officer's words to the exclusion of the officer's conduct and the circumstances of Van Dort's detention. In U.S. v. Bravo, 295 F3d 1002 (9th Cir. 2002), it was held that an officer cannot negate a custodial situation simply by telling a suspect that the suspect is not under arrest because such an affirmation is only one factor within the

totality of the circumstances to be considered in the analysis of an arrest. Further, under Thornton, an arrest has been accorded a broad definition that applies if a reasonable person, innocent of any crime, would have felt free to walk away under the circumstances. In this case, a reasonable person would have believed that the person was under arrest, despite the officer's statement to the contrary. All the Thornton factors being met, Van Dort was in fact placed under arrest. The court then considered whether the arrest was lawful based on probable cause and concluded that the facts and circumstances were insufficient for the officer to believe that Van Dort was committing or had committed an offense. The officer may have suspected that Van Dort had used drugs and used that suspicion to take Van Dort in for purposes of eliciting a confession, but at the time of the arrest, there was no evidence to support a reasonable belief of Van Dort's drug use sufficient to establish probable cause, so Van Dort's arrest was unlawful. St. v. Van Dort, 2003 MT 104, 315 M 303, 68 P3d 728 (2003), followed in St. v. Ellington, 2006 MT 219, 333 M 411, 143 P3d 119 (2006).

Use of Force in Self-Defense Distinguished From Use of Force in Resisting Arrest — Jury Instruction Proper: Courville was stopped by an officer who had reports of underage drinking in the area. When the officer tried to arrest Courville, Courville assaulted the officer. Courville claimed that his conduct was self-defense. The jury was instructed regarding the justifiable use of force and the unlawful use of force in resisting arrest. Courville contended that the instructions confused the jury by creating two classes of persons against whom the use of force is justified, in violation of equal protection. The Supreme Court disagreed. The use of self-defense applies equally to both classes of persons and depends on a reasonable belief of imminent harm based on the facts of the situation. The fact that the actor against whom the defensive conduct is directed happens to be a police officer is inapplicable to the self-defense defense. A person cannot use force to resist arrest, but can use defensive force if it is reasonably believed that force is necessary as against the imminent use of unlawful force. The claim of self-defense in justification of one's conduct is always considered within context and circumstances of the specific event at issue so that the factfinder can determine whether the accused's belief is reasonable. The jury was properly instructed, but found no merit in Courville's defense that the use of force against the officer was reasonable in this case. No substantial right of Courville was prejudiced, so the conviction was affirmed. St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002).

Sufficient Evidence to Support Finding That Fleeing Suspect in Detention for Purpose of Proving Escape: Martin was convicted of escape after shooting a police officer who was in pursuit following Martin's attempt to cash a forged check. Martin contended that the evidence was insufficient to support the conviction because he was never placed in official detention and thus could not have formed the requisite mental state for escape. The Supreme Court noted that, pursuant to St. v. Thornton, 218 M 317, 708 P2d 273 (1985), actual restraint does not require physical restraint. It was inconceivable that Martin did not recognize the officer's command to halt or stop as an assertion of the officer's authority to effect Martin's arrest or that Martin believed that he was free to walk away. Therefore, the evidence was sufficient to support the jury's finding that Martin was placed in official detention and to support Martin's conviction for escape. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Intent to Arrest Formed After Person Physically Restrained After Failing to Stop as Requested — Investigative Stop, Not Arrest: An officer had authority to arrest Anderson, whose walking and driving led her to believe that he was DUI. The officer restrained him with a "gooseneck hold" when he failed to stop as requested. She testified without contradiction that it was not until after he resisted her hold and she could clearly identify the odor of intoxicants that she decided to arrest him for DUI. The request to stop and use of the gooseneck hold constituted an investigative stop, not an arrest. Anderson v. St., 275 M 259, 912 P2d 212, 53 St. Rep. 125 (1996).

Three Elements of Arrest: An arrest occurs when there is authority to arrest, when that authority is asserted with the intention to effect an arrest, and when the person is restrained. Anderson v. St., 275 M 259, 912 P2d 212, 53 St. Rep. 125 (1996).

Plain View Doctrine Justifying Seizure of Contraband Pipe During Stop and Frisk Search for Weapons: After Stubbs was stopped on a reasonable suspicion of criminal activity, including speeding, reckless or careless driving, and eluding a peace officer, the officer noticed numerous weapons in the vehicle, providing a reasonable justification for searching Stubbs on the scene. During a pat-down search of Stubbs' clothing, the officer thought that a lump in Stubbs' pocket might be a deadly weapon. After removing the item to make sure that it was not a weapon, the item was in plain view and the incriminating character of the object, a brass pipe, was apparent. Absent any indication that the search was used as a pretext to discover illicit drugs or paraphernalia, the discovery of the pipe was inadvertent and seizure of the contraband was

justified. St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Escape From Arresting Officer — Physical Restraint Not Prerequisite of Arrest: A valid arrest is an underlying element of "official detention" as that term is used in 45-7-306 and is therefore also an underlying element of the offense of escape. A valid arrest occurred when a Department of Highways (now Department of Transportation) enforcement officer stopped a truck to weigh it and a passenger began to unload it, threatened the officer when he was told to stop unloading, and was twice told he was under arrest. Actual physical restraint of the passenger is not a prerequisite to a valid arrest. The standard for an arrest when there is no physical restraint is whether a reasonable person, innocent of any crime, would have felt free to walk away under the circumstances. The passenger was properly charged with and convicted of the offense of escape. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985), followed, as to the lack of need for physical restraint, in St. v. Widenhofer, 286 M 341, 950 P2d 1383, 54 St. Rep. 1438 (1997), and St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Federal Constitutional Requirement of Search Warrant Prior to Entry Into Home to Conduct Search or Make Arrest: A search warrant cannot be obtained under 46-5-203 (renumbered 46-5-224) for the purpose of searching for and seizing a person unless that person has been kidnapped. Although subsection (3) of this section and 46-6-401(3) (renumbered 46-6-210) would have permitted entry into respondent's home to arrest a fugitive without a search warrant, entry into a home to conduct a search or make an arrest has been held by the U.S. Supreme Court in Steagald v. U.S., 451 US 204, 68 L Ed 2d 38, 101 S Ct 1642 (1981), to be unreasonable under the fourth amendment to the United States Constitution unless done pursuant to a warrant. Therefore, compliance with this section or 46-6-401 (renumbered 46-6-210) would not satisfy the requirements of the fourth amendment. St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984).

Use of Force — Liability: In making a lawful arrest, the officer may use all necessary means to effect the arrest if the person to be arrested either flees or forcibly resists; but if the officer unnecessarily assaults the person, he is criminally liable for such assault. St. v. Prlja, 57 M 461, 189 P 64 (1920).

Collateral References

Arrest *key* 68.

6A C.J.S. Arrest §§51 through 57.

5 Am. Jur. 2d Arrest §67, et seq.

What constitutes "custodial interrogation" within rule of Miranda v. Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation—private security guards, detectives, or police. 51 ALR 6th 219.

What constitutes "custodial interrogation" within rule of Miranda v. Arizona requiring that suspect be informed of federal constitutional rights before custodial interrogation—in jail or prison. 38 ALR 6th 97.

Propriety of police action involving application of choke hold, constriction of throat, or the like to prevent accused from swallowing evidence—state cases. 64 ALR 5th 741.

Rescue doctrine: concern for possible victim (rescue doctrine) as justifying violation of Miranda requirements. 9 ALR 4th 595.

Intentional force: peace officer's liability for death or personal injuries caused by intentional force in arresting misdemeanant. 83 ALR 3d 238.

Deadly force: right of peace officer to use deadly force in attempting to arrest fleeing felon. 83 ALR 3d 174.

Right to resist excessive force used in accomplishing lawful arrest. 77 ALR 3d 281.

Modern status of rules as to right to forcefully resist illegal arrest. 44 ALR 3d 1078.

What constitutes obstructing or resisting an officer, in the absence of actual force. 44 ALR 3d 1018.

Traffic offenses: right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under Miranda v. Arizona. 25 ALR 3d 1076. 42 ALR 1200; 3 ALR 1170.

46-6-105. Time of making arrest.

Commission Comments

1991 Comment: This statute retains the first sentence of 1987 MCA 46-6-105 and is the general provision establishing when an arrest may be made. The exception to this statute, cases involving domestic violence, is not included in the general statute.

The 1967 Commission aptly commented:

[A] person cannot be arrested at night in his home for a prior misdemeanor unless upon the direction of a magistrate endorsed upon a warrant of arrest. . . . This restriction was imposed to prevent the police from harassing a person or searching his home on the pretext of arresting him for a misdemeanor committed at some other time and place. Allowing the police to arrest for a misdemeanor at night can be an effective law enforcement tool provided it is not used as a sham to torment a citizen in his home.

Source: A.L.I., section 23 and R.C.M. 1947, section 94-6007.

This provision broadens the scope of arrests for misdemeanors. The existing code (R.C.M. 1947, section 94-6007) prohibits all misdemeanor arrests at night unless upon the direction of the magistrate endorsed upon the warrant. The proposed section expands this to allow arrests for all misdemeanors at night, except that a person cannot be arrested at night in his home for a prior misdemeanor unless upon the direction of a magistrate endorsed upon a warrant of arrest [or, under the 1985 amendment, unless he is arrested under 46-6-401 (renumbered 46-6-210) for domestic abuse (now partner or family member assault) or aggravated assault against a family member or household member]. This restriction was imposed to prevent the police from harassing a person or searching his home on the pretext of arresting him for a misdemeanor committed at some other time and place. Allowing the police to arrest for a misdemeanor at night can be an effective law enforcement tool provided it is not used as a sham to torment a citizen in his home. The provision for the time of making felony arrests remains unchanged.

Compiler's Comments

1995 Amendment: Chapter 350 at end substituted "partner or family member assault" for "domestic abuse".

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

1991 Amendment: Near beginning of first sentence, after "made", deleted "on any day and" and near end substituted "judge" for "magistrate" and in second sentence substituted "46-6-311" for "46-6-401(2)" and after "abuse" deleted "or aggravated assault against a family member or household member. A summons of a peace officer to the home or private dwelling by a family or household member constitutes an exigent circumstance for making an arrest pursuant to 46-6-401(2)"; and made minor changes in style.

1985 Amendment: Inserted last two sentences relating to arrest for domestic abuse.

Case Notes

Carport Not Considered Part of Home — Privacy Standard Inapplicable to DUI Search of Condominium Carport: Large was arrested for misdemeanor DUI while seated in her running car that was parked in the carport outside her condominium. Large moved to suppress the evidence because she was arrested at night at her home for a misdemeanor committed elsewhere, in violation of this section. She also contended that the arrest was in violation of her right to privacy. The motion was denied, and on appeal, the Supreme Court affirmed. Although a carport may be structurally contiguous with the rest of a private house or dwelling, presence in a carport does not equate to presence in the home, and although lot lines do convey certain concrete ownership rights, the right to be free from misdemeanor arrest at night is reserved for the home, not coterminous property appurtenant to the home. Further, under 61-8-101, ways of the state open to the public include parking areas and other public or private places adapted for public travel that are in common use by the public. Large could not be considered to be in her home while sitting in a car parked in the common-area parking lot in her condominium complex where officers could see what was readily visible to any visitor without being overly intrusive. Thus, Large had no reasonable expectation of privacy that prohibited her arrest in her own carport, nor did a violation of this section occur. Whitefish v. Large, 2003 MT 322, 318 M 310, 80 P3d 427 (2003). See also St. v. Hubbel, 286 M 200, 951 P2d 971 (1997).

Bench Warrant Not in Conformance With Statute — Night Arrest in Home Unlawful: A City Court bench warrant stating that police were to arrest defendant "wherever she may be found" and that the warrant "may be served any time of the day or night" was overbroad and did not authorize the arrest of defendant in her home at night, for a misdemeanor committed at some other time and place, without the express direction of a judge endorsed on the warrant. Plumlee v. Travis, 254 M 96, 834 P2d 1386, 49 St. Rep. 648 (1992).

Defendant With One Foot Inside Doorway Considered Home: The arresting officer followed the defendant to his home, intending to give him a citation for an illegal turn. The officer stopped the defendant after the defendant had one foot inside his doorway and ordered him to return to his car that was parked in the driveway. The officer then gave the defendant field sobriety tests and charged him with driving under the influence. The Supreme Court held that the defendant was in his home because he had one foot inside his doorway and that the officer's restraining the

defendant for the illegal turn constituted an illegal, warrantless arrest of the defendant in his home for a misdemeanor committed at some other place and time. The court went on to state that all evidence acquired after the illegal arrest pertaining to the DUI charge was inadmissible. Billings v. Whalen, 242 M 293, 790 P2d 471, 47 St. Rep. 706 (1990).

Warrantless Arrest in Home for Misdemeanor — Subsequent Confession Admissible: The defendant was arrested in his home on a misdemeanor charge. The arrest was affected without a warrant. He subsequently confessed to and was convicted of deliberate homicide. The defendant moved to suppress evidence of his confession on the basis it was tainted due to an unlawful incarceration. Although the United States Supreme Court has stated that, absent exigent circumstances, a warrantless arrest for a minor crime cannot be made in the defendant's home, the defendant's confession was sufficiently an act of free will to purge any original taint. The confessions obtained from the defendant were neither causally connected to the initial arrest nor involuntary. Therefore, the motion to suppress was properly denied. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

Collateral References

Arrest *key* 67.
6A C.J.S. Arrest §54.
5 Am. Jur. 2d Arrest §72.

46-6-107. Miranda warning prior to custodial interrogation.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

Code Commissioner Correction: In last sentence deleted reference to 46-5-402, which was repealed by Ch. 343, L. 2003, and made corresponding minor changes in style.

Case Notes

Arrested Driver's Refusal of Breath Test Nontestimonial Conduct: Because the refusal of a driver to take a breath test is nontestimonial conduct, the constitutional prohibition against self-incrimination is not implicated. St. v. Slade, 2008 MT 341, 346 M 271, 194 P3d 677 (2008).

Sufficient Proof of Miranda Warning Despite Failure of Recording Equipment — Denial of Motion to Suppress Statements Proper: Following Gittens' arrest, officers attempted to memorialize the reading of Gittens' Miranda rights, but the camera equipment failed to record any audio. At trial, Gittens moved to suppress all statements that he made after the arrest on grounds that, absent recorded proof, he had not been properly informed of his Miranda rights. The trial court denied the motion, and Gittens appealed, but the Supreme Court affirmed. Pursuant to St. v. Grey, 274 M 206, 907 P2d 951 (1995), officers should preserve a tangible record of the giving and waiver of Miranda rights when the means to do so are readily available, but the lack of a tangible record does not mandate suppression of a detainee's statements. Rather, this is simply one factor that weighs against the state in proving its burden. The proper inquiry is whether, based on all available evidence, the state met its burden of proving that the officer read the detainee the Miranda rights and whether those rights were waived. In this case, two officers testified that they had made a good faith effort to preserve a record of the reading and waiver, that one officer read the Miranda rights off of a card while the other officer observed, that Gittens verbally waived the rights and never indicated that he wished to avail himself of those rights, and that if the officers had known that the audio equipment was nonfunctional, they would have had Gittens sign a written acknowledgment and waiver. The trial court weighed the testimony of Gittens and the officers and found the officers more credible. The Supreme Court declined to disturb the trial court's decision that the state met its burden of proving that Gittens was properly advised of his rights despite the lack of a tangible record. St. v. Gittens, 2008 MT 55, 341 M 450, 178 P3d 91 (2008).

Defendant's Volunteering of Information Inconsistent With Request for Attorney — Miranda Claims Properly Denied: Stombaugh contended that she was never read her Miranda rights and did not waive the right to an attorney. The arresting officer and a witness both testified that the officer read Stombaugh's Miranda rights from a card at the time of the arrest. The District Court resolved the conflicting testimony by noting that Stombaugh would not have requested an attorney at the same time that she was volunteering information about drug paraphernalia in her vehicle. The Supreme Court concluded that Stombaugh's Miranda claims were properly denied. St. v. Stombaugh, 2007 MT 105, 337 M 147, 157 P3d 1137 (2007).

Defendant Not Subject to Interrogation When Apprehended — Miranda Warning Inapplicable to Gratuitous Statement: Defendant who was suspected of growing marijuana was not questioned by the deputy who took him into custody. Once in custody, a detective identified himself to the defendant and informed him of the execution of a search warrant for a marijuana

growing operation. Although the defendant gratuitously responded that he had a "medical grow", the detective did not question the defendant about the statement. The defendant moved to suppress the gratuitous statement, claiming that it was made while he was in custody and prior to being "Mirandized". The District Court denied Zito's suppression motion. On appeal, the Supreme Court affirmed, ruling that while the defendant was in custody, he was not questioned by any law enforcement officer or otherwise coerced or induced into making the statement. Without an interrogation, the gratuitous "medical grow" statement does not fall under the auspices of Miranda. St. v. Zito, 2006 MT 211, 333 M 312, 143 P3d 108 (2006).

Statements Made Prior to Miranda Warning Not in Response to Interrogation Admissible: Zito argued that a statement made by him at the time of his arrest that his marijuana operation was a "medical grow" could not be used as a basis for subsequent questioning because he had not been read his rights prior to making the statement. The Supreme Court held that even if Zito was in custody at the time of the statement, he made the remark on his own and not in response to interrogation by the police and therefore it was not elicited in violation of his rights. St. v. Zito, 2006 MT 211, 333 M 312, 143 P3d 108 (2006).

Part 2
Arrest With a Warrant

Part Commission Comments

1991 Part Comments: These arrest provisions consolidate the 1987 statutes governing the arrest of an individual under a warrant. The statutes are largely an adaptation of the 1987 code, but some minor changes have been made. In no instance, however, do the changes significantly change the established procedure concerning an arrest under a warrant.

The only code provision not carried forward in these statutes concerns the arrest of an individual outside the county in which the warrant was issued. That provision required that the defendant be brought to the "nearest and most accessible judge in the county" without unnecessary delay. See 1987 MCA 46-6-202(4). The Commission recognized that the nearest and most accessible judge may be in an adjoining county. Continuing the 1987 requirement, the Commission felt, would burden police procedure and could compromise the defendant's rights. Thus, the requirement "in the county" is not retained in these statutes. The statutes still require an initial appearance to be conducted without unnecessary delay. See Title 46, ch. 7, part 1.

This part is compatible with the Federal Rules of Criminal Procedure and the Uniform Rules of Criminal Procedure. Both the federal rules and this part, for example, provide that an arrest warrant be shown to the defendant as soon as possible after the defendant requests to see it. Compare 46-6-203 and Rule 4(d)(3), Fed. R. Crim. P. There are also differences. The federal rule, for example, allows the government's attorney to request a summons in lieu of a warrant. See Rule 4(a), Fed. R. Crim. P. This part allows the court the discretion to issue either a summons or an arrest warrant. See 46-6-211.

46-6-201. Issuance of arrest warrant upon complaint.

Commission Comments

Commission Comment Not Divided: This section is a recodification of part of section 95-603, R.C.M. 1947. Section 46-6-202 (renumbered 46-6-214 and 46-6-215) is also derived from section 95-603. The commission comments to section 95-603 are printed in their entirety under 46-6-201.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 107-9.

In general, the proposed section [46-6-201 and 46-6-215] involves no substantial changes in the present Montana law. The section does expand the chapter on Arrest by incorporating the pertinent complaint provisions from Title 94, Chapter 58 (R.C.M. 1947). Use of the complaint in this section should make the section on Issuance and Service of an Arrest warrant more meaningful since the purpose of the complaint at this point is to justify the issuance of the arrest warrant. The section presents in a systematic arrangement the procedure to be followed from the time the complaint is made until the warrant is executed. It must be noted, however, that both an information, [Title 46, ch. 11, part 2], and an indictment, [Title 46, ch. 11, part 3], may also be used as the basis of an arrest warrant. The contents of the complaint as stated in R.C.M. 1947, section 94-5801 are rewritten in [46-6-201(1)] without change in substance. The two most notable changes are the deletion of the requirement that the complaint contains the general name of the offense (see R.C.M. 1947, section 94-5801(3)[)] and the inclusion of the statement showing probable cause to believe that the accused has committed an offense. The deletion of the general name of the offense from the complaint is in conformity with most modern statutes and is sanctioned in State v. Schnell, 107 Mont. 579, 88 P.2d 19. The purpose for including a statement

of probable cause is not to charge an offense but rather to establish a basis for issuing the warrant of arrest.

The present requirements of R.C.M., section 94-5803 are rewritten in [46-6-201(2), (3)] without change in substance. Thus, the magistrate is still under a duty to examine the complaint under oath, but the matter need not be as thoroughly aired as is required in the trial of the person accused, before issuing a warrant or dismissing the charge. (State ex rel. Manek v. Justice Court, 110 Mont. 550, 554, 104 P.2d 14.)

The choice provided in [46-6-201(3)] between a warrant and a summons, in the discretion of the court or county attorney, is new but is consistent with the method provided for obtaining the accused's presence in court as stated in [46-6-212(1)].

[Section 46-6-214(2)] follows the former law that bail must be established by a judicial officer rather than an administrative one. As a result the section anticipates that where bail is specified in the warrant the procedures provided for in [46-9-303 (now repealed, but see 46-9-302(2)(b))] may be utilized.

[Section 46-6-215] omits as unnecessary the service of an arrest warrant by a private person. The language of the section does not greatly expand the scope of the warrant of arrest. The existing law draws a distinction between warrants issued in justice courts and warrants issued in district or supreme courts. The section abolishes this distinction between the issuing courts and allows any peace officer to whom the warrant is directed, to execute it in any place in the state. The change is minor and since most of the warrants are issued in justice courts, the change should clarify and simplify the procedure and facilitate the process for execution of an arrest warrant.

Compiler's Comments

1993 Amendment: Chapter 262 deleted (1) and (2) that read: "(1) A complaint, as the basis of an arrest warrant, shall be in writing.

(2) When a complaint is presented to a court charging a person with the commission of an offense, the court shall examine upon oath the complainant and may also examine any witnesses"; in first sentence, after "complainant and", inserted "from the examination of" and after "witnesses" inserted "or affidavits" and in third sentence substituted "prosecutor" for "county attorney".

Applicability of Commission Comments: Because of amendment by Ch. 184, L. 1977, applicability of the commission comments should be scrutinized.

Case Notes

Search of Probationer's Residence or Vehicle — Reasonable Grounds and Probable Cause Distinguished: One condition of Kriesel's probation was a provision that Kriesel be subject to search and seizure of his residence, person, or vehicle upon the request of his probation officer at any time with or without a warrant and with or without probable cause. Kriesel was arrested for violating probation and released to await revocation proceedings but failed to report to his probation officer, so a bench warrant was issued for his arrest. Following a vehicle stop based on an informant's description of his car, Kriesel was arrested on the outstanding warrant and methamphetamine and drug paraphernalia were found in the car. Kriesel tested positive for marijuana and amphetamine. On appeal, Kriesel moved to suppress the evidence found in the search, alleging that the informant supplied information that was not sufficiently corroborated and that there was thus insufficient particularized suspicion to stop his vehicle, as required under 46-5-401. However, in this case, the stop was initiated to detain Kriesel under the authority of a valid outstanding warrant, satisfying the probable cause requirement of this section, and as a result, the particularized suspicion requirement was satisfied. Further, under St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154 (1998), a search of a probationer's residence or vehicle does not require probable cause, but rather reasonable grounds as determined by the totality of the circumstances. The reasonable grounds standard requires substantially less than the probable cause standard because of a probationer's diminished expectation of privacy and the superior position of the probation officer to determine what level of supervision is necessary to provide rehabilitation and community safety. The District Court found that given Kriesel's status as a probationer, the search of his vehicle was properly executed. Given the evidence that there was probable cause for the stop and reasonable grounds for the search, the court's findings were not clearly erroneous, were correctly applied as a matter of law, and thus were affirmed. St. v. Kriesel, 2000 MT 144, 300 M 44, 2 P3d 831, 57 St. Rep. 564 (2000).

Probable Cause as Issue in Warrant Proceedings — Effect of Illegal Arrest on Evidence in Subsequent Prosecution: As set out in U.S. v. Harris, 403 US 573, 29 L Ed 2d 723, 91 S Ct 2075

(1971), the issue in warrant proceedings is not guilt beyond a reasonable doubt but probable cause for believing a crime has occurred. Even if the defendant's arrest has been unlawful, an illegal arrest has no impact on subsequent prosecution using evidence not tainted by illegality. St. v. Sor-Lokken, 246 M 70, 803 P2d 638, 47 St. Rep. 2264 (1990).

Illegal Pretrial Process and Procedure — State's Right to Charge and Try Case: Youth Court petition initiating proceedings did not state the facts constituting the offense youth was charged with in ordinary and concise language so as to enable a person of common understanding to know what was intended. The petition did not include a witness list. An arrest warrant was issued out of the Youth Court, although there is no provision in the Youth Court Act for issuance of an arrest warrant. Presumably the warrant was issued under 46-6-201, but there was no showing of probable cause supported by oath or affirmation reduced to writing. The youth had already been arrested in Oklahoma at the time the warrant was issued. By what process and authority he was arrested in Oklahoma was not shown, nor was it shown he was arrested by a law enforcement officer. He was subsequently transferred to the District Court for trial as an adult and convicted of two counts of deliberate homicide. The Youth Court proceedings from issuance of the warrant for arrest onward were patently defective. However, this did not preclude the State from having him transferred to the District Court, proceeding against him, and obtaining a conviction. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983), followed in St. v. Sor-Lokken, 247 M 343, 805 P2d 1367, 48 St. Rep. 142 (1991).

Parolee's Wallet at Scene of Homicide — Probable Cause for Arrest: There was probable cause or reasonable grounds to believe accused committed acts constituting a violation of his parole conditions where his wallet was found at the scene of a criminal homicide. Accused could not successfully contend on appeal following deliberate homicide conviction that statements made to police should be suppressed for being the result of an arrest without probable cause. St. v. Plouffe, 198 M 379, 646 P2d 533, 39 St. Rep. 1064 (1982).

Complaint Not Defective: When a complaint was issued in one county but the offense was committed in another, it was not defective, since the purpose of the complaint was not to charge the offense but to establish the basis for an arrest warrant. St. v. Benbo, 174 M 252, 570 P2d 894 (1977).

Complaint Conclusory and Complainant Not Examined: An arrest warrant was invalid and the subsequent search and seizure unlawful when the complaint of the Deputy County Attorney, under oath, disclosed nothing more than conclusion, the complainant was not examined under oath, and an undercover agent could not say that he had purchased from the defendant. State ex rel. Wicks v. District Court, 159 M 434, 498 P2d 1202 (1972), distinguished in State ex rel. Douglas v. District Court, 161 M 525, 507 P2d 1055 (1973).

Extent of Examination Before Issuing Warrant: The magistrate examining the complaint need not go into the matter as thoroughly as is required at trial. State ex rel. Vanek v. Justice Court, 110 M 550, 104 P2d 14 (1940).

Mandamus Not to Control Discretion: On an application for a Writ of Mandamus to compel a Justice of the Peace to dispose of an accusation, the Writ will issue commanding the Justice to take action by either issuing a warrant of arrest or dismissing the complaint, but it will not issue to control his discretion. State ex rel. Vanek v. Justice Court, 110 M 550, 104 P2d 14 (1940).

Duty of Justice of the Peace: Under former law it was the duty of a Justice of the Peace, when he was satisfied upon the complaint of any citizen that an offense had been committed, to issue a warrant of arrest and to have the offender brought before him for trial or examination. St. v. O'Brien, 35 M 482, 90 P 514 (1907).

Attorney General's Opinions

Power of "Accident Investigator" to Enforce Provisions of Mandatory Insurance Law: The role of an "accident investigator", who is not a peace officer, in enforcing the provisions of the mandatory insurance law is the same as that of a private person. If the accident investigator has reasonable cause to believe an offense has been committed, he must execute a sworn complaint pursuant to 46-6-201. 38 A.G. Op. 49 (1979).

Law Review Articles

Criminal Procedure—Montana Law and the Federal Impact: Paragraphs II.B. and III.A. discuss probable cause. Elison, 38 Mont. L. Rev. 27 (1977).

Collateral References

Criminal Law *key* 208, et seq.

22 C.J.S. Criminal Law §§447 through 452; 97 C.J.S. Witnesses §22, et seq.

5 Am. Jur. 2d Arrest §§13 through 19.

46-6-204. Minor irregularities in warrant.

Commission Comments

1991 Comment: Minor irregularities not affecting the substantial rights of the accused are generally acceptable in criminal processes. This statute incorporates the 1987 code language that recognized that principle.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 107-10.

This section is consistent with the idea expressed throughout the code that a ministerial error should not be the basis for defeating the law. Only when the defendant's substantial rights have been prejudiced should the warrant be dismissed.

Case Notes

Signed Arrest Warrant Listing Wrong Offense Considered Inconsequential and Ministerial — Arrest Pursuant to Valid Warrant — Motion to Suppress Properly Denied: Law enforcement executed a search warrant on Torgeson's residence in Mineral County and found a meth lab. Torgeson was charged in Mineral County with operating a clandestine drug laboratory and the District Court issued a warrant for Torgeson's arrest, but the warrant incorrectly named the charged offense as a violation of bail conditions. Torgeson was subsequently located in Missoula County. Missoula County officers verified the Mineral County charges and confirmed that a warrant was outstanding, and went to Torgeson's residence to arrest him. Torgeson was arrested based on the Mineral County warrant and was read his Miranda rights. A search of the residence revealed another meth lab. Torgeson moved to dismiss or suppress statements he made after being given the Miranda warnings because the arrest was based on an invalid arrest warrant from Mineral County. The motion was denied, and on appeal the Supreme Court affirmed. Section 46-6-210 provides that a peace officer may arrest a person when the officer reasonably believes that a warrant for the person has been issued, and 46-6-204 provides that a warrant may not be dismissed because of technical irregularities that do not affect the person's substantial rights. Torgeson described no substantial right that was prejudiced by the erroneous charge stated in the Mineral County warrant. The warrant was in writing, was signed by a District Court judge, and was based on an existing felony charge of operating a clandestine drug laboratory. The name of the person to be arrested, the date of the charge, and the amount of bail were all correctly stated in writing, and a complete record of the proceedings leading to issuance of the warrant existed. The irregularity in the warrant did not affect Torgeson's substantial rights, and under these circumstances Torgeson was arrested pursuant to a valid warrant, so the motion to dismiss or suppress was properly denied. St. v. Torgeson, 2008 MT 295, 345 M 415, 191 P3d 448 (2008), distinguishing St. v. McKee, 1998 MT 110, 288 M 454, 958 P2d 700 (1998).

46-6-210. Arrest by peace officer.

Commission Comments

1991 Comment: This statute is a restatement of 1987 MCA 46-6-401(1)(a) through (1)(c). The statute establishes those instances in which an arrest may be made under a warrant, whether issued in this state or from another state. The statute's first sentence establishes the general rule regarding an arrest under a warrant.

Subsection (1) recognizes the authority of a peace officer to effect an arrest under a warrant issued within this state for any offense, whether a felony or misdemeanor. [This subsection was amended to add the exception regarding a warrant for a violation of a city ordinance in order to make this provision consistent with 46-6-215.]

Subsection (2) permits arrests on the basis of warrants issued from other states for felony offenses. The provision that arrests under warrants issued outside this state are allowed only for felony offenses is a limitation adopted in 1967 and continued in the 1987 statute.

The statute recognizes that arrests on the basis of a warrant may occur without the warrant in possession. Under 46-6-216, however, the defendant may request to see the warrant that authorized his arrest.

This statute presumes that no changes are necessary and contemplates no change in established procedure.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 107-2 and R.C.M. 1947, section 94-6003.

The section states the circumstances under which a peace officer may make an arrest for either a felony or a misdemeanor with or without an arrest warrant. Subdivisions [(1)(a) and (1)(b)] relate to arrests for either a felony or misdemeanor based on a warrant of arrest issued in this state. The change suggested by these sections was made to conform with [46-6-216], to allow peace officers to arrest on a warrant which they do not have in their possession. This change was thought to be desirable in light of modern methods of communication. That is, when an officer

has been informed that a warrant has been issued for the arrest of a person and he locates the suspect, it would be impractical to require that the officer go to the station and get the warrant and then return to make the arrest.

Subdivision [(1)(c)] relates to arrests based on out-of-state warrants. The commission felt that this provision should be limited to felony warrants only.

It should be noted that subdivisions [(1)(a) through (1)(c)] all relate to arrests based on arrest warrants.

Subdivision [(1)(d)] is the sole and exclusive provision for arrests for either a felony or a misdemeanor without an arrest warrant. [Under the 1985 amendment inserting subsection (2), this is no longer the case.] Under this provision the theory of arrests for a misdemeanor without a warrant would be the same as for a felony without a warrant. This is in conformity with the case law and constitutional requirements that an arrest without a warrant must be based upon reasonable (probable) cause. See, Montana Constitution [1889], Article III, section 7 [now Art. II, sec. 11, 1972 Mont. Const.], and State ex rel. Wong You v. District Court, 106 Mont. 347, 78 P.2d 353. The scope of arrests for misdemeanors has been broadened to allow an arrest for a past misdemeanor not committed in the officer's presence. This may be done without an arrest warrant but must be based on a showing of probable cause and at night can only take place outside the person's home or dwelling as stated in proposed section [46-6-105]. [Under the 1985 amendment inserting subsection (2), this is no longer the case.] Presently, the officer is often handicapped by being unable to arrest for a past misdemeanor not committed in his presence, e.g., family squabble [under the 1985 amendment inserting subsection (2), this is no longer the case] or traffic infraction.

Subdivision [(1)(d)] adopts the federal rule, and that of many other jurisdictions, that an arrest without a warrant may be made on reasonable grounds that the person has committed or is committing an offense, and not on the basis that "an offense has in fact been committed."

Compiler's Comments

1993 Amendment: Chapter 262 near beginning of (1), after "except that", inserted "unless otherwise provided by law".

1991 Amendment: At end of (1) inserted "except that a warrant for violation of a city ordinance may not be acted upon unless the person is located within the limits of the city in which the violation is alleged to have occurred"; deleted (1)(d) that read: "(d) he believes on reasonable grounds that the person is committing an offense or that the person has committed an offense and the existing circumstances require his immediate arrest"; deleted former (2) that read: "(2) A peace officer may arrest a person anywhere, including his place of residence, if the peace officer has probable cause to believe the person is committing or has committed domestic abuse or aggravated assault against a family member or household member even though the offense did not take place in the presence of the peace officer. A summons of a peace officer to a place of residence by a family or household member constitutes an exigent circumstance for making an arrest. Arrest is the preferred response in domestic abuse cases involving injury to the victim, use or threatened use of a weapon, violation of a restraining order, or other imminent danger to the victim"; and made minor changes in style.

1985 Amendment: Inserted (2) relating to arrest for domestic abuse.

Applicability of Commission Comments: The applicability of the commission comments should be scrutinized with reference to the amendment made pursuant to Supreme Court order dated October 10, 1968, which added to subsection (4) the requirement that "the existing circumstances require his immediate arrest".

Case Notes

Warrant 170
Belief That Offense Committed 171

WARRANT

Signed Arrest Warrant Listing Wrong Offense Considered Inconsequential and Ministerial — Arrest Pursuant to Valid Warrant — Motion to Suppress Properly Denied: Law enforcement executed a search warrant on Torgeson's residence in Mineral County and found a meth lab. Torgeson was charged in Mineral County with operating a clandestine drug laboratory and the District Court issued a warrant for Torgeson's arrest, but the warrant incorrectly named the charged offense as a violation of bail conditions. Torgeson was subsequently located in Missoula County. Missoula County officers verified the Mineral County charges and confirmed that a warrant was outstanding, and went to Torgeson's residence to arrest him. Torgeson was arrested based on the Mineral County warrant and was read his Miranda rights. A search of the residence revealed another meth lab. Torgeson moved to dismiss or suppress statements he made after

being given the Miranda warnings because the arrest was based on an invalid arrest warrant from Mineral County. The motion was denied, and on appeal the Supreme Court affirmed. Section 46-6-210 provides that a peace officer may arrest a person when the officer reasonably believes that a warrant for the person has been issued, and 46-6-204 provides that a warrant may not be dismissed because of technical irregularities that do not affect the person's substantial rights. Torgeson described no substantial right that was prejudiced by the erroneous charge stated in the Mineral County warrant. The warrant was in writing, was signed by a District Court judge, and was based on an existing felony charge of operating a clandestine drug laboratory. The name of the person to be arrested, the date of the charge, and the amount of bail were all correctly stated in writing, and a complete record of the proceedings leading to issuance of the warrant existed. The irregularity in the warrant did not affect Torgeson's substantial rights, and under these circumstances Torgeson was arrested pursuant to a valid warrant, so the motion to dismiss or suppress was properly denied. St. v. Torgeson, 2008 MT 295, 345 M 415, 191 P3d 448 (2008), distinguishing St. v. McKee, 1998 MT 110, 288 M 454, 958 P2d 700 (1998).

Reasonable Mistake in Arrest of Misidentified Person and Subsequent Seizure of Incriminating Evidence — Admissibility of Evidence: The landlady of a rental apartment asked police to come and talk to her about her tenant, whom she identified as Thomas Bateman, and gave the officers Bateman's physical description, approximate age, and a description of Bateman's suspicious activity. The officer radioed in for an outstanding warrant check on Thomas Bateman and discovered that Thomas Bateman had an outstanding warrant for misdemeanor possession of dangerous drugs. The warrant information matched the description provided by the landlady. When officers knocked on Bateman's door and asked if he was Thomas Bateman, Bateman replied affirmatively. The officers said they had a warrant for his arrest and attempted to handcuff Bateman, and Bateman dropped a bag of Gummy Bears and what appeared to be a marijuana pipe. Bateman then told the officers that there was another Thomas Bateman and that there had been police confusion regarding them in the past. Officers checked Bateman's identification, radioed to dispatch for further information, and determined that although their ages and physical descriptions were similar, the arrestee was indeed not the Thomas Bateman with the outstanding warrant. Because the officers saw Bateman drop the marijuana pipe and noticed the odor of smoke and other drug paraphernalia in the living room, they had probable cause at that point to arrest him. Also in the apartment was another man who did have an outstanding warrant. Officers then obtained a warrant to search the apartment and discovered a methamphetamine lab in the crawl space. Bateman moved to dismiss the charges because the evidence resulted from an illegal arrest. The motion was denied, and Bateman appealed. Citing Hill v. Calif., 401 US 797 (1971), the Supreme Court affirmed. The officers acted reasonably, albeit mistakenly, in arresting Bateman. Because the arrest was reasonable, the subsequent discovery of incriminating evidence was legal and admissible. St. v. Bateman, 2004 MT 281, 323 M 280, 99 P3d 656 (2004).

Arrest Without Warrant in Officer's Possession: Defendant attempted to suppress identification evidence on the grounds that the arrest was illegal. He argued that the arresting officer should have had an arrest warrant in his possession. The Supreme Court rejected the argument since the Kalispell police did have a warrant for the arrest of the defendant at the time of the arrest and it was not necessary that the arresting officer have it in his possession. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

Parking Meter Violation — Unlawful Search — Ordinance Unconstitutional: The search of the defendant's person under a warrant of arrest issued by a police magistrate for a parking meter violation was an unreasonable search since evidence at a suppression hearing did not disclose any basis for a mandatory custodial arrest. Furthermore, the city ordinance involved was unconstitutional to the extent that it precluded the defense that the defendant was not driving the vehicle when the parking violation occurred—depriving him of due process. St. v. Jetty, 176 M 519, 579 P2d 1228 (1978).

BELIEF THAT OFFENSE COMMITTED

Suspect's Conduct and Officer's Knowledge of Suspect's Criminal History Sufficient Probable Cause for Warrant to Search Vehicle for Drugs: When officers arrested Frasure on an outstanding warrant, Frasure acted jittery and nervous, spoke with choppy, accelerated speech, and was sweating. Based on their training, the officers knew Frasure's actions were consistent with a person under the influence of methamphetamine. The officers also knew from previous contact that Frasure was a methamphetamine addict who had previously been arrested for methamphetamine offenses. A pat-down search incident to the arrest revealed a marijuana pipe in Frasure's pocket. Frasure denied consent to search the vehicle that he was in when arrested,

but the vehicle was impounded and a warrant was obtained to search the vehicle. The search revealed drugs and paraphernalia, and Frasure moved to suppress the evidence on grounds that there was insufficient probable cause for the search warrant. The motion was denied, and on appeal, the Supreme Court affirmed. The officers' knowledge and Frasure's conduct constituted sufficient evidence to support the officers' belief that Frasure had committed an offense, so sufficient probable cause existed to support the vehicle search, and denial of Frasure's motion to suppress was not erroneous. St. v. Frasure, 2004 MT 242, 323 M 1, 97 P3d 1101 (2004).

Officer's Knowledge of Vehicle Owner's Revoked License Sufficient Basis for Suspicion of Criminal Activity to Warrant Stopping Vehicle: Deputy Keintz observed a vehicle displaying a distinctive personalized license plate being driven by a female south of Missoula. The officer recognized the license plate, recalled the prior arrest and license suspension of the vehicle owner, and initiated a traffic stop. Halvorson was the owner and driver of the vehicle and was ticketed for driving with a suspended license. On appeal, Halvorson contended that the officer did not have sufficient information to form a particularized suspicion that the occupant of the vehicle was or had been engaged in criminal activity to justify stopping the vehicle. Applying the criteria in St. v. Gopher, 193 M 189, 631 P2d 293 (1981), the Supreme Court followed St. v. Pike, 551 NW 2d 919 (Minn. 1996), in holding that an officer's knowledge that the owner of a vehicle has a revoked driver's license is enough to form the basis of a reasonable suspicion of criminal activity when the officer observes the vehicle being driven, as long as the officer remains unaware of any facts that would render unreasonable an assumption that the owner is driving the vehicle. St. v. Halvorson, 2000 MT 56, 299 M 1, 997 P2d 751, 57 St. Rep. 270 (2000), followed in Billings v. Costa, 2006 MT 181, 333 M 84, 140 P3d 1070 (2006). Costa was followed in St. v. Neil, 2009 MT 128, 350 M 268, 207 P3d 296 (2009).

Defendant's Discovery of Surveillance Grounds for Arrest: The defendant argued that the police had no basis to arrest him without a warrant. The Supreme Court upheld the arrest on the basis that the officers were aware that the defendant had learned he was under surveillance and his arrest was necessary to prevent him from destroying evidence. St. v. Sorensen, 243 M 321, 792 P2d 363, 47 St. Rep. 873 (1990).

Field Sobriety Tests Not Mandatory to Establish Probable Cause to Arrest on DUI Charge: Conducting field sobriety tests is not a requisite for determining whether probable cause exists for arrest on a DUI charge under 61-8-401. Probable cause must be based on an assessment of all relevant circumstances, and field sobriety tests are a tool that can assure the officer that the person is under the effect of intoxicating beverages. However, such tests are not mandatory and were not required as evidence in this case because the record was replete with other evidence supporting a DUI offense. Missoula v. Forest, 236 M 129, 769 P2d 699, 46 St. Rep. 237 (1989).

Citizen Informant's Report and Officers' Observations Forming Basis for Probable Cause: A citizen informant communicated the following facts, among others, to officers at the crime scene: (1) the defendant stabbed and shot at the informant; (2) defendant was intoxicated; (3) the woman in a trailer house with defendant was recently beaten by defendant; (4) the woman was terrified and believed she would be beaten again; and (5) informant believed the woman was in danger and was being held against her will. The officers observed informant's injured hand and his excited, fearful demeanor. The officers received no response in their attempts to hail the trailer occupants with a bullhorn. These circumstances constituted sufficient probable cause that an offense had been committed to justify a warrantless arrest. St. v. Hammer, 233 M 101, 759 P2d 979, 45 St. Rep. 1326 (1988).

Facts Following Stop Prompting Probable Cause: A founded suspicion to stop for investigative detention may ripen into probable cause to arrest through the occurrence of facts or incidents after the stop. St. v. Lee, 232 M 105, 754 P2d 512, 45 St. Rep. 903 (1988), citing St. v. Sharp, 217 M 40, 702 P2d 959, 42 St. Rep. 1009 (1985), and followed in St. v. Schoffner, 248 M 260, 811 P2d 548, 48 St. Rep. 424 (1991). See also Jess v. St., 255 M 254, 841 P2d 1137, 49 St. Rep. 951 (1992).

Arrest Outside City Limits by City Police Absent Local Ordinance — Arrest Lawful in Capacity as Private Citizen: The city of Eureka never enacted an ordinance giving city police jurisdiction outside the city limits pursuant to 7-32-4301, and defendant contended that his arrest for DUI and hit-and-run made 0.8 mile outside Eureka was therefore illegal and that all evidence resulting from the arrest was inadmissible. The Supreme Court found that by enacting 7-32-4301 (authorizing city police arrests within 5 miles of town), 46-6-502 (authorizing arrests by private citizens), and 46-6-411 (authorizing out-of-state officers in close pursuit to make arrests in Montana), it is clear that Montana no longer adheres to the common-law rule strictly prohibiting arrests outside an officer's jurisdiction. A police officer outside his jurisdiction has not lost his characteristics of being a private citizen; therefore, if an arrest by a private citizen

would be lawful under the circumstances, the arrest by an officer outside his jurisdiction would be lawful. St. v. McDole, 226 M 169, 734 P2d 683, 44 St. Rep. 561 (1987), followed in St. v. Williamson, 1998 MT 199, 290 M 321, 965 P2d 231, 55 St. Rep. 843 (1998).

Probable Cause for Warrantless DUI Arrest: After a citizen reported a vehicle being driven recklessly, the undersheriff discovered the vehicle parked at defendant's trailer. Defendant stepped outside his trailer where he admitted driving and agreed upon request to perform field sobriety tests. Upon failing the tests, defendant was arrested and subsequently convicted of driving under the influence of alcohol. Defendant appealed, alleging that evidence had been obtained pursuant to illegal arrest. The Supreme Court affirmed the conviction, stating that the citizen's report, defendant's admissions, and the undersheriff's observations provided the undersheriff with probable cause for the arrest. Defendant had reduced privacy expectation once he stepped outside the trailer. Police may legally seize evidence likely to disappear before a warrant can be obtained. St. v. Ellinger, 223 M 349, 725 P2d 1201, 43 St. Rep. 1778 (1986), followed in Jess v. St., 255 M 254, 841 P2d 1137, 49 St. Rep. 951 (1992). See also St. v. Lee, 232 M 105, 754 P2d 512, 45 St. Rep. 903 (1988), St. v. Schoffner, 248 M 260, 811 P2d 548, 48 St. Rep. 424 (1991), and In re Bauer v. St., 275 M 119, 910 P2d 886, 53 St. Rep. 65 (1996).

Federal Constitutional Requirement of Search Warrant Prior to Entry Into Home to Conduct Search or Make Arrest: A search warrant cannot be obtained under 46-5-203 (renumbered 46-5-224) for the purpose of searching for and seizing a person unless that person has been kidnapped. Although subsection (1)(c) of this section and 46-6-104 would have permitted entry into respondent's home to arrest a fugitive without a search warrant, entry into a home to conduct a search or make an arrest has been held by the U.S. Supreme Court in Steagald v. U.S., 451 US 204, 68 L Ed 2d 38, 101 S Ct 1642 (1981), to be unreasonable under the fourth amendment to the United States Constitution unless done pursuant to a warrant. Therefore, compliance with this section or 46-6-104 would not satisfy the requirements of the fourth amendment. St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984).

Stop and Frisk Procedure Applicable to Automobiles — Particularized Suspicion of Trained Police: Where, upon investigating a possible burglary, the investigating officer stopped a suspicious looking automobile and noticed what appeared to be stolen property in the back seat of the car, which was driven off at a high rate of speed in the middle of the investigation, the District Court did not err in denying the defendant's motion to suppress the stolen property recovered from the automobile. The dictum in St. v. Rader, 177 M 252, 581 P2d 437 (1978), that stop and frisk principles do not apply to automobiles must be abandoned in light of the principle most recently announced in U.S. v. Cortez, 449 US 411, 66 L Ed 2d 621, 101 S Ct 690 (1981), that an assessment of whether a crime has been committed must be based upon all relevant circumstances and the evidence evaluated in light of the knowledge of a trained law enforcement officer. When a trained police officer has a particularized suspicion that the occupant of a vehicle is or has been engaged in criminal activity or is a witness thereto, a limited and reasonable investigatory stop and search is justified. St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981), followed in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), St. v. Lee, 232 M 105, 754 P2d 512, 45 St. Rep. 903 (1988), In re Blake, 220 M 27 712 P2d 1338, 43 St. Rep. 143 (1986), St. v. Stemple, 198 M 409, 646 P2d 539, 39 St. Rep. 1085 (1982), St. v. Schatz, 194 M 59, 634 P2d 1193, 38 St. Rep. 1687 (1981), St. v. Halvorson, 2000 MT 56, 299 M 1, 997 P2d 751, 57 St. Rep. 270 (2000), and St. v. Herbenson, 2001 MT 75, 305 M 68, 22 P3d 1128 (2001). See also Jess v. St., 255 M 254, 841 P2d 1137, 49 St. Rep. 951 (1992), and In re Bauer v. St., 275 M 119, 910 P2d 886, 53 St. Rep. 65 (1996).

Probable Cause to Arrest — Corroboration — Recent Stabbing: Where a security guard called the police, informing the police that a stabbing had occurred and that the suspect was located in a certain area, and where this information was later corroborated when: (1) the police found the suspect; (2) the suspect admitted participation in the stabbing; (3) the police observed blood on the suspect; and (4) the suspect produced a knife with blood on it, the officers had sufficient knowledge to warrant the belief that an offense had been committed by the defendant and sufficient probable cause to arrest the defendant. St. v. Graves, 191 M 81, 622 P2d 203, 38 St. Rep. 9 (1981).

Immediate Warrantless Arrest — Evidence Obtained Pursuant to Arrest — Collective Police Information Considered — Exceptional Circumstances: On appeal from a conviction for conspiracy to sell dangerous drugs, the defendant attacked his arrest as being without probable cause and unlawfully warrantless. The Supreme Court found the arrest was based on probable cause and lawful. Therefore, the evidence seized after the arrest was admissible at trial. An officer could make an arrest without a warrant when he believed on reasonable grounds that the person had committed an offense and the existing circumstances required immediate arrest.

"Reasonable grounds" to arrest is synonymous with "probable cause" to arrest. Probable cause may be found in a case such as this by evaluating the collective information of the police, not just that of the arresting officer. Here the court found more than the defendant's mere presence at the scene of the crime, and it found probable cause had existed. On the issue of the necessity of immediate arrest, the court compared the situation to the "exceptional circumstances" that allow police to enter a residence without a warrant to search and arrest. Considering the possibilities of the defendant's fleeing and the likelihood that the evidence of the buy, which easily could have been destroyed or disposed of, might be found on the defendant because he was present at delivery, the court held that the officers were reasonable in their belief that an immediate arrest was necessary. St. v. Davis, 190 M 285, 620 P2d 1209, 37 St. Rep. 1958 (1980).

Probable Cause to Make Warrantless Entry and Arrest: The Supreme Court cautioned that arrest and search warrants should be used as the rule and not the exception but that sufficient exigent circumstances existed here, especially due to the involvement of juveniles, to justify the warrantless entry and arrest. St. v. Allen, 188 M 135, 612 P2d 199 (1980), following St. v. Hull, 158 M 6, 487 P2d 1314 (1971); St. v. Bennett, 158 M 496, 493 P2d 1077 (1972); St. v. Means, 177 M 193, 581 P2d 406 (1978).

Probable Cause to Arrest — Factors in Addition to Mere Presence at the Scene: Defendant's mere presence at the scene of the homicide was not sufficient probable cause to justify his arrest. The court agreed but stated that the facts presented more. The police had overheard the events in the house over an open telephone line and the defendant was present with the corpse at the scene when the police arrived within minutes after the events were overheard on the phone. The scratches on the defendant's face indicated recent involvement in a fight. These events sufficiently constituted probable cause to arrest the defendant. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Timeliness of Warrantless Arrest: Defendant, charged with mitigated deliberate homicide, argued that too much time had elapsed between commission of the crime and the arrest to support a warrantless arrest. The court disagreed because knowledge of the commission of a crime may be gained by an officer through a mechanical apparatus, and an offense is deemed committed in the presence of the officer so as to justify arrest without a warrant when he hears the disturbance and proceeds at once to the scene. What the officer overheard on the telephone reasonably led him to believe that the defendant was committing an offense. The warrantless arrest pursuant to that belief minutes later was proper regardless of whether or not the existing circumstances required immediate arrest. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Probability Sufficient: To constitute probable cause for arrest or issuance of a search warrant "only a probability of criminal conduct need be shown". St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978), quoting State ex rel. Garris v. Wilson, 162 M 256, 511 P2d 15 (1973).

Suspicion of Officer Insufficient for Probable Cause: Evidence obtained when officers stopped a vehicle on the pretext of a traffic violation and arrested the defendant without probable cause was properly suppressed. Suspicion of an officer alone, unsubstantiated by some evidence upon which to base a belief that a crime is or has been committed, is not enough to establish probable cause, no matter what the subsequent search discloses. St. v. Rader, 177 M 252, 581 P2d 437 (1978). For later case apparently to the contrary, see St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981), annotated under this section.

Marijuana Odor — Factor in Probable Cause: Law enforcement officers had probable cause to believe an offense was being committed in the defendants' residence and, because of the presence of exigent circumstances, were justified in entering and arresting the defendants and searching the defendants and the premises immediately under their control. Thus, the constitutionality of the warrantless search and seizure condition of parole and probation status was irrelevant. St. v. Means, 177 M 193, 581 P2d 406 (1978).

Crime Committed in Another State: The Supreme Court held that Idaho law recognizes the common-law rule that an arrest may be made without a warrant when the arresting officer has probable cause to believe the person arrested had committed a crime in another state. Thus, subsequent confessions of a codefendant were properly admitted. St. v. Coleman, 177 M 1, 579 P2d 732 (1978). See also St. v. Lynch, 1998 MT 308, 292 M 144, 969 P2d 920, 55 St. Rep. 1278 (1998).

Odor of Marijuana — Not Probable Cause: A police officer's detection of the odor of marijuana emanating from inside an automobile, absent evidence of visible content, was insufficient probable cause for a warrantless search and subsequent arrest of the occupants on the basis of evidence seized in the search. St. v. Schoendaller, 176 M 376, 578 P2d 730 (1978).

No Probable Cause — Unreliability of Tip: Police detectives did not have probable cause to enter an upstairs room of an inn, arrest defendants for participating in a card game on

unlicensed premises, and search the room because of the inability of the informant's tip to satisfy the two-pronged Aguilar test. St. v. Robey, 176 M 298, 577 P2d 1226 (1978).

Probable Cause to Stop: The stop of the defendant's automobile and subsequent events were without probable cause when based solely on conjecture and speculation of another officer transmitted by radio to the arresting officer not present at the scene of the "suspicious" activity. St. v. Marshall, 174 M 278, 570 P2d 909 (1977). See St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981), annotated under this section.

Probable Cause Sufficient Without Exigency — Existing Circumstances: The police had probable cause to arrest the defendant when the facts and circumstances within the officers' knowledge could reasonably have led them to no other belief than that the defendant was committing the offense charged, notwithstanding the issue of whether or not the existing circumstances required the arrest. St. v. Lenon, 174 M 264, 570 P2d 901 (1977).

Good Faith Not Sufficient: Good faith or mere suspicion on the part of a police officer is not enough to establish probable cause. A pretext traffic stop may not be used to avoid the requirement. St. v. Lahr, 172 M 32, 560 P2d 527 (1977). See St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981), annotated under this section.

Probable Cause Sufficient Without Actual Offer to Sell Drugs: Although the defendant made no actual offer to sell drugs, except by conduct, the court found probable cause because the facts and circumstances were within the officer's knowledge and he had reasonably trustworthy information. Those facts are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. St. v. Hill, 170 M 71, 550 P2d 390 (1976).

Reliable Informant: An informant was determined to be reliable for the purpose of reasonable grounds for an arrest without a warrant under this section. State ex rel. Goulding v. District Court, 167 M 255, 538 P2d 18 (1975).

Suspicion Insufficient: An arrest or search and seizure made without a warrant is illegal and therefore unreasonable when it is made upon mere suspicion or belief unsupported by facts, circumstances, or credible information calculated to produce such belief. State ex rel. Wong You v. District Court, 106 M 347, 78 P2d 353 (1938). See St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981), annotated under this section.

Attorney General's Opinions

Peace Officers' Authority to Enforce Provisions of Mandatory Insurance Law: Peace officers who have reasonable grounds to believe that an individual is in violation of the mandatory motor vehicle insurance law may either effect the person's immediate arrest or issue a notice to appear. 38 A.G. Op. 49 (1979).

Law Review Articles

Montana's New Domestic Abuse Statutes: A New Response to an Old Problem, Women's Law Caucus, 47 Mont. L. Rev. 403 (1986).

Collateral References

Arrest *key* 63(1) through (4), 65; Criminal Law *key* 218(1).

6A C.J.S. Arrest §§14 through 36.

5 Am. Jur. 2d Arrest §§40 through 46.

Officer's ruse to gain entry as affecting admissibility of plain-view evidence—modern cases. 47 ALR 4th 425.

What amounts to violation of drunken driving statute in officer's "presence" or "view" so as to permit warrantless arrest. 74 ALR 3d 1138.

46-6-211. Issuance of arrest warrant or summons.

Commission Comments

1991 Comment: Subsection (1) preserves the general rules concerning the issuance of a warrant or summons by a court. The provision gives the court discretion to issue either a warrant or summons when the defendant is a person and discretion to issue a summons if the defendant is a corporation. Subsection (1) preserves the practice that permits more than one warrant or summons to issue from a single criminal charge. Some other provisions of the 1987 code, however, have been amended.

A key amendment allows a warrant or summons to issue only upon the filing of a charge. Previously, the code allowed a summons to issue when the court was otherwise authorized to issue an arrest warrant. An arrest warrant may issue only after filing a complaint or charge against the defendant. See 1987 MCA 46-6-201. The Commission recognized that the standard—probable cause—is the same for filing a charge as for issuing a warrant. This statute should not cause any change in established procedure and still contemplates that either a warrant or summons may issue either simultaneously with or after filing a charge.

The second sentence of subsection (1) affords the court the discretion to issue a summons when a charge is filed against a corporation. The Commission acknowledged that this change departs from the mandate in 1987 MCA 46-6-304(1) but has determined that the court should have such discretion. Obtaining the appearance of the corporation by other means may now be considered.

The general rule regarding service of a summons, whether to a person or corporation, follows the procedure established in civil proceedings but adds a new provision allowing a criminal summons to be mailed as well as personally served. This practice is now common and saves considerable time and expense. The Commission believed that service by mail was appropriate because the court could issue a warrant and was giving the defendant a break by using a summons.

The federal rules provide that an arrest warrant will issue unless an attorney for the government requests a summons. See Rule 4(a), Fed. R. Crim. P. While the Commission recognized that the County Attorney may be helpful to the court, allowing the court final discretion was considered the proper rule. The uniform rules appear to contemplate a lesser standard for the issuance of a summons. The Commission did not consider that rule as an alternative. See Rule 221, Unif. R. Crim. P.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), before "46-11-201", deleted "46-11-110 and". Amendment effective March 12, 1997.

46-6-212. Failure to appear following summons or notice to appear.

Commission Comments

1991 Comments: This statute consolidates two sections found in the 1987 code that established the procedure upon failure to appear in response to a summons. Subsection (1) preserves the substance of 1987 MCA 46-6-303. The statute, however, does not provide that the court must await a defendant's failure to respond to a notice to appear before an arrest warrant can issue. The statute treats the failure to respond to a notice to appear and to a summons in the same manner. That is, once the judge is satisfied that the person commanded to appear will not do so, an arrest warrant may issue immediately. In either case, the judge's discretion to issue an arrest warrant is preserved.

Subsection (2) preserves 1987 MCA 46-6-304(3), regarding the procedure followed upon the failure of a corporation to appear.

This statute allows the judge to issue a warrant of arrest either before the time for the appearance stated in the summons or after the person fails to appear. The statute contemplates that a person is more likely to respond to a summons if the alternative is the issuance of an arrest warrant. The failure to appear in response to a notice to appear or a summons should not result in a contempt citation.

Source: [Former section 46-6-303] A.L.I., section 14.

This provision allows the magistrate to issue a warrant of arrest either before the time for the appearance stated in the summons or after the person fails to appear. This provision does not make failure to appear a contempt of court. The issuance of an arrest warrant should be sufficient if the person summoned does not appear.

The language of the second sentence of the section serves as a directive to the magistrate to guide his actions in issuing an arrest warrant.

[Former section 46-6-304] Illinois Code of Criminal Procedure, [Chapter] 38, section 107-13; A.L.I., sections 15-17, and R.C.M. 1947, sections 94-9601 through 94-9610.

The section continues the present law establishing a standard for proceeding against a corporation in a criminal action.

The section is intended to remove surplus language from the present code sections without changing the substance.

Compiler's Comments

1991 Amendment: (46-6-303) Deleted former first sentence that read: "Upon failure of the person summoned to appear, the magistrate shall issue a warrant of arrest", in first sentence, after "summons", inserted "or notice to appear", before "becomes" substituted "judge" for "magistrate", and after "person" substituted "has not appeared or" for "summoned"; and made minor changes in style.

(46-6-304) Deleted former (1) and (2) that read: "(1) Upon a charge filed against a corporation for the commission of an offense, the court shall issue a summons setting forth the nature of the offense and commanding the corporation to appear before the court at a certain time and place.

(2) The summons for the appearance of a corporation may be served in the manner provided for service of summons upon a corporation in a civil action"; after "entered" substituted "in accordance with 46-12-204 and the matter must" for "by the court having jurisdiction to try the offense for which the summons was issued and such court shall"; and made minor change in style.

Collateral References

Corporations *key* 531, et seq.

19 C.J.S. Corporations §727.

46-6-213. Form and content of summons.

Commission Comments

1991 Comment: Subsections (1) and (2) retain 1987 MCA 46-6-302. Use of the summons is relatively new in Montana. The summons is an instrument designed to get a person into court without the necessity and inconvenience of an immediate arrest. This statute specifies the minimum requirements of a valid summons.

Subsection (4) is an amendment to the 1987 code provision and requires the summons to forewarn the individual summoned of the consequences of a failure to appear. This statute reflects the suggested contents of a summons as presented in the uniform rules. See Rule 222(d), Unif. R. Crim. P.

The 1967 Commission's comments concerning the summons remain appropriate:

Issuing a summons does not constitute an arrest. In fact, it is a courtesy substitute for an arrest when the court, in its discretion believes that the person can be relied upon to appear. Further, it precludes the necessity of setting bail..

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 107-11.

This [46-6-301 (now repealed) and this section] is a new provision to Montana criminal law which establishes a procedure for getting persons into court without the necessity and inconvenience of an immediate arrest. This provision vests the justice of the peace and the district court judge with discretion to refrain from using a warrant of arrest when they feel the person summoned will appear. The broad language of this provision allows the use of a summons in either a felony or misdemeanor case.

The Federal Rules of Criminal Procedure, Rule 4, provide for the use of a summons. Also, the sections of several states provide for the use of summons for specific criminal offenses or classes of offenses. It has been stated that in England a summons is used in eighty per cent of the criminal cases. Issuing a summons does not constitute an arrest. In fact, it is a courtesy substitute for an arrest when the court, in its discretion believes that the person can be relied upon to appear. Further, it precludes the necessity of setting bail.

Compiler's Comments

1991 Amendment: Inserted (1) concerning issuance of summons instead of warrant; inserted (2) concerning service of summons; in (3)(a), after "Montana", inserted "or in the name of the municipality if the violation of a municipal ordinance is charged"; inserted (4) requiring issuance of arrest warrant for failure to appear; and made minor changes in style.

46-6-214. Form and content of arrest warrant.

Commission Comments

1991 Comment: This statute is a restatement of the 1987 statutes providing for the form and content of an arrest warrant. The provisions of 1987 MCA 46-6-202(1) are preserved within this statute. Subsection (2) reflects the 1987 code that provided that the amount of bail, if any, may be stated in the warrant. See 1987 MCA 46-6-202(2).

This statute consolidates the 1987 code concerning the form of the arrest warrant. No change to prior law is contemplated by adopting this statute.

[See commission comments to 46-6-201.]

Compiler's Comments

1991 Amendment: In (1)(c), after "before", deleted "the court issuing the warrant or, if the judge is absent or unable to act, before" and after "court" substituted "for an initial appearance" for "in the same county or the adjoining county"; deleted (4) that read: "(4) If an arrest is made in a county other than the one in which the warrant was issued, the arrested person shall be taken without unnecessary delay before the nearest and most accessible judge in the county where the arrest was made or the adjoining county"; and made minor changes in style.

Case Notes

Signed Arrest Warrant Listing Wrong Offense Considered Inconsequential and Ministerial — Arrest Pursuant to Valid Warrant — Motion to Suppress Properly Denied: Law enforcement

executed a search warrant on Torgeson's residence in Mineral County and found a meth lab. Torgeson was charged in Mineral County with operating a clandestine drug laboratory and the District Court issued a warrant for Torgeson's arrest, but the warrant incorrectly named the charged offense as a violation of bail conditions. Torgeson was subsequently located in Missoula County. Missoula County officers verified the Mineral County charges and confirmed that a warrant was outstanding, and went to Torgeson's residence to arrest him. Torgeson was arrested based on the Mineral County warrant and was read his Miranda rights. A search of the residence revealed another meth lab. Torgeson moved to dismiss or suppress statements he made after being given the Miranda warnings because the arrest was based on an invalid arrest warrant from Mineral County. The motion was denied, and on appeal the Supreme Court affirmed. Section 46-6-210 provides that a peace officer may arrest a person when the officer reasonably believes that a warrant for the person has been issued, and 46-6-204 provides that a warrant may not be dismissed because of technical irregularities that do not affect the person's substantial rights. Torgeson described no substantial right that was prejudiced by the erroneous charge stated in the Mineral County warrant. The warrant was in writing, was signed by a District Court judge, and was based on an existing felony charge of operating a clandestine drug laboratory. The name of the person to be arrested, the date of the charge, and the amount of bail were all correctly stated in writing, and a complete record of the proceedings leading to issuance of the warrant existed. The irregularity in the warrant did not affect Torgeson's substantial rights, and under these circumstances Torgeson was arrested pursuant to a valid warrant, so the motion to dismiss or suppress was properly denied. St. v. Torgeson, 2008 MT 295, 345 M 415, 191 P3d 448 (2008), distinguishing St. v. McKee, 1998 MT 110, 288 M 454, 958 P2d 700 (1998).

Arrest With Telephonically Approved Warrant and Without Written Copy Signed by Judge: A judge approved an arrest over the phone. She typed the warrant on her computer but never gave a copy, with her signature on it, to the officer. The officer's arrest of defendant in his home, without a warrant that was in writing and signed, as required by this section, when two persons guarded the home while the officer called the judge and when the judge did not live far from the home, was illegal because it was made without a valid warrant. The District Court erred by denying a motion to suppress all evidence gained as a result of the invalid arrest warrant. St. v. McKee, 1998 MT 110, 288 M 454, 958 P2d 700, 55 St. Rep. 433 (1998).

Delay in Initial Appearance — Evidence Excluded: The failure to provide the defendant with a prompt initial appearance necessitated exclusion of evidence obtained and statements allegedly made after the defendant's arrest when he established that the delay was unnecessary and the prosecution failed to meet the burden of showing that such evidence and statements were not reasonably related to the delay. St. v. Benbo, 174 M 252, 570 P2d 894 (1977). See also St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999).

Description of Place and Property: When probable cause for issuance of a search warrant was shown, disclosing the time, place, and manner of an alleged violation of the liquor law, the warrant could validly issue, notwithstanding that the complaint did not set forth the time of commission of offense. St. v. Tesla, 69 M 503, 223 P 107 (1924).

Attorney General's Opinions

Jurisdiction Over DUIs: A City Court may issue an arrest warrant in the name of the state of Montana when a violation of 61-8-401 is charged. 41 A.G. Op. 95 (1986).

Collateral References

Criminal Law *key* 208, et seq.

22 C.J.S. Criminal Law §451.

46-6-215. Execution of warrant.

Commission Comments

1991 Comment: This statute reflects the 1987 code concerning the execution of an arrest warrant. See 1987 MCA 46-6-202(3). The general rule is preserved in the first two sentences. The exception to the general rule—when a warrant has been issued for the violation of local ordinances—is retained in the last sentence.

Compiler's Comments

1991 Amendment: Near beginning, after "warrant", substituted "may" for "shall" and at end substituted "by law" for "by 7-32-4301 and 7-32-4302"; and made minor changes in style.

Case Notes

Arrest Two Years and Five Months From Date of Offense — No Denial of Due Process: There was no violation of the statute of limitations or denial of defendant's due process rights when an arrest warrant was executed 1 year and 9 months from the date it was issued (2 years and 5

months from the date of the offense). St. v. Cummins, 257 M 491, 850 P2d 952, 50 St. Rep. 377 (1993).

46-6-216. Manner of arrest with warrant.

Commission Comments

1991 Comment: This statute adopts 1987 MCA 46-6-203, with minor changes made to provide for a gender-neutral statute. This statute contemplates no changes in the present manner of making an arrest under a warrant.

Source: A.L.I., section 24.

The present Montana law does not draw a distinction between an arrest with or without a warrant in so far as the officer's conduct is concerned. This section attempts to define exactly when the warrant must be shown to the arrested person. California recently adopted similar language allowing the officer to arrest on a warrant, without having the warrant in his possession. This approach should make the arrest warrant a more effective law enforcement tool when used with modern methods of communication.

Compiler's Comments

1991 Amendment: Made minor changes in style.

Applicability of Commission Comments: The amendment of this section by Ch. 116, L. 1979, appears to be nonsubstantive and thus would not affect the applicability of the commission comments.

Case Notes

Arrest Without Warrant in Officer's Possession: Defendant attempted to suppress identification evidence on the grounds that the arrest was illegal. He argued that the arresting officer should have had an arrest warrant in his possession. The Supreme Court rejected the argument since the Kalispell police did have a warrant for the arrest of the defendant at the time of the arrest and it was not necessary that the arresting officer have it in his possession. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

Collateral References

Arrest *key* 65.

6A C.J.S. Arrest §51.

5 Am. Jur. 2d Arrest §§10 through 29.

Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records. 45 ALR 4th 550.

Part 3
Warrantless Arrest and Notice to Appear

46-6-310. Notice to appear.

Commission Comments

1991 Comment: This statute, formerly 1987 MCA 46-6-404, affords a peace officer the discretion either to make an arrest or to issue a notice ordering the person to appear at a certain time and place.

As the 1967 Commission commented, "This notice is a courtesy to the person involved and his failure to appear will result in a summons or warrant of arrest being issued."

Neither the Federal Rules of Criminal Procedure nor the Uniform Rules of Criminal Procedure provide for such a notice requirement.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 107-12.

This section is the counterpart to [46-6-301 (now repealed, but see 46-6-213)] which vests the magistrate with discretion as to whether an arrest warrant is necessary to obtain a person's presence in court. This provision vests similar discretion in a peace officer arresting without a warrant.

This provision seems to be a workable solution to a very touchy social and legal problem. Since a person is not arrested when he is given a notice to appear, this method of securing a person's presence in court may save embarrassment for both the police officer and the person who received the notice.

This notice is a courtesy to the person involved and his failure to appear will result in a summons or warrant of arrest being issued. The commission did not attach any civil or criminal penalty for failure to appear.

The commission did agree that a procedure patterned after the operating procedure of the Montana highway patrol on issuing traffic citations would be followed. The officer would give the

person notice and if he failed to appear, then the officer could sign the notice and it would become the complaint forming the basis for the warrant of arrest.

Compiler's Comments

2009 Amendment: Chapter 360 inserted (1)(f) regarding suspension of driver's license; and made minor changes in style. Amendment effective July 1, 2009.

1991 Amendment: Made minor changes in style.

Case Notes

Truant Smelling of Alcohol — Particularized Suspicion for Arrest — Motion to Suppress Properly Denied: A 14-year-old boy's mother called his school, reported that he had not returned home the previous night, and requested that he be picked up. The school resource officer notified police and asked that the boy be brought to school if found. An officer later found the boy on the street smelling of alcohol and took the boy to the police station where it was discovered that several town businesses had been burglarized during the night, including a bowling alley where money and liquor had been stolen. Money and liquor were found on the youth, and his shoes were taken as evidence to see if they matched prints found at the bowling alley. The youth moved that all evidence be suppressed, but the motion was denied. On appeal, the Supreme Court affirmed. Based on the fact that the officer smelled alcohol on the youth, the officer's particularized suspicion that the youth had been drinking developed into probable cause to believe that the youth committed the offense of consuming or possessing alcohol. Because the officer had probable cause to make an immediate arrest, including the fact that the boy had been reported missing from home and was truant from school, it was constitutionally permissible to take the boy into custody pursuant to 41-5-321 and reasonable to conduct a search pursuant to that arrest for the youth's safety. In re Z.M., 2007 MT 122, 337 M 278, 160 P3d 490 (2007).

Arrest and Detention for Nonjailable Offense Unreasonable Absent Circumstances to Justify Immediate Arrest: A Havre police officer responded to a 2:47 a.m. complaint that two people were "messing around with cars" and were running toward the post office, but no physical description was provided. While searching the post-office area, the officer noticed a person walking down the street. Upon seeing the police car, the person began running. Bauer was eventually found and arrested for minor in possession (MIP), second offense. During booking, Bauer was also found to be in possession of drugs, but moved to suppress on grounds that his arrest and detention for a nonjailable offense was an unlawful violation of the right to privacy, the right to be free from unreasonable search and seizure, and the right to be free from cruel and unusual punishment. The District Court concluded that the arrest was lawful because once the officer had probable cause to arrest, the right to detain was inherent. The Supreme Court disagreed, reversed, and suppressed the fruits of the search. When determining the reasonableness of a warrantless search, the state's interest must be balanced against the level of intrusion into an individual's privacy resulting from the search, and this analysis applies equally to the seizure of a person. Although 46-6-311 gives officers the discretion to either arrest or issue a notice to appear, to be constitutional, the officer's exercise of that discretion must be reasonable, and in addition to probable cause, there must also be circumstances that require immediate arrest. It is unreasonable for an officer to effect an arrest and detention for a nonjailable offense when there are no circumstances to justify an immediate arrest, and a person stopped for such an offense should not be subjected to the indignity of an arrest and police station detention when a simple, nonintrusive notice to appear will serve the interests of law enforcement. Here, the officer knew that imprisonment was not a potential punishment for Bauer's second offense MIP, and there were no circumstances that required Bauer's immediate arrest, so Bauer should have been issued a notice to appear in lieu of arrest. St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001).

Attorney General's Opinions

Peace Officers' Authority to Enforce Provisions of Mandatory Insurance Law: Peace officers who have reasonable grounds to believe that an individual is in violation of the mandatory motor vehicle insurance law may either effect the person's immediate arrest or issue a notice to appear. 38 A.G. Op. 49 (1979).

46-6-311. Basis for arrest without warrant — arrest of predominant aggressor — no contact order.

Commission Comments

1991 Comment: This statute closely reflects 1987 MCA 46-6-401(1)(d). That code provision described when a peace officer could effect an arrest without a warrant. Previously, such warrantless arrests could occur when the peace officer "believes on reasonable grounds" that the

person is committing or has committed an offense. The statute recognizes that "reasonable grounds" is synonymous with probable cause. The operable phrase "probable cause to believe" replaces "believes on reasonable grounds" in the statute. The change accurately reflects the 1987 MCA. See St. v. Rader, 177 Mont. 252, 256, 257 (1978), and Art. II, sec. 11, Mont. Const.

As the 1967 Commission noted, this provision provides a significant distinction for cases in which such a warrantless arrest may occur. Namely, "an arrest without a warrant may be made on reasonable grounds that the person has committed or is committing an offense, and not on the basis that "an offense has in fact been committed"". Clearly, probable cause for an arrest without a warrant must attach to the person, not the offense.

While the Uniform Rules of Criminal Procedure provide for an arrest without a warrant, they do not compare to either the 1987 code or this statute. The 1987 MCA language is not in the Federal Rules of Criminal Procedure but is reflected in the current federal statutes concerning a warrantless arrest. See 18 U.S.C. 3052. As noted, however, this statute adopts language that recognizes that the appropriate standard is probable cause. The change avoids any possible consideration that "reasonable grounds" is a lesser standard. Substantive law in the area has not been altered.

Compiler's Comments

2005 Amendment: Chapter 411 inserted (3) concerning standing order for no contact in partner or family member assault cases. Amendment effective October 1, 2005.

Preamble: The preamble attached to Ch. 411, L. 2005, provided: "WHEREAS, the Legislature has reviewed and considered the report filed by the Montana Domestic Violence Fatality Review Commission, which conducted case reviews of domestic violence homicides of spouses, partners, and children; and

WHEREAS, victims of domestic violence are at high risk for additional threats, violence, and homicide; and

WHEREAS, a victim's participation in a prosecution is jeopardized when a domestic violence assault is followed by intimidation in the form of threats and coercion; and

WHEREAS, courts have the authority to impose conditions on defendants charged with partner or family member assault when conditions will improve victim safety; and

WHEREAS, a court order restricting contact between the offender and the victim will improve victim safety."

2003 Amendment: Chapter 304 in (2)(b) in four places substituted "predominant aggressor" for "primary aggressor". Amendment effective October 1, 2003.

1997 Amendment: Chapter 484 inserted (2)(b) requiring officer to evaluate to determine primary aggressor when responding to partner or family assault complaint and providing criteria for determining primary aggressor; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 11, Ch. 484, L. 1997, was a severability clause.

1995 Amendment: Chapter 350 in (2), in second sentence, substituted "partner or family member assault" for "domestic abuse"; and made minor changes in style.

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

1993 Amendment: Chapter 425 in first sentence in (2) substituted "partner" for "household member"; and made minor changes in style.

Case Notes

Authority and Probable Cause to Make DUI Arrest: Ditton contended that the city police officer who arrested Ditton for DUI lacked authority to make the arrest because the arrest occurred outside city limits. Ditton also asserted that the officer lacked probable cause to make the arrest. Nevertheless, Ditton was convicted of DUI. Ditton appealed, but the Supreme Court affirmed on both issues. Although the arrest was outside city limits, pursuant to 7-32-4301 and relevant city ordinances, police officers had authority to conduct traffic stops within 5 miles of city limits. The arrest was within that area, so the officer had authority to make the stop. In addition, probable cause was present based on Ditton's overall driving, including striking a stop sign after the officer activated emergency lights, and an audio and video recording of the interactions between Ditton and the officer. The interactions, which included Ditton's performance in field sobriety tests, Ditton's overall appearance and level of functionality, and Ditton's driving, were sufficient to allow the officer to make a probable cause determination. St. v. Ditton, 2009 MT 57, 349 M 306, 203 P3d 806 (2009).

Probable Cause and Particularized Suspicion of DUI Based on Flagrant Traffic Violations — Suspension of License Proper: Cybulski drove west in the eastbound lane of an interstate highway for at least 30 minutes, obviously oblivious to the surrounding environment. Cybulski

initially refused to stop for a pursuing officer, and when she did stop, she failed to respond to the officer's instructions, and the officer had to forcibly remove her from the car before placing her under arrest. Cybulski failed field sobriety tests and refused to take a breath test, so her license was suspended. Cybulski later petitioned for reinstatement of her license, and the District Court granted the petition on grounds that although the officer had a particularized suspicion to stop Cybulski for driving on the wrong side of the highway, the officer lacked the requisite particularized suspicion to conduct sobriety tests and the probable cause to make a DUI arrest. On appeal, the Supreme Court reversed. An experienced officer could infer that Cybulski was DUI based on the sheer length of time that Cybulski traveled on the wrong side of the interstate and her apparent obliviousness to oncoming traffic traveling in the same lane. When paired with Cybulski's unusually delayed response to pursuing officers, the officer was entitled to infer that Cybulski was DUI even before she stopped her car. Probable cause existed because there were sufficient facts and circumstances within the officer's personal knowledge to warrant a reasonable belief that Cybulski had committed an offense. Because the officer had both a particularized suspicion to believe that Cybulski was DUI and probable cause for an arrest, Cybulski was lawfully under arrest at the time that she was removed from her car and handcuffed on the interstate and when asked to submit to a breath test, so her license was properly suspended. In re License Suspension of Cybulski, 2008 MT 128, 343 M 56, 183 P3d 39 (2008).

Search Incident to Conversation After Traffic Stop Concluded Considered Voluntary — Motion to Suppress Properly Denied: Officers stopped Merrill for investigation following an improper lane change. A license plate check showed that Merrill was not the vehicle owner. However, the vehicle was owned by a person suspected by one of the officers to be involved with dangerous drugs. The officer told Merrill that he was just giving her a verbal warning and that she was free to go. Stepping away from the vehicle, the officer noticed that Merrill seemed unusually nervous. Suspicious about the report regarding the vehicle owner, the officer again approached the vehicle and asked Merrill if he could talk to her. Merrill answered affirmatively. The officer then asked if he could search the vehicle. Merrill again answered affirmatively. Merrill stepped out of the car, and the officer asked if he could search her person, including her pockets. Merrill again answered affirmatively, and the officer discovered drugs in her pocket. Merrill contended that she had been unlawfully detained subsequent to an investigatory stop and that the evidence should be suppressed. The trial court concluded that the search was voluntary and denied the suppression motion. On appeal, the Supreme Court affirmed. Once the officer completed the investigation of the improper lane change, the investigatory stop was concluded and Merrill was free to leave. What followed was neither a subsequent investigatory stop nor an extension of the first stop, but rather a voluntary exchange, and nothing prevents an officer from engaging a citizen in a voluntary conversation. A purely voluntary conversation intrudes on no constitutionally protected interest, so Merrill was accorded no constitutional protection related to the search and seizure, and denial of the motion to suppress was appropriate. St. v. Merrill, 2004 MT 169, 322 M 47, 93 P3d 1227 (2004), followed in St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004).

Legal Duty of Sheriff to Protect Domestic Violence Victim — Exception to Public Duty Doctrine Immunity Created Between Sheriff and Victim: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found the Sheriff negligent and awarded plaintiffs $358,000. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that no special relationship existed between the victim and the Sheriff under the domestic violence statutes that would trigger a legal duty upon the Sheriff to protect the victim. On appeal, the Supreme Court noted an exception to the public duty doctrine's immunity provision in cases when a special relationship between the victim and an officer has been created. The domestic violence statutes created such a special relationship, which gave rise to a special duty by virtue of the victim's status as a member of a protected class. The Sheriff had a statutory duty to protect the victim with a notice of her rights under 46-6-602, and by failing to give the victim the required notice, the jury could conclude that the Sheriff was negligent and, arguably, negligent per se. Although arrest of the husband was discretionary, the Sheriff also had a mandatory duty under 46-6-603 to seize the husband's weapon, which had been displayed during a prior domestic dispute, but failed to do so. Thus, the jury had sufficient evidence to conclude that the Sheriff's negligence or negligent per se conduct led to the victim's death, and the District Court committed reversible error in granting judgment to the contrary. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004), following Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999).

Preservation of Right to Argue Sufficient Evidence of Negligence on Appeal From Judgment as Matter of Law: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found for the plaintiffs. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that the domestic violence statutes did not trigger mandatory legal duties upon the Sheriff regarding arrest and seizure. On appeal, the Sheriff argued that because plaintiffs did not specifically appeal from the District Court's refusal to instruct the jury that violations of the arrest and weapon seizure provisions of the domestic violence law were negligence per se, plaintiffs could not argue on appeal that evidence that the statutes were violated supported the verdict. The Supreme Court examined the definitions of common-law negligence and negligence per se, noting that the jury was given the full panoply of instructions on common-law negligence and that despite the fact that negligence per se instructions were not given, plaintiffs nevertheless argued that violation of the statutes was evidence of negligence. Pursuant to Nehring v. LaCounte, 219 M 462, 712 P2d 1329 (1986), even if a violation of a statute does not constitute negligence per se, the violation may nonetheless be considered as evidence of negligence. Because plaintiffs appealed from the judgment as a matter of law, they preserved their right to argue on appeal that the jury had before it sufficient evidence of negligence. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004).

Issues for Consideration in Petition for Review of Seizure of Driver's License: As established in Bush v. Dept. of Justice, 1998 MT 270, 291 M 359, 968 P2d 716 (1998), the three issues to be determined by a District Court in a petition for review of a seizure of a driver's license are whether: (1) the arresting officer had a particularized suspicion that a person was driving or in actual control of a vehicle on the ways of this state while under the influence of alcohol or drugs; (2) the petitioner was lawfully under arrest, including the existence of probable cause; and (3) the petitioner in fact declined to submit to a breath test. In this case, Widdicombe contested the first two determinations, but the Supreme Court affirmed. While leaving town on a two-lane highway, the arresting officer and another officer in the patrol car observed Widdicombe crossing the center lane three times, in violation of 61-8-321, and this fact was corroborated by videotape evidence. Thus, Widdicombe failed to meet the burden of proving a lack of particularized suspicion for the initial stop. Further, it was not necessary for the arresting officer to testify to probable cause when another officer witnessed the event and testified. Thus, Widdicombe failed to prove that the officers did not have probable cause for the arrest. Widdicombe v. State ex rel. LaFond, 2004 MT 49, 320 M 133, 85 P3d 1271 (2004), distinguishing St. v. Lafferty, 1998 MT 247, 291 M 157, 967 P2d 363 (1998).

Exigent Circumstances and Probable Cause Justifying Warrantless Entry Into Private Home — Motion to Suppress Evidence of Warrantless Search Properly Denied: In response to an urgent domestic violence 9-1-1 call from Saxton, officers arrived at Saxton's mobile home, but because they received no response to their calls and knocking, the officers entered the home to protect the lives of possible victims inside. Once inside, the officers discovered a marijuana growing operation and subsequently arrested Saxton on drug charges. Saxton moved to suppress the evidence on grounds that the warrantless entry was unlawful, but the motion was denied, and Saxton appealed. The Supreme Court recognized the general rule that warrantless searches conducted inside a person's home are per se unreasonable, with few exceptions. Pursuant to St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065 (1998), one exception occurs when an officer concludes that there are exigent circumstances and probable cause to conduct the search, and in this case, exigent circumstances and probable cause justified entry into the home. It was reasonable for the responding officers to conclude that it was necessary to enter the home to discover and protect Saxton or other potentially incapacitated victims. Because entry was justified, the District Court did not err in denying Saxton's motion to suppress evidence obtained as a result of the search. St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003).

Defendant Present in Apartment Where Methamphetamine Lab Found — Totality of Circumstances Justifying Warrantless Arrest: Officers raided Savage's apartment, identified by an anonymous tip as a suspected methamphetamine laboratory. Nalder was also present, and although officers had no previous suspicions regarding Nalder, they arrested her after hearing a toilet running and observing her standing in the kitchen, which was adjacent to the bathroom, near what appeared to be a jar filled with a substance in the first stage of the methamphetamine-producing process. During an interview, Nalder admitted to flushing substances used to make methamphetamine down the toilet when she heard the officers announce themselves. Nalder was charged with tampering with physical evidence, but Nalder moved to suppress the statements and the charge on grounds that probable cause did not exist

for her warrantless arrest. The motion was denied, and Nalder was convicted and appealed, contending error in denial of the motion to suppress based on certain findings that were allegedly incorrect. The Supreme Court affirmed. The trial court's finding that the officers announced their presence twice before entering the apartment, contrary to Nalder's claim that she did not hear any knocking, was supported by the evidence and not clearly erroneous because failure to hear did not constitute evidence contradicting the officers' testimony that they announced themselves. The trial court's finding that the officers broke down the door was not supported by substantial evidence and was thus erroneous, but the error was not prejudicial in light of the totality of the circumstances. Nalder correctly asserted that her mere presence at the scene did not justify arrest and that there must be some connection with criminal activity before her warrantless arrest was justified. However, considered in light of the totality of the circumstances and the trained officers' knowledge, there was sufficient probable cause for Nalder's arrest. The officers received extensive training in what to reasonably expect while raiding a methamphetamine laboratory, and evaluated in accordance with the officers' perceptions, they could reasonably believe that Nalder was committing, and had just committed, a crime. St. v. Nalder, 2001 MT 270, 307 M 280, 37 P3d 661 (2001).

Arrest and Detention for Nonjailable Offense Unreasonable Absent Circumstances to Justify Immediate Arrest: A Havre police officer responded to a 2:47 a.m. complaint that two people were "messing around with cars" and were running toward the post office, but no physical description was provided. While searching the post-office area, the officer noticed a person walking down the street. Upon seeing the police car, the person began running. Bauer was eventually found and arrested for minor in possession (MIP), second offense. During booking, Bauer was also found to be in possession of drugs, but moved to suppress on grounds that his arrest and detention for a nonjailable offense was an unlawful violation of the right to privacy, the right to be free from unreasonable search and seizure, and the right to be free from cruel and unusual punishment. The District Court concluded that the arrest was lawful because once the officer had probable cause to arrest, the right to detain was inherent. The Supreme Court disagreed, reversed, and suppressed the fruits of the search. When determining the reasonableness of a warrantless search, the state's interest must be balanced against the level of intrusion into an individual's privacy resulting from the search, and this analysis applies equally to the seizure of a person. Although this section gives officers the discretion to either arrest or issue a notice to appear, to be constitutional, the officer's exercise of that discretion must be reasonable, and in addition to probable cause, there must also be circumstances that require immediate arrest. It is unreasonable for an officer to effect an arrest and detention for a nonjailable offense when there are no circumstances to justify an immediate arrest, and a person stopped for such an offense should not be subjected to the indignity of an arrest and police station detention when a simple, nonintrusive notice to appear will serve the interests of law enforcement. Here, the officer knew that imprisonment was not a potential punishment for Bauer's second offense MIP, and there were no circumstances that required Bauer's immediate arrest, so Bauer should have been issued a notice to appear in lieu of arrest. St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001).

Public Duty Doctrine as Applied to Law Enforcement Personnel — Exception in Cases of Special Relationship: Trina admitted that she had been drinking when stopped in her vehicle by Officer Driscoll, who nevertheless believed that sufficient probable cause did not exist to arrest the woman. Instead, thinking Trina might be impaired, the officer suggested a ride home or that Trina walk the 2-mile distance and warned Trina about returning to the vehicle. Trina decided instead to walk to a phone and call for a ride and was killed in traffic. Trina's husband brought suit for civil damages under 42 U.S.C. 1983, claiming that the officer breached the duty to protect, in violation of Trina's due process rights. The District Court summarily dismissed the claim, holding that because no probable cause existed for Trina's arrest, the officer had no duty to protect Trina from harm and that without a duty, the action failed. The public duty doctrine provides that a police officer's duty to protect and preserve the peace is owed to the public at large rather than to a particular person, unless a special relationship exists, thus giving rise to a special duty that is more particular than that owed to the public. A special relationship is established: (1) by a statute intended to protect a specific class of persons, of which the plaintiff is a member, from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances when the agency has actual custody of the plaintiff or of a third person who harms the plaintiff. Relying on Stewart v. Standard Publishing Co., 102 M 43, 55 P2d 694 (1936), the Supreme Court agreed that although the officer may not have initially owed Trina a duty to protect, that duty was

assumed as a matter of law when the officer prevented the woman from driving her car and ensured that she did not attempt to drive. The question of whether the duty to protect was breached is a question of fact for the jury, so summary dismissal was improper. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999), clarifying and distinguishing Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), and followed in Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004). Nelson was followed, as to elements of exception to the public duty doctrine (nonlaw enforcement case), in Orr v. St., 2004 MT 354, 324 M 391, 106 P3d 100 (2004), and Prosser v. Kennedy Enterprises, Inc., 2008 MT 87, 342 M 209, 179 P3d 1178 (2008). See also Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989), and Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996).

City Police Officer Making Arrest Outside Territorial Jurisdiction — Probable Cause Required: A city police officer, investigating a phone call reporting a suspected drunk driver, pursued Williamson outside city limits and arrested him, although the officer observed no erratic driving or other indicators of alcohol impairment prior to stopping Williamson's truck. Williamson moved to suppress all the evidence on the basis that the officer did not have probable cause to make the stop, contending that probable cause was necessary because the officer was acting outside his territorial jurisdiction as a city police officer and that the information within the officer's knowledge at the time of the stop did not rise to the level of probable cause. Williamson's motion was denied. Clarifying the difference between the probable cause necessary to effectuate a valid arrest and the particularized suspicion necessary to justify an investigative stop, the Supreme Court noted that although an officer ordinarily needs only a particularized suspicion for a traffic stop, under these circumstances, the officer was outside his jurisdiction when the stop was made and was thus not acting within the scope of his authority as a peace officer. The criminal procedures in 46-5-401 and this section were not available to the officer. Rather, as a peace officer acting outside his territorial jurisdiction, his authority was limited to that provided to private citizens under 46-6-502, so probable cause was required. The citizen informant's telephone report was not sufficient to establish probable cause because the relayed report was devoid of information as to why the informant believed that Williamson was intoxicated and the officer did not inquire into the basis of the report before stopping Williamson's truck. The report created, at most, a suspicion that an offense was being committed, but that suspicion alone was insufficient to establish probable cause. Even if the informant had sufficient information to establish probable cause for a citizen's arrest of Williamson, that information was not relayed to the officer, who thus did not possess sufficient information to make the stop. The judgment was reversed because the District Court erred in refusing to suppress the evidence. St. v. Williamson, 1998 MT 199, 290 M 321, 965 P2d 231, 55 St. Rep. 843 (1998), distinguishing St. v. Schoffner, 248 M 260, 811 P2d 548 (1991), and followed in St. v. Reiner, 2003 MT 243, 317 M 304, 77 P3d 210 (2003), and St. v. Ellington, 2006 MT 219, 333 M 411, 143 P3d 119 (2006).

Motor Vehicle Stop of Intoxicated Defendant — Justifiable Apprehension of Harm: Officer Mantooth stopped a car fitting the radio description of a vehicle and, upon looking inside, saw an apparently drunken male passenger leaning over with his arms between his legs as if hiding something and saw an empty holster between the driver and passenger. After a scuffle, Hagberg was charged by information with felony assault (now assault with a weapon) and misdemeanor resisting arrest. The Supreme Court affirmed the holding of the District Court that Officer Mantooth's affidavit supporting the motion for leave to file the information was sufficient, noting that it was not necessary for Officer Mantooth to have personally observed a gun in order to be apprehensive about his safety. The Supreme Court also held that the District Court did not abuse its discretion by denying Hagberg's motion to dismiss because of an unlawful arrest. Because Officer Mantooth was in apprehension for his safety, a felony had been committed and Mantooth was justified in making the arrest. St. v. Hagberg, 277 M 33, 920 P2d 86, 53 St. Rep. 528 (1996).

Plain View Doctrine Justifying Seizure of Contraband Pipe During Stop and Frisk Search for Weapons: After Stubbs was stopped on a reasonable suspicion of criminal activity, including speeding, reckless or careless driving, and eluding a peace officer, the officer noticed numerous weapons in the vehicle, providing a reasonable justification for searching Stubbs on the scene. During a pat-down search of Stubbs' clothing, the officer thought that a lump in Stubbs' pocket might be a deadly weapon. After removing the item to make sure that it was not a weapon, the item was in plain view and the incriminating character of the object, a brass pipe, was apparent. Absent any indication that the search was used as a pretext to discover illicit drugs or paraphernalia, the discovery of the pipe was inadvertent and seizure of the contraband was

justified. St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Arrest Without Written Authority — Suppression of Evidence: An arrest by a Montana law enforcement officer for violation of the terms of probation must be in accordance with 46-23-1012. The police officer arrested the probationer in violation of 46-23-1012 when the arrest was for a probation violation and the police officer did not have written authority to arrest from the probation officer. Assuming that probation violation is a criminal offense and that the police officer had probable cause to arrest for violation of probation, the arrest was not proper under this section because existing circumstances did not require an immediate arrest. The gun seized in defendant's bedroom after the arrest was suppressed as evidence in the federal prosecution for violation of 18 U.S.C. 922(g)(1), which prohibits possession of a firearm by a convicted felon. U.S. v. Shepard, 21 F3d 933 (9th Cir. 1994).

Plain View Doctrine Justifying Seizure of Contraband Pipe During Stop and Frisk Search for Weapons: After Stubbs was stopped on a reasonable suspicion of criminal activity, including speeding, reckless or careless driving, and eluding a peace officer, the officer noticed numerous weapons in the vehicle, providing a reasonable justification for searching Stubbs on the scene. During a pat-down search of Stubbs' clothing, the officer thought that a lump in Stubbs' pocket might be a deadly weapon. After removing the item to make sure that it was not a weapon, the item was in plain view and the incriminating character of the object, a brass pipe, was apparent. Absent any indication that the search was used as a pretext to discover illicit drugs or paraphernalia, the discovery of the pipe was inadvertent and seizure of the contraband was justified. St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Arrest by Peace Officer Outside Officer's Jurisdiction — Applicability of Driving Under the Influence Implied Consent Law: A peace officer is by statute "any person who by virtue of the person's office or public employment is vested by law with a duty to maintain public order and make arrests for offenses while acting within the scope of the person's authority". Though a city police officer's authority did not extend beyond the city limits and his arrest of a driver beyond the city limits for being under the influence could only be a citizen's arrest, he was within the definition of a peace officer even when outside the geographical area in which he had jurisdiction because he was at the time of the arrest a peace officer in fact and by virtue of holding the particular job. Therefore, the implied consent law applied even though it refers to a person "arrested by a peace officer". Maney v. St., 255 M 270, 842 P2d 704, 49 St. Rep. 980 (1992).

Attorney General's Opinions

Authority to Enact Ordinances Regulating Breach of Peace: Section 7-32-4302 authorizes but does not require that a city or town council adopt ordinances to prevent acts or conduct calculated to disturb the public peace. In situations in which this authority has not been exercised, a city or town police officer acting within the officer's territorial jurisdiction may arrest a person for the violation of a state law prohibiting offenses against the public order. 45 A.G. Op. 9 (1993).

46-6-312. Manner of arrest without warrant.

Commission Comments

1991 Comment: This statute is a restatement of 1987 MCA 46-6-106. The statute preserves the requirements of informing the individual of the officer's authority, the officer's intention to make an arrest, and the officer's reason for arresting the individual. Previous exceptions to this general rule have also been preserved.

The instances in which a private person may make an arrest without a warrant have been preserved. See 46-6-502. The Commission felt that a private person should not be held to the strict requirements that a peace officer must follow. When a peace officer finally does take custody of the defendant, however, the officer must inform the defendant of those matters stated in this statute.

Rules 212(a) and 212(e) of the Uniform Rules of Criminal Procedure contain requirements similar to those specified in the statute. The uniform rules were not used as models for the statute.

The Federal Rules of Criminal Procedure have no similar requirement.

Source: A.L.I., sections 25 and 26.

This section establishes the standard for an arrest made by either a private person or a peace officer without an arrest warrant. Although the language is different than the present Montana law the results should be the same. The language was used to maintain uniformity with the prior section and to clarify the present law. Both [46-6-216 and 46-6-312] require the person making

the arrest to state (1) his authority, (2) his intention to arrest the accused, and (3) the cause of the arrest.

These two sections are a restatement of the existing law and practice in Montana. The language of the sections anticipates that the officer shall give appropriate notice of the three items before the arrest, either with or without a warrant, but the Montana court has recognized, in case law, the exceptions stated in this section. (See State v. Gay, 18 Mont. 51, and State v. Bradshaw, 53 Mont. 96.) In Altizer v. State (Okla.), 206 P. 1106, 1108 the court stated: "From the foregoing provisions it is seen that the first duty of an officer in attempting to make an arrest without a warrant (where the arrested person is not arrested during the actual commission of the offense or has escaped and is immediately pursued) is to inform the person to be arrested of his authority in so acting and the cause for so acting. If this simple provision of the section were more closely observed by arresting officers (as it should be), we are convinced that there would be much less trouble in making arrests without a warrant."

Compiler's Comments

1993 Amendment: Chapter 262 at beginning, after "peace officer", deleted "or person".

1991 Amendment: Made minor changes in style.

Case Notes

Warrantless Arrest — No Warrant Necessary Prior to Search: After an arrest properly made under this section, a person may be searched without a search warrant prior to placement in a police holding cell. Billings v. Skurdal, 224 M 84, 730 P2d 371, 43 St. Rep. 2036 (1986).

Probable Cause to Make Warrantless Entry and Arrest: The Supreme Court cautioned that arrest and search warrants should be used as the rule and not the exception but that sufficient exigent circumstances existed here, especially due to the involvement of juveniles, to justify the warrantless entry and arrest. St. v. Allen, 188 M 135, 612 P2d 199 (1980), following St. v. Hull, 158 M 6, 487 P2d 1314 (1971); St. v. Bennett, 158 M 496, 493 P2d 1077 (1972); St. v. Means, 177 M 193, 581 P2d 406 (1978).

Validity of Warrantless Arrest: A warrantless arrest was valid under section 95-608(d), R.C.M. 1947 (now part of 46-6-210). St. v. Bennett, 158 M 496, 493 P2d 1077 (1972).

Exception to Duty to Inform: When the officer is well known to those whom he seeks to arrest and when those parties, instead of surrendering as directed by the officer, immediately prepare to fire upon him, the ceremony of disclosing the official character of the officer and the reason for the arrest is voluntarily dispensed with by the parties to be arrested. St. v. Gay, 18 M 51, 44 P 411 (1896).

Collateral References

Arrest *key* 61.

6A C.J.S. Arrest §§9 through 45.

5 Am. Jur. 2d Arrest §§30 through 52.

46-6-313. Release.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-6-403. The Commission considered recommending that the prosecuting attorney, as well as the peace officer with custody, may order the defendant released but eventually rejected the recommendation as unnecessary. If the prosecutor declines to file charges, the appropriate officer should be directed to release the arrested person.

This statute embodies what the 1967 Commission referred to as the "station adjustment doctrine". The 1967 Commission also noted that the "right of release does not excuse or free from civil responsibility, an officer who has made an illegal arrest". This holds true under the 1987 statute. The release of the defendant at this phase, however, does not preclude the prosecution from pursuing the charges at a later date.

Apparently the Federal Rules of Criminal Procedure and the federal statutes do not provide for such a release. Rule 244 of the Uniform Rules of Criminal Procedure is similar to this statute and does contemplate some input from the prosecuting attorney. See Rule 244(a)(2), Unif. R. Crim. P.

This statute should create no substantive change in the law but merely reflects established procedure.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 107-6.

This section enunciates the "station adjustment" doctrine of release by an officer who has made a legal arrest without a warrant but subsequently determines from investigation that

there is insufficient evidence for proceeding further with the criminal charge. This right of release does not excuse or free from civil responsibility, an officer who has made an illegal arrest.

Compiler's Comments

1991 Amendment: At end substituted "to commence prosecution" for "for criminal complaint against the person arrested"; and made minor changes in style.

Part 4
Arrest by a Peace Officer

Part Commission Comments

1991 Part Comments: There are occasions when a peace officer will either require assistance or be assisting in the arrest of a suspected criminal offender. The statutes governing the conduct of an officer or citizen on these occasions are provided in this part.

Neither the Federal Rules of Criminal Procedure nor the Uniform Rules of Criminal Procedure have provisions concerning assisting in an arrest.

Part Law Review Articles

In Defense of a Youth: This article discusses, in part, custody of youth by law enforcement officers. Curtis, 36 Mont. L. Rev. 225 (1975).

46-6-402. Assisting a peace officer.

Commission Comments

1991 Comment: This statute is a restatement of 1987 MCA 46-6-402. Under this statute, a peace officer may command a private person to assist in making an arrest. Upon receiving such a command, the private person has the same authority as a peace officer and is protected from any civil liability that may result from his actions.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 107-8.

The section allows a police officer to summon assistance. Nearly all arrests today are made by police officers and they may, at times, need assistance from a private citizen. It was not deemed essential to give a private person the authority to summon assistance. A private person seldom makes an arrest and if the suspect is dangerous the person should summon the police, not other private persons. Also, problems would arise if a private person attempted to make an arrest without probable cause and summoned assistance from other private persons. The problem would arise with the civil immunity offered in the section.

Subdivisions [(1) and (2)] clarify the problems of the assistant's authority and civil liability. Subdivision [(1)] establishes a minimum age requirement for those persons (males) required to render assistance. The proposed section would have statewide application in that it applies to all officers and citizens regardless of the fact that the officer is making the arrest outside of his own municipality or county.

Compiler's Comments

1991 Amendment: At end of (2) inserted "in making an arrest"; and made minor changes in style.

Applicability of Commission Comments: Amendment by Ch. 535, L. 1975, made subsection (1) applicable to females as well as males.

Collateral References

Arrest *key* 69.

6A C.J.S. Arrest §14.

5 Am. Jur. 2d Arrest §127.

46-6-411. Assisting officer of another state.

Commission Comments

1991 Comment: This statute preserves the Uniform Act on Close Pursuit, which was codified as 1987 MCA 46-6-411. The statute recognizes that the term "state" includes the District of Columbia. Rather than provide a special definition for this statute, which would not comply with the concept of a general definition provision, the District of Columbia is included in the body of the statute. This minor change should not change the law or established procedure.

Source: R.C.M. 1947, sections 94-6023 through 94-6028.

No change in the law except an apparent error in R.C.M. 1947, section 94-6025 was corrected by changing the word "unlawful" to "lawful."

Compiler's Comments

1991 Amendment: In (1), after "United States", inserted "or of the District of Columbia" and after "pursuit" deleted "and continues within this state in such close pursuit"; in (2), after "state",

substituted "of the United States, or of the District of Columbia" for "in accordance with the provisions of subsection (1)"; deleted former (4) and (5) that read: "(4) For the purpose of this section, the word "state" shall include the District of Columbia.

(5) This section may be cited as the "Uniform Act on Close Pursuit""; and made minor changes in style.

Subsection Not Codified: Subsection (e) of section 95-619, R.C.M. 1947, a temporary provision, was not codified in the MCA. This subsection has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 196, L. 1967.

Case Notes

Arrest Outside City Limits by City Police Absent Local Ordinance — Arrest Lawful in Capacity as Private Citizen: The city of Eureka never enacted an ordinance giving city police jurisdiction outside the city limits pursuant to 7-32-4301, and defendant contended that his arrest for DUI and hit-and-run made 0.8 mile outside Eureka was therefore illegal and that all evidence resulting from the arrest was inadmissible. The Supreme Court found that by enacting 7-32-4301 (authorizing city police arrests within 5 miles of town), 46-6-502 (authorizing arrests by private citizens), and 46-6-411 (authorizing out-of-state officers in close pursuit to make arrests in Montana), it is clear that Montana no longer adheres to the common-law rule strictly prohibiting arrests outside an officer's jurisdiction. A police officer outside his jurisdiction has not lost his characteristics of being a private citizen; therefore, if an arrest by a private citizen would be lawful under the circumstances, the arrest by an officer outside his jurisdiction would be lawful. St. v. McDole, 226 M 169, 734 P2d 683, 44 St. Rep. 561 (1987), followed in St. v. Williamson, 1998 MT 199, 290 M 321, 965 P2d 231, 55 St. Rep. 843 (1998).

Collateral References

Arrest *key* 63(3).

6A C.J.S. Arrest §15.

5 Am. Jur. 2d Arrest §§50 through 52.

Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit. 34 ALR 4th 328.

46-6-412. Arrest by officer of United States customs service or immigration and naturalization service.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Source: This section is based on North Dakota Century Code, section 29-06-15, and Minnesota Statutes Annotated, sections 629.30 and 629.34.

46-6-420. Arrest, citation, or stop quotas prohibited.

Compiler's Comments

2007 Amendment: Chapter 244 in (1) near middle after "citations" inserted "or investigative stops"; in (2) at end inserted "or investigative stops"; deleted former (2)(b) that read: "(b) The term does not include the use of generally accepted management techniques that employ performance objectives as part of an overall employee evaluation"; and made minor changes in style. Amendment effective April 25, 2007.

Effective Date: Section 3, Ch. 242, L. 2005, provided that this section is effective on passage and approval. Approved April 15, 2005.

Part 5
Arrest by a Private Person

Part Commission Comments

1991 Part Comments: This part embodies the principal rules establishing authority for a private person to arrest another. The 1987 provisions that established special rules for an arrest by a merchant were not retained. The Commission's objective of providing generally applicable rules of criminal procedure would not support such provisions. The Commission acknowledged that the Legislature has the prerogative to enact such statutes but suggested that such statutes were not appropriate or needed.

Part Case Notes

Concealment Alone Not Probable Cause for Arrest: Although concealment, as defined in 46-6-501 (now repealed), contains the basic elements of theft (deception and intent to deprive), it has a limited meaning applying to Title 46, ch. 6, part 5, authorizing a merchant to search a

suspected shoplifter. Thus, prima facie evidence of concealment does not alone provide, as a matter of law, probable cause for arrest, but probable cause may be the result of such a search or it may exist prior to such a search. Vogel v. Gibson's Discount Centers, 209 M 518, 681 P2d 40, 41 St. Rep. 874 (1984).

Part Collateral References

Homicide: private person's authority, in making arrest for felony, to shoot or kill alleged felon. 32 ALR 3d 1078.

46-6-502. Arrest by private person.

Commission Comments

1991 Comment: This statute establishes the general authorization for an arrest by a private person and provides the appropriate limitations on custody. The 1987 code section was similar, but if the offense had not been committed in the person's presence, the offense had to be a felony before a private arrest could be made. See 1987 MCA 46-6-502(2). This statute eliminates the felony-misdemeanor distinction but provides that the "circumstances require the person's immediate arrest". The provisions allowing a warrantless arrest by a police officer or by a private citizen are kept distinct but parallel.

Commission Comment Not Divided: This section is a recodification of part of section 95-611, R.C.M. 1947. Section 46-6-503 (now repealed) is also derived from section 95-611. The commission comments to section 95-611 are printed in their entirety under 46-6-502.

Source: R.C.M. 1947, section 94-6004.

This modifies the present Montana law by restricting the power of a private person to arrest to the two situations stated above. The section deleted subdivision (2) of R.C.M. 1947, section 94-6004 which allowed a private person to arrest for a felony not committed in his presence. Under the deleted subdivision a private person could make a legal arrest without probable cause by showing the person arrested had committed a felony. This would supposedly allow arrest without proof of probable cause.

The word "offense" used in subsection [(1)] is broad enough to allow a citizen to arrest for misdemeanors and ordinance violations as well as felonies committed in his presence.

The consensus of the commission was that modern law enforcement requires that most arrests be made by police officers and the right of private persons to arrest should be strictly limited.

Compiler's Comments

2009 Amendment: Chapter 332 in (1) inserted second sentence allowing a private person the use of reasonable force to detain the arrested person; and made minor changes in style. Amendment effective April 27, 2009.

Preamble: The preamble attached to Ch. 332, L. 2009, provided: "WHEREAS, the Legislature declares that:

(1) the right of Montanans to defend their lives and liberties, as provided in Article II, section 3, of the Montana Constitution, and their right to keep or bear arms in defense of their homes, persons, and property, as provided in Article II, section 12, of the Montana Constitution, are fundamental and may not be called into question;

(2) the use of firearms for self-defense is recognized within the right reserved to the individual people of Montana in Article II, section 12, of the Montana Constitution;

(3) self-defense is a natural right under section 1-2-104, MCA, and is included in sections 49-1-101 and 49-1-103, MCA;

(4) the lawful use of firearms for self-defense is not a crime or an offense against the people of the state;

(5) in a criminal case in which self-defense is asserted, the burden of proof is as provided in [section 10] [actually section 9, Ch. 332, L. 2009, enacting 46-16-131];

(6) in self-defense, the use of justifiable force discourages violent crime and prevents victimization; and

(7) the purpose of [sections 1 through 3] [enacting 45-3-110 through 45-3-112] is to clarify and secure the ability of the people to protect themselves."

1991 Amendment: Substituted present language regarding arrest by private person for former text that read: "A private person may arrest another when:

(1) he believes on reasonable grounds that an offense is begin committed or attempted in his presence;

(2) a felony has in fact been committed and he believes on reasonable grounds that the person arrested has committed it; or

(3) he is a merchant, as defined in 30-11-301, and has probable cause to believe the other is shoplifting in the merchant's store".

Scope of Commission Comments: The commission comments do not address the provisions of subsection (3) added by amendment in 1974.

Case Notes

Insufficient Probable Cause for Citizen Arrest — Suppression of Evidence Proper: At the visitor center at Malmstrom Air Force Base, security officers smelled alcohol on May's breath when May sought to enter the base. Because May was a civilian, the officers believed that May could be detained but not arrested, so they held May's driver's license, registration, and proof of insurance, and May was told to wait until a highway patrol officer arrived. May was subsequently arrested for DUI and at trial asked the District Court to suppress evidence from the arrest on grounds that the arrest was not based on probable cause and was thus illegal. Following denial of the suppression motions and conviction, May appealed, and the Supreme Court reversed. Applying the test in St. v. Widenhofer, 286 M 341, 950 P2d 1383 (1997), the court determined that May's detention constituted a citizen arrest. The test for probable cause for a citizen arrest is whether a reasonable person, under personally known facts and circumstances, is warranted in believing that someone is committing or has committed an offense. Here, the security officers' sole basis for detaining May was the smell of alcohol, but the odor of alcohol emanating from May's person, standing alone, was insufficient to establish probable cause for a citizen arrest. Thus, the arrest was illegal, and evidence related to the arrest should have been suppressed. St. v. May, 2004 MT 45, 320 M 116, 86 P3d 42 (2004).

Authority for Arresting Out-of-Jurisdiction Peace Officer to Act Following Arrival of Officer With Jurisdiction: When a Belgrade police officer stopped a motorcyclist in Bozeman after observing erratic driving and after the stop observed behavior indicative of intoxication, he was acting within his authority as a private citizen under this section. However, when the Bozeman police, whom he had contacted, arrived, the Belgrade officer's authority to act as a private citizen under this section ceased and his performance of tests on the driver, placing him under arrest, transporting him to the jail, requests for a breath test, and writing of a citation, all in the absence of exigent circumstances, exceeded his citizen arrest authority under this section. Thus, the evidence obtained after the Bozeman police arrived was illegally obtained and must be suppressed in the DUI prosecution. To the extent that Maney v. St., 255 M 270, 842 P2d 704 (1992), suggests a contrary result, it is overruled. St. v. Hendrickson, 283 M 105, 939 P2d 985, 54 St. Rep. 516 (1997).

Arrest by Peace Officer Outside Officer's Jurisdiction — Applicability of Driving Under the Influence Implied Consent Law: A peace officer is by statute "any person who by virtue of the person's office or public employment is vested by law with a duty to maintain public order and make arrests for offenses while acting within the scope of the person's authority". Though a city police officer's authority did not extend beyond the city limits and his arrest of a driver beyond the city limits for being under the influence could only be a citizen's arrest, he was within the definition of a peace officer even when outside the geographical area in which he had jurisdiction because he was at the time of the arrest a peace officer in fact and by virtue of holding the particular job. Therefore, the implied consent law applied even though it refers to a person "arrested by a peace officer". Maney v. St., 255 M 270, 842 P2d 704, 49 St. Rep. 980 (1992), partially overruled in St. v. Hendrickson, 283 M 105, 939 P2d 985, 54 St. Rep. 516 (1997).

Lack of Formal Custody Transfer by Police Officer Outside Officer's Jurisdiction: Police officer followed beyond the Chinook city limits a vehicle he believed was driven by a person with a revoked license. He radioed for backup and stopped the vehicle after noticing it was moving slowly and erratically. The driver's breath smelled of alcohol, and after field sobriety maneuvers, the police officer and a Deputy Sheriff who had arrived agreed that the driver was impaired. The police officer then arrested the driver and delivered him to the Sheriff's office in Chinook. The police officer did not have to formally transfer custody to the Deputy Sheriff for the police officer's citizen's arrest to be legal. Maney v. St., 255 M 270, 842 P2d 704, 49 St. Rep. 980 (1992), partially overruled in St. v. Hendrickson, 283 M 105, 939 P2d 985, 54 St. Rep. 516 (1997).

Arrest Outside City Limits by City Police Absent Local Ordinance — Arrest Lawful in Capacity as Private Citizen: The city of Eureka never enacted an ordinance giving city police jurisdiction outside the city limits pursuant to 7-32-4301, and defendant contended that his arrest for DUI and hit-and-run made 0.8 mile outside Eureka was therefore illegal and that all evidence resulting from the arrest was inadmissible. The Supreme Court found that by enacting 7-32-4301 (authorizing city police arrests within 5 miles of town), 46-6-502 (authorizing arrests by private citizens), and 46-6-411 (authorizing out-of-state officers in close pursuit to make arrests in Montana), it is clear that Montana no longer adheres to the common-law rule strictly

prohibiting arrests outside an officer's jurisdiction. A police officer outside his jurisdiction has not lost his characteristics of being a private citizen; therefore, if an arrest by a private citizen would be lawful under the circumstances, the arrest by an officer outside his jurisdiction would be lawful. St. v. McDole, 226 M 169, 734 P2d 683, 44 St. Rep. 561 (1987), followed in St. v. Sunford, 244 M 411, 796 P2d 1084, 47 St. Rep. 1684 (1990), and St. v. Williamson, 1998 MT 199, 290 M 321, 965 P2d 231, 55 St. Rep. 843 (1998).

Authority of Auxiliary Officer: The Lemmons were divorced after 20 years of marriage. Leroy was seeing Donna Myers, and Koralyn was seeing John Sweeting. Myers and Sweeting had just ended a personal and business relationship. Sweeting asked Koralyn to get a briefcase out of Leroy's truck. The briefcase actually belonged to Myers. Leroy and Myers returned to the truck and found the briefcase missing. They concluded Koralyn had taken it since the truck was not broken into. Leroy and Myers went to Koralyn's home. She heard them drive up and put a gun in the waistband of her pants. Leroy and Koralyn fought, and Leroy struck her in the head with the gun. Leroy and Myers put Koralyn on the floor of the truck and went to the Sheriff's department. The Sheriff was not immediately available, so Leroy and Myers left, with Koralyn still on the floor of the truck, to find Sweeting. A high speed chase ensued in which the cars rammed together and gunshots were exchanged. The chase ended when Leroy's transmission caught fire. The charges arising from the pursuit were dropped. Leroy was charged with aggravated assault and kidnapping. He was convicted of assault and unlawful restraint. Leroy contended his conduct was authorized by statute since he is a member of the county Sheriff's posse and was making an arrest. The court held membership in the posse merely made him an auxiliary officer. He had only the arrest authority of a private person. No offense was committed in his presence, no felony was committed, and he is not a merchant. He had neither authority to arrest Koralyn nor reason to believe he did. St. v. Lemmon, 214 M 121, 692 P2d 455, 41 St. Rep. 2359 (1984).

Concealment Alone Not Probable Cause for Arrest: Although concealment, as defined in 46-6-501 (now repealed), contains the basic elements of theft (deception and intent to deprive), it has a limited meaning applying to Title 46, ch. 6, part 5, authorizing a merchant to search a suspected shoplifter. Thus, prima facie evidence of concealment does not alone provide, as a matter of law, probable cause for arrest, but probable cause may be the result of such a search or it may exist prior to such a search. Vogel v. Gibson's Discount Centers, 209 M 518, 681 P2d 40, 41 St. Rep. 874 (1984).

Compulsion to Remain — Not Unlawful Restraint: Plaintiff, a new employee of defendant, was accused by a fellow employee of taking a watch. The assistant manager, while ostensibly giving plaintiff a tour of the store, took her to an office where store personnel and the police were present. Plaintiff was confronted with the charge and denied it. Plaintiff agreed to a lie detector test. The meeting lasted from 20 to 45 minutes. The lie detector test vindicated plaintiff. While plaintiff stated she felt compelled to remain in the office, there was no evidence she was restrained against her will. There was substantial evidence to support the judgment for defendants. Hardy v. LaBelle's Distrib. Co., 203 M 263, 661 P2d 35, 40 St. Rep. 436 (1983).

Criminal Dismissal Conditioned on Not Suing Anyone but Supermarket That Arrested Plaintiff — Civil Summary Judgment Granted Supermarket: After apprehension by defendant's employee and subsequent arrest by the Sheriff's department, the plaintiff and County Attorney bargained a dismissal conditioned on the plaintiff's execution of a covenant not to sue the Sheriff, county, police, or city. The covenant not to sue contained a clause reserving plaintiff's right to sue defendant. A summary judgment was granted defendant on assault, false arrest, and false imprisonment because the defendant's actions may have been acceptable under this section if there were probable cause, which is usually evidenced by the ordinary processes of law that were foreclosed to the defendant by the agreement in this case. Plaintiff was denied all relief. Brothers v. Rosauer's Supermarkets, Inc., 545 F. Supp. 1041, 39 St. Rep. 1758 (D.C. Mont. 1982).

Detaining Suspected Shoplifter Without Arrest — Unconstitutional: The plaintiff was accused of shoplifting by the defendant's employee. Plaintiff's purse was searched and nothing was found. Plaintiff was then detained under the authority of 46-6-503 (now repealed) until the police arrived and arrested her. After being acquitted of the shoplifting charge, the plaintiff brought suit for false arrest. The trial court instructed the jury in the words of 46-6-503 (now repealed) over plaintiff's objection. On appeal, the Supreme Court said there must be a showing of compelling state interest which would justify the infringement of plaintiff's right to privacy. The mere fact that defendant's conduct comported with the merchant's detention statute does not establish a compelling state interest. No compelling state interest was shown which would justify the very serious invasion of a person's privacy which occurred. Insofar as 46-6-503 (now repealed) permits a merchant with immunity to stop and detain an individual for up to 30 minutes without making an arrest, it is an unconstitutional invasion of the right to privacy and

the right to be secure from unreasonable searches and seizures guaranteed by Art. II, sec. 10 and 11, Mont. Const. Duran v. Buttrey Foods, Inc., 189 M 381, 616 P2d 327 (1980).

Determining Lawfulness of Arrest: While the legality of an arrest by a private person without a warrant cannot depend upon what is found in the possession of the person arrested, the fact that his belief that a crime was being committed is found to be correct accredits the belief and gives weight to the evidence upon which he acted. A liberal rather than a strict interpretation should be followed; if he acted in good faith and the facts and circumstances were such as to warrant a man of prudence and caution in believing as he did when making the arrest, it should be held lawful. St. v. Hum Quock, 89 M 503, 300 P 220 (1931).

Authority to Arrest Limited: The authority of a private person to make an arrest without a warrant is more limited than that of an officer to make a like arrest. State ex rel. Sadler v. District Court, 70 M 378, 225 P 1000 (1924).

Degree of Probable Cause Required: To entitle a private person to make an arrest for a public offense committed or attempted in his presence, the facts and circumstances must be such that upon them alone he would be justified in making a complaint upon which a warrant might issue. State ex rel. Sadler v. District Court, 70 M 378, 225 P 1000 (1924).

False Imprisonment: In an action for false imprisonment, it was proper to refuse the defendant an instruction to the effect that the law gives a private person the right to make an arrest when the person arrested has committed or is about to commit a public offense in his presence and that, if the jury believes that the plaintiff had taken from the defendant property of the latter which the defendant was attempting to recover at the time of the alleged imprisonment, the verdict should be for the defendant. Kroeger v. Passmore, 36 M 504, 93 P 805 (1908).

Collateral References

Arrest *key* 64.

6A C.J.S. Arrest §71.

5 Am. Jur. 2d Arrest §§47 through 49.

Authority of public official, whose duties or functions generally do not entail traffic stops, to effectuate traffic stop of vehicle. 18 ALR 6th 519.

False imprisonment: construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters. 47 ALR 3d 998.

46-6-505. Custody by peace officer.

Commission Comments

1991 Comment: This statute adopts Rule 213 of the Uniform Rules of Criminal Procedure (1974). The statute makes clear that the procedure established by 46-6-104 and 46-6-312, regarding the manner of an arrest, must be employed when an officer takes custody of an arrested person.

46-6-507. Arrest by probation and parole officer.

Compiler's Comments

Effective Date: Section 7, Ch. 386, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 17, 2003.

Part 6
Domestic Violence Provisions

Part Collateral References

"Cohabitation" for purposes of domestic violence statutes. 71 ALR 5th 285.

46-6-601. Written report when no arrest made in domestic violence situation.

Compiler's Comments

1991 Amendment: Made minor changes in style.

Law Review Articles

Montana's New Domestic Abuse Statutes: A New Response to an Old Problem, Women's Law Caucus, 47 Mont. L. Rev. 403 (1986).

46-6-602. Notice of rights to victim in partner or family member assault.

Compiler's Comments

1997 Amendment: Chapter 233 near end of notice to victim inserted next to last paragraph advising victim of right to exclusion of residential address from voter list.

1995 Amendment: Chapter 350 near beginning of first sentence substituted "partner or family member assault" for "domestic abuse", after "45-5-206" substituted "or responds to a call

in which partner or family member assault is suspected" for "if the victim is present", and after "officer" inserted "outside the presence of the offender"; and substituted language to be included in statement of victim's rights (see 1995 Session Law for text) for former statement language that read: ""IF YOU ARE THE VICTIM OF DOMESTIC ABUSE, the county attorney's office can file criminal charges against your abuser. You have the right to go to court and file a petition requesting any of the following orders for relief:

(1) an order restraining your abuser from abusing you;

(2) an order directing your abuser to leave your household;

(3) an order preventing your abuser from transferring any property except in the usual course of business;

(4) an order awarding you or the other parent custody of or visitation with a minor child or children;

(5) an order restraining your abuser from molesting or interfering with minor children in your custody or a family member or partner, as defined in 45-5-206; or

(6) an order directing the party not granted custody to pay support of minor children or to pay support of the other party if there is a legal obligation to do so.""

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

1993 Amendment: Chapter 425 in (5), at end, inserted "or family member or partner, as defined in 45-5-206".

Case Notes

Legal Duty of Sheriff to Protect Domestic Violence Victim — Exception to Public Duty Doctrine Immunity Created Between Sheriff and Victim: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found the Sheriff negligent and awarded plaintiffs $358,000. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that no special relationship existed between the victim and the Sheriff under the domestic violence statutes that would trigger a legal duty upon the Sheriff to protect the victim. On appeal, the Supreme Court noted an exception to the public duty doctrine's immunity provision in cases when a special relationship between the victim and an officer has been created. The domestic violence statutes created such a special relationship, which gave rise to a special duty by virtue of the victim's status as a member of a protected class. The Sheriff had a statutory duty to protect the victim with a notice of her rights under this section, and by failing to give the victim the required notice, the jury could conclude that the Sheriff was negligent and, arguably, negligent per se. Although arrest of the husband was discretionary, the Sheriff also had a mandatory duty under 46-6-603 to seize the husband's weapon, which had been displayed during a prior domestic dispute, but failed to do so. Thus, the jury had sufficient evidence to conclude that the Sheriff's negligence or negligent per se conduct led to the victim's death, and the District Court committed reversible error in granting judgment to the contrary. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004), following Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999).

Preservation of Right to Argue Sufficient Evidence of Negligence on Appeal From Judgment as Matter of Law: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found for the plaintiffs. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that the domestic violence statutes did not trigger mandatory legal duties upon the Sheriff regarding arrest and seizure. On appeal, the Sheriff argued that because plaintiffs did not specifically appeal from the District Court's refusal to instruct the jury that violations of the arrest and weapon seizure provisions of the domestic violence law were negligence per se, plaintiffs could not argue on appeal that evidence that the statutes were violated supported the verdict. The Supreme Court examined the definitions of common-law negligence and negligence per se, noting that the jury was given the full panoply of instructions on common-law negligence and that despite the fact that negligence per se instructions were not given, plaintiffs nevertheless argued that violation of the statutes was evidence of negligence. Pursuant to Nehring v. LaCounte, 219 M 462, 712 P2d 1329 (1986), even if a violation of a statute does not constitute negligence per se, the violation may nonetheless be considered as evidence of negligence. Because plaintiffs appealed from the judgment as a matter of law, they preserved their right to argue on appeal that the jury had before it sufficient evidence of negligence. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004).

46-6-603. Partner or family member assault — seizure of weapon.

Compiler's Comments

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

Case Notes

Legal Duty of Sheriff to Protect Domestic Violence Victim — Exception to Public Duty Doctrine Immunity Created Between Sheriff and Victim: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found the Sheriff negligent and awarded plaintiffs $358,000. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that no special relationship existed between the victim and the Sheriff under the domestic violence statutes that would trigger a legal duty upon the Sheriff to protect the victim. On appeal, the Supreme Court noted an exception to the public duty doctrine's immunity provision in cases when a special relationship between the victim and an officer has been created. The domestic violence statutes created such a special relationship, which gave rise to a special duty by virtue of the victim's status as a member of a protected class. The Sheriff had a statutory duty to protect the victim with a notice of her rights under 46-6-602, and by failing to give the victim the required notice, the jury could conclude that the Sheriff was negligent and, arguably, negligent per se. Although arrest of the husband was discretionary, the Sheriff also had a mandatory duty under this section to seize the husband's weapon, which had been displayed during a prior domestic dispute, but failed to do so. Thus, the jury had sufficient evidence to conclude that the Sheriff's negligence or negligent per se conduct led to the victim's death, and the District Court committed reversible error in granting judgment to the contrary. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004), following Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999).

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CHAPTER 7
INITIAL APPEARANCE OF ARRESTED PERSON

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff

to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

Part 1
General Provisions

46-7-101. Appearance of arrested person — use of two-way electronic audio-video communication.

Commission Comments

1991 Comment: Following arrest, each defendant is entitled to an initial appearance before a judge without unnecessary delay. See St. v. Benbo, 174 Mont. 252 (1977). This basic principle was recognized in 1987 MCA 46-7-101 and is preserved in the statute. The language of the statute has been revised to simplify the process. [Subsection (2) was inserted by Ch. 710, L. 1991, and was not proposed by the Commission.]

Source: R.C.M. 1947, sections 94-6014 through 94-6016; Illinois Code, [Chapter] 38, section 109-1; A.L.I., section 7.

This provision includes the requirement of an appearance before a magistrate without unnecessary delay after arrest in cases of arrest with a warrant.

It is the commission's intention to limit the return, where no warrant is issued, to one before a justice of the peace or district court judge. This should afford greater protection to the defendant as well as the state. This section allows a first appearance in the county where the arrest is made rather than forcing the arrested person to be removed to another county for the purpose of stating the charge and setting bail.

Subsection [(2)] is approximately the same as the present code requirements as to substance although it does not provide for the delivery of an arrested person to a peace officer as an alternative to appearance before a judge by the person making the arrest. It would seem that while the private person making the arrest may summon police assistance and the arrested person would proceed to the judge under the custody and control of the police officer it is reasonable to require the private arresting person to accompany the peace officer to the judge and assist in making the complaint.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1991 Amendments: Chapter 710 inserted (2) allowing satisfaction of requirement of initial appearance of defendant by two-way electronic audio-video communication; and made minor changes in style.

Chapter 800 substituted present language concerning taking arrested person before judge for initial appearance for former text that read: "(1) Any person making an arrest under a warrant shall take the arrested person without unnecessary delay before the judge issuing the warrant or, if he is absent or unable to act, before the nearest or most accessible judge of the same county. If an arrest is made in a county other than the one in which the warrant was issued, the arrested person shall be taken without unnecessary delay before the nearest and most accessible judge in the county where the arrest was made.

(2) Any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest or most accessible judge in the same county, and a complaint stating the charges against the arrested person shall be filed forthwith".

Source of 1991 Amendment: The 1991 amendment made by Ch. 710 to this section is based in part on California Penal Code, section 977.2, and in part on Rule 43.1, Idaho Court Rules.

Case Notes

No Error in Thirty-Three-Day Delay in Municipal Court Appearance: Peterson appealed the District Court's affirmation of a Municipal Court decision denying Peterson's motion to dismiss a DUI and careless driving case because of a 33-day delay in Peterson's initial Municipal Court appearance. The Supreme Court held that the delay was acceptable under this section, given that Peterson was not incarcerated and did not assert any impairment of a defense because of the

delay and because no probable cause determination was at issue. Billings v. Peterson, 2004 MT 232, 322 M 444, 97 P3d 532 (2004), distinguishing County of Riverside v. McLaughlin, 500 US 44 (1991).

No Error in Refusing to Dismiss Charges for Failure to Hold Timely Probable Cause Hearing: Brown was arrested on February 13, but no probable cause hearing was held until February 18. Brown moved for dismissal on due process grounds of failure to hold a probable cause hearing within 48 hours of arrest, citing County of Riverside v. McLaughlin, 500 US 44, 114 L Ed 2d 49, 111 S Ct 1161 (1991), but the dismissal motion was denied. Brown appealed. The Supreme Court pointed out that the question to be decided was not whether Brown was accorded a timely probable cause determination, but rather whether the District Court erred in refusing to dismiss the charges as a remedy for failure to hold a probable cause hearing. Dismissal of charges is not the correct remedy for failure to timely charge a person who was arrested without a warrant. Under St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), the proper remedy is the exclusion of evidence acquired as a result of the delay. The trial court did not err in refusing the motion to dismiss. St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999). See also St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982).

Remedy for Violation of Section: The proper remedy for violation of this section is suppression of improperly obtained evidence. Dismissal is an inappropriate remedy when the defendant made no motion to suppress evidence, no suppression hearing was held, and there was no evidentiary record to review that might lead to dismissal. St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982). See also St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999).

Forty-Two Day Delay From Offense to Charge — Prison Inmate: An inmate of the Montana State Prison who was not served with an arrest warrant until approximately 42 days after he assaulted a guard did not have his rights violated under this section based upon unnecessary delay from the date of the offense to the date of filing of information, initial appearance, and arraignment. Because he was incarcerated, arrest was unnecessary; thus, the need to bring him before a magistrate to prevent unjust incarceration did not exist. St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982).

Five-Day Delay During Hospitalization: Appellant had the burden of showing that the 5-day delay between arrest and arraignment constituted unnecessary delay. He showed that a Justice of the Peace was available. However, appellant was in a hospital for that period, which suggested that the delay was neither unreasonable nor prejudicial. There was nothing to suggest that the delay influenced the voluntariness of appellant's statements made to police during the period of delay. The statements were properly admitted, and motion to suppress them due to the delay was properly denied. St. v. Plouffe, 198 M 379, 646 P2d 533, 39 St. Rep. 1064 (1982).

Holding Youth Without Appearance Until Transfer to District Court: Defendant claimed he was not brought to a magistrate "without necessary delay". Defendant surrendered to the authorities and was placed in jail but was not taken before a magistrate until some 20 days later. Although defendant could show no prejudice due to this lapse of time, the Supreme Court strongly disapproved of any deliberate attempt by the State to avoid arraignment "without unnecessary delay" by first arresting and holding a juvenile under the Youth Court Act for a sustained period of time and then later attempting to prosecute the juvenile as an adult. The Supreme Court stated that if a defendant could show prejudice or a deliberate attempt by the prosecution to circumvent a speedy arraignment, they would not hesitate to fashion an appropriate remedy. St. v. Rodriguez, 192 M 411, 628 P2d 280, 38 St. Rep. 578F (1981).

Delay Not Shown to Be Unnecessary: The officers' failure to present the defendant before a magistrate before interrogation did not render the confession inadmissible when the defendant failed to show that it was an "unnecessary delay". St. v. Lenon, 174 M 264, 570 P2d 901 (1977).

Delay in Initial Appearance — Evidence Excluded: The failure to provide the defendant with a prompt initial appearance necessitated exclusion of evidence obtained and statements allegedly made after the defendant's arrest when he established that the delay was unnecessary and the prosecution failed to meet the burden of showing that such evidence and statements were not reasonably related to the delay. St. v. Benbo, 174 M 252, 570 P2d 894 (1977). See also St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999).

Unlawful Detention — No Prejudice: The defendant, convicted of the crime of uttering and delivering a fictitious check, was not entitled to a reversal of his conviction because he was detained for a period of 21 days without being taken before a magistrate when there was no confession and the detention did not prejudice him in presenting his defense on the merits at the trial. St. v. Johnston, 140 M 111, 367 P2d 891 (1962).

Delay: Delay was not unreasonable. St. v. Nelson, 139 M 180, 362 P2d 224 (1961); Cline v. Tait, 113 M 475, 129 P2d 89 (1942).

Availability of Magistrate — False Imprisonment: In an action for false imprisonment brought by the plaintiff against a Sheriff and surety on his official bond based on unnecessary delay in taking the plaintiff before a magistrate, it was necessary for the plaintiff to prove that a magistrate was available on the particular day when the false imprisonment allegedly occurred. Rounds v. Bucher, 137 M 39, 349 P2d 1026 (1960).

Law Review Articles

The McNabb-Mallory Rule: Is the Benefit Worth the Burden?, Weldele-Wade, 44 Mont. L. Rev. 137 (Winter 1983).

Collateral References

Arrest *key* 70; Criminal Law *key* 222, 229.

6A C.J.S. Arrest §60.

5 Am. Jur. 2d Arrest §§76 through 79.

Intoxication as ground for police postponing arrestee's appearance before magistrate. 3 ALR 4th 1057.

46-7-102. Duty of court.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-7-102. The statute contains some changes in terminology that do not affect established procedure. In addition, the statute requires the court to inform the defendant of the circumstances that may lead to pretrial release and of the defendant's right to a probable cause determination in a felony case.

Commission Comment Not Divided: This section is a recodification of part of section 95-902, R.C.M. 1947. Section 46-7-103 (renumbered 46-10-105) is also derived from section 95-902.

Source: New.

This section is not a basic extension of existing law. It requires that the defendant be taken before a magistrate without unreasonable delay after arrest. Existing law seems to require such an "initial appearance" in cases of arrests with or without a warrant. Failure to so act would not vitiate a conviction or suffice as grounds for a motion to dismiss. Insofar as substantive rights are not injured by an unlawful detention and there is no prejudice, there should be no dismissal or reversal although there might be a suit for false arrest or unlawful detention. Any time the defendant's substantive rights are prejudiced it would be ground for reversal whether this provision was included or not. It seems that it would be less likely that the defendant's constitutional rights would be abridged (according to federal determinations) if the above procedure was rigorously followed. Under this provision, the defendant should be duly informed of his constitutional rights (the right to know the charge against him, the right to counsel, the right to remain silent and the right to bail) as early as possible and therefore the entire subsequent procedure is apt to be looked upon with more favor by the "reviewing federal courts."

Compiler's Comments

2003 Amendment: Chapter 309 inserted (1)(f) requiring the judge to tell defendant that conviction may result in loss of firearms rights; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 346 deleted former (1)(g) that read: "(g) if the charge is a misdemeanor filed in justice's or city court, of the defendant's right to elect one jury trial, either in justice's or city court or on appeal to the district court, as provided in 46-17-201"; and made minor changes in style. Amendment effective April 19, 1999.

Preamble: The preamble attached to Ch. 346, L. 1999, provided: "WHEREAS, in Woirhaye v. Montana Fourth Judicial District Court, 1998 MT 320, 292 Mont. 185, 972 P.2d 800 (1998), the Montana Supreme Court found that Chapter 129, Laws of 1997, impinges upon rights to a jury trial guaranteed by Article II, section 26, of the Montana Constitution."

1997 Amendment: Chapter 129 inserted (1)(g) requiring defendant to be informed of right to elect one jury trial in a misdemeanor case; and made minor changes in style. Amendment effective March 24, 1997.

Applicability: Section 5, Ch. 129, L. 1997, provided: "[This act] applies to criminal charges filed on or after [the effective date of this act]." Effective March 24, 1997.

1991 Amendment: Inserted (1)(d) concerning general circumstances for pretrial release; inserted (1)(f) concerning probable cause determination; at end of (2) substituted "as provided by law" for "in accordance with the provisions of this title"; and made minor changes in style.

Commission Comment Not Divided: This section is a recodification of part of section 95-902, R.C.M. 1947. Section 46-7-103 is also derived from section 95-902. The commission comments to section 95-902 are printed in their entirety under 46-7-102.

Case Notes

Failure to Inform Defendant of Right to Counsel — Conviction Dismissed Without Prejudice: Gatlin was arrested in Butte-Silver Bow County after robbing a store. Two hours earlier, a man fitting Gatlin's description had robbed two casinos in Missoula. The Missoula victims identified Gatlin as the robber, and the Missoula County Attorney charged Gatlin with two counts of robbery in Missoula County. Gatlin was arraigned in Butte and was informed of the Missoula charges but was not informed of the right to counsel on the Missoula charges. Eventually Gatlin pleaded nolo contendere on the Butte charge and was sentenced to 5 years in prison. Gatlin was then taken to Missoula, where he was arraigned and informed of his rights and subsequently pleaded guilty to the Missoula charges and was sentenced to 25 years in prison, with the term to run concurrently with the Butte sentence. Gatlin appealed on grounds that he was not informed of the right to counsel on the Missoula charges during the Butte arraignment. The state asserted that Gatlin's rights were not violated because the Butte appearance was for the Butte-Silver Bow charges, not the Missoula charges. The Supreme Court disagreed. The record was clear that Gatlin made an initial timely appearance on the Missoula charges in Butte but was not informed of the right to counsel on the Missoula charges. The appropriate remedy was to vacate the conviction and dismiss the Missoula information. However, Gatlin was not prejudiced by the lack of counsel on the Missoula charges while incarcerated in Butte or by any delay in filing the Missoula information, so dismissal of the information was without prejudice. St. v. Gatlin, 2009 MT 348, 353 M 163, 219 P3d 874 (2009).

Error for Prosecutor to Comment on Defendant's Post-Miranda Silence Regardless When Warning Given: Following arrest on sexual assault and attempted sexual intercourse without consent charges, Godfrey received an acknowledgment of rights form from his attorney. Godfrey initialed the form and subsequently went over the form with the District Court during his initial appearance. Godfrey later complained that the state prosecutor violated Godfrey's due process rights by commenting at trial on Godfrey's silence, in violation of Doyle v. Ohio, 426 US 610 (1976). The state contended that because Godfrey did not have his Miranda rights read to him by a police officer at the time of arrest, Doyle did not apply. The Supreme Court found the state's argument to be without merit and declined to distinguish between a situation when a defendant is advised of the right to remain silent by an arresting officer and a situation when a defendant is advised of the right by a court, or to distinguish between an oral warning and a written form. However, in this case, Godfrey's counsel did not object to the prosecutor's comments at trial, so the court had to decide whether the trial error was sufficiently prejudicial to trigger plain error review. After reviewing the record, the court concluded that it was not plain that the prosecutor's comments had created an inference for the jury that by remaining silent, Godfrey must have been guilty. Absent a clear comment on or infringement of Godfrey's fundamental right to remain silent and absent a contemporaneous objection by Godfrey's counsel to the prosecutor's comments, the conviction was affirmed. St. v. Godfrey, 2004 MT 197, 322 M 254, 95 P3d 166 (2004). See also St. v. Finley, 276 M 126, 915 P2d 208 (1996), and St. v. Sullivan, 280 M 25, 927 P2d 1033 (1996).

Purpose of Act — Declaratory Judgment Properly Used to Test Constitutionality of Criminal Jurisdictional Statute — Previous Opinion Applied by Remand: Defendants in criminal proceedings in several different Justices' Courts filed actions under the Uniform Declaratory Judgments Act (UDJA) to have declared unconstitutional statutes requiring a criminal defendant in a Justice's Court proceeding to choose between a jury trial in Justice's Court or in District Court. Several civil actions requesting the same relief under the UDJA were consolidated for the purposes of appeal. The state argued that the UDJA was not intended to be used for this purpose and that the various criminal defendants could obtain the same relief by raising the unconstitutionality of the underlying statute as a defense in their individual criminal prosecutions. The Supreme Court noted that acceptance of the state's position would require each criminal defendant to litigate the constitutionality of the pertinent sections of law both in the District Courts and in the Montana Supreme Court. Citing Goff v. St., 141 M 605, 374 P2d 862 (1962), St. v. Wilson, 160 M 473, 503 P2d 522 (1972), and Gryczan v. St., 283 M 433, 942 P2d 112 (1997), and noting that the issue of the constitutionality of the pertinent statutes could be raised, but not finally decided, in the District Courts, the Supreme Court held that it was proper to use the UDJA to determine the constitutionality of the statutes requiring the election of a jury trial in one court and not both courts. On this substantive issue, the Supreme Court cited its recent decision in Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998), holding that the statute requiring the election was unconstitutional, and remanded the cases to the District Courts with directions to enter declaratory judgments in favor of the plaintiffs and appellants. McGillivray v. St., 1999 MT 3, 293 M 19, 972 P2d 804, 56 St. Rep. 11 (1999).

Limitation to One Jury Trial Held Unconstitutional: In 1997, the Legislature enacted the provisions codified at 46-17-201(3), 46-17-311(1), and former subsection (1)(g) of this section, providing that a person tried for a misdemeanor in Justice's or City Court who appeals to the District Court has the right to only one jury trial. Woirhaye was charged with misdemeanor DUI and requested a jury trial in Missoula County Justice's Court. Upon his conviction by the Justice's Court jury, Woirhaye appealed to the District Court for a trial de novo pursuant to Art. VII, sec. 4(2), Mont. Const., and 46-17-311. Woirhaye asked that the District Court declare 46-17-201(3) unconstitutional, but the District Court denied his motion. Woirhaye then petitioned the Supreme Court for a writ of supervisory control, which was granted on the grounds that Woirhaye would otherwise be denied a fundamental right. The Supreme Court held that Woirhaye's right to a jury trial in both the Justice's Court or City Court and the District Court was a fundamental right guaranteed by Art. II, sec. 24 and 26, Mont. Const. The Supreme Court pointed out that the right to a jury trial is guaranteed by Art. III, sec. 2, clause 3, of the U.S. Constitution and the sixth amendment to the U.S. Constitution and also that even if that were not the case, Montana may, under the rationale of St. v. Bullock, 272 M 361, 901 P2d 61 (1995), provide rights in excess of those guaranteed by the U.S. Constitution. The Supreme Court noted, in response to the state's argument that Art. II, sec. 24, Mont. Const., guarantees "a" jury trial, that the state's argument was not persuasive against the language of Art. II, sec. 26, Mont. Const. The Supreme Court also distinguished Ludwig v. Mass., 427 US 618 (1976), holding that Art. VII, sec. 4(2), Mont. Const., was not implicated in the case, and stated that any language in N. Cent. Serv., Inc. v. Hafdahl, 191 M 440, 625 P2d 56 (1981), indicating that a requirement for a jury trial applicable to Small Claims Court was satisfied if the right was granted at the District Court level, was dicta and could not be relied upon to support the state's case that only one jury trial was required. Consequently, the Supreme Court held 46-17-201(3), 46-17-311(1), and former subsection (1)(g) of this section to be unconstitutional as violating Woirhaye's right to a jury trial. (See 1999 amendment.) Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998), followed in McGillivray v. St., 1999 MT 3, 293 M 19, 972 P2d 804, 56 St. Rep. 11 (1999), and Balyeat Law, P.C. v. Harrison, 1999 MT 144, 295 M 13, 983 P2d 902, 56 St. Rep. 566 (1999), and followed and clarified in St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

No Conflict of Interest Because Defendant's Father Paid for and Conferred With Counsel: The fact that defendant's father paid for defendant's attorney and consulted with the attorney concerning defendant's defense does not establish a conflict of interest. Defendant was not denied effective assistance of counsel because of his father's involvement with the attorney. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Conflict of Interest — Representation by Former Assistant County Attorney — Presence of Counsel for Codefendant at Initial Hearing: Where the defendant to a hit-and-run charge signed a motion to continue his case, which motion contained a paragraph notifying him that his retained counsel had previously worked for the County Attorney, the Supreme Court held that since the defendant signed the motion and retained the lawyer anyway, he had waived his right to assert any conflict of interest charge. The Supreme Court also held that inasmuch as the defendant had, under St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982), no right to counsel at his initial hearing, he could not claim a conflict of interest by the presence of his wife's attorney at that hearing. St. v. Henricks, 206 M 469, 672 P2d 20, 40 St. Rep. 1786 (1983).

Right to Counsel — Initial Appearance: The initial appearance is not a "critical stage" of the prosecution; thus, failure to provide counsel at an initial appearance does not violate the defendant's right to effective assistance of counsel. St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982).

Attorney General's Opinions

Duty of Judge to Notify Defendant of Potential Forfeiture of Hunting, Fishing, and Trapping Privileges — Notification of Loss of Privileges Duty of Department: In order to ensure that a knowing plea is entered by a defendant accused of a fish and game violation, a judge must inform the defendant of the potential forfeiture of hunting, fishing, and trapping privileges as a result of a conviction, guilty plea, or forfeiture of bond in the case of offenses for which the loss of privileges is a direct and immediate consequence of the violation. Notification of the loss of hunting, fishing, and trapping privileges is statutorily delegated to the Department of Fish, Wildlife, and Parks. 49 A.G. Op. 20 (2002).

Collateral References

Criminal Law *key* 231, 232.

21 Am. Jur. 2d Criminal Law §§545 through 554.

CHAPTER 8
RIGHT TO COUNSEL

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

1991 Chapter Comments: This chapter encompasses those statutes governing the procedural aspects of the right to counsel. They are modeled after the 1987 code, with amendments to reflect case law. As before, a court may appoint counsel "in the interests of justice" when a need exists. When incarceration is to be preserved as a sentencing option in a misdemeanor case, counsel must be appointed to an indigent. In addition, specific requirements are imposed on court-appointed counsel when, contrary to his client's instructions, he believes an appeal would be frivolous and desires to withdraw.

There are a few code provisions that have not been retained. The provision allowing appointment after trial is not retained expressly, but it is impliedly preserved. Compare 1987 MCA 46-8-101 and 46-8-104. Parts of the 1987 code concerning eligibility for court-appointed counsel were considered to be understood and unnecessary. See 1987 MCA 46-8-111(2) [now repealed] regarding the assets of friends and relatives. Also, 1987 MCA 46-8-111(3) [now repealed], concerning the financial capability of minors, was deleted and placed in the youth offenders section.

It was believed to be unnecessary for the court to warn the defendant of the penalties for false swearing. See 1987 MCA 46-8-112.

Chapter Compiler's Comments

Interim Study of Justice System: SJR 2 (1981) requested an interim study of the Montana criminal justice system, including alternative ways and effects of redistricting Montana's District Court system, establishing a statewide district attorney system for criminal prosecutions, and providing for a statewide system of representation for indigents accused of crimes and required a report of the findings of the study to the Legislature. The Legislative Council designated the Joint Subcommittee on Judiciary to conduct the study.

Chapter Case Notes

Denial of Motion for Continuance: In a prosecution for attempted deliberate homicide, the court did not err in denying defendant's motion for a continuance, in which defendant argued he was deprived of his right to effective counsel, due process, and time to prepare his case. Motions for continuance are directed to the sound discretion of the trial court, and the trial court will not be reversed absent a showing of prejudice to the movant, citing St. v. Paulson, 167 M 310, 538 P2d 339 (1975). As more than 2 months elapsed between the entry of defendant's plea and his motion for continuance, and because he failed to show any prejudice, the motion was properly denied. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Chapter Law Review Articles

Ineffective Assistance of Counsel, Everly & Mullowney, 42 Mont. L. Rev. 408 (1981).

The Right to Effective Trial Counsel: State v. McElveen, Ostby, 37 Mont. L. Rev. 387 (1976).

Argersinger v. Hamlin: A Demand for Change in Administration of Criminal Justice: Discussion of indigent's right to counsel. Fetscher, 35 Mont. L. Rev. 151 (1974).

Right to Counsel During Police Interrogation: An Intrinsic Right? (St. v. White, 146 M 226, 405 P2d 761 (1965)), Gordon, 27 Mont. L. Rev. 84 (1965).

Assigned Counsel in Montana: The Law and the Practice, Elison, 26 Mont. L. Rev. 1 (1964).

Preliminary Hearing Is a Critical Stage of the Proceeding at Which the Indigent Defendant Is Required to Have the Assistance of Counsel, Haddon, 25 Mont. L. Rev. 174 (1963).

Part 1
Extent of Right — Indigency
Repayment of Costs

Part Commission Comments

Source: New.

It is the commission's intention that [parts 1 and 2, part 2 now repealed] be sufficiently broad to include the right of an individual county to establish a public defender system. Such a system would not be practical in any but a few of the more populous counties of the state, where the need is to provide orderly and adequate legal counsel for indigent persons. It must be emphasized, however, that it was not the intention of the commission to institute a public defender system, but only to provide a general framework for its implementation if a particular county should desire such a procedure. Further, such a procedure would have no application in civil cases.

Part Case Notes

Counsel Travel Expenses for Incarcerated Youth Properly Denied: A youth sentenced to a youth correctional facility requested reimbursement funds to enable his attorney to visit at the facility, contending that denial of the funds violated the right to counsel. The Supreme Court disagreed, absent evidence that adequate consultation with counsel could not be conducted by telephone. The court found no abuse of discretion in the Youth Court's denial of counsel's travel expenses. In re N.V., 2004 MT 80, 320 M 442, 87 P3d 510 (2004).

County Employment of Independent Contractor to Provide Legal Services: There is no express prohibition under Montana law preventing a county from entering into an independent contractor relationship for the provision of legal services. Hamner v. Butte-Silver Bow County, 233 M 271, 760 P2d 76, 45 St. Rep. 1481 (1988).

Award Unreasonable Where Only One-Fourth of Bill and Overhead: Award to attorney representing indigent of maximum $1,000 for services allowed by District Court rule, plus claimed $31.98 for expenses, was not "reasonable compensation" as required by 46-8-201 (now repealed), was an abuse of discretion, and was reversed with remand for proper redetermination where attorney requested $3,431 for 129 ½ out-of-court hours at $20 an hour, 27 in-court hours at $30 an hour, and $31.98 in expenses, and submitted an affidavit of his accountant showing that attorney's share of his firm's overhead for the time spent on the case was approximately $1,006. St. v. Boyken, 196 M 122, 637 P2d 1193, 38 St. Rep. 2184 (1981).

Reasonable Compensation Beyond Overhead Required: Section 46-8-201's (now repealed) provision for payment of what a District Court or Justice of the Supreme Court certifies to be a "reasonable compensation" for services requires that the attorney be paid a reasonable compensation. The fee should allow the financial survival of the attorney's practice and must reimburse the attorney for office overhead and expenses and yield something toward his own support. St. v. Boyken, 196 M 122, 637 P2d 1193, 38 St. Rep. 2184 (1981).

Contracts and Court Rules Setting Fees: The Bar and District Courts are cautioned to see to it that upon appointment of private counsel to defend an indigent in a criminal case there are placed upon the minutes or other District Court records the rate of pay and upper limits to be received by counsel, as well as any changes in that contract. A District Court rule adopted for each county in each district, setting rates, would comply with this requirement. In re Petition to Adopt Rule Regarding Attorney's Fees, 194 M 1, 634 P2d 1185, 38 St. Rep. 1613 (1981).

Discretionary and Maximum Fees: In view of 46-8-201 (now repealed), choice of and rate of compensation for counsel appointed to defend indigents in criminal proceedings must be left to the various District Courts, and the $30-per-hour maximum formerly set by the Supreme Court in St. v. Allies, 182 M 323, 597 P2d 64, 36 St. Rep. 820 (1979), is withdrawn and the maximum hourly rate is left to the District Courts' discretion. The $5,000 limit for any given criminal proceeding without prior court approval and the $2,000 limit for any appeal, where paid from county funds, set by St. v. Allies, are retained, but the District Courts may go above those figures in justifiable cases. In re Petition to Adopt Rule Regarding Attorney's Fees, 194 M 1, 634 P2d 1185, 38 St. Rep. 1613 (1981).

Wide Discretion Under Section 46-8-201 (Now Repealed): It is the clear intent of 46-8-201 (now repealed) that where county funds are concerned a District Court should certify as to the propriety of an attorney's bill and where state funds are concerned a Supreme Court Justice should certify, and that a wide discretion be vested in the District Courts in the matter of fees. Promulgation by the Supreme Court of a statewide fee schedule would take away the District Courts' discretionary duty to determine the propriety of the bills presented against county funds and would make the courts' certificates ministerial rather than discretionary. In re Petition to Adopt Rule Regarding Attorney's Fees, 194 M 1, 634 P2d 1185, 38 St. Rep. 1613 (1981).

Court Discretion as to Limitation of Attorneys' Fees: The District Court did not abuse its discretion in limiting payments to court-appointed attorneys to $3,000 for an appeal limited to one issue by order of the Supreme Court. Similarly it was not an abuse to limit additional expenses to $473.97, an amount less than asked for by counsel. In striking a balance between the responsibility of providing gratuitous service to indigent defendants and the increasing burdens placed on the bar by expanded service to indigent rights, much discretion must be left in the trial judge. St. v. McKenzie, 186 M 474, 608 P2d 425 (1979), following St. v. Allies, 182 M 323, 597 P2d 64 (1979).

Effective Assistance of Counsel — Effect of Delay of Payment to Appointed Counsel: The defendant's claims that the failure of the court to provide funds in advance for the appointed defense counsel created a "chilling effect" and that by the time funds became available there was inadequate time in which to prepare a defense were rejected because the defendant failed to show that the alleged lack of preparation prejudiced him in any way. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Factors to Consider in Fixing Attorney Fees: The fee need not be equal to that from a paying client. Elements of consideration in fixing fees include the amount of time and effort expended, the nature and extent of services rendered, the fees paid for similar services in other jurisdictions, the traditional responsibilities of the legal profession, the amount of public funds made available for such purposes, and a judicious respect for the taxpaying public as well as the needs of the accused. St. v. Allies, 182 M 323, 597 P2d 64 (1979), followed in St. v. Boyken, 196 M 122, 637 P2d 1193, 38 St. Rep. 2184 (1981).

Fixing A Flat Fee: The fixing by the District Court of a flat fee of $2,000 for an appeal is not such an abuse of discretion as to require intervention by the appellate court. St. v. Allies, 182 M 323, 597 P2d 64 (1979).

Liability for Payment of Defense Counsel: When prosecutions are caused by the Attorney General pursuant to his statutory authority to prosecute public offenses disclosed by an audit of the Legislative Auditor, the Department of Justice must bear the cost of attorney's fees for indigent defendants. In re Barron, 170 M 218, 552 P2d 70 (1976).

Compensation Not Allowed for Unnecessary or Useless Services — Judge's Discretion: The judge did not abuse his discretion in disallowing the attorney's claim for services rendered for an indigent defendant for time spent asking educational questions on voir dire over repeated protest from the court. The judge has discretion to disallow compensation for substantial time consumed in improper, unnecessary, or useless services. It was, however, an abuse of discretion to reduce compensation for other attorney's wasted time. State ex rel. Stephens v. District Court, 170 M 22, 550 P2d 385 (1976).

Attorney's Lien on Defendant's Estate: The court could not summarily impose a lien on the defendant's estate in favor of the county for the services of appointed counsel when it was thought the defendant might be indigent. Petition of Hunsinger, 153 M 445, 456 P2d 304 (1969).

Justices' Courts — Counsel Appointed by District Court: Since District Courts lack supervisory control over Justices' Courts, the District Court could not appoint counsel for an indigent charged with the crime of petit larceny and, therefore, compensation could not be awarded the attorney who defended him. State ex rel. Johnson v. District Court, 147 M 263, 410 P2d 933 (1966).

Duty of Defense Counsel on Appeal: When the court-appointed counsel failed to advise the clerk's office as to what would be required for the record on appeal from a conviction of burglary and there was no record before the Supreme Court, the defendant had been denied his right to effective representation by counsel on his appeal and the cause was remanded to the District Court with directions to revoke appointment of the present counsel and appoint a competent and effective counsel to properly prosecute the appeal. St. v. Bubnash, 139 M 517, 366 P2d 155 (1961).

Appointment of More Than One Counsel: The court was not limited to the appointment of one attorney but might appoint more if the gravity of the offense warranted it, and if so, each would be entitled to compensation. Huntington v. Yellowstone County, 80 M 20, 257 P 1041 (1927).

Part Attorney General's Opinions

State Funding of Legal Defense Expenses of Indigent Defendants Limited to District Courts: The 2001 amendments to 3-5-901 and 46-8-201 (now repealed) revised the manner in which District Courts are funded by providing for state assumption of most costs. However, the amendments did not revise funding for Justices' Courts, and nothing indicates that the Legislature intended to include costs associated with indigent defendants in Justices' Courts. Under 46-8-201 (now repealed), costs of remuneration for counsel appointed for indigent criminal defendants are paid by the state, but payments are limited to District Court criminal cases only. 49 A.G. Op. 21 (2002).

46-8-101. Right to counsel.

Commission Comments

1991 Comment: This statute is loosely modeled after 1987 MCA 46-8-101. The statute is a generally stated provision that gives the court wide discretion in appointing counsel and is not intended to cause a great change in established procedure.

Subsection (1) reflects 1987 MCA 46-8-101(1). The amendment stresses the need for the defendant to be notified of the right to counsel at the initial appearance.

Subsection (2) is a general rule providing the requirements that must be met before the court is required to assign counsel. Namely, the defendant seeking counsel must show that he is indigent and that he is entitled to have counsel assigned. Subsections (1) and (2) are designed to work in tandem.

Subsection (3) sets out those instances in which a defendant is entitled to counsel. A defendant charged with a felony offense is entitled to counsel. A defendant charged with a misdemeanor is entitled to counsel if incarceration is retained as a sentencing option. See Argersinger v. Hamlin, 407 US 25, 40 (1972), and State ex rel. Maier v. City Court, 203 Mont. 443 (1983).

The provision that allows the court to assign counsel as the interests of justice require has been continued. This provision should be broadly interpreted. The "interest of justice" standard is intended to apply to any part of a criminal proceeding—from precharge investigations to postverdict petitions and appeals. The granting of counsel to one defendant during precharge investigation should not be construed as allowing similarly situated defendants counsel unless counsel is otherwise required by law. Of course, a defendant is not entitled to the appointment of counsel unless his indigence is shown to the court's satisfaction. See 46-8-111 [now repealed]. Conceivably, the "interest of justice" standard would permit the court to assign counsel for appeals through the federal system.

Source: New.

The right to counsel is provided for in the U.S. Constitution (14 Amend., Due Process Clause), the Montana Constitution [1889] (Art. III, sec. 16 [now Art. II, sec. 24, 1972 Mont. Const.]) and in current Montana statutes (See R.C.M. 1947, sections 94-4806(1), 94-6101 and 94-6512 [repealed]). This section provides for the right to counsel by requiring that the defendant, when brought before a court, be informed of his right to counsel and asked if he desires counsel. If he is indigent and charged with a felony he must be advised that counsel will be provided at state expense. See also [46-7-102(1)(c)].

The court must determine whether the defendant is indigent, i.e., unable to employ counsel, and therefore entitled to assigned counsel. In making this determination the court may wish to consider such factors as income, property owned, savings, investments, pensions, unemployment compensation, social security, resources of spouse, parents, or relatives, and the number and age of dependents. The defendant's ability to post bail may be another consideration. A recent survey of Montana judges and county attorneys indicated that the determination of indigency is lenient, but adequate. [Annotator's note: Section 46-8-111, enacted in 1981, now repealed, must be considered in determining indigency.]

The question of appointed counsel where a misdemeanor is involved has not yet been fully resolved. As a result the commission left the situation open by using the words, "in the interest of justice." A number of writers have concluded that the right to counsel will be extended not only to include capital and felony cases, but misdemeanors as well, where considerable loss of liberty is at stake.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (2) after "desires" inserted "assigned", after "counsel" deleted "is unable to employ counsel, and is entitled to have counsel assigned" and inserted reference to inability to retain private counsel when charged offense is felony or misdemeanor with possibility of incarceration, after "shall" inserted reference to

ordering office of state public defender to assign counsel, after "to" inserted "represent", and after "delay" inserted reference to pending determination of eligibility under 47-1-111; deleted former (3) that read: "(3) The defendant, if unable to employ counsel, is entitled to have counsel assigned if:

(a) the offense charged is a felony;

(b) the offense charged is a misdemeanor and the court desires to retain imprisonment as a sentencing option; or

(c) the interests of justice would be served by assignment"; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1991 Amendment: In (1), at beginning, substituted "During the initial appearance before the court, every defendant must be informed of the right to have counsel" for "Every defendant brought before the court must be informed by the court that it is his right to have counsel before proceeding"; in (2) deleted former first sentence that read: "The defendant, if charged with a felony, must be advised that counsel will be furnished at state expense if he is unable to employ counsel as determined under the provisions of 46-8-111", deleted "If the offense charged is a felony", after "employ counsel" inserted "and is entitled to have counsel assigned", and at end substituted "the defendant without unnecessary delay" for "defend him"; substituted (3) concerning criteria considered in determining if assigned counsel is required for former (3) that read: "(3) If the offense charged is a misdemeanor and if the defendant desires counsel and is unable to employ counsel, a court in the interest of justice may assign counsel to defend him"; and made minor changes in style.

1981 Amendment: Deleted "of record" after "court" in the second sentence of (2) and in the first sentence of (3); added "as determined under the provisions of 46-8-111" at the end of the first sentence of (2).

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GENERALLY

Failure to Inform Defendant of Right to Counsel — Conviction Dismissed Without Prejudice: Gatlin was arrested in Butte-Silver Bow County after robbing a store. Two hours earlier, a man fitting Gatlin's description had robbed two casinos in Missoula. The Missoula victims identified Gatlin as the robber, and the Missoula County Attorney charged Gatlin with two counts of robbery in Missoula County. Gatlin was arraigned in Butte and was informed of the Missoula charges but was not informed of the right to counsel on the Missoula charges. Eventually Gatlin pleaded nolo contendere on the Butte charge and was sentenced to 5 years in prison. Gatlin was then taken to Missoula, where he was arraigned and informed of his rights and subsequently pleaded guilty to the Missoula charges and was sentenced to 25 years in prison, with the term to run concurrently with the Butte sentence. Gatlin appealed on grounds that he was not informed of the right to counsel on the Missoula charges during the Butte arraignment. The state asserted that Gatlin's rights were not violated because the Butte appearance was for the Butte-Silver Bow charges, not the Missoula charges. The Supreme Court disagreed. The record was clear that Gatlin made an initial timely appearance on the Missoula charges in Butte but was not informed of the right to counsel on the Missoula charges. The appropriate remedy was to vacate the conviction and dismiss the Missoula information. However, Gatlin was not prejudiced by the lack of counsel on the Missoula charges while incarcerated in Butte or by any delay in filing the Missoula information, so dismissal of the information was without prejudice. St. v. Gatlin, 2009 MT 348, 353 M 163, 219 P3d 874 (2009).

Defendant's Right to Counsel and Right to Trial Not Violated During Four Prior DUI Prosecutions — Enhancement of New DUI Charge to Felony Proper: Walker's 2005 DUI arrest was enhanced to a felony charge when driving records indicated that Walker had six prior DUI convictions. Walker alleged that four of the prior convictions were constitutionally infirm because Walker had not been advised of the right to counsel, the right to compel attendance of witnesses, the right to a trial by a jury, and penalty enhancement provisions. The District Court concluded that the four convictions did not violate Walker's constitutional rights and held that

the prior convictions could be used to enhance the 2005 DUI to a felony. Walker appealed, and the Supreme Court considered each assertion in turn to determine whether Walker's waiver of the right to counsel and right to trial during the prior prosecutions was made knowingly, intelligently, and voluntarily. The initial appearance/arraignment documents that Walker signed after being charged with the prior DUI offenses adequately informed Walker of the right to counsel, and Walker indicated an understanding of that right and that an attorney was not desired. A waiver of rights form and a waiver of counsel form that Walker signed evidenced that understanding. It was also sufficient that Walker was informed of the right to call witnesses to attend the proceedings, even though the constitution does not confer a right to compel witnesses to testify. Walker was also adequately informed of the right to a trial by jury and to a unanimous verdict, but it was unnecessary for the District Court to explain all the nuances or effects of waiving the right to a trial by jury. Lastly, the documents informed Walker that there might be indirect consequences of a guilty plea, including the possible loss of driving privileges and the use of the conviction in the event Walker was convicted of a crime in the future, but the District Court was not required to specifically inform Walker of the indirect consequence that a fourth or subsequent DUI might result in a felony charge, because whether Walker committed a fourth or subsequent DUI was clearly within Walker's sole control and was an indirect consequence of guilty pleas to the prior DUI offenses. Thus, Walker's prior guilty pleas were entered knowingly, intelligently, and voluntarily, and the District Court did not err in allowing the use of the prior convictions to elevate Walker's 2005 DUI to a felony. St. v. Walker, 2008 MT 244, 344 M 477, 188 P3d 1069 (2008).

Defendant Not Considered Pro Se by Default: One year and three attorneys after being charged with several DUI-related offenses, Browning terminated the services of the third court-appointed attorney and indicated that he wished to hire private counsel. The trial court allowed Browning to proceed, but cautioned that under the circumstances, Browning was considered to be representing himself. Browning's attempt to secure private counsel failed for lack of funds. During subsequent proceedings, Browning asserted that he did not wish to proceed pro se because he did not know what he was doing, but the trial court refused to appoint a fourth attorney. Browning subsequently pleaded guilty and was sentenced to 20 years but then moved to withdraw the guilty plea on grounds that the plea was involuntary because he received ineffective assistance of counsel. The motion was denied, but on appeal, the Supreme Court reversed. Although a defendant has a right to appear pro se, every reasonable presumption is indulged in against waiver of the right to counsel, and waiver will be upheld only if a defendant made the decision knowingly, voluntarily, and intelligently. In this case, the record did not support a conclusion that Browning unequivocally requested to proceed pro se, and under the test in St. v. Langford, 267 M 95, 882 P2d 490 (1994), a defendant cannot be considered pro se by default. Thus, the trial court improperly denied Browning the assistance of counsel, and Browning's motion to withdraw the guilty plea was erroneously denied. St. v. Browning, 2006 MT 190, 333 M 132, 142 P3d 757 (2006).

Exclusion of Defendant From Pretrial Meeting to Determine Whether Defendant Be Allowed to Proceed Pro Se Violative of Right to Be Present and Defend Oneself — Reversible Error: An alleged violation of the constitutional right to be present and appear at all criminal proceedings does not warrant automatic reversal. Rather, the Supreme Court considers the effect that a violation has on a defendant to determine whether a defendant has suffered any conceivable prejudice. In this case, Mann was excluded from a pretrial meeting to determine whether Mann would be represented by counsel or proceed pro se at trial on burglary and misdemeanor assault charges. This important determination implicated a substantial issue in the scope of the criminal proceedings, and excluding Mann from the meeting, at which Mann's counsel portrayed Mann in a negative light, violated Mann's right to be present and defend himself and right to effective assistance of counsel. Violation of these fundamental constitutional rights was sufficiently prejudicial to constitute reversible error, and the case was remanded for a new trial. St. v. Mann, 2006 MT 160, 332 M 476, 139 P3d 159 (2006).

Erroneous Language in Verification of Arraignment Form Constituting Sufficient Irregularity to Void Waiver of Right to Counsel — Remand for Resentencing: The state attempted to enhance Mann's DUI to a felony based on his pleading guilty to two prior DUIs. Mann challenged the enhancement based on Mann's alleged waiver of the right to counsel contained in a verification of arraignment form. The District Court held that Mann had waived the right to counsel. On appeal, the Supreme Court reversed. The language of the verification of arraignment form was so erroneous, intimidating, and virtually indecipherable that Mann could not be considered to have entered into a knowing, intelligent, or voluntary waiver of the right to counsel. The language in the form was prima facie evidence of irregularity. Because the state

had already exercised its opportunity to establish that the prior convictions were not obtained in violation of Mann's constitutional right, the Supreme Court vacated the prior convictions and remanded for resentencing in accordance with misdemeanor DUI charges. St. v. Mann, 2006 MT 33, 331 M 137, 130 P3d 164 (2006).

Ordering Defendant to Pay Counsel's Cost for First Trial as Well as Retrial: Following retrial, the judge was authorized by 46-8-113 to order defendant to pay his counsel's costs for the first trial as well as the second trial. This did not impinge upon the defendant's right to counsel, and there was no evidence to support his claim that the judge acted out of vindictiveness because defendant went to retrial. St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Right to Counsel Where Public Defender Refuses Representation: Defendant was given a 3-year deferred sentence, which was subsequently revoked and a 10-year suspended sentence imposed. At that point defendant appeared pro se, without any indication in the record of his waiver of counsel or eligibility for appointed counsel other than a statement by a public defender that defendant was ineligible for a public defender because he earned too much. The Supreme Court vacated the 10-year suspended sentence because of denial of defendant's right to counsel, stating that where a public defender refuses to represent a defendant, the District Court must inquire further. Here the defendant was not questioned in regard to his indigency, nor did the court receive any type of financial statement from him. St. v. Fry, 197 M 354, 642 P2d 1053, 39 St. Rep. 589 (1982).

WHEN RIGHT ATTACHES

No Right to Additional Counsel During Initial Inquiry Hearing on Effectiveness of Present Counsel — Initial Inquiry Not Considered Critical Stage of Proceedings: Gazda requested removal of court-appointed counsel and appointment of new counsel. The District Court conducted an initial hearing to address whether Gazda's claim was substantial enough to warrant a hearing on the merits of the ineffective assistance claim. Gazda contended that he was entitled to additional counsel during the initial hearing, but the Supreme Court disagreed. Although the right to counsel arises at every critical stage of proceedings against a defendant, the critical stage in these proceedings began with the actual hearing on the merits of the ineffective counsel claim, not during the initial hearing to establish whether Gazda had a substantial claim, which was not a hearing on the merits of the claim. Thus, the District Court did not err by failing to appoint additional counsel for Gazda during the initial hearing. St. v. Gazda, 2003 MT 350, 318 M 516, 82 P3d 20 (2003).

Right to Assistance of Counsel in Misdemeanor Cases: Indigent defendants must be furnished counsel in all misdemeanor cases except those in which the judge has weighed the seriousness and gravity of the offense and precludes any imprisonment upon conviction and informs the defendant of this before trial. St. v. Skurdal, 235 M 291, 767 P2d 304, 45 St. Rep. 2394 (1988).

Attachment at "Critical Stages" — What Stages Critical: A "critical stage" of the proceedings is any step in which there is potential substantial prejudice to the defendant, and a defendant may question failure to provide counsel at a critical stage only where potential substantial prejudice inheres in the absence of counsel. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985), followed in St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996).

Minor Charged With Traffic Offense: Since a minor may not be held in any detention facility or jail by reason of a traffic violation or for nonpayment of a fine resulting from the violation, the minor is not entitled to counsel as a fundamental right in connection with the violation. Even if he is an indigent, his right to appointment of counsel exists only when he may lose his physical liberty if he loses the litigation. State ex rel. Maier v. City Court, 203 M 443, 662 P2d 276, 40 St. Rep. 560 (1983).

Right to Counsel — Initial Appearance: The initial appearance is not a "critical stage" of the prosecution; thus, failure to provide counsel at an initial appearance does not violate the defendant's right to effective assistance of counsel. St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982), followed in St. v. Farnsworth, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989). See also St. v. Sor-Lokken, 246 M 70, 803 P2d 638, 47 St. Rep. 2264 (1990).

Initiation of Adverse Judicial Proceedings: A person's sixth and fourteenth amendment rights to counsel attach only at or after the time that adversary judicial proceedings have been initiated against him. St. v. Lara, 179 M 201, 587 P2d 930 (1978), followed in St. v. Schoffner, 248 M 260, 811 P2d 548, 48 St. Rep. 424 (1991).

Motion to File Information: A motion for leave to file an information is not a "critical stage" entitling the defendant to the right to assistance of counsel. State ex rel. Brackman v. District Court, 172 M 24, 560 P2d 523 (1977).

REQUEST

Defendant's Direction to Passenger to Call Lawyer Held Not to Be Request to Law Enforcement for Lawyer: Clark was stopped on the highway by a highway patrol officer, was arrested and put in handcuffs, and, as he was being led to the officer's vehicle, yelled back over his shoulder to his passenger, "Call the attorney now. This is harassment." Noting that the right to counsel attaches only in a custodial interrogation and that Clark was not being interrogated, the Supreme Court held that Clark's statement directed to his passenger was not a request to law enforcement that he be given an attorney. St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Error in Failure to Appoint New Counsel Following Collapse of Attorney-Client Relationship: Hendershot made repeated timely requests for new counsel, but the requests were denied, and Hendershot was convicted. On appeal, the Supreme Court found that a conflict between Hendershot and counsel arose early in the relationship and that they were at serious odds for some time. The relationship continued to deteriorate, and a complete collapse was demonstrated by Hendershot and reinforced by counsel, requiring substitution of counsel. Thus, the District Court abused its discretion in denying Hendershot's requests for new counsel, and the Supreme Court reversed for further proceedings. St. v. Hendershot, 2007 MT 49, 336 M 164, 153 P3d 619 (2007), following U.S. v. Williams, 594 F2d 1258 (9th Cir. 1979).

Standard of Review of Ruling on Request for Substitute Counsel — Abuse of Discretion: Absent an abuse of discretion, the Supreme Court will not overrule a District Court's ruling on a request for substitution of counsel, which is within the sound discretion of the District Court. An abuse of discretion occurs only if the District Court acted arbitrarily without employment of conscientious judgment or exceeded the bounds or reason resulting in a substantial injustice. St. v. Hendershot, 2007 MT 49, 336 M 164, 153 P3d 619 (2007), following St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Broad Right to Counsel During Custodial Interrogation — Limited Right to Counsel for Police Procedure Not Involving Verbal Inquiry: When first interviewed, Buck was asked to provide a fingernail scraping, but Buck requested a lawyer, and the interview was concluded. During a subsequent interrogation, Buck confessed to an assault without requesting a lawyer. Buck asserted that the confession should be suppressed because the request for a lawyer made during the first interview was not honored during the subsequent interrogation, but the suppression motion was denied. On appeal, Buck also contended that he was not educated in constitutional law sufficiently to distinguish between the right to counsel as it applied to the two different procedures. The Supreme Court noted that the right to counsel in custodial interrogation is broad enough that it may be invoked in certain circumstances by a vague statement that does not include a reference to a lawyer, but it is not so broad that it may be invoked by a request that is unambiguously linked to another police procedure. A suspect may seek legal assistance for only limited purposes in dealing with law enforcement, and a suspect's request for counsel that is unambiguously limited to a police procedure that does not involve verbal inquiry does not invoke the right to counsel in custodial interrogation. Buck's request for counsel was unambiguously limited to the search incident to the fingernail scraping and did not extend to the subsequent custodial interrogation, nor did Buck establish error related to an inability to understand the request for counsel in two different contexts. Denial of the suppression motion was affirmed. St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006), following Conn. v. Barrett, 479 US 523 (1987), and overruling St. v. Johnson, 221 M 503, 719 P2d 1248 (1986), and St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002), to the extent that those cases held that the right to counsel for self-incrimination purposes may be invoked in custodial interrogation.

No Abuse of Discretion in Denial of Motion for Substitute Counsel Absent Substantial Complaints: Minez's first trial on drug charges ended in mistrial when a juror became sick and there were no alternates. Just before a subsequent trial, Minez moved for substitution of counsel. The District Court held a hearing to allow Minez to explain the motion. Minez contended that his court-appointed counsel had not provided effective assistance in several instances in the first trial. The court noted that it had observed counsel during the first trial and had seen nothing to indicate ineffective assistance or inadequate preparation. There was every indication that counsel was acting in Minez's best interests, and the court found that Minez presented no substantial complaints and denied the motion. On appeal, the Supreme Court affirmed. The District Court made an adequate initial inquiry into Minez's claims and properly exercised discretion in determining that Minez failed to present seemingly substantial complaints and in declining to hold an additional hearing on the motion for substitution of counsel. St. v. Minez, 2003 MT 344, 318 M 478, 82 P3d 1 (2003).

Presumption of Ineffective Counsel — Irreconcilable Conflict — Error in Failure to Investigate Timely Request for Substitution of Counsel: Generally, a defendant must establish both parts of

the two-part test in Strickland v. Wash., 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984), to prevail in showing ineffectiveness of counsel: (1) that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the constitution; and (2) that counsel's deficient performance prejudiced the defense and deprived defendant of a fair trial. However, in some cases, counsel's performance is so deficient that a presumption of ineffectiveness arises and the second part of the test becomes unnecessary. Only when surrounding circumstances justify a presumption of ineffectiveness can a constitutional claim of ineffective counsel be sufficient without inquiry into counsel's actual performance at trial. Here, a presumption of ineffectiveness could have arisen by an actual conflict of interest or by an irreconcilable conflict, but in either case, once the presumption was established, the second part of the test did not need to be satisfied. To establish an irreconcilable conflict, defendant must show a complete collapse of the attorney-client relationship. New counsel should be appointed if defendant shows by material facts that there is a total lack of communication or ineffective assistance of counsel, but bare unsupported allegations are insufficient to justify appointment of new counsel. In the present case, Wilson filed a pro se petition for postconviction relief, alleging ineffective assistance of counsel. The District Court found that it had erred by denying a hearing when Wilson requested substitution of counsel but denied the petition on grounds that Wilson had received a fair trial. On appeal, the Supreme Court applied St. v. Vessey, 967 P2d 960 (Utah Ct. App. 1998), holding that when reviewing an error in failing to investigate a defendant's timely request for substitution, the question is not whether the defendant received effective assistance of counsel at a subsequent trial, but whether the conflict with counsel was sufficient that it required substitution of counsel at the time that the request was made. In Wilson's case, it could not be determined whether the District Court gave adequate consideration to the merits of Wilson's substitution request based on the facts at the time that the request was made or whether denial of the petition for postconviction relief was based simply on the court's observation of counsel at the time of trial. The order denying the petition was vacated and the case remanded for further proceedings. Wilson v. St., 1999 MT 271, 296 M 465, 989 P2d 813, 56 St. Rep. 1096 (1999), overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001). See also St. v. Zackuse, 250 M 385, 833 P2d 142 (1991), St. v. Jones, 278 M 121, 923 P2d 560, 53 St. Rep. 864 (1996), and St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371, 55 St. Rep. 284 (1998).

Double Jeopardy — Vacating Trial When Defendant Requested Attorney After First Witness Was Sworn: After the first witness was sworn and testified in a prosecution for two misdemeanors, the judge asked defendant about a letter in the court file indicating that defendant had a public defender. Defendant said that he had not been in touch with the public defender and that he wanted a lawyer. The court vacated the trial to allow defendant a chance to obtain counsel. At a trial held 11 months later, a motion to dismiss because jeopardy attached after the first witness was sworn in the first trial was properly denied. Defendant's request for counsel prompted the vacation of the first trial, and the vacation worked to his advantage because he secured the public defender's representation. Found to be without merit was defendant's claim that the legal defect at the first trial, which the court feared might arise from lack of counsel, would not have occurred because the consequence of failure to appoint counsel would only prohibit the judge, under this section, from including jail time in the sentence. St. v. Stringer, 263 M 295, 868 P2d 588, 51 St. Rep. 63 (1994).

When Right to Counsel Invoked — Subsequent Incriminating Testimony Inadmissible — Error Held Harmless: Recognizing that it was affording greater protection under the state constitutional right to counsel provision than the U.S. Supreme Court had granted under the identically worded federal constitutional provision, and that this was a departure it had previously declined to make in the area of criminal law, the Montana Supreme Court held that when detained defendant stated he would like to talk to "someone", he invoked his right to counsel. His willing participation in a subsequent recorded conversation, without advice of counsel, did not constitute a waiver of the right to counsel, and admission of the recording into evidence, being testimonial and self-incriminating in nature, was error. However, the error was harmless because defendant during trial testified to a different story than he told on the recording, and the recording was admissible for impeachment purposes. St. v. Johnson, 221 M 503, 719 P2d 1248, 43 St. Rep. 1010 (1986), overruled, to the extent that the right to counsel for self-incrimination purposes may be invoked in custodial interrogation, in St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006). Johnson was distinguished in St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Suppression of Confession — Voluntariness — Waiver of Right to Counsel After Making Request: To determine whether a confession should have been suppressed, it had to be determined whether the confession was voluntary and whether there was an unconstitutional denial of the right to counsel. In so doing, the following questions had to be answered: What was the totality of the circumstances? Was there effective assertion of the right to counsel, and if so, was there an effective waiver later? Since the evidence answered a large number of the requisite questions about the circumstances, the decision of the trial court was held not to have clearly contravened the weight of the evidence and its holding of voluntariness was upheld. Since any indication by a defendant *in any manner* that he wishes to consult with an attorney suffices, and evidence showed the defendant had met this requirement, the trial court erred in concluding that there was ineffective assertion of the right to counsel. After adopting the rule that a defendant can validly waive the right to counsel after making a request for counsel, the Supreme Court found the trial court properly found that the State had carried its "heavy burden" of showing waiver of counsel. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979); certiorari granted, Blakney v. Mont., 451 US 1013, 69 L Ed 2d 384, 101 S Ct 2999 (1981), and judgment vacated and case remanded for further consideration in light of Edwards v. Ariz., 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880 (1981); affirmed on remand, St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Remarks About Request for Counsel: The testimony of the police officer that the defendant did not want to talk to the police but asked to call his lawyer, although irrelevant and improper, was harmless error when the State presented overwhelming evidence of guilt and the defendant himself testified at trial. St. v. Flamm, 165 M 128, 526 P2d 119 (1974).

APPOINTMENT

Showing of Good Cause Required Prior to Appointment of State Public Defender in Habeas Corpus Proceedings: More than a simple motion is required before the Supreme Court will appoint the Office of State Public Defender (OSPD) to represent a person seeking habeas corpus relief. In such case, OSPD counsel will be appointed only upon a demonstration of good cause. A showing of likelihood of the illegality of the sentence of the person seeking relief, and that the sentence will be shortened or terminated if habeas corpus relief is granted, is required before OSPD counsel will be appointed. A statement that an applicant is untrained or unskilled in the law is insufficient, without more, to establish good cause. Dyer v. Mahoney, 2008 MT 117, 342 M 495, 182 P3d 737 (2008).

Choice of Counsel by Defendant: No one has a constitutional right to counsel of his choice. St. v. Skurdal, 235 M 291, 767 P2d 304, 45 St. Rep. 2394 (1988).

No Right to Representation by Nonlawyer: A defendant has an inalienable right to represent himself, but has no right to demand representation by a nonlawyer. A District Court lacks authority to allow representation of a defendant by a nonlawyer. (St. v. Skurdal, 235 M 291, 767 P2d 304, 45 St. Rep. 2394 (1988); St. v. Barnes, 232 M 405, 758 P2d 264, 45 St. Rep. 1150 (1988).

Transfer of Child Proceeding From Montana Court to Tribal Court: One of the purposes of the Indian Child Welfare Act, 25 U.S.C. §1901, et seq., is to ensure due process for all those involved, which requires a Montana court, when entertaining a tribal court motion for transfer to the tribal court of jurisdiction of children who are the subject of a Montana court proceeding, to hold a hearing on the transfer request and give a parent who claims indigency an appointed counsel if the court finds indigency. In re G.L.O.C., Youth in Need of Care, 205 M 352, 668 P2d 235, 40 St. Rep. 1354 (1983).

Right to Counsel Where Public Defender Refuses Representation: Defendant was given a 3-year deferred sentence, which was subsequently revoked and a 10-year suspended sentence imposed. At that point defendant appeared pro se, without any indication in the record of his waiver of counsel or eligibility for appointed counsel other than a statement by a public defender that defendant was ineligible for a public defender because he earned too much. The Supreme Court vacated the 10-year suspended sentence because of denial of defendant's right to counsel, stating that where a public defender refuses to represent a defendant, the District Court must inquire further. Here the defendant was not questioned in regard to his indigency, nor did the court receive any type of financial statement from him. St. v. Fry, 197 M 354, 642 P2d 1053, 39 St. Rep. 589 (1982).

Determination of Indigency: When the record reflects only the defendant's claim that he tried to get a lawyer and could not, the inquiry was not thorough and complete enough to support the determination of nonindigency and the subsequent ruling that defendant waived his right to counsel when he appeared unrepresented. St. v. Lande, 180 M 157, 589 P2d 666 (1979).

Discretion in Appointment: Matters dealing with appointment of counsel for indigent defendants are for the discretion of the trial court. St. v. Lande, 180 M 157, 589 P2d 666 (1979).

Appointment to Be Prompt: The District Court must determine indigency and appoint counsel without unnecessary delay. Fitzpatrick v. Crist, 165 M 382, 528 P2d 1322 (1974).

Substitution of Counsel: The denial of a motion for a continuance based on substitution of counsel was not an abuse of discretion or a denial of the defendants' constitutional right to counsel. St. v. Spurlock, 161 M 388, 506 P2d 842 (1973).

Justices' Courts — Counsel Appointed by District Court: Since District Courts lack supervisory control over Justices' Courts, the District Court could not appoint counsel for an indigent charged with the crime of petit larceny and, therefore, compensation could not be awarded the attorney who defended him. State ex rel. Johnson v. District Court, 147 M 263, 410 P2d 933 (1966).

Right to Appointed Counsel on Appeal: There is no provision for appointment of counsel in the Supreme Court; such appointments are made by the District Courts. Brown v. St., 140 M 289, 371 P2d 262 (1962); In re Pelke's Petition, 139 M 354, 365 P2d 932 (1961).

Proof of Denial of Counsel:

The accused was not entitled to habeas corpus on the ground that the District Court did not advise him of his rights or appoint counsel for him when there was no showing of prejudice sufficient to overcome the presumption that the court had performed its duty and the contention had not previously been raised before the Supreme Court. In re Diserly's Petition, 140 M 219, 370 P2d 763 (1962).

When the accused did not move to have the minutes of the court corrected to show, as he claimed, that he was arraigned before he was advised of his right to counsel, his affidavit contradicting the court minutes in that regard was insufficient, in the absence of a showing of prejudice, to overcome the presumption that the court performed its judicial duty. St. v. Murphy, 68 M 427, 219 P 629 (1923).

Nothing short of a refusal by the court, on an application for time to procure counsel, will justify a conclusion that the defendant was denied his constitutional right to counsel. St. v. Fowler, 59 M 346, 196 P 992 (1921).

More Than One Counsel: The court was not limited to the appointment of one attorney but might appoint more if the gravity of the offense warranted it, and if so, each would be entitled to compensation. Huntington v. Yellowstone County, 80 M 20, 257 P 1041 (1927).

DISCHARGE

Newly Appointed Attorney Necessary if Attorney-Client Relationship Completely Collapses: If the relationship between an appointed attorney and the attorney's client completely collapses in a criminal case, the refusal to substitute new counsel violates the client's right to effective assistance of counsel. St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Pretrial Motion for Substitution of Appointed Counsel — Counsel's Conduct at Trial May Be Considered: In evaluating defendant's pretrial motion for substitution of counsel, it was not error for the court to consider the counsel's conduct at trial. Although the Supreme Court has held that on a pretrial complaint the issue is whether defendant received effective assistance at that time, the court has not held that the lower court may not make logical inferences from its own observations at trial. St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Discharge of Appointed Counsel by Defendant: Once counsel has been appointed and is rendering effective assistance, the defendant has only the choice of: (1) continuing with the counsel so appointed; or (2) having his counsel dismissed and proceeding on his own, pro se. If appointed counsel is rendering effective assistance, defendant may not have different counsel appointed or demand certain counsel. St. v. Pepperling, 177 M 464, 582 P2d 341 (1978), followed in St. v. Lange, 226 M 9, 733 P2d 846, 44 St. Rep. 418 (1987).

Effect of Unwarranted Discharge of Counsel: There was no ground for appeal based on inadequate representation when the defendant attempted to discharge his appointed counsel 1 day before trial after counsel had adequately represented the defendant for months. St. v. Forsness, 159 M 105, 495 P2d 176 (1972).

EFFECTIVE ASSISTANCE

No Error in Failure to Hold Hearing on Effective Representation Absent Seemingly Substantial Complaint: Rose alleged that the trial court erred by failing to hold a hearing on Rose's complaints regarding effectiveness of counsel. The Supreme Court noted that under St. v. Weaver, 276 M 505, 917 P2d 437 (1996), and Billings v. Smith, 281 M 133, 932 P2d 1058 (1997), a defendant is entitled to a hearing on the issue of ineffective assistance of counsel if the defendant presents a seemingly substantial complaint about effective assistance. In this case, Rose voiced no seemingly substantial complaint. In fact, when the District Court appointed another attorney to inquire into Rose's complaints about counsel, Rose stated that he did not want counsel

replaced. Absent any seemingly substantial complaint, the District Court did not err by failing to hold a hearing on effective assistance. St. v. Rose, 2009 MT 4, 348 M 291, 202 P3d 749 (2009). See also St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371 (1998).

Failure to Ask Jurors Followup Questions Regarding Impartiality During Voir Dire Not Considered Deficient Counsel Performance: Whitlow contended that he received ineffective assistance of counsel because, during voir dire, the defense attorney failed to ask followup questions of two jurors regarding impartiality. Whitlow's assertion was based primarily on an affidavit and testimony provided by defense counsel years later, stating that although counsel did not recall any partiality problems during voir dire, in hindsight, counsel probably should have asked additional questions of the jurors. The Supreme Court examined the trial transcript and defense counsel's voir dire notes and concluded that Whitlow failed to demonstrate that counsel's performance was deficient and failed to overcome the presumption that the challenged acts and omissions fell within the wide range of reasonable assistance measured under prevailing professional norms and in light of the surrounding circumstances. Whitlow's ineffective assistance claim failed. Whitlow v. St., 2008 MT 140, 343 M 90, 183 P3d 861 (2008), overruling St. v. Morigeau, 202 M 36, 656 P2d 185 (1982), and its progeny to the extent that the Morigeau "ignorance or neglect" test for ineffective assistance of counsel conflicts with the correct approach, which is the "objective standard of reasonableness" test set out in Strickland v. Wash., 466 US 668 (1984), and followed in St. v. Rose, 2009 MT 4, 348 M 291, 202 P3d 749 (2009).

Claims of Ineffective Assistance of Counsel Properly Denied Absent Showing of Prejudice: Hartinger filed a petition for postconviction relief on grounds that he received ineffective assistance because his counsel: (1) failed to file a notice of appeal; (2) failed to move to suppress Hartinger's incriminating statements; (3) failed to move to suppress newly discovered evidence; and (4) incorrectly conducted voir dire. The petition was denied, and Hartinger appealed. The Supreme Court considered each claim and affirmed, noting that ineffective assistance claims must stem from counsel's neglect or ignorance rather than from informed, professional deliberation. First, Hartinger understood the right to file an out-of-time appeal but knowingly and intentionally waived that right, instead choosing to file for postconviction relief, so Hartinger could claim no prejudice from counsel's failure to file an appeal. Second, even if Hartinger's incriminating statements should have been suppressed, there was more than enough evidence to support the conviction, so no prejudice accrued. Third, counsel's decision to not suppress newly discovered evidence was an informed, tactical decision that did not constitute deficient performance. Fourth, counsel's tactic of using a peremptory challenge to remove a prospective juror who voiced pro-police views during voir dire was a reasonable trial tactic, reaffirmed the essence of voir dire, and could not be viewed as deficient performance. Hartinger v. St., 2007 MT 141, 337 M 432, 162 P3d 95 (2007).

Advising Defendant Not to Testify Not Considered Ineffective Assistance of Counsel: Stevens asserted that because he wished to testify at his trial on sexual assault charges but was advised not to testify by counsel, Stevens was not given effective assistance. The Supreme Court affirmed the District Court's findings that trial counsel's decision to not put Stevens on the stand was reasonable and sound trial strategy and that Stevens did not meet the burden of establishing that counsel's performance was deficient. Stevens v. St., 2007 MT 137, 337 M 400, 162 P3d 82 (2007).

Counsel Ready for Trial — Motion for Continuance Properly Denied: Molder asserted that a motion to continue trial should have been granted because his substitute counsel was unprepared for trial. The Supreme Court applied the factors in St. v. Sotelo, 209 M 86, 679 P2d 779 (1984), to determine whether the trial court abused its discretion in denying a continuance, including: (1) the length of the requested delay; (2) whether the state's case would be prejudiced; (3) reasons for the requested continuance; (4) whether defense counsel was diligent in preparing for trial; (5) whether defendant's right to a speedy trial would be violated; and (6) defendant's right to effective assistance of counsel. Despite Molder's assertion to the contrary, his counsel stated that a trial strategy was in place and that counsel was prepared for trial. The Supreme Court held that the trial strategy was reasonable, that Molder suffered no prejudice, and that Molder's substantial rights were not affected. Denial of the motion for continuance was affirmed. St. v. Molder, 2007 MT 41, 336 M 91, 152 P3d 722 (2007).

Withdrawal of Plea Based on Evidence That, After Guilty Plea, Assault Victim Told Public Defender That Defendant Wasn't the Assailant: Martin was charged with assault with a weapon and criminal possession of dangerous drugs. In exchange for the drug charge being dropped, he pleaded guilty to the assault charge. Two days before the sentencing date, a woman claiming to be the victim told the public defender's office that Martin was not her assailant. Martin moved for withdrawal of his guilty plea. Martin's motion was denied. Because Martin conceded in the

lower court that his plea was in exchange for dropping the drug charge, he could not claim on appeal that it was not and that it was therefore error to refuse to allow withdrawal of the guilty plea. Martin obtained a benefit the moment that the plea agreement was entered into, and it did not matter that the drug charge had not been dropped and that he had not been sentenced at the time that he moved for withdrawal of the plea. Moreover, the defendant did not receive ineffective assistance of counsel. Because the woman did not testify at the hearing, her identity as the victim was not confirmed, the woman gave an incorrect birth date, and a witness told the police that Martin told the witness that Martin had stabbed the victim. The court did not abuse its discretion when it refused to allow withdrawal of the guilty plea based on what a woman had told the public defender's office. St. v. Martin, 2004 MT 288, 323 M 320, 100 P3d 146 (2004).

Failure of Counsel to File Motion to Dismiss Not Considered Ineffective Assistance When Element of Offense Before Jury: Maki was arrested for DUI after being discovered slumped into the passenger seat of a running vehicle that was parked off the highway near a missile silo access site. Maki claimed ineffective assistance of counsel because his attorney did not file a motion to dismiss based on the fact that Maki was not on a way of the state open to the public. However, Maki's location on a way open to the public was an element of a DUI offense, so the issue was before the jury and Maki had an opportunity to contest the point. Counsel did not need to offer a motion to dismiss in order to raise the issue, and failure to do so neither prejudiced nor deprived Maki of a fair trial, so the ineffective assistance claim failed, and the DUI conviction was affirmed. St. v. Maki, 2004 MT 226, 322 M 420, 97 P3d 556 (2004).

Admission by Counsel That Defendant Resisted Arrest When Defendant Charged With Assaulting Peace Officer — Not Ineffective Assistance of Counsel: Audet was charged with assaulting a peace officer and resisting arrest. At the time of trial, Audet told the court that he wished to plead guilty to the resisting arrest charge but to go to trial on the assault charge, even though his attorney had advised otherwise. The court entered not guilty pleas for both counts. Counsel informed the jury in opening and closing statements that Audet was not contesting the resisting arrest charge, but lacked the purposeful and knowing elements required to commit officer assault. The prosecutor then convinced the jury that Audet had essentially conceded the mental state by conceding guilt for resisting arrest, and Audet was convicted on both counts. On appeal, Audet contended that counsel's conduct constituted ineffective assistance, warranting reversal. The Supreme Court applied the Strickland test and dismissed the claim. The record did not reveal why counsel chose to concede the resisting arrest charge to the jury, so the court was unable to determine whether the decision constituted an unreasonable defense strategy that would overcome the presumption that counsel's actions fell within the range of reasonable professional conduct. Pursuant to St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), Audet's direct appeal was dismissed without prejudice to the ineffective assistance issue being raised in a postconviction relief proceeding. St. v. Audet, 2004 MT 224, 322 M 415, 96 P3d 1144 (2004). See also St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003).

Proper Consideration in Postconviction Relief Proceedings of Ineffective Assistance of Counsel Claims Based on Conversations off Record: In postconviction relief proceedings, Thurston contended that he was provided ineffective assistance of counsel because: (1) he had given counsel information needed to support at least seven criteria for designating Thurston as a nondangerous offender, but counsel failed to raise the mitigating information at the sentencing hearing; (2) counsel did not discuss with Thurston how to refute testimony by the state's witnesses until they were walking to the sentencing hearing and it was too late; and (3) counsel failed to provide Thurston with an accurate portrayal of the sentence contained in a plea agreement. The District Court dismissed the claims on grounds that they would have been reflected in the record and should have been raised on direct appeal. The Supreme Court disagreed. The basis for the claims rested on conversations that Thurston had with counsel outside the courtroom and thus by their very nature could not have been reflected in transcripts or the record. The Supreme Court therefore reversed and ordered the District Court to consider the issues on their merits in accordance with the ineffective assistance test in Strickland v. Wash., 466 US 668 (1984). Thurston v. St., 2004 MT 142, 321 M 411, 91 P3d 1259 (2004).

Record Devoid of Reasons for Counsel's Conduct During Voir Dire — Ineffective Assistance Claim Improperly Raised on Direct Appeal: Defendant's claims of ineffective assistance of counsel during voir dire could not be addressed without considering matters outside the record and were therefore inappropriate for direct appeal. The claims were thus dismissed without prejudice to defendant's pursuit of the claims in postconviction proceedings. St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003), following St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003).

Counsel Decision to Forego Certain Defense Considered Trial Strategy — Insufficient Record to Determine Effective Assistance of Counsel on Direct Appeal: On direct appeal, Hendricks contended that he was provided ineffective assistance of counsel in his assault trial because his attorney failed to raise the affirmative defense of justifiable use of force. However, in a disclosure statement filed prior to the omnibus hearing, Hendricks's counsel specifically noted that the defense of justifiable use of force would not be asserted. On the morning of trial, counsel stated that no jury instructions on the defense of justifiable use of force would be offered. Thus, the decision not to raise the defense was made consciously and was not the result of ignorance or neglect and was presumed to be sound trial strategy falling within the realm of reasonable professional conduct absent evidence to the contrary. Absent a sufficient record to address the issue of ineffective assistance, the direct appeal was dismissed, requiring Hendricks to raise the issue by a postconviction relief proceeding, if at all. The Supreme Court clarified that it will no longer use the approach in St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001), to determine effective assistance of counsel, but rather the procedure set out in St. v. Herrmann, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003). St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003), followed in St. v. Webster, 2005 MT 38, 326 M 112, 107 P3d 500 (2005).

Use of Prior Convictions to Enhance Offense When Defendant Waived Right to Counsel During Prior Convictions: In 1989 and 2001, Markuson was charged with misdemeanor partner or family member assault. In both cases, he waived the right to counsel and pleaded guilty. In 2002, Markuson was again charged with partner or family member assault, and based on the two prior convictions, the third charge was designated as a felony. Markuson contended that the use of the alleged constitutionally infirm prior convictions to enhance the 2002 charge was improper because the Justice's Court in the prior cases failed to advise of the dangers and disadvantages of self-representation when the right to counsel was waived. In this case, the Supreme Court disagreed. Although the state may not use constitutionally infirm prior convictions to enhance a subsequently charged offense, a rebuttable presumption of regularity attaches to prior convictions. However, Markuson failed to demonstrate that the prior waivers of the right to counsel were not knowing and voluntary. Markuson's affidavit was insufficient to demonstrate that the prior convictions were constitutionally infirm, and the felony conviction was affirmed. St. v. Markuson, 2003 MT 206, 317 M 43, 75 P3d 298 (2003), distinguishing U.S. v. Akins, 276 F3d 1141 (9th Cir. 2001), and followed, with regard to charging felony DUI based on prior convictions, in St. v. Wolfe, 2003 MT 222, 317 M 173, 75 P3d 1271 (2003), and St. v. Joseph, 2003 MT 226, 317 M 186, 75 P3d 1273 (2003).

Failure of Defense Counsel to Question Defendant's Mental Condition During Sentencing — Alleged Errors in Attorney Performance Properly Resolved in Postconviction Relief Proceeding: Watson petitioned for postconviction relief and claimed that defense counsel provided inadequate assistance at sentencing by not questioning whether Watson suffered from a mental disease or defect. The District Court denied the petition, determining that the ineffective assistance claim was record-based and should have been raised on direct appeal. In St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001), the Supreme Court outlined a two-step process for determining whether ineffective assistance claims should have been raised on appeal or in a postconviction hearing. First, the trial record must adequately document a challenged act or omission of defense counsel for a defendant to raise an ineffective assistance claim on direct appeal. Second, the record on appeal must afford sufficient understanding of the reasons for counsel's act or omission to answer the threshold question of whether the alleged error expressed a trial strategy or tactical decision, and if the record does not supply the reason for counsel's act or omission, the claim must be raised by petition for postconviction relief. Here, the record was devoid of any evidence as to why counsel did not question Watson's mental condition, so Watson could not have properly raised an ineffective assistance claim on direct appeal. Therefore, the Supreme Court reversed and remanded for an evidentiary postconviction hearing to determine whether counsel's act or omission was a trial strategy or tactical decision. Watson v. St., 2002 MT 329, 313 M 209, 61 P3d 759 (2002), following Strickland v. Wash., 466 US 668 (1984). See also Soraich v. St., 2002 MT 187, 311 M 90, 53 P3d 878 (2002).

Complaints of Ineffective Counsel Not Seemingly Substantial — Gallagher Test: Under the test set out in St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371 (1998), when presented with allegations of ineffective assistance of counsel that purportedly require appointment of new counsel, a District Court must make an adequate initial inquiry into the nature of the complaints and determine if they are seemingly substantial. Only if the complaints are seemingly substantial, the court must appoint new counsel to represent defendant at a hearing on the merits of the motion for new counsel. Initial inquiries into allegations of ineffective assistance of

counsel are considered adequate when the District Court considers defendant's factual complaints together with counsel's explanations addressing those complaints. Here, the initial inquiry included a hearing at which defendant gave a lengthy oral explanation of complaints about the public defender and substitute counsel, with an opportunity for substitute counsel to respond to the complaints, after which the District Court concluded that defendant's complaints were not seemingly substantial. The inquiry was adequate, and the Supreme Court affirmed that conclusion. St. v. Kellames, 2002 MT 41, 308 M 347, 43 P3d 293 (2002).

Failure of Trial Counsel to Request Ruling on Use of Suppressed Confession for Impeachment Purposes — Absence in Record of Understanding of Counsel's Course of Action — Remand for Determination of Reasonableness of Counsel's Actions: Harris claimed ineffective assistance of counsel because his attorney at trial never requested a ruling from the trial court on the prosecution's use of Harris's suppressed confession for impeachment purposes. The trial court's deferral of the ruling initially preserved the issue for appeal should the prosecution have referred to the confession at trial, but Harris's counsel decided to raise the issue of the suppressed confession on direct examination, which created an opening for the prosecution to further question Harris on cross-examination and made the appealable issue moot. The record did not reveal whether counsel's acts and omissions sprang from tactical decisions based on articulable trial strategies or reflected misunderstandings of the law and trial procedures. Because information outside the record was necessary to determine the merits of Harris's assistance of counsel claim, 46-21-105 did not bar a postconviction assertion of ineffective assistance of counsel at trial (see St. v. Whitlow, 2001 MT 208, 306 M 339, 33 P3d 877 (2001)). The Supreme Court refused to speculate on whether the alleged errors reflected a coherent trial strategy or whether they were reasonable and deserved deference, so the case was remanded for an evidentiary hearing to determine whether counsel's actions fell below an objective standard of reasonableness pursuant to the first prong of the Strickland test for ineffective assistance of counsel. St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001), followed in St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006).

Lack of Seemingly Substantial Complaint Regarding Effectiveness of Counsel — Failure of Court to Make Initial Inquiry Not Erroneous: After several lawyers withdrew from his case, Frazier was assigned counsel to represent him at his sentencing hearing. At the hearing, Frazier alluded to a breakdown on the attorney-client relationship when he informed the court of difficulty communicating with counsel from his jail cell. However, there was no evidence in the record that Frazier complained about counsel's performance at any time prior to judgment, nor did he request a continuance to allow additional time for consultation, ask for substitute counsel, or object to representation by stand-in counsel. Absent a direct allegation of ineffective assistance of counsel or an expressed dissatisfaction with the attorney-client relationship, the District Court did not err in failing to hold an initial inquiry into Frazier's allusion to a breakdown of the relationship to determine whether there was a seemingly substantial complaint about inadequate counsel. St. v. Frazier, 2001 MT 210, 306 M 358, 34 P3d 96 (2001). See also St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371 (1998).

Failure to Offer Alternative Jury Instruction on Aggravated Assault When Defendant Maintains Innocence on All Charges Not Considered Ineffective Assistance of Counsel: Despite a daunting evidentiary record of Aliff's commission of a rape and attempted murder, he maintained his innocence and claimed that he was home with his wife while the victim was fighting for her life. Aliff contended on appeal that he received ineffective assistance of counsel because no alternative jury instruction was offered regarding the offense of aggravated assault. However, Aliff never claimed that he intended only to assault the victim, but rather that he did not commit the crimes for which he was charged or any other offense in connection with the incident. Counsel did not provide inadequate assistance by failing to offer an instruction that was inconsistent with the defense. The instructions that were actually offered were based on trial strategy and did not stem from neglect or ignorance. Counsel's performance was not deficient in any way, and judgment was affirmed. St. v. Aliff, 2001 MT 52, 304 M 310, 21 P3d 624 (2001).

Counsel's Decision to Not Use Racial Bias Defense Preferred by Defendant: The lower court found that appointed counsel for a defendant who sought a pretrial substitution of counsel made a tactical decision not to present the racial bias defense preferred by defendant. The lower court heard testimony that counsel did not believe that he had the skills to present the defense, but counsel also testified that he thought that the defense simply was not viable. Although there was conflicting evidence, the Supreme Court would not substitute its judgment for that of the lower court, whose finding clearly had more than a scintilla of evidence to support it. St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Failure of Counsel to Exercise Right to Lesser Included Offense Instruction — Presumption of Effective Assistance — Failure to Provide Evidence of Ineffectiveness: Section 46-16-607(3) provides that upon a defendant's request, the court shall instruct the jury that the jury may consider a lesser included offense if the jury cannot reach a verdict on the greater offense after reasonable effort. Because of the strong presumption that counsel acted reasonably and defendant's failure to provide any evidence to the contrary, the court would not find that counsel provided ineffective assistance by failing to request the instruction. St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Voluntariness of Guilty Plea Affirmed Notwithstanding Claims of Ineffective Assistance of Counsel — Strickland Test Not Met: Turner pleaded guilty to three counts of deliberate homicide, two counts of felony assault, and one count of aggravated burglary and was sentenced to three consecutive life sentences in prison. About 5 years after sentencing, Turner sought to withdraw his guilty plea, claiming that the plea was involuntarily given based on alleged ineffective assistance of counsel. A defendant may withdraw a guilty plea upon a showing of good cause, which may include a showing that counsel was inefficient, and the purpose of allowing withdrawal of a guilty plea is to prevent the possibility of convicting an innocent man. A plea is considered voluntary if it is made with knowledge of fundamental constitutional rights and an understanding of the nature of the crimes charged, but a plea is not involuntary simply because it was entered to avoid a greater punishment. The Supreme Court applies the two-part test in Strickland v. Wash., 466 US 668 (1984), when evaluating challenges to a guilty plea based on ineffective assistance of counsel. The purpose of the effective assistance of counsel guarantee is to ensure a fair trial, not to improve the quality of legal representation. The first part of the test requires a showing that counsel failed to act within the range of competence demanded of attorneys in criminal cases. Turner argued that his attorney failed to adequately investigate various defense options, used the wrong procedure in obtaining a mental evaluation, failed to adequately inform Turner of the constitutional right against self-incrimination prior to the mental evaluation, and could have used different tactics in preparing the case. The fact that some other lawyer would have done differently is not grounds for branding the appointed attorney as ineffective or incompetent, and claimed inadequacy of counsel must not be tested by a greater sophistication of appellate counsel or by appellate counsel's unrivaled opportunity to study the record at leisure and cite different tactics of perhaps doubtful efficacy. Judicial scrutiny of counsel's performance must be highly deferential, and every effort must be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time. Although Turner showed a myriad of ways that the case could have been handled differently, that showing was nothing more than mere second-guessing of the attorney's strategy and did not equate with ineffectiveness. Turner failed to address the second prong of the Strickland test, which requires a showing that the deficient performance prejudiced the defense, arguing instead that errors under the first prong rendered the guilty plea involuntary and that if the case had been handled differently, Turner would have insisted on trial. However, that argument was contradictory to the record, which showed that Turner indicated a desire not to go to trial and even signed an acknowledgment of waiver of rights and guilty plea containing language that he did not want to put his family or the remaining members of the victims' family through a trial. The record showed that Turner's primary motivation for pleading guilty was to avoid further hurting the parties involved, and nothing counsel could have done would have altered the outcome of the case. Turner's plea was the product of a voluntary and intelligent choice among the alternative courses of action open to him, and the claim of ineffective counsel was properly rejected. St. v. Turner, 2000 MT 270, 302 M 69, 12 P3d 934, 57 St. Rep. 1127 (2000), followed, with regard to the fact that some other lawyer would have done differently is not grounds for branding the appointed attorney as ineffective or incompetent, in Stevens v. St., 2007 MT 137, 337 M 400, 162 P3d 82 (2007).

Failure to Raise Every Possible Issue on Direct Appeal of Death Sentence Not Considered Ineffective Assistance of Counsel: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the direct appeal phase, applying the

two-pronged test in Strickland v. Wash., 466 US 668 (1984). Dawson argued that appellate counsel failed to raise all possible issues on direct appeal. However, appellate counsel was highly qualified, thoroughly prepared, and narrowed the issues to those felt to be most meritorious, and Dawson was unable to show any prejudice as a result of counsel's failure to raise other issues. Dawson received a trial with reliable results, there was no breakdown in the adversarial process, and the evidence of guilt was overwhelming. Dawson's criticism of appellate counsel used the distorting effects of hindsight to reconstruct the circumstances of counsel's conduct and did not evaluate the conduct from counsel's perspective at the time, which is prohibited by Strickland. The District Court did not err when it found that Dawson did not receive ineffective assistance at the direct appeal phase. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

No Prejudice From Alleged Ineffective Assistance of Counsel During Pretrial Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the pretrial phase, applying the two-pronged test in Strickland v. Wash., 466 US 668 (1984). Dawson alleged that counsel was ineffective in failing to: (1) object to the procedure and use of Dawson's psychiatric evaluation; (2) advise him of his rights during the evaluation process; and (3) conduct an adequate pretrial investigation. On the first point, the procedure followed and the use of the psychiatric evaluation were consistent with the statutory procedure in effect at the time, and counsel had no reason to question it. On the second point, Dawson satisfied the deficiency prong of the Strickland test because he should have been informed of the potential consequences of participating in the evaluation; however, there was no evidence that Dawson was prejudiced at trial or sentencing. Dawson's version of the crimes was consistent with his defense theory, and at no time did he admit killing the victims, so counsel's failure to advise him of his Miranda rights was not prejudicial. On the third point, Dawson could not establish prejudice as a result of counsel's failure to obtain complete records and staff notes of the evaluation, to investigate Dawson's possible epilepsy, or to investigate or pursue Dawson's drug use—at trial or at sentencing as a mitigating factor. The District Court did not err when it found that Dawson did not receive ineffective assistance at the pretrial phase. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000). See also St. v. Armfield, 214 M 229, 693 P2d 1226 (1984), St. v. Smith, 217 M 453, 705 P2d 1110 (1985), and Hans v. St., 283 M 379, 942 P2d 674 (1997).

No Prejudice From Alleged Ineffective Assistance of Counsel During Trial Phase — Reasonable Trial Strategy: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the trial phase. Dawson alleged that counsel was ineffective in: (1) agreeing to the procedure used to present the testimony of the state's key witness, which involved questioning of the witness by the guardian ad litem; (2) failing to corroborate the defense theory through examination of the witness; (3) failing to give an opening statement; (4) failing to object to guilt phase errors, including improper questions and comments by the state; (5) failing to obtain experts to testify regarding Dawson's drug ingestion, head injuries, and EEG tests; and (6) failing to give a closing argument. On the first point, counsel's decision to use a special procedure to examine the fragile witness was reasonable, and Dawson agreed to the procedure. On the second point, counsel's decision not to subject the witness to further questioning after her very emotional testimony was also reasonable when counsel believed that further questioning would have been more damaging to the defense than helpful. Third, waiver of an opening statement was a reasonable trial tactic under the circumstances, and that decision could not form a basis for an ineffective assistance claim (see U.S. v. Rodrigues-Ramirez, 777 F2d 454 (9th Cir. 1985), and U.S. v. Nersesian, 824

F2d 1294 (2nd Cir. 1987)). Fourth, counsel's failure to object to certain prosecutorial questions and comments was reasonable and within the wide range of permissible professional legal conduct (see U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)). Fifth, counsel's decision not to call experts did not amount to ineffective assistance. Sixth, the decision not to give a closing statement did not constitute ineffective assistance per se and was a reasonable trial strategy that did not fall below the standard of what a minimally competent defense attorney would have done in the same circumstances (see St. v. Lee, 689 P2d 153 (Ariz. 1984)). The District Court did not err when it found that Dawson did not receive ineffective assistance at trial. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

No Prejudice From Alleged Ineffective Assistance of Counsel During Sentencing Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the sentencing phase. Dawson alleged that counsel was ineffective in failing to: (1) present crucial mitigating evidence to the sentencing court; (2) conduct an adequate sentencing investigation; and (3) move the sentencing court for reconsideration of its conclusion that Dawson posed a substantial and continuing threat and had no chance for rehabilitation. On the first point, Dawson contended that counsel should have offered the statement of the state's key witness regarding another man whom she saw near the crime scene, which Dawson maintained would have bolstered his defense theory that he acted under duress or coercion. However, the statement was vague, and Dawson never offered information concerning the involvement of others. Neither the jury nor the sentencing court accepted the defense theory, and Dawson could not demonstrate prejudice because of counsel's failure to offer the statement. Counsel's decision not to present or argue evidence of Dawson's drug use as a mitigating factor did not constitute ineffective assistance, given counsel's determination that evidence of drug use would have been inflammatory and prejudicial and would have been an aggravating rather than mitigating factor. Failure of counsel to present evidence at sentencing of Dawson's good behavior in jail also did not constitute ineffective assistance because that evidence was presented at the guilt phase and was thus considered at the sentencing phase as well. Second, Dawson's assertion that counsel overlooked demonstrations of remorse found in the records of the staff that conducted his psychiatric examination, which would have served to rebut the findings by the sentencing court regarding his lack of remorse, did not constitute prejudice because the court's finding was based on the court's own observations of Dawson throughout the lengthy proceedings. It was also reasonable for counsel not to investigate Dawson's medical and school records, absent any evidence that further investigation would have been beneficial. Dawson's argument that counsel erred in failing to interview boyhood friends to develop or determine the existence of mitigating evidence also failed. Counsel did present letters from Dawson's mother, sister, and former spouses, and the failure to further investigate boyhood friends did not constitute ineffective assistance. Third, counsel's failure to move the sentencing court for reconsideration of its conclusion that Dawson posed a substantial and continuing threat and had no chance for rehabilitation was not ineffective assistance given the findings in St. v. Dawson, 233 M 345, 761 P2d 352 (1988), that evidence supported the sentencing court's finding of aggravating factors and that the death sentence was appropriate. The District Court did not err when it found that Dawson did not receive ineffective assistance at sentencing. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

Failure by Attorney to Investigate Effect of Defendant's Medication as Deficient Representation — Lack of Evidence of Effect of Medication on Defendant — No Prejudice: Defense counsel's failure to investigate the nature, effects, and amounts of defendant's medication was not a strategic decision based on professional deliberation and constituted deficient representation under the first prong of the Strickland test for ineffective assistance of counsel. However, in determining that the drug had no negative effect on defendant, the District Court considered the testimony of a psychiatrist who established that the drug in question could interfere with executive brain functions and have negative side effects on a person's judgment, and therefore the failure to investigate resulted in no prejudice to defendant. The fact that defendant expressed remorse did not excuse counsel's duty to investigate the amount and effects of the medication. The court's findings were not clearly erroneous and were supported by

substantial evidence in the record, including defendant's own testimony that the drug did not affect him mentally. Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997).

Failure to Request Instruction on Nonaggressor Principle of Self-Defense — Claim That Victim Was Aggressor — No Ineffective Assistance: Assault defendant's defense was that the victim was the initial aggressor. No one testified that defendant was the aggressor. The court instructed on self-defense, including the rule that the person using the defense cannot have been the aggressor, but did not instruct on exceptions to the rule. Defense counsel decided as a tactical matter not to request an exceptions instruction because it would not be consistent with the defense that the victim was the aggressor. That decision was based on informed professional deliberation and was not the result of neglect or ignorance. Thus, there was no ineffective assistance of counsel. St. v. Gonzales, 278 M 525, 926 P2d 705, 53 St. Rep. 1015 (1996).

Failure to Prove Counsel's Performance Deficient: Henry was convicted of driving under the influence, first in City Court and then in District Court. Henry appealed the District Court conviction, claiming ineffective assistance of counsel. The Supreme Court evaluates ineffective assistance of counsel claims under the two-prong Strickland test. The Supreme Court held that Henry had not established that his counsel's performance was deficient under the first prong, and for that reason, it need not address the prejudice prong. Henry was not denied effective assistance of counsel. St. v. Henry, 271 M 491, 898 P2d 1195, 52 St. Rep. 516 (1995).

Failure to Object to Testimony Not Ineffective Assistance: The Supreme Court rejected the defendant's argument that he had received ineffective counsel when his attorney failed to object to the testimony of the bank teller who identified him as the perpetrator of a robbery. The Supreme Court noted that the appellant provided no grounds on which the testimony could have been excluded if it had been objected to at the trial. St. v. Hembd, 254 M 407, 838 P2d 412, 49 St. Rep. 788 (1992).

Failure to Object to Substitution of Witness — Failure to Interview Witness: In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that a reasonable probability exists that but for his counsel's deficient performance, the trial's outcome would have been different. Failure to object to the adding of a name to the list of witnesses 3 weeks before trial under the circumstances of this case was not deficient. Even if failure to interview a witness was deficient, in light of the overwhelming evidence against him, the defendant cannot make the required showing. St. v. McLain, 249 M 242, 815 P2d 147, 48 St. Rep. 664 (1991).

Failure to Engage in Voir Dire: The defendant maintained that the asking of only one question by his attorney during voir dire constituted inadequate representation. The Supreme Court held that voir dire is a very subjective process and a matter of trial tactics. The court went on to point out that the state had engaged in extensive voir dire and that defense counsel could have relied on those questions in deciding whether or not to exercise preemptory challenges. St. v. Kolberg, 241 M 105, 785 P2d 702, 47 St. Rep. 120 (1990).

Introduction of Two Prior DUI Convictions Not Prejudicial: The defendant argued that he was prejudiced by the introduction of two prior DUI convictions and that his attorney's failure to object constituted inadequate legal assistance. The Supreme Court found that although the lower court was mistaken in its belief that the prior convictions had to be introduced as an element of this offense, their admission did not prejudice the defendant, particularly in light of the substantial evidence against the defendant and an almost total absence of evidence on his behalf. St. v. Kolberg, 241 M 105, 785 P2d 702, 47 St. Rep. 120 (1990).

Twenty-Four Hours Held Timely Notice of Trial: The defendant claimed that his attorney did not inform him of the trial date until 24 hours before it was scheduled and that the short notice did not provide him adequate time to consult with his attorney. The Supreme Court affirmed the lower court's finding that the defense attorney was sufficiently prepared for trial and that there was insufficient evidence to warrant a continuance. St. v. Kolberg, 241 M 105, 785 P2d 702, 47 St. Rep. 120 (1990).

Defendant Not Prejudiced by Counsel's Attempt to Impeach State Witness: Defendant contended that his counsel's performance was deficient because he failed to adequately present evidence to impeach the state's key witness against the defendant. Defendant's allegations of error amount to an attempt to second guess his counsel's trial tactics and strategies. When, as in this case, no prejudice to defendant is shown, the court will not question counsel's professional deliberations. St. v. Stewart, 235 M 239, 767 P2d 296, 45 St. Rep. 2350 (1988).

Effective Assistance of Counsel — Two-Part Test: In holding that the record does not support the defendant's claim of ineffective counsel, the Montana Supreme Court followed the two-part test adopted in St. v. Boyer, 215 M 143, 695 P2d 829, 42 St. Rep. 247 (1985). The defendant had to show that counsel's performance was deficient and that the deficient performance prejudiced the defense. In this case, the defendant's attempts to disqualify the judge were disallowed due to the

defendant's own procedural error before counsel became involved in the defense. St. v. Hoch, 234 M 405, 763 P2d 1119, 45 St. Rep. 2007 (1988).

Failure to Hold Hearing Regarding Effective Assistance of Counsel — Reversible Error: Defendant represented herself after requesting removal of counsel and being denied appointment of substitute counsel. The trial court determined defendant was competent to represent and that she had made a knowing and voluntary waiver of counsel. However, it was error for the court to fail to hold an independent hearing to establish whether defendant had received effective representation and to determine the validity of her complaints concerning counsel. Failure to make such determination deprived defendant of the opportunity to make a meaningful choice to proceed pro se, infringing the right to effective assistance of counsel and the right to a fair trial, and constituted reversible error. St. v. Enright, 233 M 225, 758 P2d 779, 45 St. Rep. 1442 (1988), followed in St. v. Weaver, 276 M 505, 917 P2d 437, 53 St. Rep. 495 (1996). See also St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371, 55 St. Rep. 284 (1998), and St. v. Hanson, 1999 MT 226, 296 M 82, 988 P2d 299, 56 St. Rep. 891 (1999), distinguishing Weaver.

Request for Substitution of Counsel Denied — No Incompetence or Prejudice: Defendant asserted it was error for the District Court to deny his motion for substitution of counsel based on claims of attorney incompetence in the field of criminal law and prejudice due to the attorney being influenced by his brother, who had previously prosecuted the defendant. It was within the court's discretion to deny new counsel after finding that the attorney had practiced law, including criminal law, for 30 years. Further, prejudice and conflict of interest would be present only if the attorney's brother's prior prosecution of defendant and the charges at issue overlapped; however, the proceedings were entirely different. St. v. Martz, 233 M 136, 760 P2d 65, 45 St. Rep. 1370 (1988).

No Conflict of Interest Because Defendant's Father Paid for and Conferred With Counsel: The fact that defendant's father paid for defendant's attorney and consulted with the attorney concerning defendant's defense does not establish a conflict of interest. Defendant was not denied effective assistance of counsel because of his father's involvement with the attorney. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Effectiveness of Counsel Who Withdrew Self-Defense and Mental Disease Defenses: It was not error for counsel to withdraw defenses of justifiable use of force and mental disease or defect when the former was unsupported by the facts and the doctors who examined defendant stated he did not have a mental disease or defect and could have acted with the requisite mental state. St. v. Docken, 222 M 58, 720 P2d 679, 43 St. Rep. 1058 (1986).

Suppression of Confession — Drugs and Memory Lapse Allegedly Causing Involuntariness: Counsel's decision to not file a motion to suppress client's confession was not error when there was no evidence in the record to support client's claim that he was under the influence of alcohol or drugs when he made the confession, his claim that he did not remember the confession was rebutted by his reiteration of the sequence of events to the court before he entered his guilty plea, and he signed a memo restating the facts. St. v. Docken, 222 M 58, 720 P2d 679, 43 St. Rep. 1058 (1986).

Effective Assistance of Counsel — Potential Charges Against Counsel as Conflict of Interest: Defendant asserted he did not receive effective assistance of counsel where his retained trial counsel mishandled the murder weapon and neither his counsel, the District Court Judge, nor the prosecutor informed him of the possible charges against his counsel which could have resulted in a conflict of interest between defendant and his counsel. The Supreme Court found that the record and findings made after the evidentiary hearing may have demonstrated improper action of counsel. However, given his conduct during trial, his testimony at the evidentiary hearing that he was not aware of any impending charges, the prosecutor's decision not to press charges but only refer the matter for investigation, and the lack of charges until the trial was completed, defendant was not denied effective assistance because of any misconduct of defense counsel or any failure to inform him of the possible charges prior to completion of the trial. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Failure to Inform Defendant of Complete Case Against Him: It appeared defendant had his plea bargain practically guaranteed before Houtz was appointed. Houtz, after reviewing the case against his client, determined the plea bargain to be reasonable and fair. He therefore pursued and achieved finalization of that bargain. The Supreme Court also found the plea bargain to be reasonable and fair. The court was not persuaded that had defendant been advised of the victim's and a witness' inconsistent statements, he would have opted to proceed to trial on the attempted deliberate homicide charge. Thus, counsel's failure to advise his client of the complete case against him did not undermine the court's confidence in the eventual outcome, the plea bargain. St. v. LaTray, 220 M 358, 715 P2d 52, 43 St. Rep. 429 (1986).

Failure to Show Incompetency: Defendant was charged with two felonies occurring at about the same time and had been convicted of a felony 5 years prior to the current charges. Defendant pleaded guilty to avoid increased punishment as a persistent felony offender. Later, defendant sought to withdraw the guilty plea on grounds of coercion and ineffective assistance of counsel. The District Court denied the motion, and the Supreme Court affirmed. The defendant failed to show that his attorney's counseling was inadequate, incompetent, or not within the range of competence demanded of attorneys in criminal cases. Counsel was not ineffective when the attorney consulted with other criminal counsel and did all things to properly defend. St. v. Williamson, 218 M 242, 707 P2d 530, 42 St. Rep. 1551 (1985).

Six and a Half Weeks to Prepare for Burglary-Theft Trial — Sufficient Time: There was nothing to indicate that, when counsel for defendant convicted of two counts of burglary and one of theft had 6 ½ weeks to prepare for trial, the attorney had insufficient time to adequately prepare and nothing to indicate that effective assistance of counsel was denied. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985).

Decision to Not Call a Witness: Defendant was convicted of felony theft of a jackhammer. New counsel appealed on the grounds that defendant was denied a fair trial and effective assistance of counsel. The Supreme Court remanded for an evidentiary hearing. The Supreme Court agreed with the findings and conclusions the trial court made at the hearing. Defendant's claim of ineffective assistance of counsel was not supported by the evidence. First defense counsel's decision to not call a defense witness at trial was clearly within the range of competence demanded of attorneys in criminal cases. The witness supposedly could have testified that he gave the jackhammer to defendant, but the witness' statement was not only inconsistent with known facts but destructive to the defendant's case. St. v. Field, 215 M 361, 697 P2d 1339, 42 St. Rep. 431 (1985).

Denial of Continuance When Attorney Informed of Appointment 25 Days Before Homicide Trial — Fair Trial and Effective Assistance Rights Denied: Attorney for defendant charged with deliberate homicide was relieved of his duty on December 14, and the new attorney learned of his appointment on December 30. On January 3, trial was set for January 24, and the new attorney was notified of the trial date on January 5. He spoke with the trial Judge on January 10 about a continuance, and on January 17 a motion for continuance was heard and denied. In the 7 days before trial, the attorney was able to interview only 8 of the state's 12 witnesses and could not locate possible defense witnesses or interview the state's pathologist. Refusal of the continuance was an abuse of discretion and reversible error requiring a new trial. The attorney's diligence was unquestioned, and though the state had a right to a speedy trial, the defendant's right to a fair trial must take precedence, particularly since defendant waived his speedy trial right. Defendant's rights to a fair trial and effective assistance of counsel were denied. St. v. Sotelo, 209 M 86, 679 P2d 779, 41 St. Rep. 568 (1984).

Remand to Determine Effective Assistance of Counsel: The defendant was convicted of two counts of sexual intercourse without consent, and after a failure to perfect his appeal, the defendant's original counsel was disbarred. On appeal taken by the defendant's second counsel, the Supreme Court reviewed the record of the original trial wherein the defendant's first lawyer was shown to have been put on notice of the existence and location of evidence he did not properly examine and wherein it was shown that the first appeal was not perfected. Because it could not determine from these facts whether the defendant had received effective assistance of counsel at trial, the Supreme Court remanded the case to the District Court for an evidentiary hearing on the issue. St. v. Boyer, 208 M 258, 676 P2d 787, 41 St. Rep. 321 (1984). On remand, counsel's efforts were found to constitute effective assistance. St. v. Boyer, 215 M 143, 695 P2d 829, 42 St. Rep. 247 (1985).

Found Effective: Counsels' efforts were effective and client was adequately represented. St. v. Dess, 207 M 396, 674 P2d 501, 41 St. Rep. 31 (1984); Digiallonardo v. Betzer, 163 M 104, 515 P2d 705 (1973); St. v. Perry, 161 M 155, 505 P2d 113 (1973).

Conflict of Interest — Representation by Former Assistant County Attorney — Presence of Counsel for Codefendant at Initial Hearing: Where the defendant to a hit-and-run charge signed a motion to continue his case, which motion contained a paragraph notifying him that his retained counsel had previously worked for the County Attorney, the Supreme Court held that since the defendant signed the motion and retained the lawyer anyway, he had waived his right to assert any conflict of interest charge. The Supreme Court also held that inasmuch as the defendant had, under St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982), no right to counsel at his initial hearing, he could not claim a conflict of interest by the presence of his wife's attorney at that hearing. St. v. Henricks, 206 M 469, 672 P2d 20, 40 St. Rep. 1786 (1983).

Postconviction Relief — Burden of Proving Ineffective Assistance of Counsel — No Prejudice Shown: Where the defendant alleged, in his petition for postconviction relief, that he had received ineffective assistance of counsel at trial because his attorney: (1) failed to invoke the spousal privilege on the defendant's behalf; (2) failed to interview a witness and call other witnesses; (3) was absent from a presentence investigation report interview; and (4) failed to object to alleged misconduct by the prosecutor, the Supreme Court found, under the rationale of St. v. LaValley, 203 M 393, 661 P2d 869, 40 St. Rep. 527 (1983), and Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983), that the defendant had an especially heavy burden of proving ineffective assistance of counsel when that issue was raised for the first time in a petition for postconviction relief and could have been previously raised on direct appeal. The court found that the defendant failed to show how he was prejudiced by the alleged acts constituting ineffective assistance. St. v. Henricks, 206 M 469, 672 P2d 20, 40 St. Rep. 1786 (1983), overruled, to the extent that it stands for the proposition that the Supreme Court can review issues in postconviction proceedings that could have been raised on direct appeal, in Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Capital Cases — Standard of Review for Ineffective Assistance of Counsel: Where the defendant was convicted of aggravated kidnapping and deliberate homicide and appealed the District Court's denial of his petition for postconviction relief, the Supreme Court declined to adopt a standard of review for ineffective assistance of counsel for capital cases different from the standard used in other criminal cases. The court found that numerous practical problems would be presented by such an approach and instead reaffirmed the application of the standard set forth in Cooper v. Fitzharris, 586 F2d 1325 (9th Cir. 1978). The court also found that the defendant had not met his burden of proof of showing ineffective assistance of counsel whether the court applied the standard set out in Cooper or another standard urged by the defendant and set out in Knight v. Florida, 394 So2d 997 (Fla. 1981), and U.S. v. DeCoster, 624 F2d 196 (Dist.Col. Cir. 1979). Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983).

Conflict of Interest of Defense Counsel Waived or Not Proven — Ineffective Assistance Not Shown: Where the defendant was convicted of aggravated kidnapping and deliberate homicide, the District Court did not err in dismissing the defendant's petition for postconviction relief alleging ineffective assistance of counsel. The conflict of interest alleged by defendant in his trial counsel allegedly arose because his counsel had defended a codefendant to which the defendant wanted to shift suspicion for the crimes committed. However, as a result of the first trial, the codefendant was acquitted of the charges and any attempt to shift suspicion would be impossible because the codefendant may not be retried. Even had there been a conflict of interest, the defendant, under the rationale of U.S. v. Partin, 601 F2d 1000 (9th Cir. 1979), waived his right to raise the issue by his agreement at his pretrial hearing to accept Mr. Adams as his defense counsel, knowing that Mr. Adams had also defended a codefendant, and by not raising the issue of a conflict of interest at trial. Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983).

Failure to Present Evidence in Mitigation of Sentencing — Ineffective Assistance Not Shown: Where the defendant was convicted of aggravated kidnapping and deliberate homicide, the District Court did not err in dismissing the defendant's petition for postconviction relief alleging ineffective assistance of counsel. The failure of defense counsel to raise the issue, at sentencing, of defendant's headaches and dizzy spells did not amount to ineffective assistance, as the defendant had not shown the relevancy of those headaches and spells to the sentencing process. Moreover, defense counsel did inform the District Court at sentencing that a previous statement of his concerning a murder committed by the defendant in prison was made mistakenly; but in light of other testimony, this slip of the tongue placed the defendant in an even more favorable light than the prosecution could have presented if the facts had become a contested point and was therefore nonprejudicial and did not show ineffective assistance of counsel. Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983).

Failure to Use Evidentiary Material and Witnesses — Ineffective Assistance Not Shown: Where the defendant was convicted of aggravated kidnapping and deliberate homicide, the District Court did not err in dismissing the defendant's petition for postconviction relief alleging ineffective assistance of counsel. Defense counsel was not ineffective simply because he did not present evidence used in the trial of an acquitted codefendant and because he did not call witnesses urged by the defendant. The defendant overlooked the fact that in the trial of the codefendant, the state's key witness failed to appear. This fact alone explains the acquittal of the codefendant. There were also rational explanations for defense counsel's failure to call each of the witnesses urged by the defendant, such as the fact that the witnesses were hostile, had poor memories, or showed poor demeanor in the presence of the jury. A failure to call witnesses for

these kinds of reasons does not show ineffective assistance of counsel. Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983).

Insufficient Trial Preparation — Ineffective Assistance of Counsel Not Shown: Where the defendant was convicted of aggravated kidnapping and deliberate homicide, the District Court did not err in dismissing the defendant's petition for postconviction relief alleging ineffective assistance of counsel. The only item of evidence submitted by the defendant to support his claim of insufficient trial preparation by defense counsel was a caseload listing showing the criminal cases assigned to defendant's counsel. An examination of the exhibit showed that many of the cases had been dismissed or did not come to trial until after the trial of the defendant's case, and the exhibit did not otherwise show a preclusion of preparation time for defense counsel. An examination of the records also showed that the pace of court calendaring meant that cases filed after the defendant's could not mature into triable contested cases until after the conclusion of the defendant's trial. The defendant therefore failed to demonstrate that defense counsel was insufficiently prepared. Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983).

Failure to Cooperate With Court-Appointed Counsel — No Right of Defendant to "Meaningful Attorney-Client Relationship": Where the defendant had been convicted of arson and sought to have his second court-appointed counsel replaced by arguing the failure of his attorney to communicate with him concerning his (the defendant's) version of the facts of his case amounting to an alibi defense, the District Court did not err in refusing to replace the second appointed counsel and the defendant was not thereby denied his right to effective assistance of counsel. In Morris v. Slappy, 461 US 1, 75 L Ed 2d 610, 103 S Ct 1610 (1983), the U.S. Supreme Court denied the existence of the "meaningful attorney-client relationship" test urged by the defendant. Moreover, the record shows that if defendant's counsel failed to present the defendant's view of the facts at trial, it was not caused by lack of diligence on counsel's part but by failure of the defendant to cooperate with his attorney. Any lack of communication between the defendant and his lawyer therefore did not prevent effective assistance of counsel. St. v. Long, 206 M 40, 669 P2d 1068, 40 St. Rep. 1493 (1983).

Defendant Speculating as to Existence of Possible Evidence: During trial the defense counsel made a vigorous attempt to establish the theory that bullets fired by the defendant ricocheted off the ground into the victims. The defendant later claimed he was denied effective assistance of counsel by his counsel's failure to cross-examine an expert witness about the possible presence of ricochet marks on the bullet removed from the victim's body. Because defendant was engaging in wild speculation as to the existence of possible evidence, his argument was without merit. St. v. Dupre, 200 M 165, 650 P2d 1381, 39 St. Rep. 1660 (1982).

No Objection Raised to Improper Argument by Prosecution — Appealability: Although objection to the prosecutor's argument may not be raised on appeal if it has not been raised at trial, if failure to object below is the basis for an effective assistance of counsel issue, it will be considered on appeal. If a prejudicial prosecutorial argument is alleged, it will not be presumed. Rather it must be established from the record that a substantial right has been denied. St. v. Dupre, 200 M 165, 650 P2d 1381, 39 St. Rep. 1660 (1982).

No Objection to Conclusory Inferences by Prosecutor: In an appeal alleging ineffective assistance of counsel in that counsel failed to object to the prosecution's conclusory inferences that the victims were wounded while attempting to flee from the defendant, because there was substantial evidence to support the inferences, the prosecutor's comments were proper. St. v. Dupre, 200 M 165, 650 P2d 1381, 39 St. Rep. 1660 (1982).

Failure to Seek Jury Instruction on Lesser Included Offense — Ineffective Assistance of Counsel: Counsel for a defendant charged with deliberate homicide failed to offer an instruction on negligent homicide and objected to an instruction on mitigated deliberate homicide. Because the decision not to seek jury instruction on lesser included offenses was reasoned and tactical, it did not amount to a denial of effective assistance of counsel as guaranteed by the sixth amendment to the United States Constitution (similar to Art. II, sec. 24, Mont. Const.). Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Claimed Defense Wrong One and Not Supported by Evidence: Defendant convicted of felony theft and robbery could not have the convictions overturned on basis of alleged denial of effective assistance of appointed counsel where: (1) the defense was that the requisite "purposely or knowingly" mental state for the crimes could not have been formed due to defendant's heavy use of drugs and alcohol during the period prior to the crime; (2) defendant was convicted and a new attorney named; (3) defendant then claimed the defense was unfounded by the evidence and should have been based upon a discrediting of the witnesses testifying to defendant's identity; (4) the defense testimony on drug-alcohol usage did not appear to support the defense; and (5) the prosecution's identification evidence was so strong that the defense attorney had little choice but

to choose not to base his defense upon discrediting it. St. v. Kubas, 197 M 185, 642 P2d 147, 39 St. Rep. 456 (1982).

Test:

A person accused of a crime is entitled to the effective assistance of counsel acting within the range of competence demanded of attorneys in criminal cases. St. v. Kubas, 197 M 185, 642 P2d 147, 39 St. Rep. 456 (1982).

Effective counsel does not mean one in which the defendant has confidence. Success is not the test of efficient counsel; frequently neither vigor, zeal, nor skill can overcome the truth. St. v. Forsness, 159 M 105, 495 P2d 176 (1972), followed in St. v. Martz, 233 M 136, 760 P2d 65, 45 St. Rep. 1370 (1988).

The Supreme Court is reluctant to second-guess defense counsel or to speculate on alternative trial tactics, particularly when counsel is vastly experienced and of unquestioned reputation. St. v. Callaghan, 144 M 401, 396 P2d 821 (1964); Tomich v. St., 141 M 487, 379 P2d 114 (1963).

The strategy of counsel will not be second-guessed to determine what could have been done to achieve a possible but highly speculative result. For assistance to be ineffective, it must be so deficient as to render the trial a farce and a mockery. St. v. Noller, 142 M 35, 381 P2d 293 (1963).

Effective Assistance of Counsel — Denial of Continuance: Defendant sought to substitute counsel on the afternoon before his scheduled trial date on the charge of robbery. The defendant also sought a continuance. When considering the motion for substitution of counsel, the court specifically questioned the defendant, after making him aware that his motion for continuance would not be granted, as to whether he still wanted substituted counsel. The defendant said he did. Defendant argued that by denying his request for a continuance his attorney was unprepared and he was denied effective assistance of counsel. In denying his petition for a Writ of Habeas Corpus, the federal court said that the defendant could have cooperated with his court-appointed counsel or he could have chosen his own counsel in sufficient time for that counsel to become prepared. He did neither. He was not deprived of a right; he failed to exercise the rights he had. Spurlock v. Risley, 520 F. Supp. 135, 38 St. Rep. 1339 (D.C. Mont. 1981).

Effect of Delay of Payment to Appointed Counsel: The defendant's claims that the failure of the court to provide funds in advance for the appointed defense counsel created a "chilling effect" and that by the time funds became available there was inadequate time in which to prepare a defense were rejected because the defendant failed to show that the alleged lack of preparation prejudiced him in any way. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Voluntary Confession in Absence of Counsel: A confession made after 3 hours' interrogation of the accused, who was advised of his right to counsel and his right to remain silent, was not rendered inadmissible by the absence of counsel when the accused never requested assistance of counsel and the confession was voluntarily given. St. v. White, 146 M 226, 405 P2d 761 (1965).

Failure of Appointed Counsel to Perfect Appeal: When the District Court appointed counsel for the defendant and ordered preparation of the record for an appeal to the Supreme Court, all at public expense, the defendant having had no voice in the choice, in the interest of justice it was incumbent upon the Supreme Court to consider the contended errors although court-appointed counsel failed to timely file the notice of appeal. St. v. Frodsham, 139 M 222, 362 P2d 413 (1961).

Time to Prepare Case: It is the duty of the court to make the appointment effective by giving a reasonable time for the preparation of the case. St. v. Blakeslee, 131 M 47, 306 P2d 1103 (1957).

INEFFECTIVE ASSISTANCE

Petition for Postconviction Relief Alleging Ineffective Assistance of Counsel Filed in District Court — Immunity of Attorney Assisting in Proceedings — Gillham Clarified: At the time of the decision in In re Gillham, 218 M 187, 707 P2d 1100 (1985), petitions for postconviction relief were addressed to the Supreme Court. Because the postconviction procedure has changed, pursuant to 46-21-105, petitions for postconviction relief are now initially filed in District Court. Thus, the Supreme Court clarified that petitions for postconviction relief alleging ineffective assistance of counsel may now be filed in the District Court where the postconviction proceeding is pending. The court affirmed that an attorney ordered to respond to a Gillham order issued by a District Court is not subject to a disciplinary proceeding before the Commission on Practice or subject to charges of malpractice. The immunity extends to all information, testimony, or documents necessarily provided in response to the allegations of ineffective assistance of counsel. Marble v. St., 2007 MT 98, 337 M 99, 169 P3d 1148 (2007).

Failure of Counsel to Suppress Letters Absent Showing That Letters Written Within Forty-Eight Hours of Arrest Considered Ineffective Assistance of Counsel: In Hope's trial for assault, Hope's counsel failed to move to suppress four letters written by Hope regarding Hope's relationship with the victim. The state did not show that any of the letters were written within

48 hours of Hope's arrest, so the District Court erred when it did not conclude that the letters should be suppressed, and counsel's failure to move to suppress the evidence resulted in the introduction of evidence that negated Hope's overall defense that he did not have an intimate relationship with the victim and did not assault her, constituting ineffective assistance of counsel. Counsel's failure was prejudicial reversible error, and the Supreme Court remanded for a new trial. Hope v. St., 2003 MT 191, 316 M 497, 74 P3d 1039 (2003).

Failure of Counsel to Properly Withdraw or Preserve Direct Appeal — Denial of Postconviction Petition Erroneous: Adams filed a pro se petition for postconviction relief, alleging ineffective assistance of counsel because his original court-appointed attorney failed to move to dismiss for lack of a speedy trial and because his subsequently appointed trial counsel offered a lesser included instruction on aggravated assault to the jury and failed to appeal to the Supreme Court following Adams' conviction, despite Adams' request to do so. The petition was denied on grounds that Adams failed to file an appeal within 60 days of judgment as required by former Rule 5, M.R.App.P. (now superseded), and Adams appealed. The Supreme Court reversed. Under 46-8-103, appointed counsel is required to continue representation until final judgment, including appellate review, unless counsel is relieved by court order. Adams' counsel failed to comply with the requirements of 46-8-103 and effect a valid withdrawal, so the right to appeal was not preserved. When a defendant would have appealed but for counsel's deficient performance, the error is prejudicial. Thus, denial of Adams' petition for postconviction relief on procedural grounds was reversible error, and on remand, Adams was allowed to raise the issues that would have been raised on direct appeal but for counsel's abandonment of the appeal, as well as the issues raised in the petition for postconviction relief that were not previously raised. St. v. Adams, 2002 MT 202, 311 M 202, 54 P3d 50 (2002), following In re Petition of Hans, 1998 MT 7, 288 M 168, 958 P2d 1175 (1998), and St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Failure of District Court to Hold Hearing After Initial Inquiry Indicated Possible Ineffective Assistance — Remand for Hearing: Gallagher was charged with one count of felony assault (now assault with a weapon). At a hearing intended to be a change of plea hearing, LaFountain, Gallagher's public defender, put Gallagher on the witness stand. Gallagher testified as to the conflicts between him and LaFountain, those conflicts being LaFountain's advice to Gallagher that Gallagher plead guilty when Gallagher did not want to do so and a personality conflict between Gallagher and LaFountain. Gallagher then requested the District Court to appoint different counsel, but no change of counsel was made. Shortly before trial, LaFountain filed a motion to withdraw, but the motion was denied. Citing Billings v. Smith, 281 M 133, 932 P2d 1058 (1997), the Supreme Court determined that the District Court did make an adequate initial inquiry into Gallagher's complaint of ineffective assistance when the District Court heard testimony by Gallagher, at what was supposed to be a change of plea hearing, concerning the conflicts between Gallagher and LaFountain. However, the Supreme Court also held that the first hearing put the District Court on notice that Gallagher's complaints were seemingly substantial and that the District Court should therefore have held a second hearing to further investigate those complaints. Because the District Court failed to hold a second hearing, the Supreme Court remanded the case to the District Court and required that the District Court hold a second hearing to determine if Gallagher's right to effective assistance of counsel was denied, saying that if his right was denied, then the judgment and sentence against him are vacated, including any fines and costs imposed, and that a new trial is ordered. St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371, 55 St. Rep. 284 (1998), followed in Wilson v. St., 1999 MT 271, 296 M 465, 989 P2d 813, 56 St. Rep. 1096 (1999), St. v. Weaver, 2001 MT 115, 305 M 315, 28 P3d 451 (2001), and Halley v. St., 2008 MT 193, 344 M 37, 186 P3d 859 (2008), and overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Ineffective Assistance of Counsel — Minute Entry of Defense Counsel's Comments Held Not Prejudicial on Charge of Bail-Jumping — Instruction on Notice to Attorney Not Prejudicial: Wereman was convicted of bail-jumping after a trial in which he testified that he failed to appear because he thought that the charge would be dismissed. The Supreme Court held that a comment by defense counsel, that counsel did not know where Wereman was, made earlier when Wereman failed to appear on a charge of aggravated assault, did not represent a conflict of interest between counsel and Wereman and did not constitute ineffective assistance of counsel. The Supreme Court stated that because Wereman himself stated that he failed to appear because he thought that the charges would be dismissed, not because he lacked notice, the comments by defense counsel contained in a minute entry did not impact on counsel's ability to represent Wereman and were not prejudicial. Citing St. v. Blackbird, 187 M 270, 609 P2d 708 (1980), the

Supreme Court also held that the District Court's instruction imputing notice to Wereman from his defense counsel should not have been given but that in this case, the giving of the instruction was harmless error. St. v. Wereman, 273 M 245, 902 P2d 1009, 52 St. Rep. 958 (1995).

Ineffective Assistance Claims Denied — No Prejudice Shown Under Strickland Test: Applying the Strickland test for determining effectiveness of counsel, the Supreme Court dismissed defendant's claims that he was ineffectively represented at trial, during the penalty phase proceedings, and during the course of direct appeal, including claims based on: (1) failure to object to prosecutor's statements that defendant was intoxicated at the time of the crime, when that was in fact true, and to object to an intoxication instruction that was based on statutory language; (2) failure to object to closing arguments during which the prosecutor portrayed himself as the victim and narrated in the first person (following U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)); (3) failure to object to the lack of corroborating evidence regarding a witness's testimony when the objection lacked merit and would have been properly overruled (following St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993)); (4) failure to investigate and pursue a mental defect defense after defendant's own psychologist of choice found him capable of going to trial (see Harris v. Vasquez, 949 F2d 1497 (9th Cir. 1990)); (5) failure to move for a substitute judge when there was no reasonable probability that the outcome of the trial would have differed with another judge presiding; (6) failure to request a change of venue absent evidence of juror bias and failure to adequately voir dire the jury when there was no reasonable probability that the outcome of the trial would have differed had voir dire been conducted more thoroughly; (7) ineffectiveness in investigating a witness's background when counsel's investigation fell within the wide range of competent assistance; (8) failure to investigate defendant's suicide attempt; (9) failure to object to certain jury instructions allowing inference of the existence of the requisite mental state from the acts of the accused (following St. v. Cowan, 260 M 510, 861 P2d 884 (1993)); (10) failure to object to instructions setting out the elements of aggravated kidnapping when defendant did not specify which of the alternatives in the instruction were objectionable (following Schad v. Ariz., 501 US 624, 115 L Ed 2d 555, 111 S Ct 2491 (1991)); (11) failure to object to the absence of Native Americans on the jury when, given recent census data, counsel could not have demonstrated that Native Americans were underrepresented on the panel; and (12) failure to object to the presence of armed officers in the courtroom (following Holbrook v. Flynn, 475 US 560, 89 L Ed 2d 525, 106 S Ct 1340 (1986)). Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Ineffective Assistance Claim on Direct Appeal Res Judicata: An evidentiary hearing held on the issue of ineffective assistance of counsel resulted in a District Court decision that the Supreme Court reviewed and affirmed. On direct appeal, the claim was held to have been fully litigated and reconsideration was barred because additional review of the same issue between the same parties would negate the intent of the doctrines of res judicata and law of the case. St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990), distinguished in St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997).

When Ineffective Assistance Claims More Appropriately Addressed by Petition for Postconviction Relief: Relying on the decision in U.S. v. Birges, 723 F2d 666 (9th Cir. 1984), the Supreme Court held that ineffective assistance of counsel claims raised on direct appeal and involving the consideration of facts beyond the record would more appropriately be addressed by a petition for postconviction relief. A defendant whose claim of ineffectiveness was appropriately classified as a petition for postconviction relief was not constitutionally entitled to counsel because such petitions are civil in nature and are not governed by constitutional requirements for counsel. St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990), followed in Thurston v. St., 2004 MT 142, 321 M 411, 91 P3d 1259 (2004). See also St. v. Mallak, 2005 MT 49, 326 M 165, 109 P3d 209 (2005).

Failure to Object to Hearsay Testimony: While it was error for defense counsel in assault trial to fail to object to hearsay testimony and introduction of certain irrelevant evidence, such error, in view of the other supporting evidence, was not so prejudicial as to amount to ineffective assistance of counsel. St. v. Probert, 221 M 476, 719 P2d 783, 43 St. Rep. 988 (1986).

Test for Ineffective Assistance:

An allegation of ineffective assistance of counsel must be grounded on facts appearing in or easily deduced from the record, not mere conclusory allegations. It must be shown that counsel's errors were so serious that he was not functioning as the counsel guaranteed by the federal constitution and that the defense was prejudiced by the deficient performance. To prove prejudice, it must be shown that there is a reasonable probability that but for counsel's errors the result of the proceeding would have been different, and a reasonable probability is one sufficient to undermine confidence in the outcome. St. v. Docken, 222 M 58, 720 P2d 679, 43 St. Rep. 1058

(1986); St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985), followed in St. v. Tome, 228 M 398, 742 P2d 479, 44 St. Rep. 1629 (1987); State v. Boyer, 215 M 143, 695 P2d 829, 42 St. Rep. 247 (1985), followed in St. v. Leavens, 222 M 473, 723 P2d 236, 43 St. Rep. 1431 (1986). See also In re Petition of Lake, 252 M 443, 830 P2d 100, 49 St. Rep. 359 (1992).

In St. v. Boyer, 215 M 143, 695 P2d 829, 42 St. Rep. 247 (1985), the court adopted the test set forth by the U.S. Supreme Court in Strickland v. Wash., 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984), for determining when ineffective assistance of counsel has occurred. Applying that test in the instant case, the court found no specific acts or omissions which would have denied the defendant a fair trial. St. v. Grant, 217 M 357, 704 P2d 1064, 42 St. Rep. 1248 (1985).

The burden on one seeking to reverse a conviction on ground of incompetency of counsel has been historically heavy. Reasonably effective counsel does not mean defendant is constitutionally guaranteed such assistance as will necessarily result in an acquittal, and in evaluating counsel's representation of the client it is not the court's function to second-guess trial tactics and strategy. The test is that persons accused of crime are entitled to effective assistance of counsel acting within the range of competence demanded of attorneys in criminal cases; and when the claim rests upon specific acts and omissions of counsel at trial, relief will be granted only if it appears that defendant was prejudiced by counsel's conduct. St. v. LaValley, 203 M 393, 661 P2d 869, 40 St. Rep. 527 (1983), followed in St. v. Johnstone, 244 M 450, 798 P2d 978, 47 St. Rep. 1715 (1990), and in St. v. McColley, 247 M 524, 807 P2d 1358, 48 St. Rep. 290 (1991). See also St. v. Bradley, 262 M 194, 864 P2d 787, 50 St. Rep. 1511 (1993), and St. v. Baker, 272 M 273, 901 P2d 54, 52 St. Rep. 735 (1995).

Persons accused of a crime are entitled to effective assistance of counsel acting within the range of competence demanded of attorneys in criminal cases, and claimed inadequacy of counsel must not be tested by a greater sophistication of appellate counsel nor by that counsel's unrivaled opportunity to study the record at leisure and cite different tactics of perhaps doubtful efficacy. To sustain a claim of ineffective assistance, defendant must show that the attorney's alleged error resulted in prejudice to defendant and stemmed from neglect or ignorance rather than from informed professional deliberation. St. v. Morigeau, 202 M 36, 656 P2d 185, 39 St. Rep. 2311 (1982). Morigeau and its progeny were overruled in Whitlow v. St., 2008 MT 140, 343 M 90, 183 P3d 861 (2008), to the extent that the "ignorance or neglect" test for ineffective assistance of counsel conflicts with the correct approach, which is the "objective standard of reasonableness" test set out in Strickland v. Wash., 466 US 668 (1984). Whitlow was followed in St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008), distinguishing St. v. Parker, 2006 MT 258, 334 M 129, 144 P3d 831 (2006).

Ineffective Assistance of Counsel Claim — Effect on Attorney-Client Privilege: When a convicted person files a petition for relief based on grounds of ineffective assistance of counsel, the petitioner's comprehension of waiver of privilege or his knowledge and consent to waiver are irrelevant. The attorney in question has a duty to respond by affidavit or other sworn testimony to admit, deny, or qualify the allegations of fact made in the petition. In future cases, if a response from a defense attorney so charged is necessary, the Attorney General shall first apply to the Supreme Court for an order preserving the responding attorney from charges of discipline or malpractice for revealing necessary confidential information from such convicted person. Petition of Gillham, 216 M 279, 704 P2d 1019, 42 St. Rep. 806 (1985). Gillham was clarified in Marble v. St., 2007 MT 98, 337 M 99, 169 P3d 1148 (2007). See also Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997), wherein it was held that failure to secure an order from the Supreme Court pursuant to Petition of Gillham did not constitute prejudice to defendant because the District Court that ruled on the petition did not rely on preliminary findings on the issue.

Denial of Continuance — Insufficient Time to Prepare Case: An information was filed December 2, 1983, charging the defendant with the offense of sexual intercourse without consent. After retaining an attorney, the defendant pleaded not guilty to the charge on December 9, 1983. The attorney continued to represent the defendant until a disagreement arose between the two concerning the handling of a motion hearing. Two days later, on May 2, 1984, the defendant released the attorney. On May 3, 1984, the defendant tried to secure another attorney, who agreed to represent the defendant only if the trial court would grant a continuance. The court refused to do so, and trial was set to begin May 14. The defendant, after trying unsuccessfully a second time to secure counsel, appeared at trial without an attorney and again moved for a continuance. The motion was denied. Voir dire commenced, a jury was selected and sworn, and the defendant again moved for a continuance, waiving his right to a speedy trial. An attorney was appointed to defend the defendant, the trial proceeded immediately without allowing defendant's counsel an opportunity to prepare, and the defendant subsequently was convicted. The trial court abused its discretion in refusing to grant the defendant's motion for a

continuance of the trial as he acted with due diligence to secure new counsel on learning he was not compatible with the attorney he initially retained. The mere right to an attorney is not sufficient if that attorney is not given sufficient time to prepare the client's case, including adequate pretrial preparation time. The defendant was denied a fair trial. St. v. Lundblade, 213 M 420, 691 P2d 831, 41 St. Rep. 2208 (1984).

Failure to Interview Witnesses or Argue Self-Defense or Lesser Offenses: Defendant convicted of deliberate homicide and aggravated kidnapping was rendered ineffective assistance of counsel and was prejudiced by counsel's conduct to the point that convictions were reversed when, among other things, counsel: (1) failed to talk to six character witnesses prior to presenting them at trial, and none of the witnesses had an opinion as to the character of the person involved and an attack upon that person's character might have damaged the state's case; (2) failed to present competent jury instructions to the trial court, including defenses and particularly self-defense, and argued against the state's proposed self-defense instruction; and (3) failed to argue mitigating circumstances and in summation argued defendant did not act in self-defense or commit negligent homicide, leaving the jury with only one option — conviction or acquittal of deliberate homicide as charged. St. v. LaValley, 203 M 393, 661 P2d 869, 40 St. Rep. 527 (1983).

Defense Questions on Prior Charges and Convictions: Defense counsel questioned defendant on prior felony convictions and charges, opening him up to cross-examination on those matters. As a result, the jury had evidence from defendant regarding his involvement in an alleged burglary in which the circumstances and defense were almost identical to the present case. This was extremely prejudicial, indicated neglect or ignorance on the part of counsel, and was not within the range of competence demanded of an attorney in a criminal case. Ineffective assistance of counsel was rendered, requiring vacation of the verdict and remand for a new trial. St. v. Morigeau, 202 M 36, 656 P2d 185, 39 St. Rep. 2311 (1982). Morigeau and its progeny were overruled in Whitlow v. St., 2008 MT 140, 343 M 90, 183 P3d 861 (2008), to the extent that the "ignorance or neglect" test for ineffective assistance of counsel conflicts with the correct approach, which is the "objective standard of reasonableness" test set out in Strickland v. Wash., 466 US 668 (1984). Whitlow was followed in Maldonado v. St., 2008 MT 253, 345 M 69, 190 P3d 1043 (2008).

Failure to Investigate and Object at Trial: The right to counsel includes the effective assistance of counsel to assure the constitutional guarantee of a fair trial. Failure of appointed counsel to prepare for trial by making a thorough investigation to substantiate the defendant's version of what transpired on the day of the crime coupled with counsel's failure to object to inadmissible evidence at trial requires a finding that defendant was without effective assistance of counsel. St. v. McElveen, 168 M 500, 544 P2d 820 (1975).

Dereliction of Duties: The court-appointed attorney denied the defendant effective representation by reason of dereliction of duties and responsibilities. St. v. Bubnash, 139 M 517, 366 P2d 155 (1961).

Attorney General's Opinions

Right to Assistance of Counsel in Misdemeanor Cases: Indigent defendants must be furnished counsel in all misdemeanor cases except those in which the judge has weighed the seriousness and gravity of the offense and precludes any imprisonment upon conviction and informs the defendant of this before trial. Should counsel be appointed, costs and attorney fees are borne by the appropriate governmental unit or agency pursuant to 46-8-201 (now repealed). 37 A.G. Op. 36 (1977).

Coroner's Inquest Is Not a Trial or Criminal Proceeding: A witness at a coroner's inquest may be accompanied and advised by counsel; however, this counsel does not have the right to participate in the inquest or cross-examine other witnesses or to comment on the coroner's instructions to the jury as a coroner's inquest is not a trial involving the merits, but rather a preliminary investigation, as no criminal consequences necessarily follow a coroner's inquest. Any subsequent criminal proceeding is brought independently by the County Attorney. 36 A.G. Op. 49 (1976).

Law Review Articles

State v. Whitlow and Ineffective Counsel: No Record, Foreshadowing the Record, and Making a Record, Harkin, 63 Mont. L. Rev. 373 (2002)

The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, Goodpaster, 58 N.Y.U.L. Rev. 299-362 (May 1983).

The Right to Effective Trial Counsel: *State v. McElveen* [This article reviews the development of a Montana standard for measuring effective assistance of counsel in light of the case of St. v. McElveen, 168 M 500, 544 P2d 820 (1975).], Ostby, 37 Mont. L. Rev. 387 (1976).

Right to Counsel During Police Interrogation: An Intrinsic Right? (St. v. White, 146 M 226, 405 P2d 761 (1965)), Gordon, 27 Mont. L. Rev. 84 (1965).

Assigned Counsel in Montana: The Law and the Practice, Elison, 26 Mont. L. Rev. 1 (1964).

Collateral References

Criminal Law *key* 231.

21 Am. Jur. 2d Criminal Law §§622, 1097, et seq.

Adequacy of defense counsel's representation of criminal client regarding entrapment defense—state cases. 43 ALR 6th 475.

Denial of accused's request for initial contact with attorney in cases involving offenses other than drunk driving—cases focusing on presence of inculpatory statements. 124 ALR 5th 1.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues—motions and objections during trial and matters other than pretrial motions. 117 ALR 5th 513.

Validity and efficacy of minor's waiver of right to counsel—cases decided since Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). 101 ALR 5th 351.

Sufficiency of access to legal research facilities afforded defendant confined in state prison or local jail. 98 ALR 5th 445.

Denial of, or interference with, accused's right to have attorney initially contact accused. 96 ALR 5th 327.

Adequacy of defense counsel's representation of criminal client—conduct at trial regarding issues of insanity. 95 ALR 5th 125.

Denial of accused's request for initial contact with attorney in cases involving offenses other than drunk driving—cases focusing on presence of inculpatory evidence other than statements by accused and cases focusing on absence of particular inculpatory evidence. 90 ALR 5th 225.

Adequacy of defense counsel's representation of criminal client—issues of mental matters concerning persons, other than counsel's client, who are involved in criminal case. 80 ALR 5th 55.

Adequacy of defense counsel's representation of criminal client—pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness. 79 ALR 5th 419.

Adequacy of defense counsel's representation of criminal client—conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness. 78 ALR 5th 197.

Adequacy of defense counsel's representation of criminal client—pretrial conduct or conduct at unspecified time regarding issues of insanity. 72 ALR 5th 109.

Adequacy of defense counsel's representation of criminal client—issues of incompetency. 70 ALR 5th 1.

Criminal defendant's representation by person not licensed to practice law as violation of right to counsel. 19 ALR 5th 351.

Ineffective assistance of counsel: right of attorney to withdraw, as appointed defense counsel, due to self-avowed incompetence. 16 ALR 5th 118.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense. 11 ALR 5th 871.

Ineffective assistance of counsel: compulsion, duress, necessity, or "hostage syndrome" defense. 8 ALR 5th 713.

Denial of accused's request for initial contact with attorney—cases involving offenses other than drunk driving. 18 ALR 4th 743, §§3 through 6, 13 superseded by 124 ALR 5th 1, §§7 through 12, 13 superseded by 90 ALR 5th 225.

Appellate and postconviction remedies: adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 ALR 4th 582.

Prior conviction: adequacy of defense counsel's representation of criminal client regarding prior conviction. 14 ALR 4th 227.

Guilty plea: adequacy of defense counsel's representation of criminal client regarding guilty pleas. 10 ALR 4th 8, §§23, 24 superseded by 19 ALR 6th 411.

Hypnosis and truth tests: adequacy of defense counsel's representation of criminal client regarding hypnosis and truth tests. 9 ALR 4th 354.

Plea bargaining: adequacy of defense counsel's representation of criminal client regarding plea bargaining. 8 ALR 4th 660.

Venue: adequacy of defense counsel's representation of criminal client regarding venue and recusation matters. 7 ALR 4th 942.

Confessions: adequacy of defense counsel's representation of criminal client regarding confessions and related matters. 7 ALR 4th 180.

Speedy trial: adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters. 6 ALR 4th 1208.

Argument of counsel: adequacy of defense counsel's representation of criminal client regarding argument. 6 ALR 4th 16.

Power of court to change counsel appointed for indigent, against objections of accused and original counsel. 3 ALR 4th 1227.

Psychiatric examination: right of accused in criminal prosecution to presence of counsel at court-appointed or -approved psychiatric examination. 3 ALR 4th 910.

Jury trial: adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial. 3 ALR 4th 601.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR 4th 27.

Choice: accused's right to choose particular counsel appointed to assist him. 66 ALR 3d 996.

Right to counsel in contempt proceedings. 52 ALR 3d 1002.

Revocation: right to assistance of counsel at proceedings to revoke probation. 44 ALR 3d 306.

Communication: scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney. 5 ALR 3d 1360.

Arraignment: accused's right to assistance of counsel at or prior to arraignment. 5 ALR 3d 1269.

46-8-102. Waiver of counsel.

Commission Comments

1991 Comment: This statute continues the provision that a defendant may waive the right to counsel. See 1987 MCA 46-8-102. The statute states the legal requirements concerning the proper waiver of the right. See St. v. Plouffe, 198 Mont. 379 (1982). The provision addressing the waiver by juvenile offenders was not continued because that element should be located in the Montana Youth Court Act.

Source: New.

This section is intended to protect the young and unwary who may not realize the importance of the advice and assistance of a lawyer. Also it is intended that the court may appoint counsel where the defendant lacks the intelligence or education to realize the importance of an attorney in the defense of a criminal charge.

Compiler's Comments

1991 Amendment: After "counsel" substituted "when the court ascertains that the waiver is made knowingly, voluntarily, and intelligently" for "except that in all felony cases where the defendant is under 18 years of age, the defendant shall be represented by counsel at every stage of the proceedings following the filing of a petition under 41-5-501".

Case Notes

Defendant Not Considered Pro Se by Default: One year and three attorneys after being charged with several DUI-related offenses, Browning terminated the services of the third court-appointed attorney and indicated that he wished to hire private counsel. The trial court allowed Browning to proceed, but cautioned that under the circumstances, Browning was considered to be representing himself. Browning's attempt to secure private counsel failed for lack of funds. During subsequent proceedings, Browning asserted that he did not wish to proceed pro se because he did not know what he was doing, but the trial court refused to appoint a fourth attorney. Browning subsequently pleaded guilty and was sentenced to 20 years but then moved to withdraw the guilty plea on grounds that the plea was involuntary because he received ineffective assistance of counsel. The motion was denied, but on appeal, the Supreme Court reversed. Although a defendant has a right to appear pro se, every reasonable presumption is indulged in against waiver of the right to counsel, and waiver will be upheld only if a defendant made the decision knowingly, voluntarily, and intelligently. In this case, the record did not support a conclusion that Browning unequivocally requested to proceed pro se, and under the test in St. v. Langford, 267 M 95, 882 P2d 490 (1994), a defendant cannot be considered pro se by default. Thus, the trial court improperly denied Browning the assistance of counsel, and Browning's motion to withdraw the guilty plea was erroneously denied. St. v. Browning, 2006 MT 190, 333 M 132, 142 P3d 757 (2006).

Erroneous Language in Verification of Arraignment Form Constituting Sufficient Irregularity to Void Waiver of Right to Counsel — Remand for Resentencing: The state attempted to enhance Mann's DUI to a felony based on his pleading guilty to two prior DUIs. Mann

challenged the enhancement based on Mann's alleged waiver of the right to counsel contained in a verification of arraignment form. The District Court held that Mann had waived the right to counsel. On appeal, the Supreme Court reversed. The language of the verification of arraignment form was so erroneous, intimidating, and virtually indecipherable that Mann could not be considered to have entered into a knowing, intelligent, or voluntary waiver of the right to counsel. The language in the form was prima facie evidence of irregularity. Because the state had already exercised its opportunity to establish that the prior convictions were not obtained in violation of Mann's constitutional right, the Supreme Court vacated the prior convictions and remanded for resentencing in accordance with misdemeanor DUI charges. St. v. Mann, 2006 MT 33, 331 M 137, 130 P3d 164 (2006).

Adequate Advisement of Danger of Self-Representation — Voluntary Waiver of Counsel Affirmed: The Supreme Court's inquiry regarding a defendant's waiver of the right to counsel focuses not on what the defendant was told concerning the dangers of self-representation, but rather on a determination of whether the defendant understood the decision and proceeded voluntarily. Instead of requiring a trial court to recite a litany of the dangers associated with a waiver of the right to counsel, the test requires that the trial court receive sufficient evidence to find that the waiver is made voluntarily, knowingly, and intelligently. In this case, defendant was generally familiar with the criminal trial process, had personally experienced a criminal trial, had participated in jury selection, was present during suppression hearings, took law enforcement in college, understood the role of an attorney, and was cautioned that acting as a trial lawyer was not something that a person could just walk into. The trial court's questioning and defendant's responses indicated that defendant understood the decision to waive counsel and made the decision knowingly and voluntarily. The trial court's decision to allow defendant to proceed pro se was affirmed. St. v. Insua, 2004 MT 14, 319 M 254, 84 P3d 11 (2004), following St. v. Colt, 255 M 399, 843 P2d 747 (1992). See also Faretta v. Calif., 422 US 806 (1975).

Unequivocal Relinquishment of Right to Counsel Required Before Self-Representation Allowed: A defendant has a constitutional right to assistance of counsel and also has a constitutional right to proceed pro se, but before an accused may forego the right to counsel and may self-represent, waiver of the benefits associated with the right to counsel must be unequivocal, voluntary, knowing, and intelligent (see St. v. Langford, 267 M 95, 882 P2d 490 (1994)). In this case, the record showed that although Swan asked to be allowed to represent himself, what he actually hoped for was that new counsel be appointed and that he be allowed access to the law library. Thus, the request for self-representation was anything but unequivocal, and the District Court did not err in refusing the request. St. v. Swan, 2000 MT 246, 301 M 439, 10 P3d 102, 57 St. Rep. 1033 (2000), followed in St. v. Browning, 2006 MT 190, 333 M 132, 142 P3d 757 (2006).

Knowing and Intelligent Waiver — Application of Keen Standards — Colt and Langford Followed: Woods, an inmate at the Swan River Correctional Training Center, or "boot camp", made admissions that he killed two people to a trustee counselor and to other boot camp inmates in an anger management workshop. Woods later made the same admission to the boot camp superintendent. After representing himself before the District Court, Woods was convicted of the homicides. Woods argued before the Supreme Court that the District Court failed to adequately warn him of the dangers in appearing pro se, citing U.S. v. Keen, 96 F3d 425 (9th Cir. 1996), for the proposition that he should have been advised of: (1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation. The Supreme Court held that Keen does not require a structured, formalistic application of those three requirements and that the Supreme Court had in any event rejected an argument similar to Woods's in St. v. Colt, 255 M 399, 843 P2d 747 (1992). The Supreme Court reviewed the transcript containing the discussion between Woods and the District Court on Woods's waiver of counsel and also held, citing St. v. Langford, 267 M 95, 882 P2d 490 (1994), that Woods's waiver of his right to counsel was unequivocal. St. v. Woods, 283 M 359, 942 P2d 88, 54 St. Rep. 617 (1997).

Right to Waive Counsel Discretionary With Trial Court: Langford was accused of five counts of deliberate homicide alleged to have been committed during a prison riot. Langford requested to have his two attorneys dismissed and to represent himself. The Supreme Court stated that although the right to self-representation is a constitutional right, it is subject to the trial court determining that the defendant is knowingly and intelligently foregoing the benefits of counsel and that the defendant is competent to self-defend. The Supreme Court held that the lower court had not abused its discretion in finding that Langford not be allowed to represent himself. St. v. Langford, 267 M 95, 882 P2d 490, 51 St. Rep. 962 (1994), following St. v. Colt, 255 M 399, 843 P2d 747 (1992). Langford was followed in St. v. Woods, 283 M 359, 942 P2d 88, 54 St. Rep. 617 (1997).

Waiver of Right to Counsel — Unequivocal: Langford was accused of five counts of deliberate homicide alleged to have been committed during a prison riot. Langford requested to have his two attorneys dismissed and to represent himself. The Supreme Court held that it was adopting the additional requirement that a request to waive the right to counsel be unequivocal, that a review of the record as a whole indicated that Langford's request to represent himself was equivocal, and that it was not error to deny him the right to represent himself. St. v. Langford, 267 M 95, 882 P2d 490, 51 St. Rep. 962 (1994), followed in St. v. Woods, 283 M 359, 942 P2d 88, 54 St. Rep. 617 (1997), and St. v. Swan, 2000 MT 246, 301 M 439, 10 P3d 102, 57 St. Rep. 1033 (2000).

Voluntary, Knowing, and Intelligent Waiver — Standards:

The District Court Judge properly found that defendant made a voluntary, knowing, and intelligent waiver of the right to counsel. The judge twice told defendant that the judge could not help him or give him breaks and would have to hold him to the same standards as an attorney. The District Court Judge is in the best position to determine whether a waiver is knowing and intelligent and is not held to a rigid standard of making the determination. The judge can consider defendant's level of understanding, background and prior experience with the legal system, seriousness of purpose, and deliberateness. St. v. Colt, 255 M 399, 843 P2d 747, 49 St. Rep. 1003 (1992), followed in St. v. Woods, 283 M 359, 942 P2d 88, 54 St. Rep. 617 (1997).

A waiver of the right to counsel must be voluntary and constitute a knowing and intelligent relinquishment of a known right. Each alleged waiver should be determined upon the surrounding facts and circumstances, including the background, experience, and conduct of the accused. Other appropriate considerations are age, education, and intelligence of accused and his capacity to understand the warnings given him, the nature of his fifth amendment rights, and the consequences of waiving those rights. St. v. Plouffe, 198 M 379, 646 P2d 533, 39 St. Rep. 1064 (1982).

In judging a waiver of the fifth amendment right to counsel, a conclusion that the right was waived necessarily entails a finding of a knowing and intelligent relinquishment of a known right, and some of the factors to be considered in making the finding are: (1) the background, experience, and conduct of the person; (2) his age, education, and intelligence; and (3) his capacity to understand the Miranda warnings given him, the nature of his fifth amendment rights, and the consequences of waiving those rights. St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Waiver of Counsel at Sentencing Hearing — Pro Se Appearance Not Ineffective Assistance of Counsel: Prior to a sentencing hearing, defendant filed a pro se motion for a new trial with over 50 pages of supporting documents in which he claimed that his counsel was ineffective. The motion was discussed at the hearing, and defendant's counsel was relieved from further duty but was appointed as standby counsel for defendant's reference for the remainder of the hearing. Defendant requested new counsel to pursue the claims set out in the motion, and the District Court explained that the matters raised in the motion could properly be raised on appeal, but not at the sentencing hearing. These facts, coupled with defendant's obvious familiarity with the criminal justice system, led to the conclusion that defendant was not denied effective assistance of counsel at the sentencing hearing. St. v. Martin, 226 M 463, 736 P2d 477, 44 St. Rep. 804 (1987).

Motion to Suppress Statements and Related Evidence — Waiver and Voluntariness — Applicability to Custodial Interrogation: The District Court granted a motion to suppress all statements made by defendant and any evidence obtained as a result of the statements, citing Smith v. Ill., 469 US 91, 83 L Ed 2d 488, 105 S Ct 490 (1984), as decisive of the suppression issue and supportive of the conclusion that defendant's request for counsel at his first interview barred further police interrogation. The Supreme Court reversed, holding that the Smith rule applied only to instances of custodial interrogation, while in this case defendant was not in custody or under formal arrest at the time he requested counsel. Further, the District Court never addressed the question of whether defendant's confession was voluntarily made; therefore, the case was remanded for hearing on the issues of waiver and voluntariness. St. v. Rorvik, 224 M 104, 728 P2d 419, 43 St. Rep. 2051 (1986).

Waiver of Right to Counsel — Defendant Indicted and Represented by Counsel: On March 4, 1981, while in the hospital for treatment of colitis and observation for suicidal tendencies, defendant was arrested and arraigned for a murder that had occurred 1 week previously. On March 7, defendant was transported to a hospital in Missoula for medical and psychiatric evaluation. On March 11, defendant's attending psychiatrist, Stratford, contacted the special prosecutor. Stratford asked whether a psychiatric examination was going to be ordered and whether an attorney had been appointed for defendant. Stratford was concerned about the

appointment of counsel because defendant was becoming more talkative to hospital personnel. The special prosecutor notified a state criminal investigator who was involved in the case and told him that the defendant was becoming more vocal, that the County Attorney involved did not interview defendants without first notifying defense counsel, that some states do not permit such interviews, that Montana had not yet decided whether such interviews should be permitted, and that it was up to the investigator whether or not to conduct an interview. The investigator did conduct two interviews without notifying defendant's counsel and as a result of the interviews obtained evidence incriminating the defendant. The District Court denied defendant's motion to suppress the evidence, finding that the State had sustained its burden of proving that defendant's waiver of his rights was effective. The Supreme Court affirmed, ruling that a defendant charged under information or indictment and represented by counsel may waive his right to counsel without notice to or presence of counsel, during an interview initiated by law enforcement officers investigating the charged crime, if defendant's waiver is voluntary, knowing, and intelligent as shown by the particular facts and circumstances surrounding that case. St. v. Norgaard, 201 M 165, 653 P2d 483, 39 St. Rep. 2028 (1982).

Waiver by Hospitalized Suicidal Person: While accused was in a hospital recovering from a suicide by poison attempt, an officer showed him an advice of rights form, explained it to accused, and asked if he understood the form. The officer said, "You're nodding yes, that you do understand", and the accused then signed a waiver of his rights and answered questions (accused could not talk and made written responses). The tape of the resulting interview suggested accused was able to understand and respond to questioning. The officer and a doctor testified that accused seemed coherent and able to give a cognizant statement. Accused was not inexperienced with police procedures. District Court properly concluded that accused made a knowing and intelligent waiver of his rights. St. v. Plouffe, 198 M 379, 646 P2d 533, 39 St. Rep. 1064 (1982).

Right to Counsel Where Public Defender Refuses Representation: Defendant was given a 3-year deferred sentence, which was subsequently revoked and a 10-year suspended sentence imposed. At that point defendant appeared pro se, without any indication in the record of his waiver of counsel or eligibility for appointed counsel other than a statement by a public defender that defendant was ineligible for a public defender because he earned too much. The Supreme Court vacated the 10-year suspended sentence because of denial of defendant's right to counsel, stating that where a public defender refuses to represent a defendant, the District Court must inquire further. Here the defendant was not questioned in regard to his indigency, nor did the court receive any type of financial statement from him. St. v. Fry, 197 M 354, 642 P2d 1053, 39 St. Rep. 589 (1982).

Motion to Suppress Confession — Central Question: The central question on a motion to suppress a confession for being involuntary is whether the State has proved by a preponderance of the evidence that the person was advised of his constitutional rights and knowingly and voluntarily waived them. St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Waiver Following Indication of Interest in Counsel: Arrested person asked police interviewing him if they thought he should get an attorney, and police stated it was up to him. He resumed talking. At a later interview with police he stated, "Maybe I should have an attorney". The police stopped talking to him and began to leave the room, and before they left he resumed talking to them, at which point they reminded him that he had just indicated he wanted an attorney. He stated that he did not want an attorney. The interview continued. He made a knowing and intelligent waiver of his right to counsel, and subsequent confession was voluntary and admissible. St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Youth — Waiver of Right to Counsel: To be effective, waiver of right to counsel by a youth in Justice's Court must be accompanied by waiver of right to counsel by the parent or guardian of the youth. Edward C. v. Collings, 193 M 426, 632 P2d 325, 38 St. Rep. 1240 (1981).

Voluntariness of Waiver of Rights of Accused — Findings and Conclusions Absent: Appeal was made from a conviction for sexual intercourse without consent and sexual assault. The defendant contended on appeal that he did not voluntarily and knowingly waive his Miranda rights and it was error for his statement to be used as evidence against him. In determining whether or not a confession should be suppressed, the trial judge must decide if it were voluntary. [This test is questionable in view of the vacation of Blakney v. Mont., 451 US 1013, 69 L Ed 2d 384, 101 S Ct 2999 (1981). Blakney had applied this test.] The Supreme Court said the determination of voluntariness turned solely on the credibility of the witnesses and deferred to the trial judge's finding of voluntariness supported by substantial credible evidence. The court declined to substitute its judgment when there was substantial evidence to support the judge's determination. Although the judge did not enter specific facts and findings as is preferable, it

was not reversible error in a suppression hearing. It was noted, too, that the defendant never asked that findings and conclusions be entered. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981).

Waiver of Right to Counsel by Defendant Claiming Mental Defect — When Confession Suppressed: Defendant, convicted of aggravated assault, appealed based on issues related to his confession. The Supreme Court on review said the real issue was whether the defendant knowingly and voluntarily waived the right to counsel. The question of waiver was inextricably interwoven with the question of the voluntariness of the accused's confession. That was especially true because the defendant alleged incapacity because of mental illness. Whether a confession should have been suppressed depends on its voluntariness, [but see St. v. Blakney below, apparently vacated for application of this test] and that depends on the "totality of the circumstances". The Supreme Court found that the evidence showed that Miranda warnings were given before confession, that the defendant was capable of understanding the warnings, that the defendant waived his rights to counsel and against self-incrimination knowingly and voluntarily, and that the defendant was not improperly induced into confession. St. v. Mercer, 191 M 418, 625 P2d 44, 38 St. Rep. 312 (1981).

Suppression of Confession — Voluntariness — Waiver of Right to Counsel After Making Request: To determine whether a confession should have been suppressed, it had to be determined whether the confession was voluntary and whether there was an unconstitutional denial of the right to counsel. In so doing, the following questions had to be answered: What was the totality of the circumstances? Was there effective assertion of the right to counsel, and if so, was there an effective waiver later? Since the evidence answered a large number of the requisite questions about the circumstances, the decision of the trial court was held not to have clearly contravened the weight of the evidence and its holding of voluntariness was upheld. Since any indication by a defendant in any manner that he wishes to consult with an attorney suffices, and evidence showed the defendant had met this requirement, the trial court erred in concluding that there was ineffective assertion of the right to counsel. After adopting the rule that a defendant can validly waive the right to counsel after making a request for counsel, the Supreme Court found the trial court properly found that the State had carried its "heavy burden" of showing waiver of counsel. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979); certiorari granted, Blakney v. Mont., 451 US 1013, 69 L Ed 2d 384, 101 S Ct 2999 (1981), and judgment vacated and case remanded for further consideration in light of Edwards v. Ariz., 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880 (1981); affirmed on remand, St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Inadequate Counsel — Self-Representation: Counsel was appointed for defendant and was dismissed by him prior to trial. The court warned defendant of the disadvantages of self-representation and appointed standby counsel to assist defendant should he so request. Having made the choice of self-representation knowingly and intelligently, defendant cannot later claim that he was denied the right to adequate counsel. St. v. Harvey, 184 M 423, 603 P2d 661 (1979).

Admissibility of Defendant's Statement When Attorney Advisability Mentioned: A defendant who said it probably was advisable that he have an attorney but who nonetheless went ahead and fully consented to being interrogated and tape-recorded was held to have made a voluntary statement, having been advised of his rights. A statement made voluntarily after the speaker has been made fully aware of and understands his rights is not objectionable because the statement is made without the advice or assistance of counsel. Electronically recorded or preserved evidence is subject to the same admissibility tests as direct evidence of eyewitnesses or earwitnesses. With proper advice to a prospective defendant who then voluntarily consents to the tape recording of his statements, the constitutional defenses of self-incrimination, unlawful search, invasion of privacy, and right to counsel disappear. St. v. Brubaker, 184 M 294, 602 P2d 974 (1979).

Implied Waiver: Willful failure to retain counsel can amount to a waiver of the right to counsel. St. v. Lande, 180 M 157, 589 P2d 666 (1979).

Indigent Appearing Unrepresented: When the record reflects only the defendant's claim that he tried to get a lawyer and could not, the inquiry was not thorough and complete enough to support the determination of nonindigency and the subsequent ruling that defendant waived his right to counsel when he appeared unrepresented. St. v. Lande, 180 M 157, 589 P2d 666 (1979).

Discharge of Appointed Counsel by Defendant: Once counsel has been appointed and is rendering effective assistance, the defendant has only the choice of: (1) continuing with the counsel so appointed; or (2) having his counsel dismissed and proceeding on his own, pro se. If appointed counsel is rendering effective assistance, defendant may not have different counsel

appointed or demand certain counsel. St. v. Pepperling, 177 M 464, 582 P2d 341 (1978), followed in St. v. Lange, 226 M 9, 733 P2d 847, 44 St. Rep. 418 (1987).

Juveniles — Suppression of Statements and Evidence: In the trial of a juvenile for shooting a police officer, a motion for suppression of evidence, obtained under authority of a lawful inspection and statements voluntarily made, was erroneously granted. However, statements made after a waiver of counsel, which were void because of lack of counsel for the underaged defendant, were properly suppressed. St. v. District Court, 176 M 257, 577 P2d 849 (1978).

Exception: This section was held to be inapplicable to a defendant under 18 manifesting certain characteristics. St. v. Braden, 154 M 90, 460 P2d 85 (1969).

Waiver by Competent and Informed Defendant: The right to counsel may be knowledgeably waived by a defendant who is competent to do so and has been fully informed of his rights by the court. Nelson v. St., 144 M 439, 397 P2d 700 (1964).

Determination of Whether Waiver Voluntary: The right to counsel may be intelligently waived by an accused, and the determination of whether the waiver was intelligently made will depend upon the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused. Petition of Jones, 143 M 19, 386 P2d 747 (1963).

Law Review Articles

Waiver of Fourth Amendment Rights by the Accused, Dye, 31 Mont. L. Rev. 57 (1969).

Collateral References

Validity and efficacy of minor's waiver of right to counsel—cases decided since application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). 101 ALR 5th 351.

Waiver of right to counsel by insistence upon speedy trial in state criminal case. 19 ALR 4th 1299.

46-8-103. Duration of assignment.

Commission Comments

1991 Comment: This statute reflects 1987 MCA 46-8-103. In fact, subsection (1) is a restatement of the 1987 code concerning the appointment of counsel. Subsection (2) contains the requirements imposed on the defendant's court-appointed counsel if the counsel seeks a withdrawal after verdict and before initial appeal. These requirements are imposed to ensure that all defendants, including indigent defendants, have "the same rights and opportunities on appeal as nearly as is practicable . . .". See Anders v. Calif., 386 US 738, 744, 745 (1967).

Source: New.

Compiler's Comments

2003 Amendment: Chapter 19 in (2) at beginning of first sentence after "counsel" substituted "determines that an appeal would be frivolous or wholly without merit, counsel shall file a motion with the court requesting" for "finds the defendant's case on appeal to be wholly frivolous, counsel shall advise the court of that fact and request", inserted second sentence requiring attestation by counsel that an appeal would be frivolous and that defendant was advised of counsel's decision and the right to file a response, in third sentence at beginning substituted "motion" for "request" and at end substituted "discussing any issues that arguably support an appeal" for "referring to anything in the record that might arguably support the appeal", inserted fourth and fifth sentences regarding memorandum contents and mailing, and in sixth sentence after "entitled to" deleted "receive a copy of counsel's memorandum and to" and after "file a" substituted "response" for "reply". Amendment effective October 1, 2003.

1991 Amendment: In (1), after "appeal", inserted "to the Montana supreme court" and after "the court" inserted "that assigned counsel or that has jurisdiction over the case"; inserted (2) concerning withdrawal of counsel; and made minor changes in style.

Case Notes

Showing of Good Cause Required Prior to Appointment of State Public Defender in Habeas Corpus Proceedings: More than a simple motion is required before the Supreme Court will appoint the Office of State Public Defender (OSPD) to represent a person seeking habeas corpus relief. In such case, OSPD counsel will be appointed only upon a demonstration of good cause. A showing of likelihood of the illegality of the sentence of the person seeking relief, and that the sentence will be shortened or terminated if habeas corpus relief is granted, is required before OSPD counsel will be appointed. A statement that an applicant is untrained or unskilled in the law is insufficient, without more, to establish good cause. Dyer v. Mahoney, 2008 MT 117, 342 M 495, 182 P3d 737 (2008).

Appointed Counsel — No Ineffective Assistance of in Postconviction Relief Proceedings: Kallowat contended that he received ineffective assistance from his appointed counsel who failed

to represent him in postconviction relief proceedings and to follow Kallowat's instruction to file an appeal in federal court. The Supreme Court disagreed. Kallowat was appointed two different attorneys, one of whom withdrew because of an excessive workload, and another who withdrew citing no discernible basis entitling Kallowat to relief, so Kallowat was allowed to proceed pro se. There was no error in allowing counsel to withdraw. Further, attorneys in criminal cases are required to represent a client only until final judgment is rendered, including appeals to the Montana Supreme Court, so counsel was not required to represent Kallowat in appealing to the federal courts. Thus, Kallowat's argument that he did not receive effective assistance of counsel failed. Kallowat v. St., 2004 MT 152, 321 M 501, 92 P3d 1176 (2004).

Failure of Counsel to Properly Withdraw or Preserve Direct Appeal — Denial of Postconviction Petition Erroneous: Adams filed a pro se petition for postconviction relief, alleging ineffective assistance of counsel because his original court-appointed attorney failed to move to dismiss for lack of a speedy trial and because his subsequently appointed trial counsel offered a lesser included instruction on aggravated assault to the jury and failed to appeal to the Supreme Court following Adams' conviction, despite Adams' request to do so. The petition was denied on grounds that Adams failed to file an appeal within 60 days of judgment as required by former Rule 5, M.R.App.P. (now superseded), and Adams appealed. The Supreme Court reversed. Under this section, appointed counsel is required to continue representation until final judgment, including appellate review, unless counsel is relieved by court order. Adams' counsel failed to comply with the requirements of this section and effect a valid withdrawal, so the right to appeal was not preserved. When a defendant would have appealed but for counsel's deficient performance, the error is prejudicial. Thus, denial of Adams' petition for postconviction relief on procedural grounds was reversible error, and on remand, Adams was allowed to raise the issues that would have been raised on direct appeal but for counsel's abandonment of the appeal, as well as the issues raised in the petition for postconviction relief that were not previously raised. St. v. Adams, 2002 MT 202, 311 M 202, 54 P3d 50 (2002), following In re Petition of Hans, 1998 MT 7, 288 M 168, 958 P2d 1175 (1998), and St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Failure of Appointed Counsel to Perfect Appeal: When the District Court appointed counsel for the defendant and ordered preparation of the record for an appeal to the Supreme Court, all at public expense, the defendant having had no voice in the choice, in the interest of justice it was incumbent upon the Supreme Court to consider the contended errors although court-appointed counsel failed to timely file the notice of appeal. St. v. Frodsham, 139 M 222, 362 P2d 413 (1961).

46-8-104. Assignment of counsel after trial — definition.

Commission Comments

Source: R.C.M. 1947, section 94-6513.

Compiler's Comments

2007 Amendment: Chapter 417 in (1) in introductory clause near middle after "chapter 1" substituted "to represent" for "to defend", in two places before "petitioner" deleted "defendant", substituted "action or proceeding brought under Title 46, chapter 21" for "criminal action or proceeding", after "appellant" substituted "is eligible for the appointment of counsel" for "desires counsel", and at end after "and" deleted "is unable to employ counsel"; inserted (1)(a) through (1)(e) establishing criteria for when a court of record may order the state public defender's office to assign counsel to represent a petitioner or appellant in a postconviction action or proceeding; inserted (2) providing that an appointment of counsel made in the interests of justice may be made only when extraordinary circumstances exist; inserted (3) defining extraordinary circumstances; and made minor changes in style. Amendment effective May 3, 2007.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 near beginning after "may" inserted reference to ordering office of state public defender to assign counsel and after "counsel" inserted reference to Montana Public Defender Act; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

Case Notes

Appointment of Public Defender Prior to Filing of Petition for Postconviction Relief Prohibited: This section provides that a District Court may order that counsel from the Office of State Public Defender represent an eligible person who has filed a postconviction action or proceeding under certain circumstances, but nothing in this section allows appointment of a public defender in advance of the filing of a petition for postconviction relief. Further, 47-1-104 does not give a District Court authority to appoint counsel employed by the public defender system to represent a person who may desire to file a petition for postconviction relief but who has not done so. Office of St. Pub. Defender v. District Court, 2007 MT 333, 340 M 234, 178 P3d 693 (2007).

Conditions for Appointment of Appellate Counsel: The Supreme Court found this section to be vague, confusing, lacking in legislative guidance, and either overbroad or underinclusive with regard to appointment of counsel for defendants. The court determined that it will appoint counsel when a defendant's, petitioner's, or appellant's motion or petition demonstrates that: (1) a statute specifically mandates appointment of counsel; (2) the defendant, petitioner, or appellant is clearly entitled to counsel under the U.S. or Montana Constitution; or (3) extraordinary circumstances exist that require appointment of counsel to prevent a miscarriage of justice. The motion or petition must reference specific facts and documents in the record and cite specific jurisprudential, statutory, or constitutional authority to demonstrate the existence of a condition warranting appointment of counsel. (Note: The 2007 Legislature revised this section to provide guidance as suggested in Dillard.) Dillard v. St., 2006 MT 328, 335 M 87, 153 P3d 575 (2006).

No Right to Counsel in Petition to Dispose of Evidence — Issue Held Res Judicata: Woods was convicted of writing a bad check. After the state filed a petition to dispose of certain evidence pursuant to 46-5-306 through 46-5-309, Woods argued to the District Court that he was entitled to appointed counsel, pursuant to this section, for the purpose of responding to the petition. The District Court held that Woods was not entitled to appointed counsel because the granting of the state's petition would not result in a conviction of an offense for which Woods could be punished. Woods appealed that decision to the Supreme Court, and the Supreme Court affirmed the District Court. After the District Court granted the petition to dispose of evidence, Woods again raised the issue of his entitlement to appointed counsel to the District Court. The District Court denied the request for the same reason that it had previously. Woods then appealed to the Supreme Court. The Supreme Court held that because of its earlier decision in the matter of Woods's right to counsel, the issue was now res judicata, and the Supreme Court therefore affirmed the holding of the District Court. St. v. Woods, 286 M 355, 951 P2d 981, 54 St. Rep. 1445 (1997).

Right to Counsel Where Public Defender Refuses Representation: Defendant was given a 3-year deferred sentence, which was subsequently revoked and a 10-year suspended sentence imposed. At that point defendant appeared pro se, without any indication in the record of his waiver of counsel or eligibility for appointed counsel other than a statement by a public defender that defendant was ineligible for a public defender because he earned too much. The Supreme Court vacated the 10-year suspended sentence because of denial of defendant's right to counsel, stating that where a public defender refuses to represent a defendant, the District Court must inquire further. Here the defendant was not questioned in regard to his indigency, nor did the court receive any type of financial statement from him. St. v. Fry, 197 M 354, 642 P2d 1053, 39 St. Rep. 589 (1982). See also Swearingen v. St., 2001 MT 10, 304 M 97, 18 P3d 998 (2001), holding that a reading of 46-21-201 with this section requires appointment of counsel even if an indigent defendant fails to notify the court of a "desire" for counsel.

Right to Appointed Counsel on Appeal: There is no provision for appointment of counsel in the Supreme Court; such appointments are made by the District Courts. Brown v. St., 140 M 289, 371 P2d 262 (1962); In re Pelke's Petition, 139 M 354, 365 P2d 932 (1961).

46-8-113. Payment by defendant for assigned counsel — costs to be filed with court.

Commission Comments

1991 Comment: This statute is a restatement of 1987 MCA 46-8-113. The statute establishes certain procedures allowing the court to assign the costs of court-appointed counsel as a part of the defendant's sentence. Court-appointed counsel should be paid by the appropriate governmental entity, and reimbursement by the defendant for these costs should be made to that governmental entity.

Compiler's Comments

2009 Amendment: Chapter 467 in (1) in introductory clause substituted "the court shall require" for "the court may require" and after "represent the defendant" inserted "as follows, except as provided in subsections (2) and (3)"; inserted (1)(a) and (1)(b) concerning costs of counsel; in (2) inserted second sentence requiring assigned counsel in criminal jury trial to file statement of costs; and made minor changes in style. Amendment effective July 1, 2009.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (1) at beginning inserted reference to part of sentence or condition under sentence imposed under this title, after "costs of" deleted "court-appointed", and after "counsel" deleted "as a part of or a condition under the sentence imposed as provided in Title 46" and inserted "assigned to represent the defendant"; in (2) after "limited to" deleted "reasonable compensation and" and after "by the" deleted "court-appointed counsel" and inserted reference to costs incurred by office of state public

defender in providing defendant with counsel; in (3) after "costs" deleted "of court-appointed" and inserted "for assigned"; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1993 Amendment: Chapter 262 in first sentence of (4), after "pay costs", deleted "and who is able to but refuses or fails to pay those costs".

1991 Amendment: In (1), at beginning, deleted "Under the provisions of 46-18-201" and at end inserted "imposed as provided in Title 46"; in (2) deleted second sentence that read: "Costs may not include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law"; in (4), after "who is", substituted "able to but refuses or fails to pay those costs" for "not in contumacious default in the payment thereof"; and made minor changes in style.

Case Notes

Order to Pay Costs of Court-Appointed Counsel Within Statutory Parameters — Sentence Objectionable, Not Illegal Within Scope of Lenihan Rule and Not Colorable Claim on Appeal: Kirkland asserted for the first time on appeal that the sentencing court imposed an illegal sentence by ordering Kirkland to pay the costs of court-appointed counsel incurred during proceedings related to revocation of Kirkland's deferred sentence. Kirkland also contended that the sentencing court erred by not specifying in its written judgment that payment was to be made to the Office of State Public Defender, as required in 46-8-114. The Supreme Court noted that under St. v. Lenihan, 184 M 338, 602 P2d 997 (1979), appellate review of a sentence that is illegal or in excess of statutory mandates may be conducted even though that argument was not raised in District Court. However, the Supreme Court also noted that St. v. Kotwicki, 2007 MT 17, 335 M 344, 151 P3d 892 (2007), clarified Lenihan in that a sentencing court's failure to abide by a statutory requirement rises to an objectionable sentence, not necessarily an illegal one that would invoke the Lenihan exception. Here, Kirkland's sentence requiring payment of costs of counsel was statutorily authorized in this section and was therefore considered objectionable, but not illegal. Thus, Kirkland failed to present a colorable claim that his sentence fell outside statutory parameters and warranted review under the Lenihan rule, so the Supreme Court declined to consider Kirkland's arguments for the first time on appeal. St. v. Kirkland, 2008 MT 107, 342 M 365, 181 P3d 616 (2008).

Repayment of Costs and Fees of Court-Appointed Counsel as Condition of Deferred Sentence: As a condition of Holland's deferred sentence, the District Court ordered Holland to repay $2,922 in costs and fees expended in his defense by court-appointed counsel. Holland appealed on grounds that the court was not authorized to impose such a condition on a deferred sentence. The Supreme Court disagreed, holding that because subsection (1) of this section included all costs related to a criminal defense and because the statute contained no limitation on which defense costs a judge may require a defendant to pay, the District Court did not err in requiring Holland to repay costs and fees of court-appointed counsel as a condition of the deferred sentence. (Note: A 2005 amendment provided that costs must be limited to costs incurred by the Office of State Public Defender.) St. v. Holland, 2008 MT 26, 341 M 237, 177 P3d 482 (2008).

Unlawful Order That Defendant Pay Assigned Counsel After Finding That Defendant Unable to Pay — Reversed: A court may not sentence a defendant to pay the costs for assigned counsel unless the defendant is or will be able to pay them. In this case, even though the District Court found that Starr could not afford to pay a $3,000 fee, the court nevertheless ordered Starr to pay $2,103.40 in attorney fees. Absent an affirmative finding of Starr's ability to pay attorney fees, the sentence was against the weight of the District Court's evidentiary findings and thus was illegal. The Supreme Court reversed with instructions to strike the portion of the sentence concerning attorney fees. St. v. Starr, 2007 MT 238, 339 M 208, 169 P3d 697 (2007).

Constitutionality of Montana Recoupment Statutes: Ellis contended that 46-8-115 and this section violated the right to equal protection because they strip indigent defendants of protections against imprisonment for debt that are afforded to similarly situated nonindigent criminal defendants and civil judgment debtors. The Supreme Court disagreed. Under Montana's recoupment statutes, a court may not sentence a defendant to pay the costs of court-appointed counsel unless the court determines that the defendant is or will be able to pay the costs, nor do counsel costs become a judgment in the same manner as civil judgments. Further, a defendant may at any time petition the court for remission of payment on grounds that payment will impose manifest hardship on the defendant or the defendant's family. Ellis's equal protection claim was also rejected for failure to identify similarly situated classes that are treated differently, inasmuch as individuals who are ordered to pay recoupment costs as a condition of a felony criminal sentence are not similarly situated to civil judgment debtors. Thus,

Ellis failed to establish that the recoupment statutes violated the constitutional right to equal protection. St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), following St. v. Farrell, 207 M 483, 676 P2d 168 (1984). See also Fuller v. Oregon, 417 US 40 (1974).

Improper Assessment of Costs of Court-Appointed Counsel Based on Possible Future Financial Resources: Although the sentencing court recognized that Hirt had no financial resources, the court imposed costs of $9,558 to pay for Hirt's court-appointed counsel, stating that it would hold a hearing in the future to modify judgment after considering Hirt's financial resources at a later date. Citing St. v. Rennick, 1999 MT 155, 295 M 97, 983 P2d 907 (1999), the Supreme Court noted that once a valid sentence is imposed, a court lacks jurisdiction to modify a sentence absent specific statutory authority and may not reserve the right to change a sentence or add conditions at a later time. In addition, a court may not sentence a defendant to pay the costs of court-appointed counsel unless the defendant is or will be able to pay them. In this case, the sentencing court articulated no determination that Hirt would have resources in the future to pay the costs, so the Supreme Court remanded for reconsideration of costs. St. v. Hirt, 2005 MT 285, 329 M 267, 124 P3d 147 (2005).

Error in Requiring Restitution Without Considering Resources of Defendant: After revoking Rudolph's suspended sentence, the District Court ordered Rudolph to reimburse the county for the costs of a court-appointed attorney. However, the court committed reversible error when it did not consider Rudolph's financial resources or ability to pay the costs, and the case was remanded for further consideration. St. v. Rudolph, 2005 MT 41, 326 M 132, 107 P3d 496 (2005).

Reimbursement Costs for Court-Appointed Attorney Proper: Defendant contended that the District Court improperly required victim restitution in an incest case because the court did not specify an amount of total restitution, consider the victim's pecuniary loss, or consider defendant's financial resources or ability to pay, as required in 46-18-244. The Supreme Court held that defendant had mischaracterized the issue, noting that the District Court had not ordered any amount for victim restitution, but rather had ordered defendant to pay an amount in reimbursement costs for defendant's court-appointed attorney, and had correctly considered defendant's resources as set out in the presentence investigation report, as provided in this section. Payment of reimbursement costs was affirmed. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

Ordering Defendant to Pay Counsel's Cost for First Trial as Well as Retrial: Following retrial, the judge was authorized by this section to order defendant to pay his counsel's costs for the first trial as well as the second trial. This did not impinge upon the defendant's right to counsel, and there was no evidence to support his claim that the judge acted out of vindictiveness because defendant went to retrial. St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Order to Pay Attorney Fees to Be Based on Factual Findings of Defendant's Ability to Pay: After his conviction for theft of public welfare funds in violation of 45-6-301, defendant was ordered to repay the cost of his court-appointed attorney. Because the case record did not indicate an inquiry into defendant's financial status or ability to repay the legal fees, the Supreme Court remanded the case for reconsideration of the order. St. v. Farrell, 207 M 483, 676 P2d 168, 41 St. Rep. 91 (1984).

Collateral References

Validity, construction, and application of state recoupment statutes permitting state to recover counsel fees expended for benefit of indigent criminal defendants. 39 ALR 4th 597.

46-8-114. Time and method of payment.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in first sentence after "costs of" deleted "court-appointed" and inserted "assigned" and after "counsel" inserted reference to 46-8-113; and in second sentence after "made to the" deleted "clerk of district court. The clerk of district court shall forward the payments to the department of revenue for deposit in the state general fund" and inserted reference to office of state public defender and depositing into account established in 47-1-110. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2001 Amendment: Chapter 585 in third sentence substituted "shall forward the payments to the state treasurer for deposit in the state general fund" for "shall distribute the payments to the government agency responsible for the expense of court-appointed counsel as provided for in 46-8-201"; and made minor changes in style. Amendment effective July 1, 2002.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in version effective July 1, 2002, the code commissioner changed "state treasurer" to "department of revenue".

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1991 Amendment: Near end substituted "distribute the payments to the government agency" for "disburse the payments to the county, agency, state agency, or local government unit"; and made minor changes in style.

1985 Amendments — Composite Section: Chapter 295 in third sentence, after "disburse the payments", substituted "to the county, agency, state agency, or local government unit" for "to the county or state agency".

Chapter 680 in last sentence, after "county", inserted "city, town". Because the term "local government unit" encompasses the terms "city" and "town", the Code Commissioner omitted from the composite as redundant the Ch. 680 amendment to this section.

Case Notes

Order to Pay Costs of Court-Appointed Counsel Within Statutory Parameters — Sentence Objectionable, Not Illegal Within Scope of Lenihan Rule and Not Colorable Claim on Appeal: Kirkland asserted for the first time on appeal that the sentencing court imposed an illegal sentence by ordering Kirkland to pay the costs of court-appointed counsel incurred during proceedings related to revocation of Kirkland's deferred sentence. Kirkland also contended that the sentencing court erred by not specifying in its written judgment that payment was to be made to the Office of State Public Defender, as required in this section. The Supreme Court noted that under St. v. Lenihan, 184 M 338, 602 P2d 997 (1979), appellate review of a sentence that is illegal or in excess of statutory mandates may be conducted even though that argument was not raised in District Court. However, the Supreme Court also noted that St. v. Kotwicki, 2007 MT 17, 335 M 344, 151 P3d 892 (2007), clarified Lenihan in that a sentencing court's failure to abide by a statutory requirement rises to an objectionable sentence, not necessarily an illegal one that would invoke the Lenihan exception. Here, Kirkland's sentence requiring payment of costs of counsel was statutorily authorized in 46-8-113 and was therefore considered objectionable, but not illegal. Thus, Kirkland failed to present a colorable claim that his sentence fell outside statutory parameters and warranted review under the Lenihan rule, so the Supreme Court declined to consider Kirkland's arguments for the first time on appeal. St. v. Kirkland, 2008 MT 107, 342 M 365, 181 P3d 616 (2008).

46-8-115. Effect of nonpayment.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (1) near beginning after "costs of" deleted "court-appointed" and inserted "assigned"; and in (3) in first sentence near beginning after "costs of" deleted "court-appointed" and inserted "assigned". Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1993 Amendment: Chapter 262 near middle of (1) substituted "prosecutor" for "county attorney"; and made minor changes in style.

1991 Amendment: Made minor changes in style.

Case Notes

Constitutionality of Montana Recoupment Statutes: Ellis contended that 46-8-113 and this section violated the right to equal protection because they strip indigent defendants of protections against imprisonment for debt that are afforded to similarly situated nonindigent criminal defendants and civil judgment debtors. The Supreme Court disagreed. Under Montana's recoupment statutes, a court may not sentence a defendant to pay the costs of court-appointed counsel unless the court determines that the defendant is or will be able to pay the costs, nor do counsel costs become a judgment in the same manner as civil judgments. Further, a defendant may at any time petition the court for remission of payment on grounds that payment will impose manifest hardship on the defendant or the defendant's family. Ellis's equal protection claim was also rejected for failure to identify similarly situated classes that are treated differently, inasmuch as individuals who are ordered to pay recoupment costs as a condition of a felony criminal sentence are not similarly situated to civil judgment debtors. Thus, Ellis failed to establish that the recoupment statutes violated the constitutional right to equal protection. St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), following St. v. Farrell, 207 M 483, 676 P2d 168 (1984). See also Fuller v. Oregon, 417 US 40 (1974).

CHAPTER 9
BAIL

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's

work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

1991 Chapter Comments: This chapter governs the release or detention of a criminal defendant, whether before or after trial. These statutes are an amalgamation of the 1987 state code and the federal code governing the process. See 1987 MCA 46-9-101, et seq., and 18 U.S.C. 3141, et seq. The federal rules do contain provisions concerning a defendant's release, but the federal rules were not favored by the Commission. Nonetheless, the statutes are compatible with the federal rules. Compare Title 46, ch. 9, and Rule 46, Fed. R. Crim. P.

Two key changes are embodied in these statutes. First, the posting of bail is treated in the same fashion as any other condition of release. The statutes do not require the posting of bail, as the 1987 code apparently required, but allow posting bail as a condition of release. Second, because bail is treated as an equal among other conditions of release, any express reference to a personal recognizance release has been eliminated. Even under the 1987 code, such a release would have been subject to certain conditions. In the scheme embraced by these statutes, the court has wide discretion in deciding to impose certain conditions, if any, when a defendant's release is ordered.

These statutes are compatible with the state constitution and the 1987 code. The provisions recognize that a defendant in a capital offense case may be detained, require the consideration of community safety at a release hearing, and continue the provisions for arrest bond certificates. The statutes do not expressly continue some code provisions, such as the presumption of dangerousness of a defendant (1987 MCA 46-9-103(2)) or the requirement of a report of drug usage (1987 MCA 46-9-203).

Chapter Law Review Articles

Criminal Procedure—Montana Law and the Federal Impact: Paragraph IV.B. discusses bail with emphasis on the discretion vested in the trial court to determine appropriate bail. Elison, 38 Mont. L. Rev. 53 (1977).

In Defense of a Youth: This article discusses, among other things, bail for youth. Curtis, 36 Mont. L. Rev. 230 (1975).

Chapter Collateral References

Propriety of applying cash bail to payment of fine. 42 ALR 5th 547.

Part 1
Definition and Availability of Bail

46-9-102. Bailable offenses.

Commission Comments

Source: Kentucky Rules of Criminal Procedure, Rule 4.04; R.C.M. 1947, sections 94-8303 and 94-8304; Montana Constitution [1889], Article III, section 19 [now Art. II, sec. 21, 1972 Mont. Const.].

The county attorney, if he resists an application for bail in a capital case, must make some showing that the proof is evident or the presumption great thus bringing the case within the exception. (State ex rel. Murray v. District Court, 35 Mont. 504, 90 Pac. 513 (1907).)

Case Notes

Good Time Credit for Indigent Defendant Confined to County Detention Facility: The decision in Bearden v. Ga., 461 US 660, 76 L Ed 2d 221, 103 S Ct 2064 (1983), clearly and unambiguously stands for the principle that to deprive a criminal defendant of freedom simply because, through no want of bona fide effort, willful refusal, or fault of the defendant, the defendant lacks the financial resources to buy liberty is contrary to the fundamental fairness required by the 14th amendment to the U.S. Constitution. This is not to say that poverty insulates a defendant from having to post a reasonable bond should the facts and circumstances of the case so require. However, if a criminal defendant is unable to secure presentence freedom by posting bail for no other reason than indigency, that defendant is entitled to good time credit for the presentence time spent in a county detention facility to the same extent that the law allows good time credit to the criminal defendant who is able to post bail and thus serve the entirety of a sentence in the state correctional facility. In the present case, it was not clear from the record whether defendant was offered or denied bail and whether, if offered, the sole reason for defendant's inability to post bail was indigency; nevertheless, the Supreme Court granted defendant's petition for writ of habeas corpus and remanded to the District Court for a determination of whether defendant was entitled to good time credit for time served in the county detention facility. MacPheat v. Mahoney, 2000 MT 62, 299 M 46, 997 P2d 753, 57 St. Rep. 291 (2000), following MacFarlane v. Walter, 179 F3d 1131 (9th Cir. 1999), and followed in Eisenman v. St., 2000 MT 170, 300 M 322, 5 P3d 542, 57 St. Rep. 704 (2000), in which the case of an indigent defendant was remanded for a determination of whether defendant was detained presentence in a county detention facility because he was too poor to post bail and thus entitled to credit for good time under the MacPheat test. However, see also McGinnis v. Royster, 410 US 263, 35 L Ed 2d 282, 93 S Ct 1055 (1973). MacPheat was distinguished in Sebastian v. Mahoney, 2001 MT 88, 305 M 158, 25 P3d 163 (2001).

Discretion of Trial Court: Bail is a matter within the discretion of the trial court, and its ruling will not be disturbed unless a clear abuse of discretion appears. Denial of bail cannot be claimed as showing prejudice by the trial judge, for such is a mere preliminary matter and has nothing to do with the trial on the merits. St. v. London, 131 M 410, 310 P2d 571 (1957).

When Bail Proper in Homicide Case: Bail is properly allowed in a homicide case in the absence of a showing by the County Attorney that the proof of the defendant's guilt is evident or the presumption thereof great. State ex rel. Murray v. District Court, 35 M 504, 90 P 513 (1907).

Attorney General's Opinions

Authority of Municipal Court to Grant Time-Pay Bail Bonds: A time-pay bail bond system, which allows a defendant to make payments in monthly or weekly installments in an amount and frequency set by a court to correspond with the requirement that the defendant pay the full bail amount before the date of trial, promotes the constitutional policy of providing bail except in capital cases. The system also comports with statutory requirements that the bail amount not be oppressive and be considerate of the defendant's financial ability. The system requires a defendant to pay cash for the bond, albeit in installments paid over a period of time. Because a court has discretion to set the appropriate bail amounts and to accept personal property in lieu of cash, the court also has discretion to set the timing on the payment of any cash bond. Therefore, a Municipal Court Judge is authorized to release a defendant on a time-pay bail bond in an amount set by the judge to be paid in installments. 49 A.G. Op. 18 (2002).

Collateral References

Bail *key* 43.

8 C.J.S. Bail §§19 through 32.

8A Am. Jur. 2d Bail and Recognizance §§12 through 27.

Detention: pretrial preventive detention by state court. 75 ALR 3d 956.

Insanity of accused as affecting right to bail in criminal case. 11 ALR 3d 1385.

46-9-104. Bail on a new trial.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 110-11.

This section is consistent with the other provisions in this article in that it provides that the original bail may be continued, reduced, increased, or substituted.

Case Notes

Reversal of Conviction: The trial court abused its authority in denying bail to defendant whose conviction for first-degree murder was remanded for a new trial. St. v. Campbell, 160 M 111, 500 P2d 801 (1972).

46-9-105. General authority for release and detention.

Commission Comments

1991 Comment: This statute is presented as the primer for the release and detention provisions. Subsection (1) is reflective of the federal code and limits the conduct of a release or detention proceeding to the provisions of this chapter. See 18 U.S.C. 3141. Subsection (2) requires that a person released pursuant to this chapter appear as ordered.

46-9-106. Release or detention of defendant pending trial.

Commission Comments

1991 Comment: This statute states the appropriate instances when a defendant may be released or ordered detained prior to a verdict. The statute closely reflects the federal code but retains the state's practice that a defendant in a capital case may be detained without bail.

Subsection (1) adopts the release requirements contained in the federal code. That code allows the imposition of conditions to ensure the appearance of the defendant and the safety of the community. See generally 18 U.S.C. 3142(b). The 1987 state code did not expressly require consideration of community safety in a pretrial release. See 1987 MCA 46-9-103. To this extent, the written law may change, but the prevailing practice should not.

Subsection (2) provides that the defendant in a capital offense may be ordered detained. Detention is permitted only in capital offenses and only if conditions of release do not protect the community and ensure the defendant's appearance.

In any case in which the defendant's appearance and community safety can be ensured by certain conditions, a defendant should be released pending trial.

Case Notes

No Showing That Defendant's Rights Violated by Failure to Make Bail or to Be Released on Own Recognizance — Writ of Habeas Corpus Denied: Following Miller's arrest on charges of negligent homicide and failure to remain at the scene of an accident, the District Court set bail at $30,000. When Miller could not make bail, the amount was reduced to $10,000. Indigent, Miller could not pay the reduced bail and remained incarcerated. Miller petitioned the Supreme Court for a writ of habeas corpus, arguing that his continued incarceration was a violation of 46-9-111 and this section and the constitutional guarantees of bail and against excessive sanctions. The Supreme Court noted that a defendant has a presumptive right to be released on a reasonable bail or on the defendant's own recognizance on conditions that will protect the community. However, the burden in a habeas corpus proceeding is on the petitioner to present a record that is sufficient to make a prima facie showing that the District Court's order constituted a violation, deprivation, infringement, or denial of the petitioner's constitutional, statutory, or legal rights. After considering the meager record and the seriousness of the allegations, the Supreme Court was not convinced that Miller had no ability to provide any bail or that the District Court could have released Miller on conditions that could be enforced and that could ensure the protection of the community. Thus, Miller failed to show that his rights were violated, and his petition for a writ of habeas corpus was denied. Miller v. District Court, 2007 MT 58, 336 M 207, 154 P3d 1186 (2007).

Attorney General's Opinions

Authority of Municipal Court to Grant Time-Pay Bail Bonds: A time-pay bail bond system, which allows a defendant to make payments in monthly or weekly installments in an amount and frequency set by a court to correspond with the requirement that the defendant pay the full bail amount before the date of trial, promotes the constitutional policy of providing bail except in capital cases. The system also comports with statutory requirements that the bail amount not be oppressive and be considerate of the defendant's financial ability. The system requires a defendant to pay cash for the bond, albeit in installments paid over a period of time. Because a court has discretion to set the appropriate bail amounts and to accept personal property in lieu of cash, the court also has discretion to set the timing on the payment of any cash bond. Therefore, a Municipal Court Judge is authorized to release a defendant on a time-pay bail bond in an amount set by the judge to be paid in installments. 49 A.G. Op. 18 (2002).

46-9-107. Release or detention pending appeal — revocation — sentencing hearing.

Commission Comments

1991 Comment: This statute is an adaptation of the federal code governing a defendant's postverdict release. See generally 18 U.S.C. 3143. The statute, however, embodies only a generally stated principle. The statute is also reflective of the 1987 state code that expressly required consideration of community safety. See 1987 MCA 46-9-103. Unlike the 1987 code, the statute does not require admission to bail for minor offenses or probation violations, and the

statute does not preserve the presumption of dangerousness in deliberate homicide cases. See 1987 MCA 46-9-103. Such provisions are implied considerations under the community safety standard.

Source: R.C.M. 1947, section 94-8305.

Compiler's Comments

1991 Amendment: At beginning of second sentence substituted "The court shall order the detention of a defendant" for "A person", after "sentence" substituted "or a revocation hearing or" for "or a person found guilty of an offense and sentenced to a term of imprisonment", and after "appeal" substituted "unless the court" for "may be admitted to bail only if the judge"; deleted (2) that read: "(2) A person found guilty of the offense of deliberate homicide is presumed to pose a danger to the safety of the community, which presumption is rebuttable"; and made minor changes in style.

1985 Amendment: In (1) and (2) substituted new bail standards (see 1985 Session Law for text) for former text that read: "(1) After conviction of an offense not punishable by death, a defendant who intends to appeal may be admitted to bail:

(a) as a matter of right, from a judgment imposing a fine only or any judgment rendered by a justice's or city court;

(b) as a matter of discretion in all other cases.

(2) A defendant convicted of the offense of deliberate homicide is presumed to be a danger to others and not entitled to be admitted to bail, which presumption is rebuttable".

Case Notes

Likelihood of Success on Appeal Not Factor in Determining Release of Defendant Pending Appeal: Ingraham argued that because at least one issue in his pending appeal created a strong likelihood that the Supreme Court would reverse his conviction, equity and fairness required that he be released on bond pending appeal. The Supreme Court held that the statute governing the availability of release on bond pending appeal does not refer to the likelihood of a successful appeal and therefore is not grounds for release on bond. Ingraham v. St., 284 M 481, 945 P2d 19, 54 St. Rep. 782 (1997).

Weighing Evidence to Determine Continuation of Bond Pending Appeal Within Trial Court's Discretion: Ingraham argued that the trial court abused its discretion in denying his motion that he be released on bond pending appeal. The Supreme Court held that it was not an abuse of discretion for the trial court to give greater weight to evidence indicating that the defendant would pose a threat to the community if released pending appeal than to evidence presented by the defendant indicating that he would not pose a threat. Ingraham v. St., 284 M 481, 945 P2d 19, 54 St. Rep. 782 (1997).

Denial of Bond Pending Appeal — Method of Supreme Court Review — Jurisdiction: After conviction for negligent homicide and on related charges, Ingraham moved the District Court to continue bond pending appeal. The District Court denied the motion, finding that Ingraham was a danger to the community and therefore did not meet the requirements of this section. Ingraham then moved the Supreme Court, pursuant to former Rule 22, M.R.App.P. (now superseded), to continue bond pending appeal or, in the alternative, to accept appeal of the District Court's order denying bond, pursuant to former Rule 1, M.R.App.P. (now superseded), and 46-20-104. The Attorney General moved to dismiss, contending that there was no provision in law for appeal from a District Court order denying bond pending appeal and that Ingraham should have brought an original habeas corpus proceeding. The Supreme Court agreed with the Attorney General and dismissed Ingraham's motion or appeal, holding that Ingraham should have brought a petition for a writ of habeas corpus pursuant to 46-22-103. Ingraham then filed a petition for a writ of habeas corpus, which was filed with Justice Trieweiler pursuant to 3-2-212. Justice Trieweiler granted the petition to the extent necessary for the District Court to hold an evidentiary hearing as provided by statute, under the theory that the District Court was the more appropriate court for the hearing than was the Supreme Court. The Attorney General opposed the order by applying to the full Supreme Court for a writ of supervisory control, arguing, contrary to the state's previous position, that 46-22-103 does not really apply to persons convicted in a criminal case and that the more appropriate procedure was an original proceeding "in the nature of habeas corpus" before the full Supreme Court. The application for a writ of supervisory control was denied, was treated by the Supreme Court as a late-filed response to Ingraham's petition for a writ of habeas corpus, and was referred to Justice Trieweiler. Justice Trieweiler determined that it was inappropriate for him alone to determine the form of review of the District Court's denial of bond. Justice Trieweiler also determined that: (1) Ingraham had no constitutional right to bond pending appeal; (2) Ingraham did have a right to the proper exercise of the District Court's discretion in the application of this section; and (3) that right was a

substantial right for the purposes of 46-20-104. For these reasons, Justice Trieweiler vacated his previous order granting Ingraham's petition for a writ of habeas corpus and referred the matter to the full Supreme Court for review of the District Court's order denying bond pending appeal. St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Consideration of Moot Issue of Right to Reasonable Bail: Although a petition to the Supreme Court for a writ of habeas corpus was moot because petitioner was no longer in custody, the issue was the petitioner's right to reasonable bail, and the court accepted jurisdiction to address the substantive issues by writ of supervisory control in order to address a constitutional issue capable of repetition. Wier v. Lincoln County Sheriff's Dept., 278 M 473, 925 P2d 1172, 53 St. Rep. 1013 (1996).

Right to Bail and Stay of Justice's Court Sentence on Appeal to District Court: Under the plain language of this section, a person convicted in Justice's Court of partner assault and carrying a concealed weapon while under the influence had a right to bail pending his appeal to the District Court in the absence of a Justice's or District Court finding that he was likely to flee or posed a danger to a person or the community. If admitted to bail, a person's Justice's Court sentence should be stayed pending appeal. The state claimed that Wier did not seek bail; however, he had no opportunity because both the Justice of the Peace and the District Court Judge were unavailable. Wier had previously posted a bail bond in Justice's Court to secure his release pending a trial, and the Justice's Court still had the bond at the time of the appeal. The Justice's Court erred in failing to stay imposition of its sentence pending appeal to the District Court. Wier v. Lincoln County Sheriff's Dept., 278 M 473, 925 P2d 1172, 53 St. Rep. 1013 (1996).

Convicted Felon Allowed Preconviction Bail Not Automatically Entitled to Bail Pending Appeal: Prior to his conviction for deliberate homicide, Moore was allowed bail, and following conviction, he was designated a nondangerous offender (see 1995 repeal of 46-18-404) for purposes of parole eligibility. After conviction, Moore was denied bail pending appeal. Moore petitioned for a writ of habeas corpus, claiming that he is entitled to bail pending appeal as a matter of law pursuant to 46-20-204 and this section. The Supreme Court found that under this section, the District Court was required to order the detention of Moore unless it found that he was "not likely to flee". Since the District Court made the opposite finding based on evidence presented at the hearing, the Supreme Court found no abuse of discretion in the District Court's order denying bail pending appeal. The Supreme Court also held that the phrase "[i]f an appeal is taken and the defendant is admitted to bail" contained in 46-20-204(2) referred to bail pending appeal and requires that the District Court stay the execution of its sentence if the defendant is admitted to bail pending appeal. Because Moore was not admitted to bail pending appeal, his sentence should not be stayed. Moore v. McCormick, 260 M 305, 858 P2d 1254, 50 St. Rep. 1054 (1993).

Convicted Felon Designated Nondangerous Offender for Purposes of Parole Eligibility Not Automatically Entitled to Bail Pending Appeal: Prior to his conviction for deliberate homicide, Moore was allowed bail, and following conviction, he was designated a nondangerous offender (see 1995 repeal of 46-18-404) for purposes of parole eligibility. After conviction, Moore was denied bail pending appeal. Moore petitioned for a writ of habeas corpus, claiming that he is entitled to bail pending appeal as a matter of law pursuant to 46-18-404 (now repealed). The Supreme Court found that the criteria for admitting a defendant to bail pending appeal and the criteria for designating the defendant a nondangerous offender are not the same. Under 46-18-404(1)(b) (now repealed), the trial court is required to determine whether the defendant constitutes a "substantial danger to other persons or society", while under this section, the trial court may not allow bail pending appeal unless it finds that the defendant "is not likely to flee". The Supreme Court held that it could therefore be appropriate to designate a defendant such as Moore a nondangerous offender for the purposes of parole eligibility but also be appropriate to deny him bail pending appeal. Moore v. McCormick, 260 M 305, 858 P2d 1254, 50 St. Rep. 1054 (1993).

Time When Bail Must Be Granted: Appellant was entitled to be admitted to bail either in the Justice Court before his appeal was perfected or in the District Court after the appeal was perfected. State ex rel. Abbitt v. Justice Court, 220 M 210, 714 P2d 140, 43 St. Rep. 300 (1986).

Presence at Postconviction Hearing Not Required: Defendant is not required to be present at a postconviction hearing held to determine whether defendant was eligible for bail pending appeal because such proceedings are not part of the trial. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Denial of Bail — Poor Risks:

The Supreme Court denied the petitioner's application for admission to bail pending appeal based on a clear and present danger that bail would not guarantee the appearance of the

defendant for execution of sentence in the event of affirmance of the conviction on appeal, and that the safety of the public would be jeopardized by the release of the petitioner pending appeal. St. v. Bretz, 175 M 471, 575 P2d 44 (1978).

The court properly exercised its discretion in denying bail on appeal when there was evidence of prior offenses by one defendant and attempts to intimidate and influence witnesses by another defendant, demonstrating that the defendants were poor bail risks. State ex rel. Bretz v. Sheriff, 167 M 363, 539 P2d 1191 (1975).

Denial of bail pending appeal subsequent to conviction of second-degree murder was not an abuse of discretion when based on concern for safety of other citizens living in the area. French v. Crist, 163 M 544, 518 P2d 35 (1974).

Denial of Bail — Complete Presentence Investigation: When a complete presentence investigation was conducted, the trial court did not abuse its discretion by refusing admission to bail pending appeal. St. v. Kotarski, 154 M 309, 462 P2d 873 (1969).

Improper Tax on Right to Bail: The imposition of a penalty assessment on bail was an unconstitutional violation of due process. The purpose of bail is to insure the presence of the defendant, and it should not be used as a revenue measure. State ex rel. Sanders v. Butte, 151 M 171, 441 P2d 190 (1968).

Abuse of Discretion: District Court did not abuse its discretion when it refused to fix bail on appeal of defendant sentenced to state prison. Bubnash v. St., 139 M 639, 366 P2d 867 (1961).

Collateral References

Bail *key* 44; Criminal Law *key* 999(1), (2).

8 C.J.S. Bail §§39 through 60.

8A Am. Jur. 2d Bail and Recognizance §§40 through 45.

46-9-108. Conditions upon defendant's release — notice to victim of stalker's release.

Commission Comments

1991 Comment: This statute recognizes certain specific conditions that the court may impose upon a defendant's release to ensure the community's safety and the defendant's presence at a later proceeding. The statute weaves together provisions of both the state and federal codes. However, no significant change in established procedure is anticipated.

Subsection (1) lists certain conditions that the court can impose upon a defendant who is released pending criminal proceedings. While reflective of the 1987 state code, some changes have been made. First, the statute allows the court discretion with respect to the imposition of certain conditions. The 1987 code required a single condition—that the defendant not commit an offense. The Commission recommended making this condition discretionary but recognized that all persons, even criminal defendants, are expected to abide by the law.

Second, in the 1987 code, the court could impose certain restrictions on travel. These statutes do not continue the automatic restriction against out-of-state travel. However, as a reflection of the federal code, this provision was amended to permit restrictions on personal associations and residency, as well as travel. Compare 1987 MCA 46-9-501(1)(b)(iv) and 18 U.S.C. 3142(c)(2)(D).

Third, the condition prohibiting use of dangerous drugs has been amended to prohibit the use of controlled substances without a prescription. This change was made to better cover any instance of substance abuse that may arise. Compare 1987 MCA 46-9-501(1)(b)(ix) and 18 U.S.C. 3142(c)(2)(I).

Subsection (1), because it is entirely discretionary upon the court, avoids any direct recognition of the release on personal recognizance. See 1987 MCA 46-9-111. Because the imposition of bail is a condition under these statutes, the court may order a defendant's release without posting bail. Thus, the release on one's own recognizance is impliedly preserved.

Subsection (2) is an adaptation of provisions from the federal code and is intended to prevent the abuse of judicial discretion with respect to the imposition of release conditions. The initial sentence requires that the conditions imposed be reasonable and be the least restrictive that will ensure the defendant's appearance and the community's safety. These restraints were not expressly established in the 1987 code. The second sentence recognizes the court's discretion to amend a release order at any time upon a proper motion. This provision parallels a 1987 code provision but is stated in a more general manner. See 1987 MCA 46-9-311.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 110-10 and R.C.M. 1947, section 94-8306.

This section is not intended to limit the conditions that may be imposed under [46-9-111].

Compiler's Comments

2005 Amendment: Chapter 411 in (1)(e)(i) at end inserted language concerning restrictions in no contact order in partner or family member assault cases. Amendment effective October 1, 2005.

Preamble: The preamble attached to Ch. 411, L. 2005, provided: "WHEREAS, the Legislature has reviewed and considered the report filed by the Montana Domestic Violence Fatality Review Commission, which conducted case reviews of domestic violence homicides of spouses, partners, and children; and

WHEREAS, victims of domestic violence are at high risk for additional threats, violence, and homicide; and

WHEREAS, a victim's participation in a prosecution is jeopardized when a domestic violence assault is followed by intimidation in the form of threats and coercion; and

WHEREAS, courts have the authority to impose conditions on defendants charged with partner or family member assault when conditions will improve victim safety; and

WHEREAS, a court order restricting contact between the offender and the victim will improve victim safety."

2003 Amendment: Chapter 27 in (3) near beginning substituted "detention center" for "court"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 449 in (3) near beginning after "violation of" inserted "45-5-206" and after "45-5-220" inserted "or 45-5-626"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 292 inserted (3) requiring notice to alleged stalking victim. Amendment effective April 9, 1993.

1991 Amendment: Deleted former (1) and (1)(a) that read: "(1) If a person is admitted to bail, the conditions of bail shall be:

(a) that he will appear to answer in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged on final order of the court and will not depart from this state without leave"; in (1), near beginning after "required", substituted "or that will ensure the safety of any person or the community" for "and to protect any person from bodily injury"; inserted (1)(a) concerning not committing an offense; at end of (1)(b) inserted "and will not pose a danger to the safety of any person or the community"; deleted (1)(b)(iii) that read: "(iii) maintain or commence an educational program"; near end of (1)(d) inserted "the defendant's personal associations, place of abode, and"; at end of (1)(e) deleted "except that contact which is necessary to the preparation of the defense"; in (1)(f), before "agency", deleted "law enforcement", after "or" inserted "individual", and at end inserted "or other appropriate individual"; in (1)(i), at end after "drug", substituted "or other controlled substance without a legal prescription" for "without a prescription from a licensed medical practitioner"; deleted (1)(b)(x) that read: "(x) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose"; inserted (1)(j) concerning bail; inserted (1)(k) concerning return to custody for specified hours; inserted (2) prohibiting unreasonable conditions; deleted (3) that read: "(3) If the defendant is admitted to bail after conviction, the conditions of bail, in addition to those set forth in subsection (1), shall be that:

(a) he will duly prosecute his appeal; and

(b) if the judgment is affirmed or the cause reversed and remanded for a new trial, he will forthwith surrender to the officer from whose custody he was bailed"; and made minor changes in style.

1985 Amendment: In (1) in introductory clause, after "admitted to bail", deleted "before conviction"; in (1)(b) substituted language relating to any other conditions the court may prescribe to assure defendant's appearance and protect people for former (1)(b) that read: "any other conditions that the court may reasonably prescribe to assure his appearance when required"; inserted (2) authorizing the judge to impose additional or different conditions; and in (3) in introductory clause inserted "in addition to those set forth in subsection (1)", and deleted former (2)(b) and (2)(c) that read: "(b) he will appear at such time and place as the court may direct;

(c) he will not depart from this state without leave of the court".

Case Notes

No Showing That Defendant's Rights Violated by Failure to Make Bail or to Be Released on Own Recognizance — Writ of Habeas Corpus Denied: Following Miller's arrest on charges of negligent homicide and failure to remain at the scene of an accident, the District Court set bail at $30,000. When Miller could not make bail, the amount was reduced to $10,000. Indigent, Miller

could not pay the reduced bail and remained incarcerated. Miller petitioned the Supreme Court for a writ of habeas corpus, arguing that his continued incarceration was a violation of 46-9-106 and 46-9-111 and the constitutional guarantees of bail and against excessive sanctions. The Supreme Court noted that a defendant has a presumptive right to be released on a reasonable bail or on the defendant's own recognizance on conditions that will protect the community. However, the burden in a habeas corpus proceeding is on the petitioner to present a record that is sufficient to make a prima facie showing that the District Court's order constituted a violation, deprivation, infringement, or denial of the petitioner's constitutional, statutory, or legal rights. After considering the meager record and the seriousness of the allegations, the Supreme Court was not convinced that Miller had no ability to provide any bail or that the District Court could have released Miller on conditions that could be enforced and that could ensure the protection of the community. Thus, Miller failed to show that his rights were violated, and his petition for a writ of habeas corpus was denied. Miller v. District Court, 2007 MT 58, 336 M 207, 154 P3d 1186 (2007).

Criminal Defendant Entitled to Interest Earned on Cash Deposited as Bail Bond — Constitutional Issues: Richland County sought to retain the interest earned on a defendant's $50,000 cash bail bond that had been deposited with the court in an interest-bearing account and to apply the money to the county's general fund. Applying the general rule in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 US 155, 66 L Ed 2d 358, 101 S Ct 446 (1980), the Supreme Court held that, absent a statutory provision allowing retention of the interest, the county is no more entitled to retain interest on a cash bail bond than it would be to retain accruing dividends on a deposit of stocks or bonds or the appreciated value on a pledge of real estate under 46-9-401. Retention of interest by the county would also violate several constitutional provisions as well, including: (1) the guarantee in Art. II, sec. 17, Mont. Const., that a citizen cannot be deprived of property without due process of law; (2) the guarantee in Art. II, sec. 29, Mont. Const., that property cannot be taken for public use without just compensation; and (3) a potential thwarting of Art. II, sec. 24, Mont. Const., which guarantees a speedy trial, through the incentive by the county to prolong a criminal prosecution as long as possible in order to earn more interest on a bond deposit. Therefore, if the Clerk of Court deposits bond money in an interest-bearing account, then interest earned on the deposit belongs to the owner of the funds that generated the interest. Siroky v. Richland County, 271 M 67, 894 P2d 309, 52 St. Rep. 343 (1995), distinguishing Fresno Firefighters' Local 753 v. Jernagan, 222 Cal. Rep. 886, 177 Cal. App. 3d 403 (Cal. Ct. App. 5th Dist. 1986).

46-9-109. Release or detention hearing.

Commission Comments

1991 Comment: This statute establishes certain procedural requirements for the conduct of a release or detention hearing. Because the 1987 state code did not address court procedure at the hearing, the federal rules were used as a model. The statute is intended to standardize some of the considerations reviewed during the hearing and to establish a time at which the hearing will be conducted.

Subsection (1) requires that a defendant's eligibility for release be determined at the defendant's first appearance before the court. This provision was adopted to fix a time for the hearing and to recognize that expediency is preferred when a defendant's constitutional rights are concerned. While the statute fixes the time at the first appearance, nothing in the statute prevents a party from seeking a continuance.

Subsection (2) requires the court to consider certain factors in determining whether the defendant should be released. Considerations include the nature of the offense, the available evidence, the defendant's personal history (including past criminal conduct), and the bail (if any) that can be posted. The statute, while generally stated, is reflective of 1987 MCA 46-9-301.

Subsection (3) permits either party to request a hearing to determine whether the conditions imposed upon a defendant's release were appropriate. The provision operates in conjunction with the court's discretion to amend a release order at any time.

46-9-110. Release order.

Commission Comments

1991 Comment: This statute establishes the requirement that a release order include a written statement of any conditions or restrictions on the defendant's release. The purpose of adopting this provision is to ensure that the defendant and the appropriate agencies are notified of the terms of the defendant's release. The statement of conditions or restrictions included in the order should be delivered to the appropriate agencies.

The Commission reviewed the federal code, which contained extensive requirements for a release order, but determined that this generally stated statute satisfied the Commission's concerns. The Commission saw no reason to recommend adoption of the extensive federal code requirements.

46-9-111. Release on own recognizance.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 110-2.

In Montana's present bail system a great inequity arises because an indigent accused is incarcerated pending further criminal proceedings while a moneyed counterpart is freed on bail.

In Bandy v. U.S., 82 Sup. Ct. 11, 13 (1961) Douglas said: "Further reflection has led me to conclude that no man should be denied release because of indigency. Instead, under our constitutional system, a man is entitled to be released on personal recognizance where other relevant factors make it reasonable to believe that he will comply with the orders of the court."

A second factor which raised the issue of bail and recognizance is the work of the Vera Foundation. The purpose of the project was to test the hypothesis that a great number of defendants could safely be released on their own recognizance. The results of the project show that of 2,900 released on their own recognizance only 19 failed to appear. This is fewer than 1%—a smaller percentage than those that jump bail.

This proposal does not provide that all indigents or other defendants will automatically be at liberty pending trial. The court has discretion whether to allow a person pretrial freedom on personal recognizance. This decision by the court should only be made after investigation. This investigation could be carried on by such an agency as the parole board [now Board of Pardons and Parole].

The scope of personal recognizance is intended to cover a person that might be too poor a risk to grant pre-trial freedom unless provisions are made for additional supervision. An example of this would be to allow an accused person freedom pending trial on the condition he "check in" every day or remain in jail when not at work.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

No Showing That Defendant's Rights Violated by Failure to Make Bail or to Be Released on Own Recognizance — Writ of Habeas Corpus Denied: Following Miller's arrest on charges of negligent homicide and failure to remain at the scene of an accident, the District Court set bail at $30,000. When Miller could not make bail, the amount was reduced to $10,000. Indigent, Miller could not pay the reduced bail and remained incarcerated. Miller petitioned the Supreme Court for a writ of habeas corpus, arguing that his continued incarceration was a violation of 46-9-106 and this section and the constitutional guarantees of bail and against excessive sanctions. The Supreme Court noted that a defendant has a presumptive right to be released on a reasonable bail or on the defendant's own recognizance on conditions that will protect the community. However, the burden in a habeas corpus proceeding is on the petitioner to present a record that is sufficient to make a prima facie showing that the District Court's order constituted a violation, deprivation, infringement, or denial of the petitioner's constitutional, statutory, or legal rights. After considering the meager record and the seriousness of the allegations, the Supreme Court was not convinced that Miller had no ability to provide any bail or that the District Court could have released Miller on conditions that could be enforced and that could ensure the protection of the community. Thus, Miller failed to show that his rights were violated, and his petition for a writ of habeas corpus was denied. Miller v. District Court, 2007 MT 58, 336 M 207, 154 P3d 1186 (2007).

Collateral References

Personal recognizance: application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release. 78 ALR 3d 780.

46-9-115. Release ordered by court where charge not pending.

Commission Comments

1991 Comment: This statute requires that the court in which a charge is pending be notified of the defendant's release and the conditions of that release, including the amount of bail, if any, that was required. The statute also requires that the court with trial jurisdiction obtain the bail posted as a condition of the release. Although stated in more general terms, the statute preserves the practice established in the 1987 code. See 1987 MCA 46-9-202.

Source: R.C.M. 1947, sections 94-6507 to 94-6510.

This provision gives the defendant a right to be brought before any magistrate who can admit him to bail. This provision is consistent with the prior provision in providing procedure and setting a time for establishing bail.

Compiler's Comments

1991 Amendments: Chapter 710 amendments rendered void by Ch. 800.

Chapter 800 substituted present language concerning delivery of posted financial items and conditions of release for former text that read: "The defendant, when arrested for a bailable offense, must be taken without unnecessary delay before the nearest or most accessible judge in order that bail may be fixed. If the defendant is brought before a judge other than the court in which the charge is pending, the judge must establish and accept bail and set the time for the appearance of the defendant in the court in which the charge is pending. Upon acceptance of bail, the judge must deliver the bail without delay to the court in which the charge is pending".

Collateral References

Bail *key* 40 through 53.

8 C.J.S. Bail §§61 through 68.

Part 2
Bail — General Procedural Provisions

46-9-201. Who may admit to bail.

Commission Comments

Commission Comment Not Divided: This section is a recodification of part of section 95-1102, R.C.M. 1947. Section 46-9-204 (now repealed) is also derived from section 95-1102. The commission comments to section 95-1102 are printed in their entirety under 46-9-201.

Source: R.C.M. 1947, sections 94-8401, 94-8601 and 94-8405.

This section [46-9-201 and 46-9-204 (now repealed)] is intended to cover all situations as to who can grant bail during the different stages of a criminal proceeding starting with the initial appearance and including preliminary examination, arraignment, trial, appeal or any post-conviction remedy.

Compiler's Comments

1993 Amendment: Chapter 262 at end substituted "46-9-206" for "46-9-115"; and made minor changes in style.

1991 Amendment: Inserted fourth sentence allowing satisfaction of requirement of initial appearance of defendant by two-way electronic audio-video communication; and made minor changes in style.

Source of 1991 Amendment: The 1991 amendment made by Ch. 710 to this section is based in part on California Penal Code, section 977.2, and in part on Rule 43.1, Idaho Court Rules.

Collateral References

Bail *key* 46 through 48.

6A C.J.S. Arrest §60; 8 C.J.S. Bail §§61 through 72.

8A Am. Jur. 2d Bail and Recognizance §§12 through 18.

Right of bail in proceedings in juvenile courts. 53 ALR 3d 848.

46-9-203. Report to county attorney concerning drug users.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-9-206. Setting bail — appearance or use of two-way electronic audio-video communication.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1991 Codification: This section was enacted by Ch. 710 as subsection (2) of 46-9-202 (renumbered 46-9-115). The Code Commissioner codified the subsection as a new section because of the numerous amendments to 46-9-202 (renumbered 46-9-115) made by Ch. 800, L. 1991.

Source of 1991 Amendment: The 1991 amendment made by Ch. 710 to this section is based in part on California Penal Code, section 977.2, and in part on Rule 43.1, Idaho Court Rules.

Part 3
The Amount of Bail

46-9-301. Determining the amount of bail.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 110-5.

The purpose of this section is to eliminate the practice of automatically setting bail entirely on the basis of the crime involved. The objection to setting bail amounts using the seriousness of the offense charged as the major criterion is that other factors which might indicate that the defendant is a "good risk" are completely ignored. This section is intended to implement Montana Constitution [1889], Article III, section 20 [now Art. II, sec. 22, 1972 Mont. Const.] which states that "Excessive bail shall not be required."

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1986 Amendment: Inserted (11) requiring bail to be "sufficient to include the charge imposed in 46-18-236".

1985 Amendment: Inserted (1) requiring bail sufficient to ensure defendant's presence; inserted (3) requiring bail sufficient to protect people from injury; inserted (8) requiring bail amount to consider defendant's time spent in, and ties to, the community; inserted (9) requiring bail amount to consider the defendant's family relationships; inserted (10) relating to defendant's employment status; and in (7) at end, after "record", deleted "employment status, and family background".

Case Notes

Good Time Credit for Indigent Defendant Confined to County Detention Facility: The decision in Bearden v. Ga., 461 US 660, 76 L Ed 2d 221, 103 S Ct 2064 (1983), clearly and unambiguously stands for the principle that to deprive a criminal defendant of freedom simply because, through no want of bona fide effort, willful refusal, or fault of the defendant, the defendant lacks the financial resources to buy liberty is contrary to the fundamental fairness required by the 14th amendment to the U.S. Constitution. This is not to say that poverty insulates a defendant from having to post a reasonable bond should the facts and circumstances of the case so require. However, if a criminal defendant is unable to secure presentence freedom by posting bail for no other reason than indigency, that defendant is entitled to good time credit for the presentence time spent in a county detention facility to the same extent that the law allows good time credit to the criminal defendant who is able to post bail and thus serve the entirety of a sentence in the state correctional facility. In the present case, it was not clear from the record whether defendant was offered or denied bail and whether, if offered, the sole reason for defendant's inability to post bail was indigency; nevertheless, the Supreme Court granted defendant's petition for writ of habeas corpus and remanded to the District Court for a determination of whether defendant was entitled to good time credit for time served in the county detention facility. MacPheat v. Mahoney, 2000 MT 62, 299 M 46, 997 P2d 753, 57 St. Rep. 291 (2000), following MacFarlane v. Walter, 179 F3d 1131 (9th Cir. 1999), and followed in Eisenman v. St., 2000 MT 170, 300 M 322, 5 P3d 542, 57 St. Rep. 704 (2000), in which the case of an indigent defendant was remanded for a determination of whether defendant was detained presentence in a county detention facility because he was too poor to post bail and thus entitled to credit for good time under the MacPheat test. However, see also McGinnis v. Royster, 410 US 263, 35 L Ed 2d 282, 93 S Ct 1055 (1973). MacPheat was distinguished in Sebastian v. Mahoney, 2001 MT 88, 305 M 158, 25 P3d 163 (2001).

Bail of $300 for Indigent Not Excessive: The Supreme Court held that a $300 bail for an indigent accused of two traffic offenses was not excessive because the sum equaled the maximum amount of the fines and the defendant had failed three times to appear on the charges. Billings v. Layzell, 242 M 145, 789 P2d 221, 47 St. Rep. 558 (1990).

Indigent Intentionally Prolonged Incident — No Constitutional Violation: The defendant, an indigent, failed three times to appear to answer charges on two traffic violations. The lower court ordered him held in jail until his trial, which was set for 65 days later, with bail set at $300. The Supreme Court stated that the record indicated that the City Court Judge had engaged in a wholly inappropriate exercise of judicial power to punish the defendant by setting the bail in an amount the defendant could not pay and then setting an excessively late trial date. While incarceration of indigents is not prevented in every case, a court must search for the least oppressive alternative. However, the Supreme Court refused to find a constitutional violation

because the defendant had $47 and could have obtained a surety bond for $50 and made no attempt to obtain the additional $3 he needed. Billings v. Layzell, 242 M 145, 789 P2d 221, 47 St. Rep. 558 (1990).

Bail Not Excessive: Defendant was not effectively denied his right to bail by reason of excessive bail. The court considered the factors in this section and set bail in an amount calculated to ensure defendant's presence at future criminal proceedings. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Right to Bail: It was not reversible error for trial court to set the appellant's bail at $500,000 originally and then lower it to $50,000 a week later. The imposition of bail is an area that is largely within the discretion of the trial court, and the amount set will always be upheld if it is reasonable. St. v. Lance, 222 M 92, 721 P2d 1258, 43 St. Rep. 1086 (1986).

Factors to Be Considered: The trial judge in determining the amount of bail to be fixed should take into consideration, inter alia, the enormity of the crime, the maximum penalty, the pecuniary condition of the defendant, the probability of the defendant's flight, his general character and reputation, and the apparent strength of the proof as bearing upon the probability of his conviction. St. v. McLeod, 131 M 478, 311 P2d 400 (1957).

Attorney General's Opinions

Authority of Municipal Court to Grant Time-Pay Bail Bonds: A time-pay bail bond system, which allows a defendant to make payments in monthly or weekly installments in an amount and frequency set by a court to correspond with the requirement that the defendant pay the full bail amount before the date of trial, promotes the constitutional policy of providing bail except in capital cases. The system also comports with statutory requirements that the bail amount not be oppressive and be considerate of the defendant's financial ability. The system requires a defendant to pay cash for the bond, albeit in installments paid over a period of time. Because a court has discretion to set the appropriate bail amounts and to accept personal property in lieu of cash, the court also has discretion to set the timing on the payment of any cash bond. Therefore, a Municipal Court Judge is authorized to release a defendant on a time-pay bail bond in an amount set by the judge to be paid in installments. 49 A.G. Op. 18 (2002).

46-9-302. Bail schedule — acceptance by peace officer.

Commission Comments

1991 Comment: Subsection (1) is an adaptation of the 1987 code that permitted a court to establish a bail schedule for minor offenses. It was determined that the bail schedule should not be limited to misdemeanor offenses. The Commission recognized that there are some felony offenses that may be compatible with a bail schedule. The development of a bail schedule allows law enforcement agencies to expedite a defendant's release without violating the constitutional mandate that bail be set by the court. This statute does not override more specific statutes that require the court to personally review the case before setting the amount of bail.

Subsection (2) is a newly developed provision intended to consolidate two 1987 statutes. See 1987 MCA 46-9-302 and 46-9-303. Both of these statutes addressed those instances in which a peace officer may accept bail on behalf of a judge. Subsection (2) recognizes that bail may be accepted in accordance with a bail schedule or as expressed in the terms of an arrest warrant. Subsection (3) is a restatement of the procedure upon the acceptance of bail. The required procedure includes the issuance of a receipt and delivery of bail to the judge. The consolidation of these two statutes does not alter established procedure.

Source: New.

This provision is designed to establish a constitutional procedure for the determination, acceptance, and forfeiture of bail for certain minor offenses such as traffic, fish and game, and minor liquor violations. Under the present practice peace officers both determine and accept bail for traffic and other minor offenses (see [44-1-1101 and 44-1-1102]). In order to comply with the constitutional requirements, bail must be set by a judicial officer. The procedure provided for in this section is for the convenience of the offender, peace officer, magistrate and the state.

The schedule shall establish what is acceptable for bail, i.e., cash, checks, or other collateral. Further, it may include the release of an individual on his own recognizance if the judge desires.

Compiler's Comments

2003 Amendment: Chapter 465 inserted (2)(b) allowing posting of driver's license in lieu of bail for traffic offenses; inserted (4) providing for procedure for valid temporary driving permit when driver's license is posted in lieu of bail; inserted (5) providing for return of driver's license accepted in lieu of bail; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 449 inserted (1)(c) concerning violation of an order of protection; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: Chapter 484 in second sentence in (1), after "offense", substituted "is any assault on a partner or family member, as partner or family member is defined in 45-5-206" for "is partner or family member assault, as defined in 45-5-206". Amendment effective July 1, 1997.

Severability: Section 11, Ch. 484, L. 1997, was a severability clause.

1995 Amendment: Chapter 350 in (1), in second sentence, substituted "partner or family member assault" for "domestic abuse, any assault against a family member or a partner".

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

1993 Amendments: Chapter 292 in (1), at end, inserted reference to stalking. Amendment effective April 9, 1993.

Chapter 425 in (1), at end, substituted "partner, as defined in 45-5-206" for "household member".

1991 Amendment: Throughout section substituted "judge" for "justice of the peace or city judge"; in (1), in first sentence before "bail", deleted "cash" and at end substituted "over which the judge has original jurisdiction" for "except for offenses amounting to felonies and the offense of domestic abuse" and inserted second sentence requiring appearance for domestic offenses; at end of (2)(a) inserted "established under subsection (1)"; inserted (2)(b) concerning bail specified in arrest warrant; and made minor changes in style.

1985 Amendment: At end of (1) substituted "except for offenses amounting to felonies and the offense of domestic abuse" for "not amounting to a felony".

Case Notes

"In Accordance With the Schedule": The court's finding of a violation of this section was not supported by substantial evidence when the record failed to show that the bond accepted by an officer in reliance on his everyday experience and memory was any different from that listed in the bond schedule. St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977).

Attorney General's Opinions

Authority of Municipal Court to Grant Time-Pay Bail Bonds: A time-pay bail bond system, which allows a defendant to make payments in monthly or weekly installments in an amount and frequency set by a court to correspond with the requirement that the defendant pay the full bail amount before the date of trial, promotes the constitutional policy of providing bail except in capital cases. The system also comports with statutory requirements that the bail amount not be oppressive and be considerate of the defendant's financial ability. The system requires a defendant to pay cash for the bond, albeit in installments paid over a period of time. Because a court has discretion to set the appropriate bail amounts and to accept personal property in lieu of cash, the court also has discretion to set the timing on the payment of any cash bond. Therefore, a Municipal Court Judge is authorized to release a defendant on a time-pay bail bond in an amount set by the judge to be paid in installments. 49 A.G. Op. 18 (2002).

Collection of Charge Upon Forfeiture of Bail Bond: In order to collect the additional $10 charge required by 46-18-236 in the event the offender posts bail and chooses not to appear, a court may exercise its power under 46-9-302 and increase the bail schedule for minor offenses in a like amount. 41 A.G. Op. 59 (1986).

Collateral References

Bail *key* 48.

6A C.J.S. Arrest §60; 8 C.J.S. Bail §73.

46-9-311. Reduction, increase, revocation, or substitution of bail.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 110-6 and R.C.M. 1947, sections 94-8507 and 94-8307.

This section includes "substitutions" of bail as well as increasing bail as referred to in the old code. The most important change is that either side must have notice of any proposed change in the status of the bail. Either side may move for a change in the bail. This applies to all stages of bail. Revocation of bail shall occur only for cause.

Case Notes

Concurrent Notice and Revocation Reasonable: Concurrent notice and revocation of bail at petitioner's hearing on his application for a Writ of Habeas Corpus was reasonable as petitioner had left the state and did not return until the time of hearing. In re Petition of Gray, 184 M 363, 603 P2d 230 (1979).

Revocation — "Law of the Case" Principle: When petitioner in a habeas corpus proceeding had been released on bail for 15 months, the revocation of bail by a judge other than the judge

who had originally admitted the defendant to bail did not violate the "law of the case" principle. In re Petition of Gray, 184 M 363, 603 P2d 230 (1979).

Revocation of Bail by Court on Its Own Motion: A court may act on its own motion to revoke bail. In re Petition of Gray, 184 M 363, 603 P2d 230 (1979).

Denial of Reduction: The court did not err in refusing the defendant's motion to reduce bail when the person assaulted was in a very precarious condition and it was not known whether he would live or die. St. v. McLeod, 131 M 478, 311 P2d 400 (1957).

Collateral References

Bail *key* 53; Habeas Corpus *key* 33.

8 C.J.S. Bail §§112 through 123.

8A Am. Jur. 2d Bail and Recognizance §§101 through 104.

Part 4
Furnishing Bail

Part Attorney General's Opinions

Restitution Not to Be Made From Forfeited Appearance Bond: A judge is without the authority to order restitution to be made from a forfeited appearance bond. Restitution is not a "cost" of the case that may be defrayed. Section 46-18-603 refers specifically to costs incurred by the county, not by the victim. The money from the forfeited bond is to be paid to the County Treasurer. 38 A.G. Op. 96 (1980).

46-9-401. Forms of bail.

Commission Comments

1991 Comment: This statute is modeled after the 1987 code and establishes the types of property that may be used to satisfy a bail requirement. The statute is chiefly a restatement of the code, but some amendments have been made to expand the established procedure.

A new provision has been added to subsection (1) that "certificates of deposit or other personal property" may be accepted as satisfaction for a bail requirement. Subsection (2) amends the 1987 code to impose certain restrictions on a commercial surety bond. Subsection (3) is a new provision that expressly recognizes that the surety may surrender the defendant, whether or not other types of bail have been posted, whenever the surety considers himself insecure.

The statute alters established procedure by expanding the types of personal property that may be posted as bail and by regulating certain aspects of the surety bond. It is not anticipated that these changes will greatly affect the defendant's ability to post bail.

Source: New.

This section is merely a statement of the various acceptable methods of posting bail.

Compiler's Comments

2009 Amendment: Chapter 360 in (1)(e) near middle after "offense" substituted "as provided in 61-5-214" for "in Title 61, chapters 3 through 10, except chapter 8, part 4"; and made minor changes in style. Amendment effective July 1, 2009.

2003 Amendment: Chapter 465 inserted (1)(e) allowing posting of driver's license in lieu of bail for traffic offenses; inserted (4) providing for return of driver's license accepted in lieu of bail; and made minor changes in style. Amendment effective October 1, 2003.

1991 Amendment: In (1)(a), before "court", deleted "clerk of the", after "bonds" inserted "certificates of deposit", and at end substituted "other personal property approved by the court" for "any combination thereof approved by the judge"; in (1)(b), at beginning, inserted "pledging" and substituted "defendant" for "accused"; at beginning of (1)(c) and (1)(d) inserted "posting"; inserted (2) concerning bond ensuring appearance; inserted (3) authorizing surety to surrender defendant; and made minor changes in style.

Case Notes

Conflicting Evidence Whether Indemnity Note on Bail Bond Considered Valid Contract — District Court's Finding Not Clearly Erroneous: Rohrich signed an indemnity agreement with Anderson, who owned a bail bond business, to secure a bond posted for the release of Brummer. When signing the indemnity note, Rohrich did not question Anderson about the note and signed it without discussion regarding the effect of his signature. The note provided that should Anderson become liable for the forfeiture of the bail bond, the indemnitor would indemnify Anderson, with interest, and also pay reasonable attorney fees in the event that a suit was necessary to collect the amount owed. Brummer subsequently fled the state, and the County Attorney moved for bail forfeiture. The District Court ordered that judgment in the full amount of bail be entered against Brummer and against Anderson as the surety. After Anderson

satisfied the judgment, he waited to see if Rohrich would indemnify him, but Rohrich did not do so; therefore, Anderson brought an action to enforce the indemnity note. At trial, Rohrich maintained that the note was blank when he signed it and that therefore he did not sign a valid contract. Rohrich also contended that the date on the note, which was 1 year after Brummer was released from prison, was further evidence that Anderson did not complete the terms of the note prior to Rohrich's signature. Anderson testified that the note did contain all essential terms when Rohrich signed it, and that testimony was affirmed by Anderson's assistant. Anderson also testified that the date was a typographical error and that as a matter of business practice, he would not provide an indemnitor with a blank note. Further, Rohrich was familiar with indemnity notes, having signed notes on three prior occasions with Anderson, including two that he signed for himself. After weighing the conflicting evidence, the District Court ordered Rohrich to pay the full amount, plus attorney fees, interest, and costs. Rohrich appealed, and the Supreme Court affirmed, paying substantial deference to the trial court because as the factfinder, the trial court was in the best position to evaluate the testimony and judge the credibility of the witnesses. Anderson v. Rohrich, 2001 MT 106, 305 M 274, 26 P3d 99 (2001).

Criminal Defendant Entitled to Interest Earned on Cash Deposited as Bail Bond — Constitutional Issues: Richland County sought to retain the interest earned on a defendant's $50,000 cash bail bond that had been deposited with the court in an interest-bearing account and to apply the money to the county's general fund. Applying the general rule in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 US 155, 66 L Ed 2d 358, 101 S Ct 446 (1980), the Supreme Court held that, absent a statutory provision allowing retention of the interest, the county is no more entitled to retain interest on a cash bail bond than it would be to retain accruing dividends on a deposit of stocks or bonds or the appreciated value on a pledge of real estate under this section. Retention of interest by the county would also violate several constitutional provisions as well, including: (1) the guarantee in Art. II, sec. 17, Mont. Const., that a citizen cannot be deprived of property without due process of law; (2) the guarantee in Art. II, sec. 29, Mont. Const., that property cannot be taken for public use without just compensation; and (3) a potential thwarting of Art. II, sec. 24, Mont. Const., which guarantees a speedy trial, through the incentive by the county to prolong a criminal prosecution as long as possible in order to earn more interest on a bond deposit. Therefore, if the Clerk of Court deposits bond money in an interest-bearing account, then interest earned on the deposit belongs to the owner of the funds that generated the interest. Siroky v. Richland County, 271 M 67, 894 P2d 309, 52 St. Rep. 343 (1995), distinguishing Fresno Firefighters' Local 753 v. Jernagan, 222 Cal. Rep. 886, 177 Cal. App. 3d 403 (Cal. Ct. App. 5th Dist. 1986).

Cash Bail Required — Findings in Record Required: Defendant contended that by ordering his $25,000 bail bond to be comprised of $15,000 by the normal surety method and $10,000 in cash, the District Court violated Art. II, sec. 21, Mont. Const., and 46-9-401. The issue was moot as to defendant. The Supreme Court said in the future it would closely scrutinize a requirement of bail in the form of cash which could effectively prevent a person from being free on bail pending trial and clash with the presumption of innocence. If a court believes a cash bail is necessary, it must make specific findings to that effect and include those findings in the record for purposes of review. St. v. Rodriguez, 192 M 411, 628 P2d 280, 38 St. Rep. 578F (1981).

Liberty Bonds as Bail: One depositing Liberty bonds as bail was estopped from claiming that their forfeiture was unauthorized. Kirschbaum v. Mayn, 76 M 320, 246 P 953 (1926).

Attorney General's Opinions

Authority of Municipal Court to Grant Time-Pay Bail Bonds: A time-pay bail bond system, which allows a defendant to make payments in monthly or weekly installments in an amount and frequency set by a court to correspond with the requirement that the defendant pay the full bail amount before the date of trial, promotes the constitutional policy of providing bail except in capital cases. The system also comports with statutory requirements that the bail amount not be oppressive and be considerate of the defendant's financial ability. The system requires a defendant to pay cash for the bond, albeit in installments paid over a period of time. Because a court has discretion to set the appropriate bail amounts and to accept personal property in lieu of cash, the court also has discretion to set the timing on the payment of any cash bond. Therefore, a Municipal Court Judge is authorized to release a defendant on a time-pay bail bond in an amount set by the judge to be paid in installments. 49 A.G. Op. 18 (2002).

State Financial Responsibility for Sentenced Inmate Upon Oral Pronouncement of Sentence: A sentencing hearing represents the only common date by which the criminal justice system can definitely measure when legal and financial responsibility for an inmate shifts from a county to the state. Oral pronouncement of sentence from the bench in the presence of a defendant constitutes final judgment (see St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998)). Once

sentenced, an inmate is considered to be in the legal custody of the Department of Corrections, even though a local or regional detention center may serve as a place of temporary detention until the inmate can be placed by the Department. Therefore, upon oral pronouncement of sentence that transfers legal custody of an inmate to the Department, the financial responsibility for the inmate transfers to the Department as well. 49 A.G. Op. 13 (2001).

Law Review Articles

Criminal Law and Administration—Arrest Bonds: This portion of the Legislative Summary for the 1957 session of the Montana Legislature explains Ch. 39, L. 1957, which enacted guarantee arrest bond certificate provisions. Staff, 18 Mont. L. Rev. 122 (1957).

Collateral References

Bail *key* 73.

8 C.J.S. Bail §§152 through 155.

8A Am. Jur. 2d Bail and Recognizance §§77 through 91.

46-9-402. Persons prohibited from furnishing bail security.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 110-13.

The object of this section is to protect the attorneys working on criminal cases and the officials who administer the bail provisions. It will also prevent any unfavorable implications which might arise if attorneys and bail officials were allowed to act as sureties.

46-9-403. Qualifying property as bail.

Commission Comments

1991 Comment: This statute is chiefly a restatement of the 1987 code that established certain qualifications for posting bail. See 1987 MCA 46-9-403. The key changes adopted under this statute provide for closer regulation of the use of commercial surety bonds.

Subsection (1) has been amended to require a defendant or surety to file a schedule describing all personal property posted to meet a bail requirement. The 1987 code required this listing only when stocks or bonds were posted as bail. The amendment provided by the statute recognizes that bail may be satisfied by certificates of deposit and other personal property, as well as by stocks or bonds.

Subsection (4) preserves the code's recognition that a commercial surety bond may be executed by any qualified surety company. However, the provision has been amended to establish minimum form requirements for such an undertaking. Such requirements were considered necessary for better regulation of commercial sureties and for establishing uniformity in statewide practice. The Insurance Commissioner shall prescribe a form for commercial bonds that meets the minimum requirements stated in this statute.

Subsection (5) is a new provision that expressly recognizes the court's authority to investigate the sufficiency of an undertaking posted to satisfy bail. This provision should not cause a change in established procedure.

Source: R.C.M. 1947, section 94-8403.

The last half of subsection (1) of R.C.M. 1947, section 94-8403 which allowed the magistrate to refuse to accept any person on bail who is not a resident of the county where bail is offered has been deleted. It was determined that under modern conditions the bailor need not be a resident of the county. A surety's financial condition can be easily checked any place in Montana today. The remainder of paragraph [(1)] is taken verbatim from the prior section.

Compiler's Comments

1991 Amendment: In (1) and (2) substituted "defendant" for "accused"; in (1), at beginning, substituted "property posted as a condition of release is personal property" for "the bail is stock or bonds or both" and after "list of the" substituted "personal property, including a description of each item, its location and market value, and the total market value of all items listed" for "stocks and bonds deposited describing each in sufficient detail that it may be identified, the market value of each stock or bond, and the total market value of the stocks and bonds listed"; in (2) and (3) substituted "property" for "bail"; in two places in (2)(a) and two places in (2)(b) substituted "property" for "real estate"; in (2)(a), at end, substituted "defendant or sureties" for "affiant"; in (3) and (4) substituted "property posted as a condition of release" for "bail"; in (3), near middle of second sentence, substituted "judge" for "magistrate"; in (4) before "bond" deleted "surety" and inserted last clause and (4)(a) through (4)(c) concerning form prescribed by Commissioner of Insurance and requirements of undertaking; inserted (5) authorizing court examination of undertaking; and made minor changes in style.

Collateral References

Bail *key* 55, 60.

8 C.J.S. Bail §§150, 152, 160.

8A Am. Jur. 2d Bail and Recognizance §§77 through 91.

Liability of surety on bail bond taken without authority. 27 ALR 4th 246.

46-9-412. Guaranteed arrest bond certificates.

Commission Comments

Source: R.C.M. 1947, section 94-8508.

Compiler's Comments

1993 Amendment: Chapter 262 near middle of (1) increased maximum surety amount from $500 to $1,000.

1991 Amendment: In (1) decreased amount from $5,000 to $500; in (2) substituted "must include those matters required by 46-9-401" for "and shall state the following:

(a) the name and address of the automobile clubs, automobile associations, or insurance companies which issued the guaranteed arrest bond certificates with respect to which the surety company undertakes to be surety; and

(b) the unqualified obligation of the surety company to pay the fine or forfeiture in an amount not exceeding $5,000 of any person who, after posting a guaranteed arrest bond certificate with respect to which the surety company has undertaken to be surety, fails to make the appearance to guarantee which the guaranteed arrest bond certificate was posted"; and made minor changes in style.

1989 Amendment: In two places increased maximum value of guaranteed arrest bond surety from $100 to $5,000; and made minor change in phraseology.

46-9-414. Certificates accepted in lieu of cash.

Commission Comments

Source: R.C.M. 1947, section 94-8509.

No change.

Compiler's Comments

1991 Amendment: In (1), at beginning after "certificate", deleted "with respect to which a surety company has become surety or a guaranteed arrest bond certificate issued by an insurance company authorized to transact both automobile liability insurance and surety business within this state as provided in 46-9-411 and 46-9-412" and decreased amount from $5,000 to $1,000; in (2), after "certificate", deleted "posted as a bail bond in a court in this state" and at end, after "provisions", substituted "established by this chapter unless otherwise provided by law" for "as bail bonds posted in criminal cases, and a guaranteed arrest bond certificate posted as a bail bond in a municipal court in this state is subject to the forfeiture and enforcement provisions of the chapter or ordinance of the particular municipality pertaining to bail bonds posted"; and made minor changes in style.

1989 Amendment: Increased maximum value of guaranteed arrest bond certificate used as bail bond from $100 to $5,000; and made minor changes in phraseology.

Administrative Rules

ARM 23.3.406 Acceptance by officer of guaranteed arrest bond certificate.

Part 5
Conditions of Bail — Violation Thereof

46-9-502. Conditions performed — bail discharged.

Commission Comments

Commission Comment Not Divided: This section is a recodification of part of section 95-1116, R.C.M. 1947. Section 46-9-503 is also derived from section 95-1116. The commission comments to section 95-1116 are printed in their entirety under 46-9-502.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 110-8(f) and (g).

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Criminal Defendant Entitled to Interest Earned on Cash Deposited as Bail Bond — Constitutional Issues: Richland County sought to retain the interest earned on a defendant's $50,000 cash bail bond that had been deposited with the court in an interest-bearing account and

to apply the money to the county's general fund. Applying the general rule in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 US 155, 66 L Ed 2d 358, 101 S Ct 446 (1980), the Supreme Court held that, absent a statutory provision allowing retention of the interest, the county is no more entitled to retain interest on a cash bail bond than it would be to retain accruing dividends on a deposit of stocks or bonds or the appreciated value on a pledge of real estate under 46-9-401. Retention of interest by the county would also violate several constitutional provisions as well, including: (1) the guarantee in Art. II, sec. 17, Mont. Const., that a citizen cannot be deprived of property without due process of law; (2) the guarantee in Art. II, sec. 29, Mont. Const., that property cannot be taken for public use without just compensation; and (3) a potential thwarting of Art. II, sec. 24, Mont. Const., which guarantees a speedy trial, through the incentive by the county to prolong a criminal prosecution as long as possible in order to earn more interest on a bond deposit. Therefore, if the Clerk of Court deposits bond money in an interest-bearing account, then interest earned on the deposit belongs to the owner of the funds that generated the interest. Siroky v. Richland County, 271 M 67, 894 P2d 309, 52 St. Rep. 343 (1995), distinguishing Fresno Firefighters' Local 753 v. Jernagan, 222 Cal. Rep. 886, 177 Cal. App. 3d 403 (Cal. Ct. App. 5th Dist. 1986).

Collateral References

Bail *key* 74, 75, 77(2), 79(1).

8 C.J.S. Bail §§176 through 219.

8A Am. Jur. 2d Bail and Recognizance §§113 through 121.

Bail: effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. 33 ALR 4th 663.

46-9-503. Violation of release condition — forfeiture.

Commission Comments

1991 Comment: This statute combines elements of the 1987 state code and the federal code into a single statute concerning the violation of release conditions. The amendments adopted in this statute should not cause a significant change in established procedure.

Subsection (1) reflects a provision from the federal code that allows the prosecutor to seek a revocation of a release order when conditions imposed by the court are not being observed. See 18 U.S.C. 3148. The statute recognizes the prosecuting attorney's right to make a motion for a revocation of release, allows the judge to issue an arrest warrant for a violator of release conditions, and requires that the defendant be brought before a judge for an initial appearance upon arrest. The last requirement is expressly provided to avoid any question about the defendant's entitlement to an appearance following arrest.

Subsection (2) provides that bail posted as a condition of release may be forfeited only if a defendant fails to appear as required. The 1987 code was unclear as to when bail could be forfeited. The Commission determined that forfeiture should be an option only when the defendant fails to appear. The provision requires notice of forfeiture to the defendant and the bail sureties and allows that such notice may be mailed to their last- known address.

Subsection (3) retains the 30-day notice period recognized in the 1987 code. See 1987 MCA 46-9-503(3). If during that period the defendant appears as required or the defendant's failure to appear is explained, the court may order the forfeiture discharged. The actual procedure required for a proper forfeiture is provided in 46-9-511.

Source: See commission comments to 46-9-502.

Compiler's Comments

2003 Amendment: Chapter 420 in (3) near middle of first sentence after "sureties" inserted "surrender the defendant pursuant to 46-9-510 or ", after "judge" substituted "shall" for "may", and at end substituted "without penalty" for "upon terms as may be just"; inserted (5) providing that if a surety returns a defendant within 90 days of forfeiture of a bond, the forfeiture must be discharged without penalty; and made minor changes in style. Amendment effective April 18, 2003.

1997 Amendment: Chapter 456 in (3), near beginning, extended time after forfeiture from 30 days to 90 days; and inserted (4) concerning exoneration.

1993 Amendment: Chapter 270 at end of (2) inserted "within 10 working days or the bond becomes void and must be released and returned to the surety within 5 working days"; and in first sentence of (3), near beginning after "the forfeiture", deleted "the defendant or" and inserted second sentence providing that if the defendant appears within 90 days after forfeiture with a satisfactory excuse, the forfeiture must be discharged.

1991 Amendment: In (1) substituted present language concerning violation of condition of release and arrest for former text that read: "If the accused does not comply with the conditions of

the bail bond, the court having jurisdiction shall enter an order declaring the bail to be forfeited"; in (2) substituted first sentence concerning forfeiture of bail for failure to appear for former text that read: "If such forfeiture is declared by a district court" and in second sentence substituted "defendant" for "accused"; in (3), after "defendant or", substituted "the defendant's sureties appear and satisfactorily excuse the defendant's failure to appear, the judge" for "his bail appear and satisfactorily excuse his negligence or failure to comply with the conditions of the bail, the court, in its discretion"; deleted (4) that read: "(4) If such forfeiture is declared by a district court and if the forfeiture is not discharged as provided in this section, the court shall enter judgment for the state against the accused and his sureties for the amount of the bail and costs of the proceedings"; and made minor changes in style.

Case Notes

Conflicting Evidence Whether Indemnity Note on Bail Bond Considered Valid Contract — District Court's Finding Not Clearly Erroneous: Rohrich signed an indemnity agreement with Anderson, who owned a bail bond business, to secure a bond posted for the release of Brummer. When signing the indemnity note, Rohrich did not question Anderson about the note and signed it without discussion regarding the effect of his signature. The note provided that should Anderson become liable for the forfeiture of the bail bond, the indemnitor would indemnify Anderson, with interest, and also pay reasonable attorney fees in the event that a suit was necessary to collect the amount owed. Brummer subsequently fled the state, and the County Attorney moved for bail forfeiture. The District Court ordered that judgment in the full amount of bail be entered against Brummer and against Anderson as the surety. After Anderson satisfied the judgment, he waited to see if Rohrich would indemnify him, but Rohrich did not do so; therefore, Anderson brought an action to enforce the indemnity note. At trial, Rohrich maintained that the note was blank when he signed it and that therefore he did not sign a valid contract. Rohrich also contended that the date on the note, which was 1 year after Brummer was released from prison, was further evidence that Anderson did not complete the terms of the note prior to Rohrich's signature. Anderson testified that the note did contain all essential terms when Rohrich signed it, and that testimony was affirmed by Anderson's assistant. Anderson also testified that the date was a typographical error and that as a matter of business practice, he would not provide an indemnitor with a blank note. Further, Rohrich was familiar with indemnity notes, having signed notes on three prior occasions with Anderson, including two that he signed for himself. After weighing the conflicting evidence, the District Court ordered Rohrich to pay the full amount, plus attorney fees, interest, and costs. Rohrich appealed, and the Supreme Court affirmed, paying substantial deference to the trial court because as the factfinder, the trial court was in the best position to evaluate the testimony and judge the credibility of the witnesses. Anderson v. Rohrich, 2001 MT 106, 305 M 274, 26 P3d 99 (2001).

Court's Discretion Not Limited to Actual Damages: This section does not limit the court's discretion to actual damages. When assessing costs in a bond forfeiture case, the court should consider: (1) the willfulness of the defendant's violation of bail conditions; (2) the surety's participation in locating or apprehending the defendant; (3) the cost, inconvenience, and prejudice suffered by the state as a result of the violation; (4) any intangible costs; (5) the public interest in ensuring a defendant's appearance; and (6) any mitigating factors. St. v. Am. Bankers Ins. Co. of Fla., 229 M 183, 745 P2d 687, 44 St. Rep. 1879 (1987).

Incarceration by Foreign Sovereign Not Per Se Satisfactory Excuse: Defendants were arrested and detained by authorities in a foreign jurisdiction, resulting both in their failure to appear in Montana for an omnibus hearing and in a subsequent bond forfeiture. Their surety argued that such detention was an excuse satisfactory to suspend surety's responsibility except for actual costs incurred in returning defendants to Montana. However, defendants' incarceration was a direct result of their own criminal acts. Defendants could not avail themselves of their own wrong to escape accountability in Montana, nor could the surety avail itself of an excuse not available to defendants. Incarceration by a foreign sovereign was not a per se satisfactory excuse for failure to appear, but it was a factor for the District Court to consider in determining discharge. St. v. Am. Bankers Ins. Co. of Fla., 229 M 183, 745 P2d 687, 44 St. Rep. 1879 (1987).

Surety's Liability Not Excused by State's Failure to Seek Extradition: Surety argued that the state had a duty to seek the return of defendants incarcerated in a foreign jurisdiction. However, the state is not the surety's surety and has no duty to remedy the surety's breach of contract. The state need only refrain from obstructing or interfering with surety's efforts, and failure to seek extradition did not constitute such interference. St. v. Am. Bankers Ins. Co. of Fla., 229 M 183, 745 P2d 687, 44 St. Rep. 1879 (1987).

Immediate Forfeiture Upon Nonappearance Not Required: Nothing in this section requires a court to declare a forfeiture immediately upon a defendant's first nonappearance. St. v. Sunday, 224 M 340, 729 P2d 1319, 43 St. Rep. 2235 (1986).

Jurisdiction Not Lost Due to Delay in Mailing Notice of Bond Forfeiture: A 77-day delay between the date bond was forfeited and the date surety agent was notified did not deprive the District Court of jurisdiction simply because notice was not mailed "forthwith" as required by this section. As long as the 30-day period elapsed between the notice of forfeiture and judgment on the forfeiture, the statutory requirements and mandates of due process were met. (See 1993, 1997, and 2003 amendments.) St. v. Sunday, 224 M 340, 729 P2d 1319, 43 St. Rep. 2235 (1986).

Grounds for Vacation of Forfeiture — Particular Facts: Damage to and expenses of the county are not the only factors the court may consider in discharging forfeiture of a bail bond. This section directs the court to order discharge upon such terms as may be just, and the court should consider other factors and circumstances peculiar to the case. St. v. Musgrove, 202 M 516, 659 P2d 285, 40 St. Rep. 251 (1983).

Partial Excuse Allowable: This section does not require a complete as opposed to a partial excuse, and Supreme Court would not read such a requirement into this section. St. v. Musgrove, 202 M 516, 659 P2d 285, 40 St. Rep. 251 (1983).

Vacation of Forfeiture Granted — Mentally Disturbed Defendant: District Court had jurisdiction to order vacation of $45,000 worth of a $50,000 bail bond forfeiture, based on its findings that defendant thought he was being "railroaded" at trial, claimed a total emotional breakdown and a desire to go to Texas and commit suicide, did not think he knew what he was doing, and was diagnosed by a psychiatrist in Texas as having psychotic depression and suicidal tendencies. St. v. Musgrove, 202 M 516, 659 P2d 285, 40 St. Rep. 251 (1983).

Review of Decision — Test: Since this section directs the court to use its discretion, the general rule on the scope of review applies and the court will not disturb the decision below absent a clear abuse of discretion, the test being whether the court acted arbitrarily without the employment of conscious judgment or exceeded the bounds of reason. St. v. Musgrove, 202 M 516, 659 P2d 285, 40 St. Rep. 251 (1983).

Bail Forfeiture Not to Be Imposed as a Penalty: The surety bond was forfeited following defendant's failure to appear. Later the defendant turned himself in and was convicted. The surety petitioned the District Court to discharge the bond forfeiture contending that the defendant's mental condition constituted a satisfactory excuse for his failure to appear. The trial court improperly excluded the defendant's wife's opinion concerning her husband's mental condition and indicated a bias that resulted in effectively denying the surety an opportunity to establish its case of excuse in order to exonerate its bond forfeiture. The trial court also caused half of the bond to be forfeited as a penalty, which is not the purpose of bail. The cause was remanded for a determination of "just terms" for discharging the bail. St. v. Musgrove, 187 M 549, 610 P2d 710 (1980).

Bond Forfeiture — Notice Procedure in Justice's Court: The statutory procedures for bond forfeiture are equally applicable to bond forfeiture proceedings in Justice's Court; therefore, such court is required to give written notice of forfeiture and allow a 30-day "waiting period" (see 1997 and 2003 amendments) during which the forfeiture may be discharged. Failing to do so, the court may not refuse further bonds from the surety. Wilshire Ins. Co. v. Carrington, 570 P2d 301, 34 St. Rep. 1135 (1977) (not reported in Montana Reports).

Liberty Bonds as Bail: One depositing Liberty bonds as bail was estopped from claiming that their forfeiture was unauthorized. Kirschbaum v. Mayn, 76 M 320, 246 P 953 (1926).

Collateral References

Bail *key* 74, 75, 77(2), 79(1).

8 C.J.S. Bail §§176 through 219.

8A Am. Jur. 2d Bail and Recognizance §§135 through 149.

Forfeiture of bail for breach of conditions of release other than that of appearance. 68 ALR 4th 1082.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction. 35 ALR 4th 1192.

Bail: effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. 33 ALR 4th 663.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial. 32 ALR 4th 600.

Bail: duration of surety's liability on posttrial bail bond. 32 ALR 4th 575.

46-9-505. Issuance of arrest warrant — redetermining bail — definition.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 110-3.

This section is a general one to cover every case of noncompliance with the conditions of the bail bond and is in addition to any other provision for notice, forfeiture, etc.

Compiler's Comments

2001 Amendment: Chapter 332 inserted (3) concerning arrest of defendant released under supervision of pretrial services agency; inserted (5) defining pretrial services agency; and made minor changes in style. Amendment effective April 21, 2001.

1993 Amendment: Chapter 262 at end of (1) deleted "at liberty on bail or on his own recognizance"; near beginning of (2) substituted "prosecutor" for "state"; and made minor changes in style.

Collateral References

Bail *key* 75; Criminal Law *key* 263.

8 C.J.S. Bail §§228, 230; 22 C.J.S. Criminal Law §355.

8A Am. Jur. 2d Bail and Recognizance §§107 through 112.

46-9-510. Surrender of defendant.

Commission Comments

1991 Comment: This statute replaces the 1987 code and allows the defendant's surrender while forfeiture of bail proceedings are pending. See 1987 MCA 46-9-205. The statute is a generally stated provision and makes no major changes in established procedure.

Subsection (1) recognizes the two events that would avoid a pending forfeiture; the defendant may personally surrender or a surety may arrest and surrender the defendant. The statute does not require the defendant's surrender to any particular person but allows surrender to either the court or any peace officer of this state. This amendment has been made to provide some latitude in the manner in which a defendant's appearance is ultimately obtained.

Subsection (2) retains 1987 MCA 46-9-205(2). That provision provides that once the defendant has surrendered, the court may order the bail exonerated.

Source: R.C.M. 1947, sections 94-8701 and 94-8702.

This section is a combination of two sections from the present code which allow the defendant to be surrendered before forfeiture of bail by the surety or the defendant himself. When this is done the bail is exonerated. [Subsection (2)] was added to establish the duty of the committing officer and the court.

Compiler's Comments

2003 Amendment: Chapter 420 in (1) in introductory clause after "bail" inserted "or within 90 days after forfeiture"; in (1)(b) at end after "officer" inserted "or any detention center facility"; in (2) near beginning of first sentence after "officer" inserted "or detention center facility" and after "defendant in" deleted "the officer's" and in second sentence after "court" substituted "shall" for "may"; and made minor changes in style. Amendment effective April 18, 2003.

1991 Amendment: In (1)(a), after "to the", substituted "court or any peace officer of this state" for "officer to whose custody he was committed at the time of giving bail"; in (1)(b), at beginning, deleted "At any time before the forfeiture of bail", and after "may" inserted "arrest the defendant and", and after "to the" substituted "court or any peace officer of this state" for "officer to whose custody he was committed and for this purpose may themselves arrest the defendant or by written authority endorsed on a certified copy of the undertaking may empower any person of suitable age and discretion to do so"; and made minor changes in style.

Collateral References

Bail *key* 80.

8 C.J.S. Bail §§207 through 217.

8A Am. Jur. 2d Bail and Recognizance §§107 through 112.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial. 32 ALR 4th 600.

Bail: duration of surety's liability on posttrial bail bond. 32 ALR 4th 575.

Bail: duration of surety's liability on pretrial bond. 32 ALR 4th 504.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond. 18 ALR 3d 1354.

46-9-511. Forfeiture procedure.

Commission Comments

1991 Comment: This statute is a generally stated provision that replaces the 1987 code's forfeiture procedure. See 1987 MCA 46-9-504. The statute continues the requirement that the city or county treasury receive any money posted as bail upon forfeiture. The forfeiture of other bail, including sureties and real or personal property, must be conducted in the same manner as other civil proceedings.

Compiler's Comments

2005 Amendment: Chapter 35 in (1)(a) near middle inserted reference to misdemeanor cases; inserted (1)(b) concerning felony cases; in (1)(c) at end of second sentence substituted "as provided under subsection (1)(a) in a misdemeanor case or under subsection (1)(b) in a felony case" for "into the treasury of the city or county where the case is pending"; and made minor changes in style. Amendment effective July 1, 2005.

46-9-512. Use of forfeited bail as restitution.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 110-8(h).

Compiler's Comments

1991 Amendment: Deleted former (1) that read: "(1) Unless restitution is ordered as provided for in subsection (2), the court having jurisdiction shall proceed with the disposition of forfeited bail as follows:

(a) If judgment be rendered or the forfeiture not discharged and the defendant has deposited money as bail, the court with whom it is deposited must, immediately after receiving notice of said judgment or order of forfeiture, pay over the money deposited to the treasury of the city or county wherein the bail was taken.

(b) When judgment is entered in favor of the state or the order of forfeiture is not discharged on any bail, execution may be issued forthwith for levy on stocks or bonds deposited with the court or upon the real estate described in the bail schedule. Such stocks, bonds, and real estate shall be sold in the same manner as in execution sales in civil actions. The proceeds of such sale shall be used to satisfy all court costs and prior encumbrances, if any, and from the balance a sufficient sum to satisfy the judgment or forfeiture shall be paid into the treasury of the city or county wherein the bail bond was taken. The balance shall be returned to the owner. The real estate so sold may be redeemed in the same manner as real estate may be redeemed after execution sales in civil actions.

(c) When judgment is entered in favor of the state and against the sureties or the surety company or when the forfeiture has not been discharged, execution may be issued against the sureties or the surety company in the same manner as executions in civil actions"; in (1), in second sentence, deleted "Except as provided in 87-1-111" and at end substituted "by law" for "in 46-18-243"; at end of (3) substituted "46-9-511" for "subsection (1)"; and made minor changes in style.

1989 Amendment: At beginning of second sentence of (2) inserted exception clause. Amendment effective March 18, 1989.

1985 Amendment: In (1) inserted "Unless restitution is ordered as provided for in subsection (2)"; and inserted (2) relating to payment of forfeited bail as restitution.

Case Notes

Bond Forfeiture Not Generally Synonymous With Conviction — No Double Jeopardy for Assault Proceedings: Toth forfeited bond for disorderly conduct that occurred on the same day that he was charged with assault with a weapon. Toth claimed that if the bond forfeiture arose from the same events that led to the assault charge, double jeopardy would bar further conviction for assault. The Supreme Court disagreed. Absent specific legislation to that effect, bond forfeiture is not generally synonymous with a conviction for double jeopardy purposes. Bond forfeiture is essentially a civil action and is not admissible as evidence in any other civil action, but bond forfeiture is included within the definition of conviction for particular statutorily delineated purposes only, not including assault. Thus, even if Toth's felony assault charge bond forfeiture arose out of the same transaction as the disorderly conduct, jeopardy did not attach by the bond forfeiture, so Toth's claim failed. St. v. Toth, 2008 MT 404, 347 M 184, 197 P3d 1013 (2008). See also Scott v. S. Carolina, 513 SE 2d 100 (S.C. 1999).

Entrance of Judgment Against Sureties on Bond — Jurisdiction Exceeded: While the District Court may summarily enter judgment against the person charged with a crime who fails to appear according to the condition of his bond, it exceeds its jurisdiction when it goes further than

to authorize proceedings by the County Attorney against the sureties by proper action and at once enters judgment against them for the amount of the bond. State ex rel. Van v. District Court, 54 M 577, 172 P 540 (1918).

Suit to Recover on Bond — Complaint: In a suit to recover the amount of a bond for failure of a defendant to appear in the District Court in accordance with the condition of the bond, it is not necessary to allege in the complaint that the defendant made default of appearance "without excuse". St. v. Wrote, 19 M 209, 47 P 898 (1897).

Attorney General's Opinions

Forfeited Appearance Bonds — Credited to Elementary School District Foundation: Forfeited appearance bonds should be credited by the County Treasurer to the equalization of the county elementary school district foundation programs (now BASE funding program), in the same manner as fines are credited under 20-9-331. This is the general method practiced as shown by audits of local government units. 38 A.G. Op. 96 (1980).

Collateral References

Bail *key* 77, 83, 93.

8 C.J.S. Bail §§336 through 338.

8A Am. Jur. 2d Bail and Recognizance §§120, 121.

CHAPTER 10
PRELIMINARY EXAMINATION

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

1991 Chapter Comments: This chapter retains a substantial part of the 1987 code governing the preliminary examination. The Commission recommended a subsequent general rule for the closure of any criminal proceeding. See 46-11-701.

Chapter Case Notes

Options for Determining Probable Cause — Time Limits: Where defendant was out on bond, a delay of 10 days between initial appearance and the determination of probable cause by leave to file an information was not unreasonable, nor was defendant entitled to a preliminary hearing. The purpose of the preliminary hearing is to determine whether there is probable cause to believe that a felony has been committed. The probable cause determination may be made in a preliminary examination in Justice's Court (46-10-105), or it may be made by application to the District Court Judge, presenting by affidavit such evidence as the judge may require (46-11-201). The only requirement is that there is an independent judicial determination of probable cause within a reasonable time. The defendant had no vested right to either procedure. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980). See also St. v. McElderry, 284 M 365, 944 P2d 230, 54 St. Rep. 922 (1997).

Preliminary Hearing — Not "Fishing Expedition": The preliminary hearing is not meant to be a "fishing expedition" for all possible evidence, and if probable cause is established to the satisfaction of the District Judge by the County Attorney's affidavit, the defendant has little reason to complain. In addition, though the defendant argued that failure to hold a preliminary examination in this case may have allowed an important witness to get away without ever being interviewed, that witness had no relevance to his defense of alibi. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Chapter Law Review Articles

Preliminary Hearing Is a Critical Stage of the Proceeding at Which the Indigent Defendant Is Required to Have the Assistance of Counsel, Haddon, 25 Mont. L. Rev. 174 (1963).

Initiation of Prosecution by Information—Leave of Court or Preliminary Examination?, Beck, 25 Mont. L. Rev. 135 (1963).

Part 1
General Provisions

Part Law Review Articles

Preliminary Hearing Is a Critical Stage of the Proceeding at Which the Indigent Defendant is Required to Have the Assistance of Counsel, Haddon, 25 Mont. L. Rev. 174 (1963).

46-10-105. Preliminary examination — when held.

Commission Comments

[See commission comments to 46-7-102.]

Compiler's Comments

1991 Amendment: In introductory clause, after "appearance", inserted "in all cases in which the charge is triable in district court"; and made minor changes in style.

See compiler's comments to 46-7-102.

Case Notes

No Error in Refusing to Dismiss Charges for Failure to Hold Timely Probable Cause Hearing: Brown was arrested on February 13, but no probable cause hearing was held until February 18. Brown moved for dismissal on due process grounds of failure to hold a probable cause hearing within 48 hours of arrest, citing County of Riverside v. McLaughlin, 500 US 44, 114 L Ed 2d 49, 111 S Ct 1161 (1991), but the dismissal motion was denied. Brown appealed. The Supreme Court pointed out that the question to be decided was not whether Brown was accorded a timely probable cause determination, but rather whether the District Court erred in refusing to dismiss the charges as a remedy for failure to hold a probable cause hearing. Dismissal of charges is not the correct remedy for failure to timely charge a person who was arrested without a warrant. Under St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), the proper remedy is the exclusion of evidence acquired as a result of the delay. The trial court did not err in refusing the motion to dismiss. St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999). See also St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982).

Reasonable Time for Preliminary Examination or Leave to File Information — Time for Commencement of "Reasonable Time" — Higley Clarified: McElderry was arrested on October 14 for DUI, fifth offense; reckless driving; and driving while her license was revoked. On October 16, she made her initial appearance in Lake County Justice's Court and was charged by complaint with the offenses for which she was arrested. On October 25, the state filed a motion in District Court for leave to file an information. The motion was granted on October 28, and an information was filed the same day. On October 29, McElderry filed a motion in District Court to dismiss the charges, arguing that this section, as interpreted by the Supreme Court in St. v. Higley, 190 M 412, 621 P2d 1043 (1980), required that a determination of probable cause be made within 10 days after a defendant's initial appearance. The District Court dismissed the information, reasoning that the state failed to hold a preliminary examination in Justice's Court or to obtain leave from the District Court to file the information within the reasonable time required by this section. The Supreme Court held that the District Court erred in calculating the reasonable time as beginning with the time of McElderry's arrest because the plain language of this section requires that the period be calculated from the date of initial appearance of the defendant. The Supreme Court therefore recalculated the total delay at 12 days, rather than 14 days. The Supreme Court further explained that its use of the 10-day time period in Higley was intended to mean that the 10-day period at issue in that case was not unreasonable but was not intended to limit the period of reasonable time to 10 days in all cases. Therefore, the Supreme Court held that the District Court erred in interpreting Higley to apply a 10-day limitation in every case.

Because the District Court erred in determining the start of the reasonable time and in applying Higley, the Supreme Court held that a new time must be calculated. However, the Supreme Court was unable to tell how the District Court would properly apply its discretion in redetermining a reasonable time and therefore vacated the judgment of the District Court and remanded the case for further proceedings consistent with the Supreme Court's opinion. St. v. McElderry, 284 M 365, 944 P2d 230, 54 St. Rep. 922 (1997), followed in St. v. Robison, 2003 MT 198, 317 M 19, 75 P3d 301 (2003).

Options for Determining Probable Cause — Time Limits: Where defendant was out on bond, a delay of 10 days between initial appearance and the determination of probable cause by leave to file an information was not unreasonable, nor was defendant entitled to a preliminary hearing. The purpose of the preliminary hearing is to determine whether there is probable cause to believe that a felony has been committed (46-10-101, now repealed). The probable cause determination may be made in a preliminary examination in Justice's Court, or it may be made by application to the District Court Judge, presenting by affidavit such evidence as the judge may require (46-11-201). The only requirement is that there is an independent judicial determination of probable cause within a reasonable time. The defendant had no vested right to either procedure. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980), followed in St. v. Farnsworth, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989). See also St. v. Sor-Lokken, 246 M 70, 803 P2d 638, 47 St. Rep. 2264 (1990), and St. v. McElderry, 284 M 365, 944 P2d 230, 54 St. Rep. 922 (1997).

Preliminary Hearing — Not "Fishing Expedition": The preliminary hearing is not meant to be a "fishing expedition" for all possible evidence, and if probable cause is established to the satisfaction of the District Judge by the County Attorney's affidavit, the defendant has little reason to complain. In addition, though the defendant argued that failure to hold a preliminary examination in this case may have allowed an important witness to get away without ever being interviewed, that witness had no relevance to his defense of alibi. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

46-10-106. Waiver.

Compiler's Comments

1991 Amendment: Substituted "judge" for "justice"; and made minor change in style.

Part 2
Procedure at Preliminary Examination

Part Case Notes

Defendant Not to Appear Handcuffed in Prison Clothes: Defendant claimed he was entitled to a new trial because the trial court refused his motion that he be permitted to attend his preliminary hearing without handcuffs and prison clothes. Although the Supreme Court found no prejudice in this case, they reminded trial courts of their duty to avoid potential prejudice caused by the appearance of a defendant. They urged trial courts to stop this practice and order custodial officials to bring defendants into court dressed in their own clothes without handcuffs. This is especially necessary since courts have been opened to the news media. St. v. Rodriguez, 192 M 411, 628 P2d 280, 38 St. Rep. 578F (1981).

Part Collateral References

Criminal Law *key* 222, 228, 229, 238.

22 C.J.S. Criminal Law §§433 through 435.

21 Am. Jur. 2d Criminal Law §§522 through 544.

Standing of media representatives or organizations to seek review of, or to intervene to oppose, order closing criminal proceedings to public. 74 ALR 4th 476.

Preconviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory. 4 ALR 3d 404.

46-10-202. Presentation of evidence.

Commission Comments

1991 Comment: This statute retains 1987 MCA 46-10-202 and governs the presentation of evidence at the preliminary examination. Minor amendments for clarity and gender neutrality have been made.

Subsection (3) is an addition to the 1987 code and adopts a provision present in the federal rules. See Rule 5.1(a), Fed. R. Crim. P.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 109-3, and R.C.M. 1947, sections 94-6109 and 94-6110.

This provision is similar to the existing law.

The preliminary examination is not intended to be a trial of the issues of the case, nor is it considered a part of the trial. It should not be confused with the arraignment which is detailed in chapter 16. It is only a preliminary procedure for determining whether there is "probable cause to believe a felony has been committed by the defendant." Nothing more is required. As a result [46-10-202(1) and 46-10-203] may not be expanded into a detailed "fishing expedition" allowing for complete discovery by either side. The section must only be used to determine whether there is sufficient reason to continue the case through the filing of an information as provided by [46-11-203].

[Section 46-10-201, now repealed] is intended to protect the accused (and others) at the preliminary stage from possible unfavorable publicity. This protects the innocent and allows the court to avoid some of the prejudice that might otherwise be engendered in the more notorious cases by allowing everyone or anyone to witness the pre-trial examination. The provision is intended to give the court the necessary direction without including unnecessary detail. It is intended that one be committed to this means of initiating a prosecution once a preliminary examination has begun. However, simply scheduling a preliminary hearing after the initial appearance, does not commit the prosecution to this procedure. One of the other alternatives may be employed, i.e., leave to file an information, or use of the grand jury indictment.

Compiler's Comments

1993 Amendment: Chapter 262 in fifth sentence of (1), after "electronic", substituted "audio-video" for "audio-visual"; and made minor changes in style.

1991 Amendments: Chapter 710 in (1) inserted fifth and sixth sentences allowing conduct of a preliminary examination by two-way electronic audio-video communication; inserted (4) allowing satisfaction of requirement of appearance of defendant by two-way electronic audio-video communication; and made minor changes in style.

Chapter 800 in (1) and (2) substituted "judge" for "justice"; inserted (3) prohibiting objection to evidence at preliminary examination; and made minor changes in style.

Source of 1991 Amendment: The 1991 amendment made by Ch. 710 to this section is based in part on California Penal Code, section 977.2, and in part on Rule 43.1, Idaho Court Rules.

46-10-203. Disposition of defendant.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-10-203, with amendments adopted from the Federal Rules of Criminal Procedure. The Commission recommended the amendments for reasons of clarity. The statute should effect no substantive change in established practice or in law. The Commission believed that the statute is flexible enough to allow the court to reduce the charge to a misdemeanor and retain the case in Justice's Court if the evidence establishes only probable cause to believe a misdemeanor has been committed.

See commission comments to 46-10-202.

Compiler's Comments

1991 Amendment: In (1) and (2) substituted "judge" for "justice"; inserted (2) concerning insufficient probable cause and discharge; and made minor changes in style.

Case Notes

Evidence of Discharge: The best evidence of plaintiff's discharge after preliminary examination on a charge of grand larceny was the endorsement on the warrant on which he was arrested, but parol evidence is admissible upon loss of the warrant. Hawley v. Richardson, 60 M 118, 198 P 450 (1921).

Probable Cause Sufficient: On a preliminary examination, all that is required of the County Attorney is to submit proof sufficient to show probable cause to believe the defendant to be guilty of the charge. In re Jones, 46 M 122, 126 P 929 (1912).

46-10-204. Record of preliminary examination.

Commission Comments

1991 Comment: This statute preserves, for the most part, 1987 MCA 46-10-204. The Commission recognized no benefit to the distinction between homicides and other offenses. This statute requires that the testimony be recorded only upon request.

Compiler's Comments

1991 Amendment: In (1), after "witness", deleted "in cases of homicide, must be reduced to writing as a deposition by a court-appointed stenographer. In cases other than homicide, the

testimony of each witness"; in (2) substituted "judge" for "justice" and after "answer" inserted "a charge"; and made minor changes in style.

Case Notes

Use at Trial of Testimony: The testimony of a witness given at the preliminary hearing in the defendant's presence, when the witness had been cross-examined by the defendant's counsel and the testimony had been recorded and transcribed by a court reporter, was expressly admissible in evidence under this section when a proper foundation had first been laid by showing that the witness could not be located for trial. St. v. Bouldin, 153 M 276, 456 P2d 830 (1969).

CHAPTER 11
COMMENCEMENT OF PROSECUTION

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

Chapter Case Notes

Jury Instructions — Presumption of Innocence: In a criminal prosecution based on theft of an automobile in which the defendant timely requested and was twice denied an instruction on presumption of innocence, it was per se reversible error to deny the instruction. The purpose of the instruction is to caution the jury against conclusions based only on the arrest and prosecution of the defendant, and an instruction on the State's burden of proof can therefore not supplant the instruction requested. St. v. Williams, 184 M 111, 601 P2d 1194 (1979).

Prosecutor's Quasi-Judicial Immunity From Prosecution: Plaintiff's civil action against a County Attorney, based upon alleged unlawful arrest by certain policemen and challenging the legality of the criminal prosecution against him, must be dismissed because the County Attorney enjoys absolute immunity for prosecutorial actions done in a quasi-judicial capacity. Hall v. Lympus, 478 F. Supp. 644 (D.C. Mont. 1979).

Chapter Law Review Articles

Criminal Procedure—Montana Law and the Federal Impact: Paragraph III.C. discusses immunity from criminal prosecution. Elison, 38 Mont. L. Rev. 48 (1977).

Discretion Exercised by Montana County Attorneys in Criminal Prosecutions, Williams, 28 Mont. L. Rev. 41 (1966).

Part 1
Methods of Commencing Prosecution

Part Commission Comments

1991 Part Comments: The first two sections of this part are a restatement of 1987 MCA 46-11-101 and 46-11-102. These statutes reflect the constitutional requirements concerning the initiation of a criminal proceeding. See Art. II, sec. 20, Mont. Const. Minor changes in language

have been made for brevity and clarity. Under the 1987 statutes, the complaint provisions appear in chapter 6, which relates to arrest warrants, because the purpose of the complaint is often to justify an arrest warrant. See commission comments, 1987 MCA 46-6-201. The complaint provisions were included with those providing for the initiation of prosecution.

Part Law Review Articles

Montana Legislative Summary, 1961—Charging Multiple Criminal Offenses: This portion of the article evaluates the advantages and disadvantages of charging multiple offenses. Staff, 22 Mont. L. Rev. 112 (1961).

46-11-101. Methods of commencing prosecution.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 111-1; [1889] Montana Constitution, Article III, section 8 [slightly modified in Art. II, sec. 20, 1972 Mont. Const.].

The section is a statement of the alternative methods of commencing a prosecution.

Compiler's Comments

1991 Amendment: At beginning deleted "When authorized by law"; and made minor changes in style.

Case Notes

Filing on Leave of Court More Than Thirty Days After Waiver of Preliminary Examination — Switch in Procedure for Commencing Prosecution: Although 46-11-203 requires an information to be filed within 30 days after a waiver of a preliminary examination, there was no error when: (1) defendant waived preliminary examination in Justice's Court on August 27; (2) on September 27, the County Attorney filed in District Court a motion for leave to file an information; and (3) on September 28, the motion was granted and the information filed. This section provides that filing an information after leave of court has been granted is an alternative to filing after a preliminary examination or waiver of a preliminary examination. The information in this case was filed within 30 days after leave to file was granted. The court rejected a claim that the state cannot switch midstream from using the preliminary examination process in Justice's Court to using the leave to file an information process in District Court. Defendant had no vested right to a particular procedure for a probable cause determination. St. v. Strobel, 268 M 129, 885 P2d 503, 51 St. Rep. 1214 (1994).

Indictment by Information Acceptable: Defendant was not denied his constitutional rights under the 5th or 14th amendment to the United States Constitution by being indicted by an information rather than by a grand jury. His argument is contrary to past holdings of the U.S. and Montana Supreme Courts. Also, this statute provides that an indictment by information is acceptable. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Illegal Pretrial Process and Procedure — State's Right to Charge and Try Case: Youth Court petition initiating proceedings did not state the facts constituting the offense youth was charged with in ordinary and concise language so as to enable a person of common understanding to know what was intended. The petition did not include a witness list. An arrest warrant was issued out of the Youth Court, although there is no provision in the Youth Court Act for issuance of an arrest warrant. Presumably the warrant was issued under 46-6-201, but there was no showing of probable cause supported by oath or affirmation reduced to writing. The youth had already been arrested in Oklahoma at the time the warrant was issued. By what process and authority he was arrested in Oklahoma was not shown, nor was it shown he was arrested by a law enforcement officer. He was subsequently transferred to the District Court for trial as an adult and convicted of two counts of deliberate homicide. The Youth Court proceedings from issuance of the warrant for arrest onward were patently defective. However, this did not preclude the State from having him transferred to the District Court, proceeding against him, and obtaining a conviction. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Transfer From Youth Court to District Court — Youth Court Hearing — Valid Initiation of District Court Action: At Youth Court hearing at which it was decided to transfer youth to District Court for trial as an adult, testimony established probable cause for filing of an information in the District Court. This procedure satisfied the state constitutional requirement that a criminal action in the District Court be initiated either by an information after examination and commitment by a magistrate or after leave granted by the District Court. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Sufficiency of Complaint: A complaint was sufficient when it stated facts constituting a public offense and charged a violation that was a misdemeanor within the jurisdiction of the Justice's Court. State ex rel. Borberg v. District Court, 125 M 481, 240 P2d 854 (1952).

Issues Narrowed From General Allegations to Specific Averments: When general allegations in a complaint are followed by specific averments, the issues are narrowed to those embraced within the particular allegations. St. v. Schnell, 107 M 579, 88 P2d 19 (1939).

Offense Erroneously Named — Nonfatal Defect: The general rule is that when the facts, acts, and circumstances are set forth with sufficient certainty to constitute an offense, it is not a fatal defect that the complaint gives the offense an erroneous name; the name of the crime is controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the complaint. St. v. Schnell, 107 M 579, 88 P2d 19 (1939).

Collateral References

Criminal Laws *key* 211(1), 252(1); Indictment and Information *key* 1, 4, 55.

22 C.J.S. Criminal Law §§436 through 440; 42 C.J.S. Indictments and Informations §§5 through 15.

41 Am. Jur. 2d Indictments and Informations §§25, 37 through 40; 47 Am. Jur. 2d Justices of the Peace §§28 through 32.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information. 44 ALR 4th 401.

Finding or return of indictment, or filing of information, as tolling limitation period. 18 ALR 4th 1202.

46-11-102. Required methods.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 111-2; [1889] Montana Constitution, Article III, section 8 [slightly modified in Art. II, sec. 20, 1972 Mont. Const.].

Compiler's Comments

1991 Amendment: After "offenses" substituted "charged" for "triable"; and made minor changes in style.

Case Notes

Sworn Complaint by Peace Officer Not Required: A peace officer may file a complaint without swearing to it. St. v. Allum, 2005 MT 150, 327 M 363, 114 P3d 233 (2005), followed in St. v. Ditton, 2009 MT 57, 349 M 306, 203 P3d 806 (2009).

Capital Crime — Indictment Not Necessary: A person may be held to answer for a capital crime without presentment or indictment by a grand jury. St. v. Corliss, 150 M 40, 430 P2d 632 (1967).

When Motion for Leave to File Necessary: It is only when there has been no examination or commitment by a magistrate that the County Attorney must move for leave to file an information. St. v. Byrd, 41 M 585, 111 P 407 (1910).

46-11-110. Filing complaint.

Compiler's Comments

1993 Amendment: Chapter 262 near middle substituted "sworn complaint or" for "complainant and" and at end, after "whether", substituted "probable cause exists to allow the filing of a charge" for "a charge may be filed"; and deleted (2) that read: "If it appears from an affidavit filed with the charge or from testimony of the complainant that there is probable cause to believe that an offense has been committed and that the person against whom the charge is made has committed it, the court shall issue a summons or an arrest warrant."

Case Notes

Probable Cause Determined Six Months After Filing Charges "Timely" — No Reversible Error: Following a car accident, Ditton was arrested on December 20 and charged with DUI, but no probable cause determination was made until 6 months after the charge was filed. Ditton moved for dismissal, arguing that the Municipal Court's failure to provide a specific, timely order finding probable cause violated the statute and required dismissal of the DUI charge. The District Court ruled that the Municipal Court, although providing no written order of probable cause, properly followed the statute and made the necessary determination of probable cause at the time that the charge was filed. On appeal, the Supreme Court affirmed the District Court's decision that the Municipal Court Judge's determination of probable cause was timely made at the time that the DUI charge was filed and was consistent with the judge's actions in setting Ditton's case for trial, which would not have been necessary without a determination of probable cause. St. v. Ditton, 2006 MT 235, 333 M 483, 144 P3d 783 (2006).

Sworn Complaint by Peace Officer Not Required: A peace officer may file a complaint without swearing to it. St. v. Allum, 2005 MT 150, 327 M 363, 114 P3d 233 (2005).

No Error in Refusing to Dismiss Charges for Failure to Hold Timely Probable Cause Hearing: Brown was arrested on February 13, but no probable cause hearing was held until February 18. Brown moved for dismissal on due process grounds of failure to hold a probable cause hearing within 48 hours of arrest, citing County of Riverside v. McLaughlin, 500 US 44, 114 L Ed 2d 49, 111 S Ct 1161 (1991), but the dismissal motion was denied. Brown appealed. The Supreme Court pointed out that the question to be decided was not whether Brown was accorded a timely probable cause determination, but rather whether the District Court erred in refusing to dismiss the charges as a remedy for failure to hold a probable cause hearing. Dismissal of charges is not the correct remedy for failure to timely charge a person who was arrested without a warrant. Under St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), the proper remedy is the exclusion of evidence acquired as a result of the delay. The trial court did not err in refusing the motion to dismiss. St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999). See also St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982).

46-11-111. Amending complaint.

Commission Comments

1991 Comment: This statute is a newly developed provision that allows a complaint to be amended under the same procedure as amending an information.

Compiler's Comments

1995 Amendment: Chapter 18 at end substituted "46-11-205" for "46-11-103".

Part 2
Filing of Information

Part Commission Comments

1991 Part Comments: This part governs the use of an information as a charging document. The statutes are essentially a restatement of the 1987 statutes and should not result in a significant change in established procedure.

Two 1987 statutes, concerning application and granting leave to file an information, have been combined into a single statute. Compare 1987 MCA 46-11-201 and 46-11-202.

The Commission determined that 1987 MCA 46-11-204, regarding the procedure to be followed when the County Attorney decides not to file, was an unnecessary provision. That section was not often followed in practice and burdened the County Attorney with an unneeded procedure. The section was repealed.

Part Case Notes

Institutional Delay Chargeable to State: Institutional delay in an arson case was caused by a separate suit brought by a newspaper to test the constitutionality of 46-10-201 (now repealed), which defendant invoked to close the proceedings to the press and public, and by the state's inaction in the face of that suit, resulting in a 214-day delay in prosecution. Although institutional, the delay was chargeable to the state, which had the power to choose the method of prosecution but also had a concomitant duty to bring the accused to trial. The delay was excessive and unjustified, and the information was properly dismissed by the trial court. St. v. Wombolt, 231 M 400, 753 P2d 330, 45 St. Rep. 714 (1988).

Determination of Probable Cause to File Criminal Charges — No Preclusion of Later Malicious Prosecution Suit: A judicial determination of probable cause to hold a party answerable to criminal charges does not preclude the party from subsequently bringing suit for malicious prosecution. The fact that the party was held to answer the criminal charge is considered presumptive but not conclusive evidence of the existence of probable cause to initiate the criminal action. The party in a malicious prosecution action can overcome the presumption by showing by a preponderance of the evidence that there was no probable cause for filing the original criminal action. Watkins v. Spring Creek Colony, 188 M 467, 614 P2d 508 (1980).

Officer Signing: A Deputy County Attorney may present an information in his own name. St. v. Larson, 75 M 274, 243 P 566 (1926).

Part Law Review Articles

Initiation of Prosecution by Information—Leave of Court or Preliminary Examination?, Beck, 25 Mont. L. Rev. 135 (1963).

46-11-201. Leave to file information.

Commission Comments

1991 Comment: Subsections (1) and (2) adopt the provisions of 1987 MCA 46-11-201(1) in combination with 1987 MCA 46-11-202(1), and these statutes were amended to allow only the Chief Justice to grant leave to file an information against a District Court Judge.

Subsection (3) has been amended to allow use of a summons as well as a warrant after leave to file has been granted and does not require the arrested person to be brought before the issuing court.

Commission Comment Not Divided: This section is a recodification of part of section 95-1301, R.C.M. 1947. Section 46-11-202 (now repealed) is also derived from section 95-1301. The commission comments to section 95-1301 are printed in their entirety under 46-11-201.

Source: R.C.M. 1947, section 94-7003. See also [46-11-333 (now repealed)].

This operates as a substitute for a preliminary examination or a grand jury investigation thereby assuring the accused that the prosecuting officer must satisfy some judicial officer as to the existence of probable cause to believe that the accused has committed an offense before any formal information can be filed against him. This approach is created by the [1889] Montana Constitution, Article III, section 8 [slightly modified in Art. II, sec. 20, 1972 Mont. Const.]. This approach would seem to give the accused less protection than the other available approaches, since in preliminary examination the defendant is present and in the grand jury investigation five jurors must be convinced of the existence of probable cause after a thorough investigation. In practice, however, direct leave to file may serve the purpose of "proof of probable cause" as well or better than the other two. The district judge is more knowledgeable as to the essentials of a criminal prosecution than either a grand jury or a justice of the peace. The requirement of satisfying the district judge as to probable cause already exists—or very nearly so by case law—"It seems to us that there must be sufficient facts and information presented to the court to move the discretion of the court . . ." (State ex rel. Juhl v. Dist. Ct., 107 Mont. 309, 84 P.2d 979.) Obtaining leave to file an information is not a mere perfunctory matter, but rests in the sound discretion of the district judge. The application must be complete in itself, and contains such salient facts as will allow the district judge to make an independent determination that an offense has been committed. It is impossible to delineate here what facts would be necessary for all cases, however a recitation of the fact the defendant had been arrested, that he was accused of a crime, and that there is good evidence (eye-witnesses), etc., implicating him with the crime would seem sufficient. (See State v. Kacar, 74 Mont. 269, 274, 240 P. 365.)

The section may appear to overrule State ex rel. Harrison v. District Court, 135 Mont. 365, 340 P.2d 544, but it does not because a hearing comparable to a preliminary examination is conducted by the district judge in each case and there is no need to remand for a preliminary examination.

Compiler's Comments

1991 Amendment: In (1), near beginning of first sentence, substituted "prosecutor" for "county attorney" and inserted second sentence concerning judge as defendant; in (2), in two places after "judge", inserted "or chief justice"; in (3), after "warrant", inserted "or summons" and after "arrest" substituted "or appearance" for "and he must be brought before the court unless the court orders otherwise"; inserted (4) concerning filing of information against District Court Judge; and made minor changes in style.

Case Notes

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GENERAL

Prejudicial Error to Amend Information by Jury Instruction: At the close of a criminal trial, the prosecution admitted that the information had cited the wrong statutes for official misconduct and the judge allowed a jury instruction that contained language from the proper statute. The Supreme Court ruled that the trial court abused its discretion in accepting a proposed jury instruction that essentially amended the original instruction after the defendant had presented his case and based his defense on the statutes cited in the original information rather than arraigning the defendant on the new charges. St. v. Later, 260 M 363, 860 P2d 135, 50 St. Rep. 1099 (1993), distinguished in St. v. Neary, 284 M 409, 944 P2d 750, 54 St. Rep. 942 (1997).

Incorrect Statutory Reference — Charge Not Invalid:

The name of a crime is controlled by the specific acts charged. When the facts, acts, and circumstances are set forth with sufficient certainty to constitute an offense, it is not a fatal defect that the complaint gives the offense an erroneous name. An erroneous statutory reference will not invalidate the charge. St. v. Collins, 226 M 188, 734 P2d 686, 44 St. Rep. 576 (1987).

A complaint which used the statutory language of 61-8-401 to describe the offense but which listed a citation to 61-8-406 was not made defective by the incorrect reference since the complaint adequately described and gave notice of the offense. The District Court did not err in granting a motion to amend the complaint to correct the statutory reference. St. v. Handy, 221 M 365, 719 P2d 766, 43 St. Rep. 897 (1986), followed in St. v. Moehr, 227 M 253, 738 P2d 499, 44 St. Rep. 1058 (1987).

Substantial Evidence to Show Common Scheme Bad Check Writing: Defendant was convicted of issuing bad checks, common scheme, a felony, after issuing or delivering a total of nine checks to various businesses and individuals over the course of a year, knowing the checks would not be paid by his bank. The court found there was sufficient evidence to support conviction as there was substantial evidence of defendant's wrongdoing. St. v. Fleming, 225 M 48, 730 P2d 1178, 44 St. Rep. 31 (1987).

Information Naming Wrong Offense Saved by Supporting Facts: Victim was twice assaulted the night of his death. Defendant admitted to the first; the second caused victim's death. The information charged defendant with deliberate homicide; he was convicted of aggravated assault arising from the first assault, and the information stated facts which made it clear the State intended to prove the nonfatal first assault as part of its deliberate homicide theory, so that defendant was informed of what was intended to be charged and could not have been surprised or misled at the trial. Therefore, an otherwise fatal defect inherent in the fact that, under the charge, defendant could have been convicted of the lesser included offense of aggravated assault in relation to the second assault but not the first, and was in fact convicted in relation to the first assault, was saved by the facts stated in the information. Therefore, the holding below that defendant was convicted of an uncharged offense and the grant of acquittal notwithstanding the guilty verdict were reversed. St. v. Longneck, 196 M 151, 640 P2d 436, 38 St. Rep. 2160 (1981), affirmed, 201 M 367, 654 P2d 977, 39 St. Rep. 2170 (1982).

Sufficiency of Information — Wrongly Named Offense: The test for sufficiency of an information is whether a person of common understanding would know what is intended to be charged. Generally, when the facts, acts, and circumstances are set forth with sufficient certainty to constitute an offense, it is not a fatal defect that the complaint gives the offense an erroneous name. St. v. Longneck, 196 M 151, 640 P2d 436, 38 St. Rep. 2160 (1981), affirmed, 201 M 367, 654 P2d 977, 39 St. Rep. 2170 (1982), distinguished in St. v. Later, 260 M 363, 860 P2d 135, 50 St. Rep. 1099 (1993), and followed in St. v. Brogan, 261 M 79, 862 P2d 19, 50 St. Rep. 1204 (1993), and St. v. Bahr, 2009 MT 378, 353 M 294, 224 P3d 610 (2009).

Right to Counsel: A motion for leave to file an information is not a "critical stage" entitling the defendant to the right to assistance of counsel. State ex rel. Brackman v. District Court, 172 M 24, 560 P2d 523 (1977).

Conclusionary Statements Inadequate: Conclusionary statements will not suffice to obtain leave to file an information. State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976).

District Court's Power to Amend Procedural Defect: The District Court has the power to allow the filing of an amended application and affidavit to remedy omissions, establishing probable cause to believe an offense has been committed, in the original affidavit since the defect was a procedural matter and not a substantive issue involving the jurisdiction of the District Court. The District Court's power to amend is essential to efficient administration of justice and the basic right of the defendant to prepare his own defense. St. v. Emerson, 169 M 284, 546 P2d 509 (1976).

Leave to File When Preliminary Hearing Ordered: When a preliminary hearing was ordered for the defendant after an initial appearance before a Justice of the Peace, the prosecutor was not precluded thereby from subsequently applying for leave to file an information under this section. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

Examination Before Leave to File: When a District Judge assumed to act upon an application for leave to file an information, he should have directed an examination before himself as magistrate or some other magistrate. State ex rel. Harrison v. District Court, 135 M 365, 340 P2d 544 (1959).

Sufficiency of Facts in Information: When the motion for leave to file the information disclosed that the decedent was shot at close range with a high-powered rifle and killed on the defendant's farm, that the Coroner's jury verdict was that the killing was intentional, that evidence of the commission of the crime and guilt of the defendant was introduced at a habeas corpus hearing, that the County Attorney had made a complete investigation, and that as a result he believed the defendant was guilty, the motion was sufficient to grant leave to file information. St. v. London, 131 M 410, 310 P2d 571 (1957).

AFFIDAVIT

Sufficiency of Charging Documents — Probability, Not Prima Facie Showing, That Defendant Committed Crime of Theft Sufficient: Harlson allegedly stole a pickup and drove it 60 miles an hour through downtown Billings. Harlson was charged with theft, criminal endangerment, and DUI. Harlson moved to dismiss on grounds that the charging documents failed to show probable cause or allege a specific location, a substantial risk of death or serious bodily injury, a speed limit, or the presence of people in the area. The motion was denied, and on appeal, the Supreme Court affirmed. Citing St. v. Elliott, 2002 MT 26, 308 M 227, 43 P3d 279 (2002), the court noted that the sufficiency of the charging documents is established by reading the information together with the affidavit in support of the motion for leave to file the information. The affidavit need not make out a prima facie case that defendant committed an offense. A mere probability that the offense was committed is sufficient. In addition, the charging documents made clear that Harlson allegedly committed theft of a vehicle and drove the vehicle at high speed through downtown Billings, exceeding the speed limit and endangering any pedestrians in the area. Harlson was acquitted of the DUI charge, so the sufficiency of the charging document as to DUI was not at issue. The theft and endangerment charges were thus supported by the charging documents, and the motion to dismiss was properly denied. St. v. Harlson, 2006 MT 312, 335 M 25, 150 P3d 349 (2006).

Information Charging Death of Newborn Child Sufficient in Alleging Probability of Homicide Despite Lack of Evidence That Child Born Alive: Elliott was charged with deliberate homicide of her newborn child. She moved to dismiss the information as insufficient because the state medical examiner offered no opinion as to whether the child was ever born alive and, without proof that the child was a person who was born and was alive, she should not have been charged with the death of a human being. The Supreme Court affirmed. The sufficiency of the charging documents is established by reading the information together with the affidavit in support of the motion for leave to file the information. The affidavit need not make out a prima facie case that defendant committed an offense. A mere probability that the offense was committed is sufficient. Thus, to withstand a motion to dismiss, the state needed only to show a probability that the baby was born alive and that Elliott committed the offense charged. In this case, the circumstances of the delivery of the baby, Elliott's hospitalization, her differing stories, the skull fractures suffered by the baby, and the concealment of the baby's body, all provided a sufficient basis to find probable cause for the deliberate homicide charge, and the District Court did not err in denying the motion to dismiss the information. St. v. Elliott, 2002 MT 26, 308 M 227, 43 P3d 279 (2002), followed, with regard to sufficiency of information, in St. v. Harlson, 2006 MT 312, 335 M 25, 150 P3d 349 (2006).

Journal Entries and Statements to County Attorney Detailing Incidents Supported Sex Crimes Charges: An affidavit in support of the information charging sexual intercourse without consent and sexual assault, which contained a long excerpt from the victim's journal detailing the abuse and vividly recounting the progression of the abuse and the particular incidents and which also contained the County Attorney's statements that the victim had told him that sexual contact took place during one incident and penetration took place during another incident, constituted more than sufficient probable cause to support the information. St. v. Mason, 283 M 149, 941 P2d 437, 54 St. Rep. 539 (1997).

Affidavit Not Demonstrating Prima Facie Case: The defendant argued that the information filed against him was incomplete because it alleged only that the he possessed the stolen items and did not establish that he had stolen the items. The Supreme Court held that the state did not have to demonstrate a prima facie case at the time the information was filed. The court held that the District Court reviewing an affidavit for probable cause may use common sense and draw permissible inferences. St. v. Ramstead, 243 M 162, 793 P2d 802, 47 St. Rep. 1101 (1990), followed in St. v. Williams-Rusch, 279 M 437, 928 P2d 169, 53 St. Rep. 1224 (1996).

Witness' Statement Not Referred to in Affidavit — No Ex Post Facto Problem — Admissible as Prior Inconsistent Statement: Defendant was convicted of operating a motor vehicle while designated a habitual traffic offender. Proceeding pro se, the defendant argued on appeal that failure to refer to a witness' statement in the affidavit supporting leave to file information constituted an ex post facto problem. The court held that he simply misunderstood that legal theory. The court further held that the statement, which asserted that defendant drove from Great Falls to Loma, was admissible as a prior inconsistent statement because the witness testified at trial that he, not the defendant, drove that distance. St. v. Grant, 217 M 357, 704 P2d 1064, 42 St. Rep. 1248 (1985).

Use of Motion's Supporting Language to Interpret Information: Motion for leave to file information served as the supporting affidavit for the information and could thus be considered

in determining the meaning of the language contained in the information because an affidavit supporting a motion for leave to file an information may be considered in determining the meaning of the language contained in the information. St. v. Longneck, 196 M 151, 640 P2d 436, 38 St. Rep. 2160 (1981), affirmed, 201 M 367, 654 P2d 977, 39 St. Rep. 2170 (1982), followed in St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983).

Common Scheme Forgery — Affidavit to Support Information: The District Court held that the affidavit accompanying an information charging common scheme forgery was insufficient. An affidavit must include sufficient facts to convince a judge that there is probable cause to believe the named defendant may have committed the crime described in the information. Proof of "common scheme" requires proof that the suspect series of acts constitute a common criminal scheme. These acts must be either individually incomplete, such that they show that a single crime had been committed, or be acts which follow one another evidencing a continuing design. In this case, the affidavit had an insufficient connection between activities. There was no showing of continuous design between the money orders, building permits, forgery activity, and defendant's other activities described in the affidavits. St. v. Renz, 192 M 306, 628 P2d 644, 38 St. Rep. 720 (1981).

Preliminary Hearing — Not "Fishing Expedition": The preliminary hearing is not meant to be a "fishing expedition" for all possible evidence, and if probable cause is established to the satisfaction of the District Judge by the County Attorney's affidavit, the defendant has little reason to complain. In addition, though the defendant argued that failure to hold a preliminary examination in this case may have allowed an important witness to get away without ever being interviewed, that witness had no relevance to his defense of alibi. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Mere Probability Sufficient: Defendant, charged with mitigated deliberate homicide, argued that the affidavit in support of the application for leave to file an information was insufficient without statements which were suppressed on his motion. The court disagreed, saying that a prima facie case showing that defendant committed an offense was not necessary in the affidavit. A mere probability is sufficient for probable cause. Evidence to establish probable cause need not be as complete as evidence to establish guilt. Judges reviewing such affidavits should use their common sense in determining whether probable cause exists. There is no requirement that the affidavit claim that no other persons had access to the home where the deceased was found. The court concluded that a common-sense reading of the affidavit, with the parts objected to deleted, indicates that the statutory and decisional guidelines were more than adequately met by the affidavit. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Jurisdiction of District Court: The failure of the Commissioner of Campaign Finances and Practices (now Commissioner of Political Practices) to recite, in an affidavit supporting a request for leave to initiate prosecution by information, the fact that the County Attorney had waived under 13-37-124 his right to prosecute the defendant was not a jurisdictional defect, and the court improperly granted the defendant's motion to dismiss. Such a defect is a procedural matter, not a substantive one, and does not require dismissal of the charge. St. v. Matthews, 183 M 405, 600 P2d 188 (1979).

Affidavit Plus Indictment Sufficient: The Supreme Court held that an affidavit revealing an admission to setting a fire was sufficient, along with an indication that the fire was intentionally set, to warrant granting leave to file an information. St. v. Hallam, 175 M 492, 575 P2d 55 (1978), followed in St. v. Arrington, 260 M 1, 858 P2d 343, 50 St. Rep. 905 (1993).

Sufficiency of Motion to Amend: Certified motion for leave to file second amended information, which was signed by the County Attorney but not supported by separate affidavit, was sufficient by itself as an affidavit within the meaning of this section. State ex rel. McKenzie v. District Court, 165 M 54, 525 P2d 1211 (1974).

Additional Evidence: In its discretion, the District Court may require evidence other than the affidavit for support before it grants permission for the direct filing of an information with the District Court. State ex rel. Bell v. District Court, 157 M 35, 482 P2d 557 (1971).

Specific Time and Place: An affidavit that does not give the specific time and place is insufficient to show probable cause even though it alleges that the defendant committed the offense. State ex rel. Bell v. District Court, 157 M 35, 482 P2d 557 (1971).

Sufficient to Establish Jurisdiction: An affidavit is sufficient to establish the jurisdiction of the District Court if it specifies that the offense was committed within the county even though the county contains an Indian reservation and the affidavit has not negated the possibility that the offense was committed within the reservation. State ex rel. Bell v. District Court, 157 M 35, 482 P2d 557 (1971).

Absence of Supporting Affidavit: Absence of a supporting affidavit for leave to file an information, contrary to 46-11-201, was not a fatal error since it is a procedural matter and does not affect the substantial rights of the defendant. St. v. Logan, 156 M 48, 473 P2d 833 (1970).

Affidavit of Witness Not Required: There is no requirement under subsection (1) that a supporting affidavit of a witness having direct knowledge of facts sufficient to establish probable cause be filed with the application to file an information. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

PROBABLE CAUSE

Sufficient Probable Cause for Filing Information — No Requirement That Information Supporting Charge Be Excised Before Determination of Probable Cause Made: Attorney Holt pleaded not guilty to five counts of felony theft of clients' funds, then moved to dismiss two of the counts, alleging that the affidavit supporting the information did not establish probable cause. The motion was denied. Pursuant to a subsequent plea agreement, Holt pleaded nolo contendere to the contested counts, but reserved the right to withdraw the plea if the agreed sentences were not imposed. Following conviction, Holt appealed on grounds that the District Court erred by not dismissing the counts because the affidavit in support of the information did not allege independent admissible evidence that Holt exercised unauthorized control over the money that was allegedly stolen, asserting in effect that the affidavit contained evidence that must be excised and that without that evidence, the affidavit failed to establish probable cause. The Supreme Court affirmed. A showing of a mere probability that a defendant committed the offense charged is sufficient to establish probable cause to file an information. It is not required that information in the affidavit supporting a charge, which might later be found inadmissible at trial, be excised before a determination of probable cause is made. At the time that Holt entered a plea, it was too early in the case to hold that a motion to dismiss would be successful at the conclusion of the state's case in chief, so denial of the dismissal motion was not error. St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006).

Sufficient Probable Cause in Affidavit to Warrant Charge of Sexual Assault: Kern contended that the state failed to establish probable cause in its affidavit charging sexual assault. The Supreme Court noted that pursuant to St. v. Arrington, 260 M 1, 858 P2d 343 (1993), an affidavit in support of a motion to file an information need not make out a prima facie case that a defendant committed an offense; rather, a mere probability is sufficient. Evidence to establish probable cause need not be as complete as the evidence necessary to establish guilt, and the determination whether a motion to file an information is supported by probable cause is left to the discretion of the trial court. Here, the factual allegations that defendant forced the victim to engage in sexual conduct were sufficient to establish the mere probability that defendant committed the offense. Kern also asserted that it was necessary that the affidavit require allegations that he committed the touching and that he did so to gratify his sexual response. The Supreme Court disagreed with both arguments. Nothing in 45-5-502 requires that a defendant commit the actual touching, nor was the affidavit required to allege the purpose of the sexual contact because that element is incorporated by reference in the statute. St. v. Kern, 2003 MT 77, 315 M 22, 67 P3d 272 (2003), following St. v. Steffes, 269 M 214, 887 P2d 1196 (1994).

No Error in Refusing to Dismiss Charges for Failure to Hold Timely Probable Cause Hearing: Brown was arrested on February 13, but no probable cause hearing was held until February 18. Brown moved for dismissal on due process grounds of failure to hold a probable cause hearing within 48 hours of arrest, citing County of Riverside v. McLaughlin, 500 US 44, 114 L Ed 2d 49, 111 S Ct 1161 (1991), but the dismissal motion was denied. Brown appealed. The Supreme Court pointed out that the question to be decided was not whether Brown was accorded a timely probable cause determination, but rather whether the District Court erred in refusing to dismiss the charges as a remedy for failure to hold a probable cause hearing. Dismissal of charges is not the correct remedy for failure to timely charge a person who was arrested without a warrant. Under St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), the proper remedy is the exclusion of evidence acquired as a result of the delay. The trial court did not err in refusing the motion to dismiss. St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999). See also St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982).

Probable Cause Found for Sexual Intercourse Without Consent and Sexual Assault — Corroboration Not Required: Little was convicted of sexual intercourse without consent and sexual assault. Before trial, Little argued that the affidavit filed in support of the information was insufficient because the victims' allegations were not corroborated and because the affidavit did not contain sufficient information to support a probability that he committed the offenses charged. The Supreme Court reviewed the standard applicable to an affidavit supporting an

information and found that the information contained allegations by the two minor victims of the defendant that showed penetration. Since the victims were under 16 years old and could not consent, the affidavits indicated a probability that Little had committed intercourse without consent. The Supreme Court also noted that the standard for probable cause did not require corroboration of the victims' allegations. St. v. Little, 260 M 460, 861 P2d 154, 50 St. Rep. 1124 (1993).

District Court Jurisdiction — Invoked by Probable Cause in Leave to File Information — Res Judicata After Appeal Process: The issue of subject matter jurisdiction cannot be waived or conferred by consent of a party and may be raised at any stage of a judicial proceeding or sua sponte by the court; but if the question of jurisdiction turns upon a finding of whether the affidavit of application for leave to file an information shows probable cause and the defendant has been found guilty and the judgment has not been appealed or has been affirmed on appeal, the issue of probable cause is res judicata. St. v. Davis, 210 M 28, 681 P2d 42, 41 St. Rep. 898 (1984).

Probable Cause, Not Prima Facie Case, Needed in Pleading: Defendants were charged with illegal possession of a slot machine. The District Court dismissed for lack of probable cause, saying the game was essentially the same as that previously found legal in Treasure St. Games v. St., 170 M 189, 551 P2d 1008 (1976). Defendants were also charged with "maintaining a bingo/keno game in which cards/chances may be purchased in excess of $.50 in violation of 23-5-412". The District Court dismissed this charge for lack of probable cause, saying the plurality language of the charge did not state an offense. On appeal, the Supreme Court found the dismissal to be error, saying the State need not demonstrate a prima facie case in the charging documents but need only show probable cause to believe an offense has been committed. St. v. Johnson, 203 M 153, 660 P2d 101, 40 St. Rep. 359 (1983). See also St. v. Buckingham, 240 M 252, 783 P2d 1331, 46 St. Rep. 2102 (1989), St. v. Arrington, 260 M 1, 858 P2d 343, 50 St. Rep. 905 (1993), and St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

Options for Determining Probable Cause — Time Limits: Where defendant was out on bond, a delay of 10 days between initial appearance and the determination of probable cause by leave to file an information was not unreasonable, nor was defendant entitled to a preliminary hearing. The purpose of the preliminary hearing is to determine whether there is probable cause to believe that a felony has been committed. The probable cause determination may be made in a preliminary examination in Justice's Court (46-10-105), or it may be made by application to the District Court Judge, presenting by affidavit such evidence as the judge may require. The only requirement is that there is an independent judicial determination of probable cause within a reasonable time. The defendant had no vested right to either procedure. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980), followed in St. v. Farnsworth, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989). See also St. v. Sor-Lokken, 246 M 70, 803 P2d 638, 47 St. Rep. 2264 (1990), and St. v. McElderry, 284 M 365, 944 P2d 230, 54 St. Rep. 922 (1997).

Larceny by Bailee: An affidavit in support of a motion for leave to file an information charging the defendant with larceny by a bailee under section 94-2701, R.C.M. 1947 (now part of 45-6-301), which listed the alleged victims and set out three fact situations alleging the issuance of insurance settlement checks and that the victims had sometime thereafter received their portion of the settlement with or without an accounting from the defendant or had not received any portion of the settlement, was sufficient to establish probable cause given the improbability that the facts alleged resulted from innocent bookkeeping errors or clerical mistakes. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Presence of Probabilities: The Supreme Court concluded that the lower court properly relied on the presence of probabilities in finding probable cause to believe that an offense was committed by the defendant, in light of the large array of facts presented by the County Attorney when seeking leave to file the information. St. v. McGuinn, 177 M 215, 581 P2d 417 (1978).

Possession of Explosives: The District Judge, on reading the affidavit, had probable cause to believe that the defendant committed the offenses charged regarding illegal possession of explosives, despite the defendant's contentions to the contrary. St. v. McBenge, 175 M 362, 574 P2d 260 (1978).

Standard for Determination: When there was confusion by witnesses whether the defendant was seen inside a burglarized store and one witness made positive identification, probable cause was established to support an information because probable cause means that there is a probability that a crime has been committed by the person named in the warrant. A prima facie showing is not necessary as affidavits of probable cause are subject to much less rigorous standards than the admissibility of evidence. St. v. Miner, 169 M 260, 546 P2d 252 (1976).

Probable Cause Found: The certified motion for leave to file an information, which included four pages of facts discovered during the investigation of homicide, together with the autopsy report, was adequate to support the finding of probable cause. State ex rel. McKenzie v. District Court, 165 M 54, 525 P2d 1211 (1974).

Probable Cause — Burglary: The arrest of the defendant in the presence of the codefendant at the site of one burglary and the subsequent discovery in the codefendant's automobile of property stolen in another burglary earlier in the same evening did not establish probable cause for an information against the defendant for the earlier burglary. State ex rel. Wilson v. District Court, 159 M 439, 498 P2d 1217 (1972).

Warrantless Arrest: When the relators were arrested and charged with possession of dangerous drugs, the District Court did not err in granting leave to file informations against such persons since probable cause existed for the arrest of these persons without a warrant. State ex rel. Glantz v. District Court, 154 M 132, 461 P2d 193 (1969).

PRELIMINARY HEARING BYPASSED

No Right to Preliminary Hearing: When the evidence in the supporting affidavit established probable cause to the satisfaction of the District Judge, the defendant had no right to a preliminary hearing. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

Permissibility:

Leave to file an information directly, without a preliminary hearing, under the statute and Constitution, was not error or abuse of the statutory privilege to bypass the preliminary hearing when the motion to file directly was supported by an affidavit and when a preliminary hearing would clearly serve no purpose nor secure an advantage to the defendant. St. v. Johnson, 149 M 173, 424 P2d 728 (1967).

The right of the court to grant leave to file an information without previous examination by a committing magistrate is settled law in this state. It is authorized by Art. III, sec. 8, 1889 Mont. Const. (now Art. II, sec. 20, 1972 Mont. Const.), and confirmed by numerous decisions of the court, and there can be no interpretation put upon any statute which will take it away. St. v. Foot, 100 M 33, 48 P2d 1113 (1935); St. v. Vuckovich, 61 M 480, 203 P 491 (1921); St. v. Bowser, 21 M 133, 53 P 179 (1898); St. v. Brett, 16 M 360, 40 P 873 (1895).

Leave to file an information without a preliminary examination is within the sound discretion of the District Court when no statement is made to the District Court of the evidence upon which the State relies for a conviction, and a Writ of Supervisory Control to revise such discretion will be denied. State ex rel. Donovan v. District Court, 26 M 275, 67 P 943 (1902).

Law Review Articles

Initiation of Prosecution by Information—Leave of Court or Preliminary Examination?, Beck, 25 Mont. L. Rev. 135 (1963).

Collateral References

Indictment and Information *key* 1, 39, 40.

42 C.J.S. Indictments and Informations §§72, 73.

46-11-203. Time for filing information.

Commission Comments

1991 Comment: This statute retains the substance of 1987 MCA 46-11-203. The provision allowing the County Attorney to be prosecuted for failure to pursue an action has been eliminated.

Source: R.C.M. 1947, section 94-6204.

The proposed language is nearly identical except the new provision is more specific as to the time (preliminary examination or leave to file) after which the county attorney must file or risk contempt of court. The word "testimony" has been changed to "evidence" which seems to be more inclusive and would allow greater breadth in the charge than may be contained in the information.

Compiler's Comments

1991 Amendment: In (1), at beginning, substituted "a finding of probable cause following a preliminary examination or waiver of a" for "the defendant has been examined and held to answer or has waived", after "examination" deleted "as provided in chapter 10", after "granted" deleted "as provided in 46-11-201 and 46-11-202", substituted "prosecutor" for "county attorney", after "offense" deleted "for which he is held to answer", at end substituted "supported by probable cause" for "disclosed by the evidence", and deleted second sentence that read: "If the county attorney fails to file the information within the time specified, he may be found guilty of contempt and may be prosecuted for neglect of duty"; inserted (2) concerning dismissal for failure to timely file information; and made minor change in style.

Case Notes

Filing on Leave of Court More Than Thirty Days After Waiver of Preliminary Examination — Switch in Procedure for Commencing Prosecution: Although this section requires an information to be filed within 30 days after a waiver of a preliminary examination, there was no error when: (1) defendant waived preliminary examination in Justice's Court on August 27; (2) on September 27, the County Attorney filed in District Court a motion for leave to file an information; and (3) on September 28, the motion was granted and the information filed. Section 46-11-101 provides that filing an information after leave of court has been granted is an alternative to filing after a preliminary examination or waiver of a preliminary examination. The information in this case was filed within 30 days after leave to file was granted. The court rejected a claim that the state cannot switch midstream from using the preliminary examination process in Justice's Court to using the leave to file an information process in District Court. Defendant had no vested right to a particular procedure for a probable cause determination. St. v. Strobel, 268 M 129, 885 P2d 503, 51 St. Rep. 1214 (1994).

New Information Filed: When the prosecution had dismissed a first information charging receipt of stolen property and filed a new one charging both grand larceny and receipt of stolen property, the second information was timely with respect to the additional larceny count since the first information had not been amended but had been dismissed and permission had been granted to file a new information. St. v. Tritz, 164 M 344, 522 P2d 603 (1974), certiorari denied, Tritz v. St., 420 US 909 (1975).

Waiver of Irregularity:

The objection to a failure to timely file the information must be made in writing and before the demurrer or plea or it is waived. St. v. Chevigny, 48 M 382, 138 P 257 (1914).

When the County Attorney fails to comply with 46-11-203, any advantage thereof must be taken by the defendant by motion to set aside the information, and failure to so take advantage of the irregularity waives it. St. v. Lagoni, 30 M 472, 76 P 1044 (1904).

Collateral References

Indictment and Information *key* 42.

42 C.J.S. Indictments and Informations §§87 through 91.

46-11-205. Amending information as to substance or form.

Commission Comments

Source: Colorado Rule 7(e); R.C.M. 1947, sections 94-6207, 94-6413 and 94-6430.

This section [as enacted made] no substantial change in the existing law. [A 1981 amendment of subsection (1) responded to a finding of unconstitutionality in St. v. Cardwell, 187 M 370, 609 P2d 1230 (1980).]

Compiler's Comments

1991 Amendment: Deleted (1)(b) that read: "(b) When the prosecution seeks leave to amend an information as to a matter of substance, the prosecuting attorney shall file"; in (1), in first sentence after "motion", substituted "is filed in a timely manner" for "for leave to amend stating" and after "affidavit" deleted "in compliance with 46-11-201(1)"; in (2), after "If", deleted "the motion is timely and the amended information is supported by probable cause"; deleted former (3) that read: "(3) No charge may be dismissed because of a formal defect which does not tend to prejudice a substantial right of the defendant"; and made minor changes in style.

1981 Amendment: Substituted "information" for "charge"; deleted "once" following "amended" in first sentence; substituted "with leave" for "without leave" in (1)(a); and inserted (1)(b) through (1)(e) relating to what the prosecutor must file, when leave to amend will be granted, arraignment without unreasonable delay, and time for defendant to prepare for trial, respectively.

Case Notes

General 278
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GENERAL

Factual Basis for Amended Charge Same as Factual Basis for Initial Charge — Second Omnibus Hearing Not Required: Adkins was originally arraigned on a charge of intent to distribute dangerous drugs, which was predicated on Adkins' possession of dangerous drugs, and an omnibus hearing was held on the charge. The state subsequently dropped the intent to distribute charge and amended the information to include only a straight possession charge.

Adkins contended that a second omnibus hearing was required on the possession charge. The Supreme Court disagreed. The factual basis for the straight possession charge was identical to the factual basis underlying the intent to distribute charge for which an omnibus hearing had been held. Therefore, when the state amends an information to charge an alternate lesser included offense that is supported by an identical factual basis, a new omnibus hearing is not required. St. v. Adkins, 2009 MT 71, 349 M 444, 204 P3d 1 (2009).

Filing of Amended Information — New Omnibus Hearing or Persistent Felony Offender Notice Not Required: Potter asserted that because he was not notified anew that the state would seek a persistent felony offender designation following the filing of an amended information adding an additional felony charge, the trial court erred in sentencing him as a persistent felony offender. The Supreme Court disagreed. Nothing in statute requires either a new omnibus hearing or a new persistent felony offender notice upon the filing of an amended information. Potter knew for over a year that the state would seek a persistent felony offender designation, and nothing in the record indicated that he was prejudiced by the timing of the notice. The persistent felony offender designation was affirmed. St. v. Potter, 2008 MT 381, 347 M 38, 197 P3d 471 (2008).

Admissibility of Evidence Related to Tampering Charge Not Considered Improper Amendment of Information on Day of Trial: On the morning of Wilson's trial on charges of tampering with evidence in a vehicle suspected to have been used in a homicide, the state announced that part of the tampering charge would concern Wilson's concealing or tampering with a gun allegedly used in the homicide. Wilson objected because neither the information nor the affidavit used in support of the information contained any allegation that Wilson had tampered with a gun. The trial court noted that the information charged Wilson with tampering with the vehicle and its contents, so if the gun was in the vehicle, the evidence was admissible. Following conviction, Wilson argued on appeal that the trial court abused its discretion by allowing a de facto amendment of substance to the information on the day of trial by allowing the state to argue that Wilson tampered with the gun. The Supreme Court disagreed. Although amendments of substance are prohibited within 5 days of trial, amendments of form are allowed any time before a verdict. In this case, raising the issue of tampering with the gun was not an amendment of substance or form and in fact was not an amendment at all. Based on the charging document itself, Wilson should not have been surprised that the state would argue that contents of the vehicle were tampered with, including the murder weapon, and allowing argument regarding the gun was not an abuse of discretion. In addition, denial of Wilson's motion for a directed verdict based on the fact that the gun evidence was based on the uncorroborated testimony of a coconspirator also was not error because there was sufficient testimony and circumstantial evidence from sources other than the coconspirator to support the charge of tampering with the vehicle and its contents. St. v. Wilson, 2007 MT 327, 340 M 191, 172 P3d 1264 (2007), distinguishing Red Lodge v. Kennedy, 2002 MT 89, 309 M 330, 46 P3d 602 (2002).

No Violation of Defendant's Substantial Rights by Filing Amended Information on Day of Trial to Include Reference to Statutorily Mandated Sentencing Range for Repeat Offender: Gardipee was charged by information with misdemeanor partner abuse. On the morning of trial, the District Court granted the state's request to amend the information to include a reference to the statutorily mandated sentencing range for repeat offenders in 45-5-206(3) because of Gardipee's prior domestic abuse convictions. Following conviction, Gardipee appealed on grounds that allowing the amended information on the day of trial violated his substantial rights. The Supreme Court disagreed. The elements of the charged crime were not changed, and the only difference between the informations was the recognition that pursuant to the statute, a persistent offender was subject to an enhanced sentence for a third or subsequent conviction, so the amendment did not violate Gardipee's substantial rights. St. v. Gardipee, 2004 MT 250, 323 M 59, 98 P3d 305 (2004).

Substantial Evidence to Show Common Scheme Bad Check Writing: Defendant was convicted of issuing bad checks, common scheme, a felony, after issuing or delivering a total of nine checks to various businesses and individuals over the course of a year, knowing the checks would not be paid by his bank. The court found there was sufficient evidence to support conviction as there was substantial evidence of defendant's wrongdoing. St. v. Fleming, 225 M 48, 730 P2d 1178, 44 St. Rep. 31 (1987).

Court Not Required to Give Notice Before Accepting Amended Information: Appellant appealed from conviction of intimidation and alleged that court erred in accepting amended information. The Supreme Court held that where the amended information was accepted on December 6, 1984, and trial began January 28, 1985, appellant had a reasonable amount of time to prepare for trial on the amended information, which did not differ materially or state a

separate charge from the original information. Neither the statute nor due process requires the court to give a defendant notice before the amended information may be accepted by the court. St. v. Lance, 222 M 92, 721 P2d 1258, 43 St. Rep. 1086 (1986).

Trial Under Original Information Following Dismissal of Amended Information: Appellant alleged that the filing of an amended information left the original information of no effect. He argued that when the amended information was dismissed there was no information then existing and that he was thereafter illegally detained. The Supreme Court disagreed, saying then when an unauthorized or otherwise improperly amended information is quashed or dismissed, further proceedings may be had on the original information. St. v. Cardwell, 191 M 539, 625 P2d 553, 38 St. Rep. 451 (1981), following St. v. Thompson, 392 S. W. 2d 617 (Mo. 1965).

Constitutionality: The term "prosecuted" used in Art. II, sec. 20, Mont. Const., means to institute and carry forward. Section 46-11-403(1) (renumbered 46-11-205) as it read prior to amendment in 1981 was unconstitutional under this interpretation of "prosecute" because it allowed amendments without leave of court in direct conflict with the constitutional provision. St. v. Cardwell, 187 M 370, 609 P2d 1230 (1980).

Sufficiency of Charge: The fact that an amendment was in fact made does not affect the sufficiency of the information if it was sufficient before the addition was made. St. v. Davis, 141 M 197, 376 P2d 727 (1962).

Waiver of Objection: When, after a plea of not guilty, the County Attorney asked permission to amend the information and counsel for the defendant stated there was no objection, any objection to the amendment of the information to include a prior conviction was waived. State ex rel. Treat v. District Court, 122 M 249, 200 P2d 248 (1948).

When Insufficiency of Information Does Not Warrant Dismissal: Insufficiency of the information does not warrant a dismissal of the action if in the opinion of the court the objection may be avoided by an amended information. State ex rel. Freebourn v. District Court, 105 M 77, 69 P2d 748 (1937).

SUBSTANTIVE AMENDMENT

Addition of New Stalking Incidents to Original Complaint — Acceptance of Substantive Amended Complaint on Day of Trial — New Trial Warranted: Kennedy was charged with a stalking incident on October 5, 1999, and was convicted in City Court. Kennedy appealed to District Court for a trial de novo. No new information or complaint was filed in District Court to reiterate the charge, but on the morning of trial, the City Attorney filed an amended complaint alleging six specific incidents of stalking, including the October 5 incident, that had occurred between December 1997 and October 1999. Kennedy moved to dismiss the stalking charge on grounds that the city failed to state the offense of repeated stalking behavior in its complaint, while the city contended that evidence of the other alleged criminal stalking offenses constituted a continuing course of conduct within the meaning of 45-1-205. The District Court denied Kennedy's motion to dismiss and allowed the amended complaint over Kennedy's objection. The trial proceeded as scheduled, and Kennedy was convicted. On appeal, the Supreme Court noted that an information must reasonably apprise the accused of the charges in order to provide an opportunity to prepare and present a defense and that alteration of a complaint is allowed at any time prior to verdict, but that acceptance of a substantive amendment is prohibited within 5 days of trial under this section. An amendment of form is one that charges the same crime, and the elements of the crime and the proof required remain the same. A substantive amendment alters the nature of the offense, the essential elements of the crime, the proofs, and the defenses. Here, the amended complaint alleging several new episodes of stalking, together with the allegation that all the incidents formed a continuous course of conduct dating back over 2 years, constituted a substantive change that added new proofs to the prosecution's burden and required Kennedy to prepare new defenses. The proposed substantive amendment was not timely filed at least 5 days before trial as required, nor did the District Court follow the procedures for motioning and rearraignment. Thus the District Court abused its discretion by accepting the amended complaint on the morning of trial, and the case was reversed for a new trial. Red Lodge v. Kennedy, 2002 MT 89, 309 M 330, 46 P3d 602 (2002).

Amending Information Not Prosecutorial Vindictiveness: Mahoney moved to withdraw his guilty plea on the basis that the prosecution's amendment of the information (under the former statute) to charge him with attempted rape and attempted homicide rather than aggravated assault constituted prosecutorial vindictiveness. The Supreme Court noted that the prosecution had moved to amend the information well before the trial date and that the defendant had not objected at that time and had subsequently pleaded guilty. The Supreme Court held that amending the information when the facts of the case supported more than one crime was a

matter of prosecutorial discretion and further that Mahoney was limited to objecting to the voluntariness of his plea. St. v. Mahoney, 264 M 89, 870 P2d 65, 51 St. Rep. 160 (1994). See also St. v. Walsh, 281 M 70, 931 P2d 42, 54 St. Rep. 64 (1997).

Arson Count: The amendment of an arson count on the opening day of the trial to charge the defendant under (1)(b) rather than (1)(a) of 45-6-103 was substantive and therefore not allowable. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

What Constitutes Different Offense: When the defendant was charged under one subsection of the aggravated assault statute and had pleaded not guilty, amendment of the charge to allege an offense under another subsection with different elements constitutes a different offense. St. v. Brown, 172 M 41, 560 P2d 533 (1976).

Charging a Different Offense, Destroying Alibi Defense: When the defendant pleaded not guilty, prepared his alibi defense, and furnished the names of alibi witnesses, to allow the State to change the date, the elements of the crime, and the drug involved would destroy the defense and would in substance charge a different offense. The court correctly refused to grant a motion to amend the information. St. v. Tropf, 166 M 79, 530 P2d 1158 (1975).

Filing of Second Information: Where defendant did not move to dismiss or demur to second information which was filed after defendant had pleaded to first information, and thus was improperly filed under this section as it read at that time, but rather entered plea to second information and moved to dismiss first information, and where defendant entered no objection to second information at subsequent trial and did not question the information on appeal, defendant waived any right he may have had to object to second information as improper amendment to first information. Gransberry v. St., 149 M 158, 423 P2d 853 (1967).

Adding Charge of Prior Conviction:

When the State on the day of trial filed an amended information changing the charge from robbery to robbery and a prior conviction of forgery, and the defendant was given no opportunity to either admit or deny the previous conviction, such amendment was substantive, increased the minimum penalty, and was reversible error. St. v. Knight, 143 M 27, 387 P2d 22 (1963).

There was no error in permitting the information to be amended to allege a prior conviction when there was no objection by the defendant and the defendant's attorney consented to its filing. State ex rel. Treat v. District Court, 122 M 249, 200 P2d 248 (1948).

Under a former statute it was held that when the defendant was charged by information with a misdemeanor (liquor violation) and some 4 months after a plea of not guilty the County Attorney was permitted over objection to amend the information by adding a charge of prior conviction, thereby changing the offense from a misdemeanor to a felony, the action of the District Court in allowing the amendment constituted error. St. v. Fisher, 79 M 46, 254 P 872 (1927).

AMENDMENT AS TO FORM

No Prejudice in Amendment of Form but Not Substance of Information: The trial court allowed the state to amend an information 11 months after leave was granted to file the information. Defendant contended that the amendment was untimely, implicitly suggesting that the changes to the information were substantive and not changes of form. The Supreme Court disagreed. The amendment merely changed the date ranges of three of the four counts against defendant by a few months. The same crimes were charged, the elements and proof required did not change, and defendant was informed of the charges. Thus, the amendment was a change of form rather than a change of substance, and defendant was not prejudiced in any way by the change, so the trial court did not err in allowing the amendment. St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004).

Amendment Charging Possession of Different Dangerous Drug One of Form Rather Than Substance: The state's original information charged Clark with two counts of possession of methamphetamine. The state later filed a motion to amend the information to consolidate the two counts of possession and to change the drug identified from methamphetamine to amphetamine. Clark moved to set aside the verdict and dismiss the amended information on grounds that the court failed to arraign on the charges contained in the amended information. The Supreme Court concluded that the amendment was one of form only. The criminal offense and the elements that the state was required to prove remained the same. Following St. v. Sor-Lokken, 247 M 343, 805 P2d 1367 (1991), arraignment on the amended information was not required because the information was amended in form only, not in substance. St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998).

Names of Offenses Correctly Cited, but Wrong Statutes Cited — Proper to Refuse to Dismiss Charges: Three charges against defendant erroneously cited the penalty statutes instead of the

statutes containing the substantive offense. The lower court did not err in allowing the state to amend the cites after the trial started and in refusing to dismiss the charges. The charges correctly named the offenses and clearly set forth the acts with which defendant was charged. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996).

Amendment After Case in Chief Permitted — Change in Form, Not Substance: Allen was originally charged with aggravated assault against Evans and assault against D.E., a minor. Prior to trial, the state charged Allen by amended information with aggravated burglary, aggravated assault against Evans, attempted deliberate homicide against Evans, and assault against D.E. Allen objected to the amended information because it stated that Allen remained in Evans's home and assaulted both Evans and D.E., but it did not refer to a separate offense as grounds for an aggravated burglary charge. After its case in chief, the state again amended the information, making the assault against Evans the basis for the aggravated assault and burglary charges, while the assault against D.E. was the additional charge forming the basis of the charge of aggravated burglary. Allen contended that the amendment constituted a substantive change because it changed the nature of the charge and lowered the state's burden of proof. The Supreme Court held that the amendment was allowable because it was a change in form rather than substance. Although the changes were made after the state's case in chief, Allen was charged with the same crime, the elements remained the same, the proof remained the same, and Allen was fully informed of the charges against him and was not prejudiced by the amendments. St. v. Allen, 278 M 326, 925 P2d 470, 53 St. Rep. 935 (1996), following St. v. Matson, 227 M 36, 736 P2d 971 (1987), and St. v. Sor-Lokken, 247 M 343, 805 P2d 1367 (1991).

Failure to Arraign on Amended Information — No Error When Amendment Not Affecting Original Charges: Defendant contended the District Court erred when it accepted an information amended to add a reference to the requisite mental states but did not arraign him on the amended information. The amendment was in form only and did not make substantial changes in the charges set out in the original information. Failure to arraign defendant on charges set forth in the amended information did not constitute reversible error. St. v. Cameron, 253 M 95, 830 P2d 1284, 49 St. Rep. 150 (1992).

Amendment of Information as to Form — Addition of Witnesses — Arraignment Not Necessary: An original information charged defendant with sexual assault and incest over a continuous period of time. Three months before trial, the state amended the information to add witnesses and to exclude the period of time the victim lived outside defendant's home. The amendment was one of form and not substance, and expanding the witness list did not prejudice the substantial rights of defendant. St. v. Sor-Lokken, 247 M 343, 805 P2d 1367, 48 St. Rep. 142 (1991).

Amended Information Not Prejudicial — Change in Form, Not Substance: An amendment to the information was properly allowed in adding the word "serious" before the phrase "bodily injury" in a charge of aggravated assault. The amendment was one of form and not of substance, no additional or different offense was charged by the amendment, and the amendment did not prejudice the defendant's substantial rights or change the nature of the offense, elements of the crime, or burden of proof. St. v. Matson, 227 M 36, 736 P2d 971, 44 St. Rep. 874 (1987).

Incorrect Statutory Reference — Charge Not Invalid: A complaint which used the statutory language of 61-8-401 to describe the offense but which listed a citation to 61-8-406 was not made defective by the incorrect reference since the complaint adequately described and gave notice of the offense. The District Court did not err in granting a motion to amend the complaint to correct the statutory reference. St. v. Handy, 221 M 365, 719 P2d 766, 43 St. Rep. 897 (1986), followed in St. v. Moehr, 227 M 253, 738 P2d 499, 44 St. Rep. 1058 (1987).

District Court's Power to Amend Procedural Defect: The District Court has the power to allow the filing of an amended application and affidavit to remedy omissions, establishing probable cause to believe an offense has been committed, in the original affidavit since the defect was a procedural matter and not a substantive issue involving the jurisdiction of the District Court. The District Court's power to amend is essential to efficient administration of justice and the basic right of the defendant to prepare his own defense. St. v. Emerson, 169 M 284, 546 P2d 509 (1976).

Amendment Proper — Incest: The amendment of an information charging the defendant with incest by changing "fornication" to "adultery" was not a substantial change in the charge and only touched a matter of form. Whether the defendant was married or unmarried at the time is not a material ingredient of the offense. St. v. Kuntz, 130 M 126, 295 P2d 707 (1956).

Clerical Error: A typographical error in the information was not fatal. St. v. Polich, 70 M 523, 226 P 519 (1924).

Change of "Malicious Destruction" to "Malicious Burning": An information charging "the malicious destruction of property" may properly be amended by substituting the word "burning" for the word "destruction". St. v. Sieff, 54 M 165, 168 P 524 (1917).

Technical Defect: Under former law an information need not contain a specific allegation that the prosecution is conducted in the name and by the authority of the State, as required by the Montana Constitution, when it appears from the record that it is so conducted, is in the proper form, and is otherwise sufficient. St. v. Barry, 45 M 582, 124 P 774 (1912).

Language Defects:

Stating facts charging a crime in the form of participial clauses does not render an information abortive. However, the proper way to make the charge is by direct allegation. St. v. Pemberton, 39 M 530, 104 P 556 (1909).

An information is not objectionable on the ground that it does not contain a statement of facts constituting the offense in ordinary and concise language or that it is not direct and certain in its statements. St. v. Phillips, 36 M 112, 92 P 299 (1907).

Technical Error in Pleading Prior Conviction: A technical error in pleading a prior conviction in another state will not work a reversal if the punishment imposed does not exceed the proper limit. St. v. Paisley, 36 M 237, 92 P 566 (1907).

Misspelling: The information was not fatally defective because of the mere misspelling of a word. St. v. Lu Sing, 34 M 31, 85 P 521 (1906).

PREJUDICE OF SUBSTANTIAL RIGHT

Failure of State to Comply With Statutory Requirements Regarding Amendment of Information — Harmless Error: Kern was charged with one count of felony sexual assault, three counts of felony assault, and two counts of misdemeanor child endangerment. Subsequently, the state amended the information three times, ultimately reducing the charges to a single count of felony sexual assault and one count of misdemeanor child endangerment. Kern alleged that the state failed to comply with the requirements of this section each time that the information was amended because, despite repeated objections, the state never filed a motion in writing stating the nature of the proposed amendment but chose to orally request leave to file each amended information. The Supreme Court confirmed that the state failed to adhere to the procedural requirements for amending the information but concluded that the state's inattention to procedural detail did not amount to reversible error. The nature of the offenses did not change despite the repeated amendments, and the essential elements of the crimes, the proofs required, and the defenses remained the same; thus, the amendments were of form rather than of substance. Kern was made aware, although not in writing, each time that the state undertook to amend the information, so Kern's substantial rights were not prejudiced by the state's failure to fully comply with this section. St. v. Kern, 2003 MT 77, 315 M 22, 67 P3d 272 (2003).

Amendment Charging Greater Offense — Procedural Safeguards Not Denied: Appealing her conviction for deliberate homicide and aggravated assault, the defendant claimed that the information, which first had charged her with mitigated deliberate homicide, was amended in violation of this section and both the state and federal constitutions. The allegation of error was rejected for three reasons. First, the appellant had relied on a case which construed this section before its 1977 amendment; the shootings had occurred in 1978 and the 1977 amendment removed the limitation construed by the case and argued by appellant. Second, the claim that the burden had been shifted unconstitutionally to the defendant to prove an element of mitigated deliberate homicide was untenable because one justification for the motion to amend the information was the fact that the defendant had failed to supply the State with the names of witnesses who would justify retaining the lesser offense; when it allows affirmative defenses at all, the State may regulate the burden of producing evidence and the burden of persuasion as long as it does not thereby shift to the defendant its own burden of proof as to each of the elements of the offense beyond a reasonable doubt. Third, the argument that the 1980 Cardwell decision should be applied retroactively was rejected. Cardwell sets out procedural safeguards of the defendant's constitutional rights when an information is amended. Although the statute on its face did not require leave of the trial court to file an amended information, [a 1981 amendment required a substantive amendment to be with leave of court] such leave was obtained, thereby substantially complying with the procedural requirements of Cardwell. It was noted that the defendant had adequate notice and time to prepare her defense and that the State had the burden of proving the same elements under both homicide charges in any event. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

Reliance on Unconstitutional Statute — Reversal Not Automatic — Prejudice Required: The defendant was charged with aiding and abetting in the commission of a burglary. Six days before

trial an amended information was filed pursuant to 46-11-403(1) (renumbered 46-11-205) charging the defendant with burglary. Since that time, 46-11-403(1) (renumbered 46-11-205) has been declared unconstitutional as it allows a substantive amendment without leave of court. On review the Supreme Court said that it will not presume that the use of 46-11-403(1) (renumbered 46-11-205) is per se prejudicial. The requisite prejudice must be shown. It is clear from the record that the defendant received every procedural consideration concerning notice and arraignment and that he was afforded sufficient time to prepare his legal defense against the amended information. The use of 46-11-403 (renumbered 46-11-205) in no way prejudiced defendant's case or materially interfered with his rights to a fair trial. St. v. Olsen, 189 M 43, 614 P2d 1061 (1980). [A 1981 amendment to 46-11-403(1) (renumbered 46-11-205) required substantive amendments to be with leave of the court.]

Jurisdiction of District Court — Defective Affidavit of Probable Cause: The failure of the Commissioner of Campaign Finances and Practices (now Commissioner of Political Practices) to recite, in an affidavit supporting a request for leave to initiate prosecution by information, the fact that the County Attorney had waived under 13-37-124 his right to prosecute the defendant was not a jurisdictional defect, and the court improperly granted the defendant's motion to dismiss. Such a defect is a procedural matter, not a substantive one, and does not require dismissal of the charge. St. v. Matthews, 183 M 405, 600 P2d 188 (1979).

When Amendment Allowed After Plea: When an amendment of the information is desired subsequent to a defendant pleading, it is only allowed as to matters of form and only when no substantial right of the defendant is prejudiced. St. v. Brown, 172 M 41, 560 P2d 533 (1976).

Failure to File Affidavit: The failure of the County Attorney to support a request for a direct information with an accompanying affidavit, contrary to 46-11-201, was a procedural matter that did not affect the substantial rights of the defendant. St. v. Logan, 156 M 48, 473 P2d 833 (1970).

Offense Incorrectly Named but Correctly Described: The general rule is that when the facts, acts, and circumstances are set forth with sufficient certainty to constitute an offense it is not a fatal defect that the complaint gives the offense an erroneous name. St. v. Schnell, 107 M 579, 88 P2d 19 (1939).

Amendment When New Trial Granted: When a new trial was granted after the defendant was convicted, the court held that the information could be amended by leave of court to charge the same offense without violating any right of the defendant and without the right of defendant to plead former jeopardy. St. v. Aus, 105 M 82, 69 P2d 584 (1932).

Defective Information:

The Supreme Court will not reverse a judgment of conviction on account of technical errors or defects in the information, when the defendant was fully advised of the nature of the charge against him to enable him to prepare to meet that charge and his substantial rights were not affected by the defect. St. v. Wehr, 57 M 469, 188 P 930 (1920).

An information charging an attempt to obtain money by false pretenses, though defective in form and containing immaterial averments, is sufficient to sustain a conviction when it is apparent that the defendant has suffered no prejudice. St. v. Phillips, 36 M 112, 92 P 299 (1907).

Sufficiency of Charge — Variance in Name of Victim:

A mistake in the name of the person injured is not to be considered material if the injury is so described in other respects as to identify it. St. v. Moxley, 41 M 402, 110 P 83 (1910).

A variance between the name of the victim in the information and the actual name is fatal. St. v. Lee, 33 M 203, 83 P 223 (1905).

Sufficiency of Charge — Forgery: An information charging forgery of a promissory note, although containing superfluous averments, was not fatally defective. St. v. Mitten, 36 M 376, 92 P 969 (1907).

Sufficiency of Charge — False Pretenses: An information charging an attempt to obtain money by false pretenses, though defective in form and containing immaterial averments, is sufficient to sustain a conviction when it is apparent that the defendant has suffered no prejudice. St. v. Phillips, 36 M 112, 92 P 299 (1907).

Name of Victim — Robbery: An information for the crime of robbery may be amended at the close of the testimony for the State so as to change the name of the person from whom it is alleged the property was feloniously taken. St. v. Oliver, 20 M 318, 50 P 1018 (1897).

Collateral References

Indictment and Information *key* 160, 161(8).

42 C.J.S. Indictments and Informations §§265 through 268.

41 Am. Jur. 2d Indictments and Informations §§160 through 181.

Circumstances, power of court to make or permit amendment of indictment with respect to allegations as to nature of activity, happening or. 17 ALR 3d 1285.

Prior convictions, power of court to make or permit amendment of indictment with respect to allegations as to. 17 ALR 3d 1265.

Criminal intent or scienter, power of court to make or permit amendment of indictment with respect to allegations as to. 16 ALR 3d 1093.

Money, power of court to make or permit amendment of indictment with respect to allegations as to. 16 ALR 3d 1076.

Name, status, or description of persons or organizations, power of court to make or permit amendment of indictment with respect to allegations as to. 14 ALR 3d 1358.

Place, power of court to make or permit amendment of indictment with respect to allegations as to. 14 ALR 3d 1335.

Time, power of court to make or permit amendment of indictment with respect to allegations as to. 14 ALR 3d 1297.

Part 3
Grand Jury

Part Commission Comments

1991 Part Comments: Notwithstanding negative connotations to the use of the grand jury as a method of filing an indictment, this option was retained. Two substantive changes were made. The judge summoning the grand jury must specifically delineate the matters to be considered, and the County Attorney has been given more control of the investigation. The remaining changes are in format and are intended to clarify the process.

Part Compiler's Comments

Section Not Codified: Section 95-1401, R.C.M. 1947, was not codified in the MCA because it is redundant with 3-15-602 and 46-11-331(2). This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 196, L. 1967, as amended by sec. 1, Ch. 3, L. 1973.

Part Case Notes

Immunity of Witness Before Grand Jury: Transactional immunity from prosecution provisions of 46-15-311 (renumbered 46-15-331 in 1985) apply to proceedings before grand juries because the grand jury is a judicial inquisitorial body. Kelly v. Grand Jury, 170 M 284, 552 P2d 1399 (1976).

Implied Power to Appoint Special Prosecutor: When the County Attorney is disqualified from acting as prosecutor because of being one of the subjects of a grand jury investigation, in the exercise of legislative express powers, the District Judge must have the implied power to appoint a qualified special prosecutor, otherwise grand jury proceedings in such a case could be brought to a halt and the entire grand jury investigation frustrated. State ex rel. Forsythe v. Coate, 169 M 384, 546 P2d 1060 (1976).

Anonymous Witnesses on Indictment: Under former law, if a person went to trial under an indictment on which the witnesses' names were designated as Richard Roe and John Doe and was convicted, the Supreme Court was required to sustain the conviction if possible and the burden was on the defendant to show prejudice. State ex rel. Porter v. District Court, 124 M 249, 220 P2d 1035 (1950).

46-11-301. Summoning grand jury.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-11-301. The statute adopts the 1987 statute, with the exception of replacing the term "necessary" with the standard phrase "to be in the public interest" that is found in Rule 6(a) of the Federal Rules of Criminal Procedure.

Source: R.C.M. 1947, sections 94-6301 and 94-6302.

The provision merely implements the portion of Article III, section 8 of the [1889] Montana Constitution [slightly modified in Art. II, sec. 20, 1972 Mont. Const.] dealing with grand juries.

Alternate jurors are provided for as a safeguard so that the grand jury does not have to be dismissed in the middle of an investigation, if one of the regular grand jurors gets sick or for some other reason has to miss some of the proceedings. It is intended that at least seven jurors must be present during the entire investigation before a grand jury can return a valid indictment. If one of the regular jurors has missed part of the grand jury proceedings he shall be disqualified and dismissed and an alternate juror will be substituted by the judge. The same general procedure may be followed as is described in [25-7-210] for the selection of alternate trial jurors. In

Montana a grand jury is normally summoned to consider particular problems and can be reconstituted to pursue another case.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1991 Amendment: In (1), after "grand jury", substituted "to be in the public interest and orders the grand jury to be drawn or summoned" for "necessary and shall so order"; and made minor changes in style.

Case Notes

Review by Supreme Court: The judicial authority of the District Court to empanel a grand jury is discretionary, but it is not an absolute, unbridled discretion. When the District Court abuses its discretion the Supreme Court may review the decision and reverse it. State ex rel. Woodahl v. District Court, 166 M 31, 530 P2d 780 (1975).

Collateral References

Grand Jury *key* 3, 9.

38A C.J.S. Grand Juries §§46 through 50.

38 Am. Jur. 2d Grand Jury §7, et seq.

Substitution or addition of jurors: validity of indictment as affected by substitution or addition of grand jurors after commencement of investigation. 2 ALR 4th 980.

46-11-302. Challenges to grand jury or grand jurors.

Commission Comments

1991 Comment: This statute is essentially a restatement of 1987 MCA 46-11-302. The introductory clause "The state" has been replaced with "The county attorney or attorney general". This amendment clarifies the fact that challenges are an option belonging to the prosecutor. The federal rule provision that allows a defendant in custody to challenge the panel or a juror on the same basis had been rejected. See Rule 6(b)(1), Fed. R. Crim. P.

A limiting phrase from the federal rules that permits challenges only until the jury is sworn has been adopted. The failure to challenge is not a waiver of any other potential objection at a later date.

The provision dealing with excusing jurors has been retained in subsection (2). The subsection parallels Rule 6(g) of the Federal Rules of Criminal Procedure.

Subsection (3) retains the substance of 1987 MCA 46-11-302(2). A minor change has been made to conform the provision with the statute format.

Source: Federal Rules of Criminal Procedure[, Rule] 6(b)(1) and (2).

The reasons for challenging an individual juror are not specifically enumerated. The change is consistent with the section on the challenge of trial jurors. The reasons for challenging a juror will remain the same as at present plus any other valid reasons the ingenuity of the challenger may produce. The motion to dismiss is available to persons other than the state. Both sides have the right to object.

Compiler's Comments

1993 Amendment: Chapter 262 at beginning of (1) substituted "prosecutor" for "county attorney or attorney general".

1991 Amendment: In (1), at beginning of first sentence, substituted "county attorney or attorney general" for "state" and near beginning of second sentence inserted "must be made before the administration of the oath of the jurors"; in (3), after "pursuant to", substituted "this part" for "46-11-303"; and made minor changes in style.

Collateral References

Grand Jury *key* 17, 18.

38A C.J.S. Grand Juries §§65 through 72.

38 Am. Jur. 2d Grand Jury §20, et seq.

46-11-303. Lead juror.

Commission Comments

Source: Federal Rules of Criminal Procedure[, Rule] 6(c).

No substantive change.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1991 Amendment: In two places, before "court", inserted "district"; and made minor changes in style.

Collateral References

Grand Jury *key* 21, 22.

38A C.J.S. Grand Juries §§61 through 64.

38 Am. Jur. 2d Grand Jury §17.

Impeachment of verdict by juror's evidence that he was coerced or intimidated by fellow juror. 39 ALR 4th 800.

46-11-304. Appointing special prosecutor.

Commission Comments

1991 Comment: This statute controls those instances in which the Attorney General or County Attorney is the subject of a grand jury investigation. The statute has no counterpart in either the Federal Rules of Criminal Procedure or the Uniform Rules of Criminal Procedure.

46-11-307. Closed hearing.

Commission Comments

1991 Comment: This statute adopts a provision from Rule 6(e)(5) of the Federal Rules of Criminal Procedure. The 1987 code provided that the grand jury retire to a private room to conduct its inquiry. See 1987 MCA 46-11-312(1). This statute makes it clear that the grand jury proceeding will be closed.

The statute allows the hearing in a contempt proceeding to be open if the proceeding is open as a matter of right. An open hearing for a contempt citation, however, must be requested by the defendant and may still be restricted. See Levine v. U.S., 362 US 610 (1960).

46-11-308. Who may be present.

Commission Comments

1991 Comment: This statute is modeled after Rule 6(d) of the Federal Rules of Criminal Procedure, concerning who may be present before the grand jury. This statute specifically identifies those persons entitled to appear before the grand jury. The statute also clarifies that only the jurors may be present during deliberations.

46-11-310. Duties of grand jurors.

Commission Comments

1991 Comment: This statute represents a substantial departure from 1987 MCA 46-11-312. This provision establishes a broadly stated rule that governs duties of the grand jury. The laundry list contained in 1987 MCA 46-11-312(3) is eliminated in favor of a more specific charge by the judge, and the statute limits the grand jury to those designated matters presented by the prosecutor that are consistent with or developed in the proceedings.

The statute eliminates the grand jury's authority to hire an expert when necessary. See 1987 MCA 46-11-312(5). If the grand jury feels that an expert is necessary, it may petition the court for such assistance.

It is not the intent of this statute to impede the ability of a grand jury to conduct an investigation. The Commission recognized the grand jury's responsibility to thoroughly investigate the matters before it. See In re Secret Grand Jury Inquiry, 170 Mont. 354 (1976). The intent is only to restrict the grand jury proceedings to those matters in which the grand jury is charged.

46-11-311. Charge to grand jury.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-11-311. The statute narrows the authority of the grand jury to investigate any potential offense of which it is aware. It requires the judge to inform the grand jury of the matters it may consider.

In addition, the statute allows the prosecutor to bring additional matters before the grand jury that are consistent with the original charge or that are developed during the proceedings. This authority is reserved for the prosecutor who will, in almost any event, assist the grand jury throughout the investigation.

Commission Comment Not Divided: This section is a recodification of part of section 95-1404, R.C.M. 1947. Sections 46-11-312 (now repealed) and 46-11-318 are also derived from section 95-1404. The commission comments to section 95-1404 are printed in their entirety under 46-11-311.

Source: California Penal Code, sections 914 and 915.

This provision is substantially the same as the existing law except the grand jury is allowed to function if their business has not been completed even though the court has adjourned.

Compiler's Comments

1991 Amendment: In second sentence, before "court", inserted "district", after "shall" substituted "instruct the jury" for "give the grand jurors such information as it deems proper or as is required by law", and at end substituted "the matters that jurors may consider" for "as to any charges of public offenses known to the court and likely to come before the grand jury" and inserted last sentence concerning additional matters developed during proceedings; and made minor changes in style.

Case Notes

Supervision of Grand Jury by Court: The District Court has limited power over a grand jury. Once called, it is not subject to control except when it exceeds the scope of statutes or performs unconstitutional acts. In re Secret Grand Jury, 170 M 354, 553 P2d 987 (1976).

Collateral References

Grand Jury *key* 23.

38A C.J.S. Grand Juries §§85 through 87; 42 C.J.S. Indictments and Informations §§33 through 39.

38 Am. Jur. 2d Grand Jury §18.

46-11-313. Subpoena of witnesses.

Commission Comments

1991 Comment: This statute preserves the authority regarding who may issue a subpoena contained in 1987 MCA 46-11-313(1). Subsections (2) and (3) make the general procedure for use of subpoenas applicable to establish uniform provisions governing criminal procedure.

Source: California Penal Code, section 939.2.

This section outlines the use of subpoenas in grand jury investigation and the procedure for their issuance.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1991 Amendment: In (1) deleted last sentence that read: "The subpoena may be directed to witnesses in the state in support of the prosecution, those witnesses whose testimony, in the opinion of the issuer, is material in an investigation before the grand jury, and such other witnesses as the grand jury may direct"; inserted (2) concerning fees and mileage of witnesses; and inserted (3) concerning applicability of subpoenas in criminal actions.

Case Notes

Quashing Grand Jury Subpoena: A District Court may not interfere with a grand jury's subpoena power except when: (1) the subpoena duces tecum is overbroad; (2) the subpoena requires self-incrimination; (3) there is a clear case of grossly abusive conduct; (4) the grand jury's investigation goes beyond the scope set forth in the court's charge; or (5) if the court did not interfere, the result would be an abuse of process. In re Secret Grand Jury, 170 M 354, 553 P2d 987 (1976).

46-11-314. Reception of evidence.

Commission Comments

1991 Comment: This statute is a restatement of 1987 MCA 46-11-314(1). Any reference to the discovery provisions of this title has been deleted. The substance of the statute, however, is retained, and the statute should not cause any change in established procedure.

Subsection (2) of 1987 MCA 46-14-314 has not been retained. The determination was made that this provision was unnecessary. The deletion is not intended to result in a change in established procedure. The Commission recognized that revealing exculpatory evidence and allowing the grand jury to hear evidence from the defendant are basic principles that need not be restated in this statute.

Commission Comment Not Divided: This section is a recodification of part of section 95-1408, R.C.M. 1947. Section 46-11-331 is also derived from section 95-1408. The commission comments to section 95-1408 are printed in their entirety under 46-11-314.

Source: California Penal Code, sections 939.6, 939.7 and 939.8.

[Section 46-11-314(1)] is substantially the same as the existing law except that it does not include a provision for hearing depositions. The majority of states that have this provision have held that the requirement of "legal evidence" is not mandatory.

Compiler's Comments

1991 Amendment: After "legal" deleted "documentary" and at end deleted "in the cases mentioned in chapter 15, part 2, of this title"; and deleted (2) that read: "(2) The grand jury is not

required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it. If it has reason to believe other evidence within its reach will explain away the charge, it shall order the evidence to be produced and for that purpose may require the county attorney to issue process for witnesses".

Case Notes

Off-the-Record Statements — Prosecutorial Misconduct: Allegations of improper statements by an Assistant Attorney General and prosecutorial misconduct do not reach the merits of the charges and are a weak basis for seeking dismissal of the charges. St. v. Scanlon, 33 St. Rep. 1355 (1976), replaced by opinion in 174 M 139, 569 P2d 368 (1977).

Collateral References

Disgrace: privilege of witness to refuse to give answers tending to disgrace or degrade him or his family. 88 ALR 3d 304.

Refusal to answer questions before state grand jury as direct contempt of court. 69 ALR 3d 501.

Power of court to control evidence or witnesses going before grand jury. 52 ALR 3d 1316.

Incompetent witness: validity of indictment where grand jury heard incompetent witness. 39 ALR 3d 1064.

Hearsay: admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction. 37 ALR 3d 612.

46-11-315. Advice and assistance to grand jury.

Commission Comments

1991 Comment: This statute retains the key provisions of 1987 MCA 46-11-315. The statute changes the code to clarify the provisions relating to advice and assistance to the grand jury.

Subsection (1) establishes a single rule describing when a judge may offer advice to the grand jury. Unless advice is sought by the grand jury, the judge may not guide or advise the grand jury proceedings.

Subsection (2) provides a distinct rule on when the prosecutor may advise or otherwise assist the grand jury. The subsection preserves the first sentence of 1987 MCA 46-11-315(2). The prosecutor is referred to in this statute in order to recognize the provisions of 46-11-304, which authorize appointment of a special prosecutor when the County Attorney is under investigation.

Subsection (3) provides that the prosecutor may employ, with the approval of the court, certain individuals to assist or advise the grand jury. The court must also approve the compensation being paid to such individuals. Under 1987 MCA 46-11-315(4), the court had control of the compensation for an interpreter, but this control has now been extended to all persons specially employed to assist or advise the grand jury. This change was made to effect controls over the cost of a grand jury.

This statute does not expressly provide for the grand juror's authority to request assistance, but the ability to do so remains unchanged under this statute. The prosecutor had the discretion to employ assistance of certain persons. See 1987 MCA 46-11-315(3).

Commission Comment Not Divided: This section is a recodification of part of section 95-1406, R.C.M. 1947. Section 46-11-316 is also derived from section 95-1406. The commission comments to section 95-1406 are printed in their entirety under 46-11-315.

Source: California Penal Code, sections 934, 935, 936, 937 and 938.1 and Kentucky Rules of Criminal Procedure, Rule 5.16.

[Section 46-11-315(1)] is substantially the same as existing law. [Section 46-11-315(2)] is new and provides a means for commencing charges against a county attorney. [Section 46-11-316] requires preparation and delivery to an indicted defendant of a copy of the transcript of testimony to enable him to know upon what the charge against him is founded and to prepare his defense.

Compiler's Comments

1991 Amendment: In (1), at end of first sentence, substituted "the judge" for "the court or the judge thereof, the attorney general, or the county attorney"; in (2), at beginning, substituted "prosecutor" for "county attorney or the attorney general" and deleted second and third sentences that read: "When a charge against or involving the county attorney, deputy county attorney, or anyone employed by or connected with the office of the county attorney is being investigated by the grand jury, the county attorney, deputy county attorney, or all or any one or more of them shall not be allowed to be present in an official capacity before the grand jury when the charge is being investigated. They or he shall only be present while a witness and after appearing as a witness shall leave the place where the grand jury is holding session"; in (3)

substituted present language concerning employment of certain people for former (3) that read: "(3) When requested to do so by the grand jury of any county, the attorney general or county attorney may employ special counsel and investigators who shall investigate and present the evidence acquired in such investigation to the grand jury"; deleted (4) that read: "(4) The grand jury or county attorney may require by subpoena the attendance of any person before the grand jury as interpreter. While his services are necessary, the interpreter may be present at the examination of witnesses before the grand jury. The compensation for the services of the interpreter constitutes a charge against the county and shall be fixed by the grand jury in an amount to be approved by the court. It shall be paid out of the county treasury on a warrant of the county auditor upon an order of the judge of the district court"; and made minor changes in style.

Case Notes

Off-the-Record Statements — Prosecutorial Misconduct: Allegations of improper statements by an Assistant Attorney General and prosecutorial misconduct do not reach the merits of the charges and are a weak basis for seeking dismissal of the charges. St. v. Scanlon, 33 St. Rep. 1355 (1976), replaced by opinion in 174 M 139, 569 P2d 368 (1977).

Delegation to Special Prosecutor: The County Attorney cannot delegate to an unofficial counsel his right to advise the grand jury, assist them in their investigations, and examine witnesses, and an order of the District Judges appointing such a special prosecutor when the County Attorney was present and able to act could not give such authority. State ex rel. Porter v. District Court, 124 M 249, 220 P2d 1035 (1950).

Presence of Unauthorized Person: Under former law, the very appearance of an unauthorized "special prosecutor" before the grand jury was sufficient to set aside the indictments without a showing of prejudice. The statute required the indictment to be set aside if the person was present while the charge was under consideration. "Under consideration" included when witnesses were being examined. State ex rel. Porter v. District Court, 124 M 249, 220 P2d 1035 (1950), distinguished in St. v. Cockrell, 131 M 254, 309 P2d 316 (1957).

Collateral References

Grand Jury *key* 33 through 35.

38A C.J.S. Grand Juries §§85, 127 through 133.

38 Am. Jur. 2d Grand Jury §§33, 34.

Duty of prosecutor to present exculpatory evidence to state grand jury. 49 ALR 5th 639.

46-11-316. Recorded proceedings.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-11-316. The procedure to be followed has been substantially revised, but these revisions should not adversely affect the rights of any party to the proceeding.

Subsection (1) is chiefly a restatement of the first sentence of 1987 MCA 46-11-316(1). Rather than being discretionary, however, the statute requires that a record be made of the grand jury proceedings. As in the 1987 code, the statute allows that the record be either written or electronically recorded.

Subsection (2) requires that the record and a transcript of the record be filed with the Clerk of the District Court. This provision reflects a basic requirement present in the code. Only this basic statute is preserved. The 1987 code also required filing transcripts within a fixed time and distributing those transcripts to certain parties. The Commission felt that once the record is certified and filed, it is accessible by any party and, therefore, distribution was unnecessary. Any party may request a copy of the record at his own expense.

Subsection (3) adopts a provision from Rule 6(e)(1) of the Federal Rules of Criminal Procedure, providing that the prosecution will not fail if the recording is incomplete.

Source: See commission comments to 46-11-315.

Compiler's Comments

1991 Amendment: In (1) deleted last sentence that read: "The shorthand notes or the recordings and transcript of the same, if any, shall be delivered to and retained by the clerk of the district court"; deleted former (2) that read: "(2) The stenographer and any typist who transcribes the stenographer's notes or recordings shall be sworn by the foreman not to disclose any testimony or the names of any witnesses except when so ordered by the court"; in (2), near beginning after "reporter", inserted "or operator of a recording device", after "shall" inserted "within 30 days after an indictment has been found", after "court" inserted "the shorthand notes or the recordings made and", and at end substituted "or recordings" for "and a copy thereof and as many additional copies as there are defendants" and deleted second and third sentences that

read: "The reporter shall complete the certification and filing within 10 days after the indictment has been found unless the court for good cause makes an order extending the time. The clerk of the district court shall deliver the original of the transcript filed with him to the county attorney immediately upon his receipt thereof, retain one copy for use only by judges in proceedings relating to the indictment, and deliver a copy of the transcript to each defendant or his attorney"; inserted (3) concerning failure of recording; and made minor changes in style.

See compiler's comments to 46-11-315.

Attorney General's Opinions

Court Reporter Serving Grand Jury: The taking of grand jury testimony is not an official duty of official court reporters, and additional compensation is due for that work performed. 36 A.G. Op. 110 (1976).

Collateral References

38 Am. Jur. 2d Grand Jury §35.

46-11-317. Secrecy of proceedings — disclosure.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-11-317. Several provisions from the Federal Rules of Criminal Procedure were incorporated, making the statute more flexible but just as protective of grand jury proceedings.

Subsection (1) combines provisions from the code with elements of the federal rule to establish a primary rule concerning grand jury secrecy. Compare 1987 MCA 46-11-317(1) and Rule 6(e)(2), Fed. R. Crim. P. The statute identifies those persons charged with secrecy and conveys the obligation to secrecy in an affirmative manner. Like the federal rule, the statute does not impose any obligation of secrecy on witnesses.

Subsection (2) establishes a principal and automatic exception to the rule of secrecy. Under the 1987 code, disclosure of matters before the grand jury was allowed to be made to the County Attorney for use in performing his duties. See 1987 MCA 46-11-317(1). The federal lead is followed in this area, and the statute permits disclosures to any prosecutor or official investigator who can use the information in the performance of duties. This statute fosters cooperation between state, local, and federal prosecutors in need of such information.

Subsection (3) provides three other instances in which the proceedings before a grand jury may be revealed. Unlike subsection (2), the disclosure of information in these instances requires court approval.

The Commission recognized that this statute would present some change in established procedure. The statute arises from a studied review of the matter and should aid in making the grand jury a more viable option.

Source: Federal Rules of Criminal Procedure, [Rule] 6(e).

Since its inception the proceedings of the grand jury have been shrouded in secrecy. The reasons most frequently articulated for the policy of secrecy are:

(1) to prevent the escape of those whose indictment may be contemplated;

(2) to insure the utmost freedom in grand jury deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;

(3) to prevent intimidation or tampering with witnesses to testify before the grand jury;

(4) to encourage free disclosure by persons having knowledge of commission of crimes;

(5) to protect an innocent accused person from public knowledge that he has been under investigation.

After the grand jury has investigated an individual's activity and he has been indicted and apprehended, all of the above reasons lose most of their weight. California's actual experience indicates that the dangers of disclosure of grand jury testimony are seriously overrated. California has followed the procedure of providing the defendant in a criminal prosecution with a copy of the transcript of the grand jury testimony before trial. This law appears to have had no adverse effect, as the grand jury has remained a vital and active force in California.

In interpreting Federal Rule 6(e) in Pittsburgh Plate Glass Co. v. Wisconsin, 360 U.S. 395 (1959), the U.S. Supreme Court decided that for disclosure to be allowed the defendant had to show some "particularized need" outweighing the policy of secrecy. This requirement leads to a complicated determination of whether there is such a particularized need. The old trend was one of undue emphasis on the policy of secrecy which many times restricted the defendant's ability to prepare his case—this is out of step with the modern liberalization of criminal discovery.

Compiler's Comments

1991 Amendment: In (1), after "made to", substituted "any prosecutor or investigator of this state and prosecutors or investigators from any other state or the federal government" for "county attorney"; in (2), in first sentence after "juror", deleted "attorney", after "testimony" inserted "or the prosecutor", and at end substituted "except as otherwise permitted by Title 46" for "only when so directed by the court preliminary to or in connection with a judicial proceeding" and inserted second and third sentences concerning obligation of secrecy and contempt; inserted (3) and (3)(a) concerning disclosure directed by District Court; at end of (3)(b) deleted "under 46-11-302(2)"; substituted (3)(c) concerning disclosure to defendant pursuant to discovery for "No obligation of secrecy may be imposed upon any person except in accordance with this rule"; deleted former (2) that read: "(2) The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons"; and made minor changes in style.

Case Notes

Improper Admonition of Secrecy: An admonition of secrecy to grand jury witnesses is not proper unless given in accordance with this section. The effect can be vitiated by lifting the improper requirement to enable adequate preparation of the defense. St. v. Scanlon, 33 St. Rep. 1355 (1976), replaced by opinion in 174 M 139, 569 P2d 368 (1977).

Collateral References

Grand Jury *key* 41.
38A C.J.S. Grand Juries §§206 through 223.
38 Am. Jur. 2d Grand Jury §39, et seq.

46-11-318. Discharge of grand jury.

Commission Comments

Source: See commission comments to 46-11-311.

Compiler's Comments

1991 Amendment: In two places, before "court", inserted "district"; and made minor changes in style.

46-11-319. Expenses of grand jury.

Commission Comments

1991 Comment: This statute preserves the provision of 1987 MCA 46-11-319. Some amendments to this statute have been adopted, but these changes should not cause any significant changes in established procedure.

Subsection (1) has been amended to reflect the fact that special prosecutors, experts, investigators, and interpreters are all paid in the same manner. This subsection controls such payments.

Subsection (3) has been amended to avoid mention of specific code provisions. The references deleted were 1987 MCA 3-5-902(1), 3-5-903 [now repealed], and 46-15-104.

Compiler's Comments

2001 Amendment: Chapter 585 in (1) at end of first sentence after "must be paid by the" inserted "county" and in second sentence after "treasurer of the county" inserted "shall pay the expenses" and near middle after "general fund of the county" inserted "or out of the district court fund, if any"; deleted former (2) that read: "(2) If the county has a district court fund, all expenses of a grand jury must be paid out of that fund"; in (2) substituted "The state shall pay the expenses of juror and witness fees and witness expenses as provided in 3-5-901 and 3-5-902" for "Subject to the procedures established by law, the state shall reimburse the court for juror and witness fees and witness expenses. The county shall deposit the amount reimbursed in its general fund unless the county has a district court fund. If the county has a district court fund, the amount reimbursed must be deposited in that fund"; and made minor changes in style. Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1991 Amendment: In (1), after "special", substituted "prosecutors" for "counsel", before "investigators" inserted "experts", and after "investigators" inserted "and interpreters"; in (3), in first sentence after "established", substituted "by law" for "under 3-5-902(1)", after "reimburse the" substituted "court" for "county", after "fees" deleted "as provided in 3-5-903", and at end deleted "as provided in 46-15-104"; and made minor changes in style.

1985 Amendments: Chapter 66 near middle of (1), inserted "except as provided in subsection (2)"; and inserted (2) providing for payment of grand jury expenses from a District Court fund.

Chapter 680 inserted (3) requiring state to reimburse juror and witness fees.

46-11-331. Finding indictment.

Commission Comments

1991 Comment: This statute is chiefly a restatement of 1987 MCA 46-11-331 and is intended to specify when an indictment may be found. In providing a separate provision for indictment, the statute distinguishes between the grand jury investigative process and the resulting charge, if any. The statute does not retain the requirement of a "true bill" and eliminates the phrase "uncontradicted or unexplained" as superfluous.

Subsection (2) retains 1987 MCA 46-11-333(2). The provision requires the notification of the District Court Judge that an indictment has been found if other charges are pending. The introductory clause of the code provision, "If the defendant is in custody or has been given bail", is replaced with language from the federal rule. Compare 1987 MCA 46-11-333(2) and Rule 6(f), Fed. R. Crim. P.

Commission Comment Not Divided: This section is a recodification of part of section 95-1410, R.C.M. 1947. Sections 46-11-332 and 46-11-333 (now repealed) are also derived from section 95-1410. The commission comments to section 95-1410 are printed in their entirety under 46-11-331.

Source: R.C.M. 1947, sections 94-6332, 94-7003 and 94-6334; and Federal Rules of Criminal Procedure, [Rule] 6(f). [See also source under 46-11-314.]

This is a consolidation of present law with minor language changes.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1991 Amendment: In (1), in first sentence after "together", deleted "if unexplained or uncontradicted"; deleted second sentence of former (2) that read: "When so found, it must be endorsed, "a true bill", and the endorsement must be signed by the foreman of the grand jury"; inserted (2) concerning concurrence by eight jurors for indictment; and made minor changes in style.

Case Notes

Discretion of Court: Although judicial authority is discretionary, it is not absolute, unbridled discretion; denial can be an abuse of discretion. State ex rel. Woodahl v. District Court, 166 M 31, 530 P2d 780 (1975).

Collateral References

Grand Jury *key* 3, 9; Indictment and Information *key* 10, 33(3), 34.

38A C.J.S. Grand Juries §§148 through 150; 42 C.J.S. Indictments and Informations §§33 through 44.

38 Am. Jur. 2d Grand Jury §7, et seq.; 41 Am. Jur. 2d Indictments and Informations §§21, et seq., 54.

46-11-332. Presenting the indictment.

Commission Comments

1991 Comment: This section establishes a distinct statute for presenting an indictment found by a grand jury. The special procedure previously used when an indictment was filed against a District Court Judge was discarded.

Source: See commission comments to 46-11-331.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1993 Amendment: Chapter 262 in second sentence of (1), before "warrant", inserted "arrest"; and made minor changes in style.

1991 Amendment: In (1), in first sentence after "must be", inserted "signed by and" and before "court" inserted "district" and inserted second sentence concerning issuance of warrant or summons; in (2) inserted sentence concerning concurrence of eight jurors for indictment and deleted "When an indictment is filed against a district court judge, it must be transmitted directly to the supreme court, which shall thereupon designate and direct a judge of the district court of another district to preside at the trial of such indictment and hear and determine all

pleas and motions affecting the defendant thereunder before and after judgment"; and made minor changes in style.

Collateral References

Indictment and Information *key* 11.

42 C.J.S. Indictments and Informations §19.

Part 4
The Charge

Part Commission Comments

1991 Part Comments: This part provides the general statutes governing the criminal charge, whether by complaint, indictment, or information. These statutes combine provisions from both the 1987 code and the Federal Rules of Criminal Procedure. The Uniform Rules of Criminal Procedure were considered but were not used. These statutes attempt to preserve the substance of the code and the established procedure concerning the criminal charge.

The code provision that required that a record book be kept of charges filed by indictment or information has not been retained. See 1987 MCA 46-11-402. The Commission recognized that the requirement was not often followed and that the practice was antiquated. The remainder of the 1987 code concerning the criminal charge is retained in these statutes.

Part Case Notes

Authority of Prosecutor to Charge Under Alternate Statutes: Defendants Richard and David Fertterer were convicted of felony criminal mischief for illegally killing game. They contended on appeal that they should have been charged under the misdemeanor provisions of Title 87 and not under the felony provisions of Title 45. Citing St. v. Brady, 249 M 290, 816 P2d 413 (1991), the Supreme Court held that the state has the authority to charge under any statute if the conduct of the defendants meets the elements of the crime. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Part Law Review Articles

Criminal Procedure—Montana Law and the Federal Impact: Paragraph IV.B. discusses amendment of the charging document. Elison, 38 Mont. L. Rev. 53 (1977).

Conviction on Testimony of Accomplice—Sufficiency of Corroborating Evidence: Summarizes St. v. Harmon, St. v. Geddes, St. v. Bolton, St. v. Keckonen, and St. v. Jones with the observation that the statutory requirement of corroboration might well be abrogated. Beighle, 21 Mont. L. Rev. 134 (1959).

46-11-401. Form of charge.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-11-401. Although in different terms and format, the statute preserves all of the stated elements of a charge as denoted in the 1987 code.

The qualifying provision that a charge be expressed "in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended" has been replaced. The more direct language in the federal rule that the charge be plain, concise, and definite has been used. Compare 1987 MCA 46-11-401(1)(c)(iii) and Rule 7(c)(1), Fed. R. Crim. P. All other requirements of a charge are retained, and the basic purpose of a charge—to apprise the person of the charges and prevent surprise prosecutions—is unaffected. See St. v. Holmes, 207 Mont. 176 (1983).

Subsection (5) adopts a provision from the federal rule that allows surplusage to be removed from an indictment or information. See Rule 7(d), Fed. R. Crim. P. The authority of the court to strike such surplusage is limited to doing so on the defendant's motion. See comment for Rule 7(d), Fed. R. Crim. P., Federal Criminal Code and Rules, West Pub. Co., p. 34 (1986 ed.).

Subsection (6) preserves the 1987 code provision recognizing that defects not affecting a defendant's substantial rights will not result in failure of a charge. See 1987 MCA 46-11-403(3). The provision is retained in this statute because it is intended to apply to all forms of charges.

Commission Comment Not Divided: This section is a recodification of part of section 95-1503, R.C.M. 1947. Section 46-11-402 (now repealed) is also derived from section 95-1503.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 111-3; R.C.M. 1947, sections 94-6403 through 94-6406.

The section is intended to cover all of the elements essential to a charge.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

2001 Amendment: Chapter 389 in (1) near middle of first sentence after "appropriate" inserted "county or"; in (2) near end after "witnesses for the" substituted "prosecution" for "state"; in (3) after "signed" substituted "by a sworn peace officer, under oath" for "on oath by a peace officer"; and made minor changes in style. Amendment effective April 28, 2001.

1993 Amendment: Chapter 262 in first sentence of (1), before "court", deleted "district"; in (3), after "oath", inserted "by a peace officer"; in (5), before "court", deleted "district"; and made minor changes in style.

1991 Amendment: In (1), in first sentence after "municipality", deleted "if a violation of a municipal ordinance is charged" and before "court" inserted "district"; deleted (1)(c)(iii) that read: "(iii) stating the facts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended" and inserted "whether the offense is a misdemeanor or a felony, the name of the person charged, and"; deleted (1)(c)(v) that read: "(v) stating the name of the accused, if known, and, if not known, designating the accused by any name or description by which he can be identified with reasonable certainty"; at end of (3) substituted "prosecutor" for "county attorney"; in (4), at end of first sentence, substituted "prosecutor" for "county attorney or by his deputy"; inserted (5) concerning striking surplusage; inserted (6) preventing dismissal due to formal defect; and made minor changes in style.

Commission Comment Not Divided: This section is a recodification of part of section 95-1503, R.C.M. 1947. Section 46-11-402 (now repealed) is also derived from section 95-1503.

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GENERAL

Gopher Rule Relates to Instructions on Lesser Included Offenses, Not Alternative Offenses: Beavers was charged with criminal endangerment, but maintained that he was entitled to a jury instruction on reckless driving as an alternative theory under the rule in St. v. Gopher, 194 M 227, 633 P2d 1195, 38 St. Rep. 1521 (1981), that a defendant is entitled to an instruction to cover every issue or theory having support in the evidence. However, Gopher applies only to instructions on lesser included offenses, not alternative offenses. The rule of law applied to alternative offenses is that of prosecutorial discretion. When the facts support a possible charge of more than one crime, the crime charged is a matter of prosecutorial discretion. (See St. v. Booke, 178 M 225, 583 P2d 405 (1978).) Beavers was properly disallowed arguing an alternative offense theory that involved an offense that was not a lesser included offense of the offense charged. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999).

Aggravated Assault — Sufficiency of Circumstantial Evidence — Extraneous Allegation of Use of Weapon Held Not to Affect Conviction — Instruction Properly Refused: Neary was charged with aggravated assault of a female friend. The evidence at trial consisted of statements by witnesses who placed him, in an angry mood, with the injured woman at the top of some stairs and who heard admissions against interest and inconsistent statements from Neary about the circumstances of the woman's injury. The state also introduced expert medical testimony that the woman's injuries were consistent with a blow to the head with an object or a fall down some stairs onto an object. A neurologist testified for Neary that the woman's injuries could have been caused in the same manner and that the woman's blood showed evidence of alcohol, amphetamines, and a prescription drug, which, in combination, would cause a propensity to fall. Neary contended that the state's case was circumstantial and that the verdict was not supported by the evidence. The Supreme Court held that Neary's inconsistent statements, his other statements, and his actions before, during, and after the incident supported the jury's verdict. The Supreme Court distinguished St. v. Gould, 216 M 455, 704 P2d 20 (1985), and St. v. Gommenginger, 242 M 265, 790 P2d 455 (1990), by pointing out that in Gommenginger, unlike the case before it, testimony came from a drug informant with a motive to lie and that in Gould, the defendant had moved to suppress pretrial admissions, that Neary had not. The Supreme Court also held that the District Court did not err in refusing to amend one of the state's jury instructions to provide that Neary had committed the elements of aggravated assault "with a weapon". The Supreme Court noted that the fact that the text of the state's information alleged that Neary struck the woman "with some type of blunt weapon" did not change the fact that the

jury was correctly given the elements of the offense of aggravated assault and that the jury was not required to find that Neary used a weapon to find him guilty of aggravated assault. Distinguishing St. v. Later, 260 M 363, 860 P2d 135 (1993), in which the defendant had been charged under the wrong statute, the Supreme Court held that Neary was not prevented from preparing an adequate defense by the statement in the information that Neary used a weapon. St. v. Neary, 284 M 409, 944 P2d 750, 54 St. Rep. 942 (1997).

Names of Offenses Correctly Cited, but Wrong Statutes Cited — Proper to Refuse to Dismiss Charges: Three charges against defendant erroneously cited the penalty statutes instead of the statutes containing the substantive offense. The lower court did not err in allowing the state to amend the cites after the trial started and in refusing to dismiss the charges. The charges correctly named the offenses and clearly set forth the acts with which defendant was charged. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996).

Use of Information and Surplus Language in Instructions Not Error: Mummey was found not guilty on the first count against him of aggravated assault against Miller. He was found guilty of the second count of felony assault (now assault with a weapon) against Darling. Mummey argued that he could not be found guilty of the second charge because it was inconsistent in its language in that it described the assault as having been perpetrated by the use of the same footwear worn in the assault of which he had been found innocent. The Supreme Court held that there was no error in incorporating the information into the jury instructions when they did not redefine the elements of the crime and that in view of all the instructions, the surplus language in the second count did not invalidate the verdict. St. v. Mummey, 264 M 272, 871 P2d 868, 51 St. Rep. 198 (1994).

Dismissal for Failure to Charge Offense of Which Convicted — Reckless Driving Not Lesser Included Offense of DUI: Barker was charged with DUI but was convicted of reckless driving by the Ravalli County Justice of the Peace. Barker appealed to the District Court and filed a motion to dismiss, which the District Court granted. The Supreme Court affirmed, holding that the reckless driving charge and the DUI charge were inapposite charges and that reckless driving was not a lesser included offense of DUI. The Supreme Court also held that the conviction should be set aside because Barker did not have notice that he was charged with reckless driving, which violated Barker's constitutional right to due process. St. v. Barker, 260 M 85, 858 P2d 360, 50 St. Rep. 970 (1993).

Information for Witness Tampering Statutorily Sufficient: The defendant contended that the information was insufficient to reasonably apprise him of the charges against him. The Supreme Court held that the information was statutorily sufficient in that it named the defendant, cited the statute, and recited the name of the crime, the facts of the crime, and the date and time of the offense. St. v. Matt, 245 M 208, 799 P2d 1085, 47 St. Rep. 1988 (1990).

Incorrect Statutory Reference — Charge Not Invalid:

The name of a crime is controlled by the specific acts charged. When the facts, acts, and circumstances are set forth with sufficient certainty to constitute an offense, it is not a fatal defect that the complaint gives the offense an erroneous name. An erroneous statutory reference will not invalidate the charge. St. v. Collins, 226 M 188, 734 P2d 686, 44 St. Rep. 576 (1987).

A complaint which used the statutory language of 61-8-401 to describe the offense but which listed a citation to 61-8-406 was not made defective by the incorrect reference since the complaint adequately described and gave notice of the offense. The District Court did not err in granting a motion to amend the complaint to correct the statutory reference. St. v. Handy, 221 M 365, 719 P2d 766, 43 St. Rep. 897 (1986).

Variance Between Information and Proof — No Prejudice: Appellant contended that a fatal variance between the information and the state's proof at trial required that the charges be dismissed. The basis of this contention was that while the affidavit in support of the information alleged that Valley Industrial Park (VIP) owned the fuel (which appellant was convicted of stealing) by virtue of a deed from the U.S. government, at trial they attempted to prove ownership by possession. Any variation between the proof and the information was found to be minor and insufficient to require dismissal of the charges. No substantial right of appellant had been prejudiced. St. v. Holmes, 212 M 526, 687 P2d 662, 41 St. Rep. 1535 (1984), followed in St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994), and St. v. Parker, 1998 MT 6, 287 M 151, 953 P2d 692, 55 St. Rep. 16 (1998).

Statutory Language Used Without Statement of Facts: An information charging a homicide is sufficient if it charges the offense in terms of a statute without reciting supporting evidentiary facts. In this case the information is sufficient. It charged three theories of homicide: (1) that the defendant as a principal purposely or knowingly caused the death of the victim by engaging in one or more of four enumerated kinds of conduct; (2) that the defendant aided and abetted in

purposely or knowingly causing the death of victim by engaging in one or more of four kinds of conduct; and (3) that the death of the victim occurred while defendant was engaged in or aiding and abetting in the commission of aggravated assault. St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982).

Time and Place of Offense: An information charging defendant with deliberate homicide charged that defendant engaged in various acts in three different counties over a period of about 2 years that resulted in the death of victim. Defendant argued that the information fails to state the time and place of the offense "as definitely as can be done". The court rejected this argument, stating that the law does not require that the time and place be stated with impossible precision; it merely requires that they be stated as definitely as possible under the circumstances, unless time is a material ingredient in the offense. St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982).

When Defendant Becomes "Accused" — Insufficient Reason for Delay of Trial — Prejudice to Defendant: Where 376 days elapsed between the filing of a complaint in Justice's Court charging the defendant with arson and the filing of an information in District Court and 423 days elapsed between the defendant's arrest and the defendant's scheduled trial, the court did not err in dismissing with prejudice for lack of a speedy trial the information charging the defendant with arson. The defendant became an "accused" on the day the complaint was filed against him in Justice's Court, the State failed without good reason to diligently pursue the charges against the defendant, and the defendant had asserted the denial of his right to a speedy trial and had shown prejudice in his plausible claims that he was no longer able to recall facts constituting an alibi and was no longer able to discover physical evidence for use in his defense independently of that evidence found by the prosecution. The defendant thus satisfied the requirements to prove a violation of his constitutional right to a speedy trial. St. v. Larson, 191 M 257, 623 P2d 954, 38 St. Rep. 213 (1981).

Charge as a Matter of Prosecutor's Discretion: When the facts of a case support possible charges of both aggravated assault and attempted deliberate homicide, the crime to be charged is a matter of prosecutorial discretion, which will not be interfered with if different proof is required under each statute and there is no clear and manifest legislative intent to the contrary. St. v. Booke, 178 M 225, 583 P2d 405 (1978). See also St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Proper Notification in Information: An information stating the alleged facts, using the language of the statutes, and directing the defendant to the appropriate sections of the criminal code properly apprises the defendant of the nature and cause of the accusation being made. St. v. Booke, 178 M 225, 583 P2d 405 (1978).

Good Cause for Continuance: If a defendant wishes to protect himself from alleged prejudice incurred by the use of an approximate date in charging an offense and the proof offered at trial, he can move for a continuance under this section. St. v. Hall, 171 M 33, 554 P2d 755 (1976).

Effect of State's Noncompliance With Court Order: Reversal was required when the prosecution withheld evidence and notice of witnesses in violation of orders of the court. St. v. Keller, 170 M 372, 553 P2d 1013 (1976).

Bill of Particulars: In a criminal case no bill of particulars may be required or ordered. St. v. Bosch, 125 M 566, 242 P2d 977 (1952).

Certainty and Precision: An information must charge with certainty and precision the crime alleged to have been committed. St. v. Hem, 69 M 57, 220 P 80 (1923).

Essential Elements of Information: An information should state the proper title of the court and cause and contain a statement of the facts constituting the offense charged in ordinary and concise language. St. v. Paine, 61 M 270, 202 P 203 (1921).

Superfluous Language: Superfluous words or sentences inserted in an information charging a crime may be treated as surplusage and disregarded. St. v. McGowan, 36 M 422, 93 P 552 (1907).

Unverified Information: The fact that an information is not verified does not deprive the court of jurisdiction to try the case. State ex rel. Nolan v. Brantly, 20 M 173, 50 P 410 (1897).

SUFFICIENCY OF CHARGE

Discretion of Prosecutor in Charging Defendant When Facts Support Possibility of More Than One Crime: After threatening to shoot his estranged wife's boyfriend during a telephone call, Smith was charged with assault with a weapon. Smith contended that he should instead have been charged with violation of privacy in communications through intimidation over the telephone and that the assault with a weapon charge should have been dismissed. The Supreme Court disagreed. The two charges were distinctly different, and the facts of the case supported a charge for either crime. Thus, the crime to be charged was a matter of prosecutorial discretion,

and the County Attorney did not abuse those broad discretionary powers in charging Smith with assault with a weapon. St. v. Smith, 2004 MT 191, 322 M 206, 95 P3d 137 (2004).

Sufficient Probable Cause in Affidavit to Warrant Charge of Sexual Assault: Kern contended that the state failed to establish probable cause in its affidavit charging sexual assault. The Supreme Court noted that pursuant to St. v. Arrington, 260 M 1, 858 P2d 343 (1993), an affidavit in support of a motion to file an information need not make out a prima facie case that a defendant committed an offense; rather, a mere probability is sufficient. Evidence to establish probable cause need not be as complete as the evidence necessary to establish guilt, and the determination whether a motion to file an information is supported by probable cause is left to the discretion of the trial court. Here, the factual allegations that defendant forced the victim to engage in sexual conduct were sufficient to establish the mere probability that defendant committed the offense. Kern also asserted that it was necessary that the affidavit require allegations that he committed the touching and that he did so to gratify his sexual response. The Supreme Court disagreed with both arguments. Nothing in 45-5-502 requires that a defendant commit the actual touching, nor was the affidavit required to allege the purpose of the sexual contact because that element is incorporated by reference in the statute. St. v. Kern, 2003 MT 77, 315 M 22, 67 P3d 272 (2003), following St. v. Steffes, 269 M 214, 887 P2d 1196 (1994).

Inadequacy of Amended Information Charging Commission of Undefined Sexual Crime: Hardaway was initially charged with burglary, and the information was amended to charge that Hardaway knowingly entered or remained unlawfully in an unoccupied structure with intent to commit theft or a sexual crime. Hardaway contended that the amended information should have been dismissed because the term "sexual crime" was not sufficiently definite in its legal meaning to reasonably apprise him of the charge against him so that he could prepare a defense. The Supreme Court agreed. An information is sufficient if it properly charges an offense in the language of the statute defining the offense charged and if a person of common understanding would know what was charged. Here, the amended information failed to adequately put Hardaway on notice of the nature or character of the offense that he was accused of intending to commit. Numerous offenses of a sexual nature are defined in Montana law, but the purported offense of sexual crime is not, nor did the information provide any factual allegations to indicate which of the potential offenses of a sexual nature Hardaway was accused of intending to commit, so he had no way of determining which of the potential offenses, if any, was being charged. St. v. Hardaway, 2001 MT 252, 307 M 139, 36 P3d 900 (2001). See also St. v. Steffes, 269 M 214, 887 P2d 1196 (1994).

Tolling of Statute for Certain Offenses Against Minors — Evidence Supporting Date of Offense and Retroactive Application: An act that enacted a statute providing that certain prosecutions may be commenced within 5 years after the victim reaches the age of 18 if the victim was less than 18 years of age at the time of the offense also provided that the act applies retroactively to offenses committed before the effective date of the act and for which the statute of limitations has not expired on the effective date of the act. Therefore, since the statute of limitations for the offenses referred to is 5 years and since the law took effect on March 24, 1989, an offense occurring between March 24, 1984, and March 24, 1989, could be prosecuted. The victim in this case contacted the County Attorney in April of 1992, when she was 19, and charges were filed in December of 1993. Testimony at trial for sexual intercourse without consent and sexual assault showed that the victim was in the 5th grade in March of 1984 and that she testified that the offenses occurred while she was in the 7th and 8th grades, but she could not fix the dates with particularity. There was no evidence that the offenses occurred prior to March of 1984. The District Court did not err in refusing to dismiss the charges on the basis of the victim's vague references to the dates of their occurrence and an alleged violation of the statute of limitations. St. v. Mason, 283 M 149, 941 P2d 437, 54 St. Rep. 539 (1997).

Sufficiency of Information Charging Deviate Sexual Conduct Without Defining Specific Terms — Definitions as Legal Term of Art: Defendant contended that the information charging him with deviate sexual conduct was insufficient because the information did not specify that the sexual contact was for the purpose of gratifying the sexual desire of either party, thereby failing to inform him of all of the essential elements of the crime. Defendant cited Russell v. U.S., 369 US 749, 8 L Ed 2d 240, 82 S Ct 1038 (1962), for the holding that the words of a statute may not be sufficient in a charging document if the words themselves do not fully, directly, and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished. The Supreme Court instead relied on Hamling v. U.S., 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887 (1974), in distinguishing between cases in which the offense charged depends upon a specific identification of fact and instances when the definition of the offense is not one of fact, but one of law. In the instant case, the information did not have to allege

that the sexual contact was for the purpose of gratifying the sexual desire of either party because both "sexual contact" and "deviate sexual conduct" are legal terms of art defined elsewhere in the criminal code. Thus, the amended information citing the name of the offense, the statute alleged to have been violated, and the time and place of each offense was sufficient to apprise defendant of the charges against him. St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994).

Theory of Accountability Not Required by Due Process to Be Set Forth in Information: Tower was arrested for sale of a dangerous drug. Over Tower's objection at trial, the jury was instructed on the issue of accountability under 45-2-301 and 45-2-302. Tower contended that as a matter of due process of law, he must have been given additional notice that he was going to be charged with the crime by a theory of accountability. Tower also claimed that he was surprised by the jury instruction on accountability given at trial. The Supreme Court reviewed the development of the law of accountability and the requirements applicable to charging documents. The Supreme Court also reviewed the trial record and determined that Tower had every reason to anticipate an accountability theory. Because accountability is not a separate offense, the Supreme Court held that due process did not require the state to set forth the theory in the information. St. v. Tower, 267 M 63, 881 P2d 1317, 51 St. Rep. 946 (1994), followed in St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998).

Lack of Specificity of Date for Charges of Intercourse Without Consent and Sexual Assault: Little was convicted of sexual intercourse without consent and sexual assault on two minors. Before trial, Little argued that the information was insufficient because it alleged that the offenses had occurred "on or about 1990" and therefore deprived him of raising a meaningful alibi defense. Citing St. v. D.B.S., 216 M 234, 700 P2d 630 (1985), and St. v. Shaver, 233 M 438, 760 P2d 1230 (1988), the Supreme Court held that even if a continuing course of conduct is not alleged and an alibi defense is raised, time is not a material ingredient to the crime of sexual intercourse without consent or sexual assault. Moreover, the statements taken from the victims evidence that Little repeatedly subjected the children to sexual acts. To hold children to a standard that requires them to recall a specific time when children are less likely to distinguish dates and times with specificity would leave the defendant virtually immune from prosecution. St. v. Little, 861 M 154, 260 P2d 460, 50 St. Rep. 1124 (1993).

Substantial Evidence to Show Common Scheme Bad Check Writing: Defendant was convicted of issuing bad checks, common scheme, a felony, after issuing or delivering a total of nine checks to various businesses and individuals over the course of a year, knowing the checks would not be paid by his bank. The court found there was sufficient evidence to support conviction as there was substantial evidence of defendant's wrongdoing. St. v. Fleming, 225 M 48, 730 P2d 1178, 44 St. Rep. 31 (1987).

Evidence That Offense Occurred a Few Months After Charge Alleged It Did: Evidence, in trial for sexually assaulting a 10- and an 11-year old girl, that the offenses took place in the spring of 1984 was not error when complaint alleged the offenses occurred in the summer of 1984, nor did introduction of that evidence constitute prosecutorial misconduct. Section 46-11-401 does not require an allegation of the exact time, date, month, or even year of the charged offense. St. v. Cornell, 220 M 433, 715 P2d 446, 43 St. Rep. 505 (1986). See also St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Harmless Error in Information — Charge Sufficient: Instead of citing 45-9-102(4), the information cited 45-9-102(3). The court rejected appellant's contention that the state failed to prove all elements as charged. In this case, the information properly charged the offense of possession of cocaine in the language of the statute proscribing such possession. The information clearly put the defendant on notice that he was being charged with possession of cocaine. The fact that the information contained the wrong penalty provision did not prejudice defendant or in any way impair his ability to prepare a defense. The information contained harmless error and was therefore sufficient. St. v. Pearson, 217 M 363, 704 P2d 1056, 42 St. Rep. 1253 (1985), followed in St. v. Brogan, 261 M 79, 862 P2d 19, 50 St. Rep. 1204 (1993).

Reasonably Specific Date in Information — No Double Jeopardy: Information charging incest indicated a 10-month period during which the crime was committed. The court found the information sufficiently specific since victim resided with defendant father during entire period and defendant could not establish deprivation of alibi defense. The court applied the test set forth in St. v. Clark, 209 M 473, 682 P2d 1339, 41 St. Rep. 833 (1984), and held that the two-part test was satisfied. Defendant contended that the broad time frame alleged in the information subjected him to double jeopardy. The court rejected the argument, noting that the State is barred by Art. II, sec. 25, Mont. Const., from retrying defendant for the offense to this particular victim during the time in question. St. v. D.B.S., 216 M 234, 700 P2d 630, 42 St. Rep. 770 (1985). See also St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Requirements of Time and Place in Charged Offense — Definiteness:
Because defendant knew from the information with what crime he had been charged, an information which stated the place of the alleged sexual intercourse without consent, but not the time of the crime, was sufficient under this section. St. v. Sanderson, 214 M 437, 692 P2d 479, 42 St. Rep. 94 (1985).

Defendant was reunited with his wife and three stepchildren in April 1981. During a family argument in July, defendant's 12-year-old stepdaughter alleged he had raped her. Defendant battered the child and her mother. Defendant was arraigned in December on an information charging him with eight counts of sexual intercourse without consent. The information specified the days on which the rapes occurred. Defendant pleaded not guilty and on March 9, 1982, noticed an alibi defense. On April 9, 1982, the State noticed its intent to amend the information to allege the time of the rapes less precisely. Defendant objected, but the trial judge permitted the amended information to be filed. Defendant was found guilty on all counts and appealed. Defendant contended that while time is generally not a material element to the crime charged, the substituting of periods of time for specific dates precluded his use of his alibi defense. The Supreme Court stated that both informations set forth facts alleging a series of rapes by the stepfather upon the child. Where a continuing course of such conduct is alleged, further specificity is not required. Children are less likely to distinguish times and dates with specificity. Defendant's notice of intent to rely on alibi did not change the nature of the crime charged or incorporate time as a necessary element of the State's proof. The amended information stated the time and place of the charged offenses as definitely as could be done under the circumstances of the case. St. v. Clark, 209 M 473, 682 P2d 1339, 41 St. Rep. 833 (1984), followed in St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Motion to File Information — Sufficiency of Affidavit — Scope of Appellate Review: An affidavit in support of a motion to file an information need not make out a prima facie case that a defendant committed an offense; a mere probability that the defendant committed the offense is sufficient. Similarly, evidence to establish probable cause need not be as complete as the evidence necessary to establish guilt. The scope of appellate review of a District Court's ruling on a motion to file an information is limited to whether or not the District Court abused its discretion. St. v. Bradford, 210 M 130, 683 P2d 924, 41 St. Rep. 962 (1984), followed in St. v. Arrington, 260 M 1, 858 P2d 343, 50 St. Rep. 905 (1993).

Sufficiency of Information: Hankins was charged with the felony offense of trafficking in the unlawfully obtained body parts of a protected species. The information stated the offense essentially in the terms of the statute, with additional allegations of time and place. Montana follows the general rule that an information is sufficient if it properly charges an offense in the language of the statute describing the offense. An information need only be sufficient to apprise the accused of the crime charged; it need not be perfect. The information need not inform the accused of the potential punishments for the offense. St. v. Hankins, 209 M 365, 680 P2d 958, 41 St. Rep. 762 (1984).

Defendant Properly Apprised of Charge: Defendant ordered 37 television sets and one big-screen television in April 1981 on behalf of his employer. The invoice overstated the cost of the 37 television sets and did not reflect the cost of the big-screen set except in the inflated value of the 37 television sets. In August 1981, the defendant exerted unauthorized control over the big-screen television. The information must contain the time and place of the offense, and the information charging the defendant stated August 1981 as the date of the theft. The purpose of the requirement is to apprise the defendant of the charges brought against him so as to prevent surprise. The defendant was properly apprised in this case. St. v. Holmes, 207 M 176, 674 P2d 1071, 40 St. Rep. 1973 (1983).

Additional Sentence for Burglary Committed With a Weapon — Not in Charge: Defendant was convicted of the crime of aggravated burglary with a weapon, and the charging document, while omitting any mention of additional sentencing under 46-18-221, did mention that he was armed with a knife and was sentenced under 46-18-221 for an additional 5 years for the use of the knife. The defendant was not sentenced for a crime with which he was not charged because 46-18-221 does not create a separate substantive offense but enhances the penalty for an underlying offense. St. v. Davison, 188 M 432, 614 P2d 489 (1980).

Motion to Strike Information for Lack of Specificity: In prosecution for attempted deliberate homicide, the court did not err in denying defendant's motion to strike the information for lack of specificity of the applicable statutes. The motion was properly denied in that it was not made before the defendant's plea was entered, and the information was sufficiently clear even though it cited only the attempt statute, as it contained an allegation that the defendant attempted deliberate homicide. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Information Found Sufficient: The information filed in this case was sufficient since each count followed the language of the statutes for deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. The State's attempt to amend the information did not aid the defendant in claiming the information was not sufficient. St. v. Coleman, 177 M 1, 579 P2d 732 (1978).

Possession of Explosives: When the State charged that on a certain day at a certain time the defendant had possession of explosives with intent that the same be used for the destruction of named persons and property, clearly the facts constituting the offense were stated so that a person of common understanding would know what was intended. St. v. McBenge, 175 M 362, 574 P2d 260 (1978).

Motion to Suppress Denied — Complaint Not Defective: When a complaint was issued in one county but the offense committed in another, it was not defective since the purpose of the complaint was not to charge the offense but to establish the basis for an arrest warrant. St. v. Benbo, 174 M 252, 570 P2d 894 (1977).

Murder:

The definitions of deliberate homicide and criminal accountability contemplate a more active role than was involved here before one can be charged as a principal or accessory to murder. State ex rel. Murphy v. McKinnon, 171 M 120, 556 P2d 906 (1976).

When two defendants, tried separately, had entered into a conspiracy to commit robbery of an officer in the perpetration of which the latter was killed by one of them, the information against the other charging a premeditated killing need not set forth the facts constituting the crime of robbery or allege that in the attempt to commit the latter crime the homicide was committed. St. v. Bolton, 65 M 74, 212 P 504 (1922).

An information charging murder in the first degree, otherwise sufficient, was not rendered insufficient by the absence of the words "a felony" after the words "murder in the first degree". St. v. Vuckovich, 61 M 480, 203 P 491 (1921).

Allegations sufficient for a common-law indictment for murder are sufficient for an information under the code. St. v. Hayes, 38 M 219, 99 P 434 (1909).

If a person of common understanding would, from the reading of an information, know that the defendant in a given case was charged with murder in the first degree, the defendant will be presumed to have had a like knowledge and be held not to have been prejudiced by the use of peculiar phraseology in it. St. v. McGowan, 36 M 422, 93 P 552 (1908).

An information for murder should directly allege that death resulted from the mortal wounds inflicted by the defendant. St. v. Keerl, 29 M 508, 75 P 362 (1904).

Time of Offense:

It is proper to charge that an offense took place "on or about" a date when the offense may have occurred within a span of 3 days and the precise time of the offense is not known. St. v. Hall, 171 M 33, 554 P2d 755 (1976).

An allegation in an information that the offense was committed "on or about" a certain date of a given year was held sufficient. St. v. Heaston, 109 M 303, 97 P2d 330 (1939).

The defendant was not prejudiced by the variance between the alleged date of commission and the date proved. St. v. Sorenson, 65 M 65, 210 P 752 (1922).

If a crime is charged as having been committed on one date while the evidence shows that it was done at another time but within the Statute of Limitations, the prosecution does not fail but there is a variance which may be material enough to justify a continuance. St. v. Gaimos, 53 M 118, 162 P 596 (1916).

In a prosecution for homicide it is sufficient if it appears that it was committed prior to the filing of the information. St. v. Vanella, 40 M 326, 106 P 364 (1910).

Unless time is a material ingredient in the offense or in charging the same, it is only necessary to prove that it was committed prior to the finding or filing of the information or indictment. St. v. Rogers, 31 M 1, 77 P 293 (1904).

An indictment that charges the commission of the offense "on or about" a certain day sufficiently states the time. St. v. Thompson, 10 M 549, 27 P 349 (1891).

Drug Offenses:

The information charging a drug offense was insufficient because it contained neither the identity of the informer nor specific facts concerning the offense and did not identify the time and place to protect the accused from double jeopardy. State ex rel. Offerdahl v. District Court, 156 M 432, 481 P2d 338 (1971).

The information charging the defendant with the sale of dangerous drugs (now criminal distribution of dangerous drugs) was sufficient even though it failed to conform with specific

requirements of this section, since the defendant was apprised of the charges against him. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

Same Transaction — Later Charge Not Particularized: An information that did not particularize the charge against the defendant was not fatally defective since prosecution for the same transaction that resulted in the earlier conviction is expressly barred. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

Attempting to Influence Jurors: A consolidated information that charged the defendant with attempting to influence two named jurors in a named action was sufficient. St. v. Bogue, 142 M 459, 384 P2d 749 (1963).

Test of Sufficiency of Information:

The test of the sufficiency of an information is whether the defendant is apprised of the charges brought against him and whether he will be surprised. St. v. Bogue, 142 M 459, 384 P2d 749 (1963), overruling St. v. Hale, 129 M 449, 291 P2d 229 (1955); St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

The test of the sufficiency of an information is whether a person of common understanding would know what is intended to be charged. St. v. Board, 135 M 139, 337 P2d 924 (1959), followed in St. v. Brogan, 261 M 79, 862 P2d 19, 50 St. Rep. 1204 (1993); St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986); St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Lewd and Lascivious Act on Child: An information charging the commission of a lewd and lascivious act on a child was sufficient although it did not allege the age of the defendant. St. v. Davis, 141 M 197, 376 P2d 727 (1962).

Obtaining Money Under False Pretenses: The information must expressly allege the facts which made the stated pretense false in a prosecution for obtaining money under false pretenses. St. v. Hale, 129 M 449, 291 P2d 229 (1955), distinguished in St. v. Fairburn, 135 M 449, 340 P2d 157 (1959), overruled on other grounds in St. v. Bogue, 142 M 459, 384 P2d 749 (1963).

Language of Statute: Ordinarily, an information charging a public offense in the language of the statute is sufficient; if considered insufficient as to details and facts, the remedy of the defendant was formerly a request for a bill of particulars. St. v. Hahn, 105 M 270, 72 P2d 459 (1937).

Attempted Rape: An information charging the defendant with attempted rape was held sufficient against the objection that no overt act was charged and intent was insufficiently alleged. St. v. Stevens, 104 M 189, 65 P2d 612 (1937), overruled on other grounds in St. v. Bosch, 125 M 566, 242 P2d 977 (1952).

Perjury: If an information for perjury sets forth the substance of the matter in respect to which the offense was committed, in what court and before whom the oath alleged to have been false was taken, and that the court or the person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which perjury is assigned, it is sufficient. St. v. Jackson, 88 M 420, 293 P 309 (1930).

Liquor Laws:

The information in a prosecution charging sale of intoxicating liquor to a minor need not specify the particular kind of liquor. St. v. Baker, 87 M 295, 286 P 1113 (1930).

When the proof showed the sale of a liquor different from that described in the information, there was a variance which was not fatal. St. v. Sedlacek, 74 M 201, 239 P 1002 (1925).

An information charging the defendant with having permitted a female to be or remain in his saloon for the purpose of being there supplied with liquor, which alleged that the defendant was "then and there" the owner and manager having charge and control, was sufficient to apprise him that he was accused of being in control. St. v. Conway, 38 M 42, 98 P 654 (1908).

Theft: An information charging defendant with stealing "five Ford wire wheels and tires" was sufficient to advise him that five wire wheels and tires for a Ford automobile were the articles charged to have been stolen. St. v. Dimond, 82 M 110, 265 P 5 (1928).

Illegal Transportation of Liquor: Neither the time of day, the means of conveyance, the particular brand of liquor transported, nor the termini of the route over which it is carried are made constituent elements of the completed offense of illegal transportation, and therefore an information charging that crime is sufficient without allegations to that effect. St. v. Dow, 71 M 291, 229 P 402 (1924).

Sedition: An information charging sedition was defective for failure to set out the specific words characterized as disloyal, contemptuous, etc. St. v. Wolf, 56 M 493, 185 P 556 (1919). See also St. v. McGlynn, 60 M 416, 199 P 708 (1921); St. v. Smith, 58 M 567, 194 P 131 (1920); St. v. Wyman, 56 M 600, 186 P 1 (1919).

Technical Defect: Under former law an information need not contain a specific allegation that the prosecution is conducted in the name and by the authority of the State, as required by the

Montana Constitution, when it appears from the record that it is so conducted, is in the proper form, and is otherwise sufficient. St. v. Barry, 45 M 582, 124 P 774 (1912).

Language Defects:

Stating facts charging a crime in the form of participial clauses does not render an information abortive. However, the proper way to make the charge is by direct allegation. St. v. Pemberton, 39 M 530, 104 P 556 (1909).

An information is not objectionable on the ground that it does not contain a statement of facts constituting the offense in ordinary and concise language or that it is not direct and certain in its statements. St. v. Phillips, 36 M 112, 92 P 299 (1907).

Forgery: An information charging forgery of a promissory note, although containing superfluous averments, was not fatally defective. St. v. Mitten, 36 M 376, 92 P 969 (1907).

False Pretenses: An information charging an attempt to obtain money by false pretenses, though defective in form and containing immaterial averments, is sufficient to sustain a conviction when it is apparent that the defendant has suffered no prejudice. St. v. Phillips, 36 M 112, 92 P 299 (1907).

Name of County: When, in an information for murder, the only mention of the county in which the crime was committed appeared in the caption describing the court and there was no expression such as "in the county aforesaid" or "said county", thus referring to the caption, the information did not allege the county in which the offense had been committed and was fatally defective. St. v. Beesskove, 34 M 41, 85 P 376 (1906).

Time and Place Essential: Time and place are essential elements and must be so alleged as to enable a person of common understanding to know what is intended by the charge. St. v. Beesskove, 34 M 41, 85 P 376 (1906).

Use of Aliases: The use of aliases in an information is sufficient. St. v. Howard, 30 M 518, 77 P 50 (1904).

LISTING WITNESSES

Failure to List Prosecution Witness — Actual Knowledge of Witness — Failure to Object to Court's Remedy: Hayworth, who was charged with attempted deliberate homicide, objected during the trial to the fact that he had not received formal, written notice of the calling of a prosecution witness. The prosecution had, however, given Hayworth's attorney oral notice of the calling of the witness, and when the District Court suggested that the witness be called later so that Hayworth could interview the witness, Hayworth's counsel did not object and did interview the witness. The Supreme Court held that under these circumstances, Hayworth was not prejudiced by the lack of formal, written notice and that the District Court did not abuse its discretion in allowing the prosecution witness to testify. St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Negligent Suppression of Evidence — Harmless Error: In an appeal involving the negligent suppression of evidence, the court agreed with appellant that the state acted improperly in suppressing four taped witness statements during discovery and a possibly incriminating statement made by appellant during his arrest and in endorsing an additional witness on the first day of trial. However, the court found that the suppressed evidence was either repetitive of other testimony or minimally supportive of a self-defense theory, and that since the defense knew of the additional witness' connection with and importance in the case, it could not convincingly claim surprise at the endorsement. Therefore, all errors were held to be harmless and not grounds for reversal. St. v. Wallace, 223 M 454, 727 P2d 520, 43 St. Rep. 1908 (1986), followed, with regard to application of harmless error rule to admissibility of hearsay testimony, in St. v. Alexander, 265 M 192, 875 P2d 345, 51 St. Rep. 474 (1994).

Prosecution Witness Endorsed on Day of Trial — Failure to Request Continuance: Under the circumstances, the District Court did not abuse its discretion in allowing the prosecution to endorse a psychological counselor, an assistant to the doctor treating the victim, as a witness on the day of the trial. The counselor was previously interviewed by the defense, and the doctor had long been identified as a prosecution witness. The defense did not petition for a continuance, which should have been done if it was believed the endorsement left the defense inadequately prepared. St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984).

Witness List Amended — Continuance Denied: The trial court properly denied a defense motion for a continuance after permitting the State to amend its witness list on the morning of trial since the State informed the defendant's counsel of a change in the information within hours after the new witness negotiated a plea involving an agreement to testify. The defense counsel knew of the development on Friday but chose to keep other commitments, thus he was estopped from claiming surprise. St. v. McClean, 179 M 178, 587 P2d 20 (1978).

Endorsement of Additional Witness on First Day of Trial: The defendant was not prejudiced when, on the first day of the trial, the District Court endorsed two more witnesses for the prosecution because the defendant's counsel and the County Attorney had already discussed the endorsement, the two names were set out in the information as victims, the County Attorney showed good cause for failing to list the names specifically as witnesses prior to the trial, and the defendant's counsel could have asked for a postponement or a continuance. St. v. Booke, 178 M 225, 583 P2d 405 (1978).

Addition of Witnesses:

The lower court did not err in allowing the addition of the names of 58 new witnesses to the amended information on the day of trial when the defendant failed to ask for a continuance, the witnesses were not prejudicial to defendant, and the court was careful to provide the defendant with protection against surprise and to ensure that the defendant was able to prepare for the testimony. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

When the State moved 6 days before trial to list additional witnesses, alleging they were discovered after the original information was filed and were necessary to prove its case in light of the defendant's affirmative defense of mental disease or defect, good cause was shown and the motion should have been granted. State ex rel. Nelson v. District Court, 173 M 221, 566 P2d 1382 (1977).

Allowing the amendment of the witness list requested because of evidentiary matters developed during presentation of the State's case was not an abuse of discretion on the part of the trial judge when the court offered the accused a continuance and there was no objection to the witnesses based on surprise by the defendant. St. v. Klein, 169 M 350, 547 P2d 75 (1976).

When the defendant's attorney knew of a witness against the defendant but failed to discover the nature and extent of his potential testimony, assuming he would not be discovered, it was not reversible error to permit the witness's name to be endorsed on the information the day of the trial to permit the witness to testify. St. v. Cooper, 146 M 336, 406 P2d 691 (1965).

Failure to List Upon Request: When the State failed to list witnesses on an information and continually failed to provide a list of witnesses even after a request by the defendant to do so and a promise by the Deputy County Attorney to the District Court that he would do so, the State did not make a sufficient showing of "good cause" to add witnesses on the day of trial. Therefore, the defendant had no burden to move for a continuance of the trial date. St. v. Haag, 176 M 395, 578 P2d 740 (1978).

Addition of Expert Witness in Midtrial: The District Court did not err in permitting the endorsement of an x-ray by a radiologist as a witness added in midtrial by the prosecution when the defense counsel knew of the existence of the x-ray prior to trial and nothing indicated an intentional or deliberate withholding of evidence by the State or lack of good cause. St. v. Gafford, 172 M 380, 563 P2d 1129 (1977).

Amendment of Witness List — Remedy When Surprise Claimed: The proper procedure when surprise is claimed from the addition of witnesses is to ask for a continuance so that the defendant may prepare. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Reasonable Anticipation of Unlisted Witness Negating Prejudice: The failure of the prosecutor to endorse on the information the State Chemist as a witness to identify marijuana was not prejudicial to the defendant constituting surprise because the defense counsel could reasonably anticipate such testimony. He had ample opportunity to rebut the evidence as he had been given a sample of the substance and had arranged for two experts to support his challenge to the prosecutor's identification of the substance. St. v. Paulson, 167 M 310, 538 P2d 339 (1975).

Adding Witnesses — Harmless Error: The defendant was not prejudiced by the prosecution's citation, when adding witnesses, of section 94-8904, R.C.M. 1947, which had been repealed and replaced by 46-15-301 (and which was itself, in 1985, repealed and replaced with 46-15-321 [now repealed] through 46-15-329), since that section is a continuation of section 94-8904, R.C.M. 1947. St. v. Rozzell, 157 M 443, 486 P2d 877 (1971).

Attorney General's Opinions

Charging of Minor for Traffic Offense — Citation of Underlying Charge: An officer who sees a minor commit a traffic offense should issue the minor a ticket charging him with unlawful operation of a motor vehicle under 61-12-601 (repealed, sec. 5, Ch. 484, L. 1987). In stating the facts of the offense, the officer should also describe the underlying traffic offense and cite the statute that sets forth the underlying offense. 41 A.G. Op. 87 (1986).

Concurrent Jurisdiction Over Certain Misdemeanors: Misdemeanor prosecutions which are within the concurrent jurisdictions of both a City Court and a Justice's Court may at the election of the prosecuting officer be brought in either court. Prosecution of such offenses must be instituted in the name of the state. 37 A.G. Op. 42 (1977).

Collateral References

Indictment and Information *key* 46, 54, 74.

42 C.J.S. Indictments and Informations §§50 through 66, 111 through 115.

41 Am. Jur. 2d Indictments and Informations §§65, 76.

Limitation of actions: necessity of alleging in indictment or information limitation-tolling facts. 52 ALR 3d 922.

Incompetent witness: validity of indictment where grand jury heard incompetent witness. 39 ALR 3d 1064.

Hearsay: admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction. 37 ALR 3d 612.

Property, objects, or instruments, other than money, power of court to make or permit amendment of indictment with respect to allegations as to. 15 ALR 3d 1357.

Middle name or initial of person named therein, sufficiency of indictment, information, or other form of criminal complaint; omitting or misstating. 15 ALR 3d 968.

46-11-404. Joinder of offenses and defendants.

Commission Comments

1991 Comment: This statute combines elements of the 1987 code and the federal rule and is intended to control the inclusion of more than one offense in a single charging document. The statute should not effect any significant changes in established procedure.

Subsection (1) is chiefly an adoption of Rule 8(a) of the Federal Rules of Criminal Procedure. The language of the clearly phrased federal rule was preferred because it referred to charges arising from a common-scheme offense. The federal rule, as adopted, was amended by adding the phrase "or different statements of the same offense" and was amended to recognize that counts may be charged separately or alternatively. These amendments were made so that the statute more closely reflects federal law. The statute recognizes that allegations shared by several counts may be incorporated by reference.

Subsection (2) reflects the second sentence of 1987 MCA 46-11-404(1). The statute preserves the authority of the court to consolidate separate charges.

Subsection (3) preserves the final two sentences of 1987 MCA 46-11-404(1). The prosecutor need not choose between any of the several charges filed. The reference in the statute to 46-11-410 recognizes the limitation that a defendant may not be found guilty of multiple offenses in some instances.

Subsection (4) preserves 1987 MCA 46-11-404(3). The code mirrors the provisions of the federal rule. Compare 1987 MCA 46-11-404(3) and Rule 8(b), Fed. R. Crim. P.

Source: Federal Rules [of Criminal Procedure, Rules] 7(c) and 8; R.C.M. 1947, section 94-6407.1; Illinois Code of Criminal Procedure, [Chapter] 38, section 111-4.

The section is basically the same as existing law except [46-11-404(3)] broadens the present law by providing for the charging of two or more defendants in the same indictment or information.

Compiler's Comments

1991 Amendment: Substituted first sentence of (1) concerning charging of two or more offenses of similar character or based on same transaction or part of a common scheme for former sentence that read: "An indictment, information, or complaint may charge two or more different offenses connected together in their commission, different statements of the same offense, or two or more different offenses of the same class under separate counts"; in (3), in first sentence after "offenses", substituted "set forth in the charging document" for "or counts set forth in the indictment, information, or complaint" and at end inserted exception clause; deleted former (2) that read: "(2) The court in which the case is triable, in the interests of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment, information, or complaint be tried separately or divided into two or more groups and each of the groups tried separately. An acquittal of one or more counts shall not be considered an acquittal of any other count"; in (3), in first sentence after "information", inserted "or complaint" and after "same" deleted "series of acts or"; deleted former (4) that read: "(4) If it appears that a defendant or the state is prejudiced by a joinder of related prosecutions or defendants in a single charge or by joinder of separate charges or defendants for trial, the court may order separate trials, grant a severance of defendants, or provide any other relief as justice may require"; and made minor changes in style.

Case Notes

No Error in Trial Court's Failure to Sever Counts of Sexual Assault and Sexual Abuse of Children — Defendant's Failure to Show Prejudice: Prior to trial, Yecovenko moved to sever

charges of sexual abuse of his stepdaughters from charges of sexual abuse of children related to Yecovenko's downloading of child pornography from the Internet, asserting that prejudice would result, but failing to assert the type of prejudice that would occur if the charges were not severed, as required by St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002). Because Yecovenko failed in District Court to satisfy the threshold requirement of alleging the nature or type of prejudice that would occur, the Supreme Court declined to consider Yecovenko's prejudice arguments on appeal, and denial of the motion to sever was affirmed. St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004).

Actual Innocence Standard Applied to Postconviction Claim Based on Incomplete DNA Results at Trial — Burden of Postconviction Statute of Limitations Met: Pope's petition for postconviction relief was denied by the District Court as barred by the 5-year statute of limitations in the 1993 version of 46-21-102 (now 1 year) and because the issues were not raised on direct appeal. The court concluded that the jurisdictional bar could be overcome only by a clear miscarriage of justice and that the exception did not apply unless Pope did not commit the offense. The court relied on an inadmissible confession that Pope committed the crime, reasoning that even if the confession was not admissible at trial, it could be considered in a postconviction proceeding because it refuted Pope's claim of innocence. Pope contended that the exception applied because newly available DNA evidence tended to show that he did not commit the crime. The Supreme Court reversed. Based on Murray v. Carrier, 477 US 478 (1986), a petitioner must demonstrate that a constitutional violation at trial has probably resulted in conviction of an individual who is actually innocent and the claim must be supported by new evidence that indicates that the individual is innocent. Montana case law provides that the miscarriage of justice must be so obvious that the judgment is rendered a complete nullity and that the exception does not apply unless the defendant did not commit the crime from which relief is sought. Further, under Schlup v. Delo, 513 US 298 (1995), actual innocence requires that no reasonable, properly instructed juror would have found the defendant guilty. Schlup also allows review only of the record and new evidence to determine what a reasonable juror would find, so the District Court improperly relied on the failed plea confession to determine that Pope was not actually innocent. Pope correctly pointed out that the use of "and/or" language in the jury instructions made it impossible to determine whether Pope was convicted of raping one or two women. Thus, Pope satisfied the Schlup actual innocence burden in light of the complete DNA report, and when coupled with the error of using "and/or" language in the alternative charge, the jury instructions, and the verdict, waiver of the time bar in 46-21-102 was required by the clear miscarriage of justice, warranting reversal. St. v. Pope, 2003 MT 330, 318 M 383, 80 P3d 1232 (2003).

Original Misdemeanor Charges Dismissed and Refiled With Felony Charge — Joinder of Charges Establishing New Case: Following an automobile accident, Topp was charged in Justice's Court with two misdemeanors to which he pleaded not guilty. The charges were subsequently dismissed, and the state filed a new information in District Court recharging Topp with the misdemeanors plus felony criminal endangerment. Topp argued that the misdemeanor charges should be dismissed because they were not prosecuted within 6 months, as required by 46-13-401. The Supreme Court held that 46-13-401 did not apply in this case. When the original misdemeanor charges were dismissed, there were no longer charges pending against Topp, so there was no requirement for prosecution. As set out in St. v. Bullock, 272 M 361, 901 P2d 61 (1995), as long as Justice's Court jurisdiction is exhausted within 6 months by some action that authorizes appeal de novo to the District Court, 46-13-401 is satisfied. Thus, when the charges were joined in District Court, the action became a case de novo, so the District Court did not err in denying Topp's motion to dismiss the misdemeanor charges on speedy trial grounds. St. v. Topp, 2003 MT 209, 317 M 59, 75 P3d 330 (2003).

Similarities in Character of Two Counts of Sexual Intercourse Without Consent Sufficient to Warrant Joinder of Charges: Freshment moved to sever two counts of sexual intercourse without consent into separate trials because the counts were not similar, involving separate victims on separate occasions. The motion was denied, and Freshment appealed. The Supreme Court affirmed. The counts satisfied most of the factors for the similarity in character test set out in St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3 (1999), so joinder was proper. Both counts involved inebriated 15-year-olds; both victims were initially introduced to Freshment through mutual friends; both alleged crimes occurred within 2 days; both crimes occurred in Billings; and in both instances, Freshment was alleged to know the ages of the victims. St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002).

Standard of Review for Severance of Counts: A criminal defendant seeking to sever counts into separate trials has the burden of proving that severing the counts is necessary to prevent

unfair prejudice. It is not enough to prove that some prejudice will result from a joint trial or that a better chance of acquittal would be realized from separate trials; rather, defendant has the burden to prove that prejudice will prevent a fair trial. As enumerated in St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3 (1999), there are three types of prejudice that defendant may prove that must be considered by a trial court: (1) the accumulation of evidence may be such that a jury would find defendant to be a bad person and wish to convict defendant of something; (2) a jury might use evidence of guilt on one count to convict on another count, even though that evidence would be inadmissible at a separate trial on the latter count; and (3) defendant may suffer prejudice by wanting to testify on one count but not another. If the District Court fails to properly weight these types of prejudice against the judicial economy resulting from a new trial, an abuse of discretion occurs. In this case, Freshment conceded the third factor and failed to meet his burden to show prejudice under the other two factors, so although the case was reversed on other grounds, no abuse of discretion was ascribed to the denial of Freshment's motion to sever. St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002), followed in St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004), and St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006).

Criminal Counts Part of Same Transaction Not Subject to Further Prosecution: In arguing that defendant's conduct attributable to Munchausen Syndrome by Proxy (MSBP) was part of the same transaction that led to joinder of offenses of similar character under this section, the state could not adopt a contrary position and argue that the counts were not part of the same transaction for purposes of further prosecution under 46-11-503. Although this section does allow joinder of offenses of the same or similar character as well as those arising out of the same transaction, the distinction was irrelevant in this case because the state's theory was always that defendant's conduct attributable to MSBP was part of the same transaction. The Supreme Court held that MSBP is a criminal objective—namely, seeking of attention through harming one's children—so defendant's actions toward two children came within the same transaction; thus, further prosecution for one child's death was barred by a former prosecution that resulted in a conviction for criminal endangerment of another child. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000). See also St. v. Waldrup, 264 M 456, 872 P2d 772 (1994).

Proper Denial of Motion to Sever Counts for Separate Trials — Balancing Process — Similarity of Counts and Applicability of Proof: Hocevar was charged with attempted deliberate homicide, two counts of deliberate homicide, criminal endangerment, and assault in connection with the deaths of her two sons. The District Court denied her pretrial motion to sever the two counts associated with the death of one son from the three counts associated with the death of her other son, finding instead that joinder was proper because the counts were similar in nature and much of the proof, which included many out-of-state professional witnesses, would apply to all counts. Hocevar appealed on grounds that the counts should have been severed and separate trials held. In determining whether to grant a motion to sever, the trial court must balance the possibility of prejudice to defendant against the judicial economy that results from a joint trial and the burden is on defendant to show that prejudice was so great as to prevent a fair trial (see St. v. Richards, 274 M 180, 906 P2d 222 (1995)). The Supreme Court, citing St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3 (1999), noted that joinder is proper in cases in which the charges are logically linked by motive and when overlapping proof must be offered. In this case, the state alleged that the deaths of both children were linked by motive through Hocevar's affliction with Munchausen Syndrome by Proxy, which is a pattern of behavior wherein a caretaker, usually a mother, fabricates or causes illness in another, usually a preverbal child, to gain attention. Thus, proof regarding all the charges overlapped, and joinder of the charges was proper. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Joinder of Criminal Counts of Similar Character — Factors in Determining Similarity of Crimes: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern moved to sever the nine counts in the information into four separate trials, pursuant to 46-13-211, based on there being four different victims. Southern claimed a lack of similarity of the alleged crimes. The motion to sever was denied, and Southern was convicted on all nine counts and subsequently appealed. Although not determinative, some factors that are relevant to whether charges in an information are of the same or similar character include whether: (1) the charges are brought under the same statute; (2) the charges involve similar victims, locations, or modus operandi; (3) the conduct charged occurred in a narrow timeframe; and (4) the conduct charged occurred in a limited geographical area. Southern sought to differentiate the crimes by pointing out that the rapes occurred at different times of day, that some involved use of a knife while others did not, and that not all the rapes took place in the victims' homes. The Supreme Court held that despite these differences, the five counts of sexual intercourse without consent were properly joined because

the crimes were of sufficiently similar character, being charged under the same statute. Counts may also be joined if the offenses constitute parts of a common scheme or plan. Thus, the kidnapping, burglary, and theft counts were also properly joined because, by definition, they were part of a common scheme linked by motive and because one charge precipitated the second charge, so overlapping proof would have been required regarding those counts and the accompanying counts of sexual intercourse without consent. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), following St. v. Richards, 274 M 180, 906 P2d 222, 52 St. Rep. 1176 (1995).

Joinder of Criminal Counts of Similar Character — No Prejudice: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern moved to sever the nine counts in the information into four separate trials, pursuant to 46-13-211, based on there being four different victims. Southern asserted that joinder of the counts under this section would result in unfair prejudice. However, it is not sufficient for a criminal defendant to prove that the defendant will face some prejudice as a result of a joint trial or that the defendant stands a better chance of acquittal in separate trials; rather, the defendant must prove that prejudice is so great as to prevent a fair trial. Applying the three basic kinds of prejudice outlined in St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), the Supreme Court found no unfair prejudice and affirmed, deferring to the trial court's discretion in balancing the possibility of prejudice against the judicial economy resulting from a joint trial. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), following St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996), and followed in St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005), and St. v. Harlson, 2006 MT 312, 335 M 25, 150 P3d 349 (2006).

Denial of Motion to Sever Economic Counts From Deliberate Homicide Count — No Error: Defendant was charged with 1 count of deliberate homicide, 51 counts of felony theft, 7 counts of felony forgery, and one count of felony deceptive practices. The Supreme Court held that the burden of showing prejudice by the joinder rests on the defendant and that the defendant must show that the prejudice was so great as to prevent a fair trial. The District Court did not err in denying defendant's motion to sever the economic counts from the deliberate homicide count. St. v. Richards, 274 M 180, 906 P2d 222, 52 St. Rep. 1176 (1995), followed in St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), and St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006).

Severance Denied — Same Charge, Same Offense, Same Incident, Same Witnesses, Same Defenses — Balance Between Prejudice and Judicial Economy: Turner and Gollehon, state prison inmates, were both charged with the beating death of another inmate. Turner moved for severance of trials, asserting that denial of the motion was prejudicial and denied him a fair trial. In striking a balance between prejudice to a criminal defendant and judicial economy, considerations of judicial economy exert strong pressure in favor of joint trials, with the burden of showing prejudice resting on the defendant. In this case: (1) both defendants were charged with the same offenses, which arose out of a single incident; (2) the state relied on the same eyewitness testimony, which would have been required at both trials if defendants had been tried separately; and (3) both defendants raised defenses of alibi or mistaken identity and used the same witnesses to support the defenses. The jury was properly instructed that it must find each defendant guilty and that it was not enough to convict one defendant on the basis of the codefendant's guilt. Given the sensitive nature of trials involving prison inmates as defendants and witnesses and the fact that the crime took place at a state institution, the District Court did not abuse its discretion in refusing to sever the trials. St. v. Turner, 262 M 39, 864 P2d 235, 50 St. Rep. 1267 (1993), followed in St. v. Enright, 2000 MT 372, 303 M 457, 16 P3d 366, 57 St. Rep. 1590 (2000).

Failure to Move for Severance — Disposition of Severance Motion Determined by Evidence Presented at Time of Motion: After trial, appellant contended that based on newly discovered evidence of battered women's syndrome, she was prejudiced by having her case tried with that of her batterer. However, the issue of propriety of a joint trial was not preserved for appeal because she failed to move for severance. Further, the disposition of a severance motion is determined by the evidence presented at the time of the motion and not upon subsequent developments. St. v. Redcrow, 242 M 254, 790 P2d 449, 47 St. Rep. 672 (1990).

Cumulative Effect of Multiple Charges Not Justifying Severance: The defendant argued that he should have been allowed separate trials on the charges because the multiple counts allowed the jury to regard him as a "bad man". The Supreme Court affirmed the lower court's refusal to sever on the basis that it was not sufficient that the defendant show some prejudice or a better chance of acquittal if separate trials were held. Rather, the defendant must show that the

prejudice was so great it prevented a fair trial. St. v. Baker, 237 M 140, 773 P2d 1194, 46 St. Rep. 686 (1989).

Joinder Proper Where Offenses Linked by Motive and Overlapping Evidence: The defendant had burglarized a home, stealing firearms that he later used in robbing a shoe store. The Supreme Court ruled that the joinder of the charges was proper because there was evidence that the stealing of the guns was done in furtherance of a plan to commit robbery, thereby showing logically connected motives and overlapping proof among the separate charges. St. v. Baker, 237 M 140, 773 P2d 1194, 46 St. Rep. 686 (1989).

Claims of Cumulative Evidence, Unrelated Crimes, and Desire of Optional Testimony Insufficient to Demonstrate Prejudice — Severance Denied: Defendant tried on three counts of issuing a bad check, one count of forgery, eight counts of deceptive practices, two counts of felony theft, one count of misdemeanor theft, and one additional count of deceptive practices or, in the alternative, felony theft alleged three reasons why the charges should have been severed for separate trial. First, that the amount of evidence had a cumulative effect, convincing the jury that defendant was a bad person; second, that many of the charges were unrelated and that much of the evidence would have been inadmissible if the charges had been severed; and third, that defendant desired to testify to some, but not all, of the charges. The Supreme Court found that severance was properly denied because the reasons stated by defendant were insufficient to show prejudice by failure to sever. St. v. Slice, 231 M 448, 753 P2d 1309, 45 St. Rep. 752 (1988), followed in Missoula v. Prinkki, 239 M 331, 779 P2d 921, 46 St. Rep. 1724 (1989), and St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996). See also St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Second Charge Precipitated by Previous Charge — Joinder Proper: Joinder is proper in cases where a second charge is precipitated by a previous charge. Therefore, in a case where a defendant charged with assault offered a witness a party, a trip out of town, $1,000, and a motorcycle if the witness would forego testifying to the assault, resulting in a charge of tampering with a witness, the assault charge provided a motive for and precipitated the witness tampering charge, and the two charges were properly joined. St. v. Bingman, 229 M 101, 745 P2d 342, 44 St. Rep. 1813 (1987), followed in St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Speculation of Prejudice Insufficient for Reversal: Appellant failed to specify which evidence offered as to one count prejudiced his trial on a second count. He admitted there was sufficient evidence for the second count to go to the jury. His very speculative allegation of prejudice was insufficient to warrant reversal. St. v. Howie, 228 M 497, 744 P2d 156, 44 St. Rep. 1711 (1987).

Severance of Two Counts of Deviate Sexual Conduct Denied — No Prejudice: In ruling on defendant's argument that the two counts of deviate sexual conduct should have been tried separately, the court found no prejudice to defendant that outweighed considerations of judicial economy. Additionally, the State argued persuasively that the effect of two separate trials on the young victims of these crimes should be considered. Each would potentially be a witness in both trials and be compelled to appear and testify twice. St. v. Phelps, 215 M 217, 696 P2d 447, 42 St. Rep. 305 (1985), followed in St. v. Kestner, 220 M 41, 713 P2d 537, 43 St. Rep. 155 (1986).

Separate Trials — Showing That Codefendant's Testimony Would Be Exculpatory: In order to demonstrate prejudice by the failure to separate trials of two criminal defendants, a defendant must show that the codefendant's testimony is exculpatory. St. v. Dess, 207 M 468, 674 P2d 502, 41 St. Rep. 81 (1984), followed in St. v. Enright, 2000 MT 372, 303 M 457, 16 P3d 366, 57 St. Rep. 1590 (2000).

Two Counts of Theft Found: The defendant was charged with theft of a big-screen television and the theft of a few appliances. While all these items were loaded on a moving van at the same time, thereby completing the execution of unauthorized control over them, they were acquired through different schemes and thereby constituted different crimes. The District Court properly found defendant guilty and sentenced him for two counts of theft. St. v. Holmes, 207 M 176, 674 P2d 1071, 40 St. Rep. 1973 (1983).

Failure of State to Elect Alternative Proofs of Robbery Not Violation of Due Process — Intent Required for Each Alternative: When the defendant was charged with robbery in the alternative under 45-5-401(1)(b) within separate counts in the same information, the District Court did not err in refusing to require the State to elect to prove one of the alternative methods of committing robbery under subsection (1)(b). The defendant was not deprived of notice and due process of law because the information was sufficient to notify the defendant of the charges against him and because the Supreme Court previously approved the charging practice followed in this case in McKenzie v. District Court, 165 M 54, 525 P2d 1211 (1974). Any failure of 45-5-401 to require that the crime of robbery be committed purposely or knowingly under each alternative in

subsection (1)(b) was cured by the giving of a jury instruction making it clear that intent was required to be proved. St. v. Ritchson, 193 M 112, 630 P2d 234, 38 St. Rep. 1015 (1981).

Justice's Court as Having Jurisdiction Despite Associated Felony Violation: A District Court does not have jurisdiction to try a misdemeanor offense of endangering the welfare of children, proscribed in 45-5-622, even though it was committed together with a felony. This section's provision that an information may charge two or more different offenses connected together in their commission is not a grant of jurisdiction but is simply a permissive joinder statute for offenses within the jurisdiction of a given court. Under 3-5-302, providing that the District Court has original jurisdiction in all felony criminal cases and "cases of misdemeanor not otherwise provided for", and 3-10-303, providing for Justice's Court jurisdiction of misdemeanors with a $500 fine, 6 months' imprisonment, or both, the Justice's Court has jurisdiction over the misdemeanor offense of endangering the welfare of children because that offense carries a maximum sentence of $500, 6 months, or both. St. v. Campbell, 191 M 75, 622 P2d 200, 38 St. Rep. 19 (1981).

Multiple Counts of Charge Arising Out of Single Incident: Petitioner objected to being charged with multiple counts of robbery arising out of the same incident. The State is permitted to do so by the express provisions of this section. Although the propriety of filing such multiple charges has been criticized in some cases, it is within the discretion of the prosecution to do so under Montana law, and accordingly there was no error. Parker v. Crist, 190 M 376, 621 P2d 484, 37 St. Rep. 2048 (1980).

Joining of Trials of Codefendants Not Prejudicial: Under this section, it is within the trial court's discretion whether or not to grant a severance of trials. In considering whether there should be a joint trial, trial courts must consider several factors: joint trials speed the administration of justice, conserve judicial time, lessen the burden of prospective jurors, and obviate the necessity of recalling witnesses. These benefits must be weighed by the trial court against the potential prejudice to a defendant that may arise as a result of his being tried with another defendant. There was no real threat of prejudice that would interfere with a fair trial where codefendants would have been associated with each other had they had separate trials and where the jury was instructed to consider each defendant's guilt or innocence. St. v. Strain, 190 M 44, 618 P2d 331, 37 St. Rep. 1763 (1980), followed in St. v. Graves, 241 M 533, 788 P2d 311, 47 St. Rep. 483 (1990), and St. v. Enright, 2000 MT 372, 303 M 457, 16 P3d 366, 57 St. Rep. 1590 (2000).

Permissive Joinder — Not Grant of Jurisdiction: Relator was charged with misdemeanor assault and burglary (a felony). Relator contends that the District Court had no jurisdiction to try him for a misdemeanor. Section 46-11-404 allows an information to charge two or more offenses connected in their commission. This section is a permissive joinder statute for offenses within the jurisdiction of a given court, not a grant of jurisdiction. Jurisdiction for the misdemeanor assault lies with the Justice's Court. State ex rel. Rasmussen v. District Court, 189 M 183, 615 P2d 231 (1980).

Severance of Habitual Traffic Offender Charge Properly Denied: The District Court did not err in refusing to sever an habitual traffic offender charge from a D.W.I. charge and a negligent homicide charge. None of the three basic kinds of prejudice outlined in St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), was found to outweigh the judicial economy resulting from a joint trial. This balancing process was left to the sound discretion of the trial judge, which was not abused. St. v. Campbell, 189 M 107, 615 P2d 190 (1980), followed in St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996), and St. v. Enright, 2000 MT 372, 303 M 457, 16 P3d 366, 57 St. Rep. 1590 (2000); standard for analyzing prejudicial joinder applied in St. v. Bingman, 229 M 101, 745 P2d 342, 44 St. Rep. 1813 (1987), and St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Separate Offense for Each Drug: When a defendant is in possession of more than one kind of prohibited drug at any one time, he may be prosecuted and convicted of a separate offense for each kind of prohibited drug he possesses. St. v. Meadors, 177 M 100, 580 P2d 903 (1978).

Motion to Force Election of Charge: The first trial judge, in ruling on the defendants' motion to force an election between the charges at the time of the arraignment, denied the motion with a reservation of the right to review it prior to trial. Thus, in the subsequent denial of the renewed motion by another judge, who assumed jurisdiction, there was no abrogation of the doctrine of "law of the case". St. v. Davis, 176 M 196, 577 P2d 375 (1978).

Constitutional Rights Denied by Denial of Severance: The joinder of the defendants' trials, after the timely and specific filing of motions for severance, allowed the jury to consider hearsay evidence that was inadmissible against certain defendants yet admissible against others and

denied individual defendants their fundamental constitutional right to confrontation. St. v. Fitzpatrick, 174 M 174, 569 P2d 383 (1977).

Charging in the Alternative: Charging two offenses in the alternative, the charges being different legal theories covering the same transaction, is proper under this section. St. v. Cline, 170 M 520, 555 P2d 724 (1976).

Multiple Counts of Aggravated Assault: When the defendant was charged on two counts of aggravated assault, both arising out of the same incident, and was acquitted on one count but convicted on the other, there was no showing of prejudice from the trial court's refusal to grant separate trials and therefore such refusal was not erroneous. St. v. Orsborn, 170 M 480, 555 P2d 509 (1976).

Multiple Offenses Arising From Same Transaction: Upon allegations of assault and battery, rape, kidnapping, and homicide, all arising from the same transaction, the prosecution is bound to prosecute them all at one time, insofar as possible. State ex rel. McKenzie v. District Court, 165 M 54, 525 P2d 1211 (1974).

"Same Class of Crimes": Grand larceny and receipt of stolen property are in the "same class of crimes". The State could charge the two offenses alternatively in the same information and was not required to elect between them. St. v. Tritz, 164 M 344, 522 P2d 603 (1974), certiorari denied, Tritz v. St., 420 US 909, 42 L Ed 2d 838, 95 S Ct 828 (1975).

Severance of Issues of Guilt and Sanity: The denial of the defendant's motion for severance for trial of the issues of the defendant's guilt or innocence and his sanity was proper. St. v. Olson, 156 M 339, 480 P2d 822 (1971), explained in State ex rel. Krutzfeldt v. District Court, 163 M 164, 515 P2d 1315 (1973).

Charge of Several Counts of Same Offense:

An information in five counts, three of which alleged larceny of more than one cow, did not violate the "former jeopardy" provision of the 1889 Montana Constitution in that each count stated a separate offense. St. v. Johnson, 149 M 173, 424 P2d 728 (1967).

When the defendant was charged with 22 counts of statutory rape and convicted on nine of the counts, it was proper that each charge be set forth in a separate count in the information, and there was no violation of the state or federal constitutional guaranty against double jeopardy. St. v. Boe, 143 M 141, 388 P2d 372 (1963), followed in St. v. Little, 861 M 154, 260 P2d 460, 50 St. Rep. 1124 (1993), and St. v. Hamilton, 2007 MT 223, 339 M 92, 167 P3d 906 (2007).

Improper Joinder of Counts — Remedy: The objection that several offenses are improperly united under separate counts in an information cannot be raised by a motion to require the prosecution to elect upon which one count it would rely for conviction, but must be taken by demurrer. St. v. Marchindo, 65 M 431, 211 P 1093 (1922).

How to Object to Information on Grounds of Duplicity: An objection to an information on the grounds of duplicity is addressed to the jurisdiction of the District Court rather than to the form of the information and may be raised by an objection to the introduction of evidence and a motion to compel an election. St. v. Mjelde, 29 M 490, 75 P 87 (1903).

Waiver by Failure to Object: Any objection to the inclusion in one count of the statement of different forms of the same offense must be made in the District Court before plea; otherwise it is waived. St. v. Mahoney, 24 M 281, 61 P 647 (1900).

Collateral References

Criminal Law *key* 622(1), 877.

22A C.J.S. Criminal Law §804; 23A C.J.S. Criminal Law §1901; 42 C.J.S. Indictments and Informations §§196, 197.

75 Am. Jur. 2d Trial §97, et seq.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor. 9 ALR 4th 972.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time. 16 ALR 3d 866.

46-11-405. Discharge of codefendant.

Commission Comments

[See commission comments to 46-11-404 for source.]

Compiler's Comments

1993 Amendment: Chapter 262 near middle of (1) substituted "prosecutor" for "county attorney" and at end substituted "prosecution" for "state"; and made minor changes in style.

46-11-410. Multiple charges.

Commission Comments

1991 Comment: This statute preserves 1987 MCA 46-11-502. While this code provision establishes some of the protections against double jeopardy, the Commission felt it was better placed in a statute related to the charge. The statute recognizes that there may be several charges arising from a single criminal transaction. The statute also states those instances in which convictions for those several offenses are not permitted because of the double jeopardy protection. Adoption of this statute should not result in a change in either practice or procedure.

Compiler's Comments

1991 Amendment: In (2)(d), after "prohibit a", deleted "designated kind of conduct generally and the other to prohibit a"; and made minor changes in style.

Case Notes

Aggravated Assault as Lesser Included Offense of Felony Homicide — Merger of Offenses — Conviction for Both Offenses Error: Russell was convicted of felony homicide and aggravated assault. Aggravated assault was charged as the predicate offense for charging felony homicide. Russell asserted that because the felony homicide conviction was predicated on the same assault, the conviction for aggravated assault should be dismissed. The District Court declined to dismiss the assault conviction, but on appeal the Supreme Court reversed. A defendant cannot be found guilty of felony homicide without having committed a predicate felony offense. When the offenses are charged in that fashion, the offenses merge and the predicate offense becomes a lesser included offense of felony homicide. Therefore, the District Court erred by not granting Russell's motion to dismiss the lesser included offense of aggravated assault after being convicted of felony murder. St. v. Russell, 2008 MT 417, 347 M 301, 198 P3d 271 (2008).

Criminal Possession of Dangerous Drugs, but Not Possession of Precursors to Dangerous Drugs, Considered Lesser Included Offense of Criminal Production or Manufacture of Dangerous Drugs by Accountability: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. However, because the production or manufacture of dangerous drugs cannot be a criminal act until the drug has been created, the state had to first prove that Becker or one of his codefendants possessed drugs in order to convict Becker on the charge of producing or manufacturing those same drugs. Read together, 46-1-202(9)(a) and subsection (2)(a) of this section barred Becker's conviction for both criminal possession of dangerous drugs and accountability for criminal production or manufacture of dangerous drugs because criminal possession is a lesser included offense of criminal production or manufacture of dangerous drugs. However, criminal possession of precursors to dangerous drugs is not a lesser included offense of accountability for criminal production or manufacture of dangerous drugs. Thus, the Supreme Court reversed the criminal possession conviction and ordered resentencing on only the criminal possession of precursors and accountability for criminal production or manufacture. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005). See also St. v. Peterson, 227 M 511, 744 P2d 870 (1987).

Failure of Counsel to Argue Included Offenses Under State Law Considered Ineffective Assistance of Counsel: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. On appeal, Becker argued that he should have been convicted only of criminal production or manufacture by accountability because the other two charges were part of the manufacturing process and that failure to include the other charges violated his due process rights. The Supreme Court declined to address the double jeopardy issue under the plain error doctrine because Becker raised it for the first time on appeal. However, the court found it appropriate to address the issue under Becker's ineffective assistance of counsel claim. Becker's counsel's failure to include all the relevant charges in a dismissal motion and to rely on the proper statutory grounds for dismissal constituted deficient performance under the first prong of the Strickland test. The second Strickland prong was also met because Becker was prejudiced by counsel's deficient performance, inasmuch as there was a reasonable probability that the result of the proceeding would have been different but for counsel's errors. The Supreme Court thus vacated the convictions and remanded for resentencing. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005). See also St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001).

Violation of Motion In Limine in First Trial Not Grounds for Double Jeopardy Dismissal in Second Trial: Mallak contended that the state goaded him into moving for a mistrial by purposely violating a motion in limine prohibiting testimony of Mallak's prior violent conduct and that under Oreg. v. Kennedy, 456 US 667 (1982), and St. v. Laster, 223 M 152, 724 P2d 721

(1986), a second trial was a violation of double jeopardy. The Supreme Court disagreed. The part of the testimony that Mallak objected to was a product of the prosecutor's inadvertence, not intention, and did not inevitably lead to a violation of the motion in limine, unlike the inherently violative questioning in Laster. Thus, double jeopardy did not apply, and the trial court did not err in denying Mallak's motion to dismiss the charges. St. v. Mallak, 2005 MT 49, 326 M 165, 109 P3d 209 (2005), followed in Billings v. Mouat, 2008 MT 66, 342 M 79, 180 P3d 1121 (2008), regarding the principle that when a mistrial is declared on a defendant's motion, double jeopardy does not bar a subsequent trial unless the governmental conduct in question was intended to goad defendant into moving for a mistrial, and followed in Helena v. Whittinghill, 2009 MT 343, 353 M 131, 219 P3d 1244 (2009), to the extent that it is insufficient to bar a retrial absent intent on the part of the prosecutor to subvert the protections afforded by the double jeopardy clause, even when the prosecutor's conduct prompting the mistrial motion constitutes harassment or overreaching.

Assault With Weapon Not Lesser Included Offense of Assault of Peace Officer — No Double Jeopardy in Convicting of Both Offenses: Matt was charged with assault with a weapon and with assault on a peace officer. Matt pleaded guilty to assault on a peace officer and moved to dismiss the assault with a weapon charge, contending that it was a lesser included offense of assault on a peace officer and that prosecution for assault with a weapon therefore violated Matt's double jeopardy rights. The Supreme Court noted that each offense requires proof of an element not included in the other offense, so assault with a weapon is not a lesser included offense of assault on a peace officer. Thus, prosecution of both offenses did not violate Matt's constitutional or statutory double jeopardy protections, and both convictions were affirmed. St. v. Matt, 2005 MT 9, 325 M 340, 106 P3d 530 (2005), following St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999).

Statute Regarding Conviction for Crime of Preparation Not Prohibitive of Charging Multiple Offenses Arising From Same Transaction: Dixon built a pipe bomb and used it to blow up a traffic sign. Dixon pleaded guilty to criminal endangerment, possession of a destructive device, and criminal mischief. An amended information was filed, lowering the criminal endangerment charge to negligent endangerment and changing the possession of a destructive device to possession of explosives. Dixon pleaded not guilty and moved to dismiss, contending that the amended information violated subsection (2)(b) of this section because the charge of possession of explosives is a crime of preparation. The Supreme Court noted that although subsection (2) of this section prohibits the state from convicting a defendant of more than one offense if one offense consists only of a form of preparation to commit the other, subsection (1) of this section expressly allows a person to be charged with and prosecuted for multiple offenses arising out of the same transaction. Dixon was not convicted of multiple offenses, so this section was not violated. St. v. Dixon, 2000 MT 82, 299 M 165, 998 P2d 544, 57 St. Rep. 354 (2000).

Incest Not Included Offense of Sexual Intercourse Without Consent: McQuiston contended that his conviction for both incest and sexual intercourse without consent violated double jeopardy protections because under this section, a defendant may not be convicted of more than one offense if one offense is an included offense in another, as defined in 46-1-202. The Supreme Court held that incest is not an included offense of sexual intercourse without consent but rather is a distinct and wholly separate offense, each crime requiring proof of distinct elements that the other does not have. McQuiston's conviction for both crimes was not a double jeopardy violation. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996), following St. v. Sor-Lokken, 247 M 343, 805 P2d 1367 (1991).

Possession of Explosives and Criminal Mischief — Neither an Inchoate Crime: Wolfe argued that he had been subjected to double jeopardy in being convicted of both possession of explosives and criminal mischief. The Supreme Court held that the statute prohibiting double jeopardy applied only to inchoate crimes and that neither of the two crimes Wolfe was convicted of was inchoate. The Supreme Court also held that under the test used in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), Wolfe had not been subjected to double jeopardy. St. v. Wolfe, 250 M 400, 821 P2d 339, 48 St. Rep. 1001 (1991).

Conviction of Sexual Assault and Incest — No Violation of Double Jeopardy Protections: Because the victim was 15 years old, the state had to prove lack of consent for a sexual assault charge. The incest statute does not require proof of lack of consent if the victim is under 18 years of age. The jury could have found defendant guilty of incest and not guilty of sexual assault. Based on the facts of this case, the convictions and sentencing of defendant for sexual assault and incest did not violate double jeopardy protections. St. v. Sor-Lokken, 247 M 343, 805 P2d 1367, 48 St. Rep. 142 (1991), followed in St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Conviction for Stealing Purse and Using Bank Card Not Multiple Conviction for Same Offense: The defendant argued that convicting him of felony theft for stealing a purse and taking money from a teller machine using a card from the purse constituted multiple convictions for the same offense. The Supreme Court held that the defendant had been charged and convicted of only one crime, rather than having been subjected to multiple convictions. St. v. Steele, 247 M 480, 807 P2d 1348, 48 St. Rep. 268 (1991).

Conviction of Criminal Trespass to Vehicles and Attempted Theft — Not Conviction Under Same Transaction: Defendant contended that he was improperly convicted of criminal trespass to vehicles and attempted theft in violation of this section. The Supreme Court applied the test set out in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), in deciding whether there were two offenses or only one. Each provision required proof of a fact that the other did not. Because each crime involved separate and distinct elements, defendant's conviction did not violate this section. St. v. Johnstone, 244 M 450, 798 P2d 978, 47 St. Rep. 1715 (1990).

Theft Not Required to Prove Robbery: The defendant argued that the lower court erred in not instructing the jury that theft is a lesser included offense of robbery. He contended that because there was conflicting evidence of whether or not he had induced fear in the bank teller, the instruction was required. The Supreme Court held that theft is not a lesser included offense because the elements of robbery can be proved even if there is no taking of property. St. v. Albrecht, 242 M 403, 791 P2d 760, 47 St. Rep. 800 (1990), followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

Sexual Intercourse Without Consent Not Lesser Included Offense of Aggravated Kidnapping: Under the rationale of this section and the standard set out in St. v. Thornton, 218 M 317, 708 P2d 273 (1985), sexual intercourse without consent is not a lesser included offense of aggravated kidnapping. St. v. Clawson, 239 M 413, 781 P2d 267, 46 St. Rep. 1792 (1989).

Possession of Dangerous Drugs as Lesser Included Offense of Possession With Intent to Sell — Instruction on Lesser Offense Required: It was reversible error for the District Court to deny defendant's instruction on the offense of possession of dangerous drugs as a lesser included offense of possession of dangerous drugs with intent to sell. St. v. Peterson, 227 M 503, 741 P2d 392, 44 St. Rep. 1268 (1987).

Misdemeanor Assault — Not Lesser Included Offense of Sexual Assault: Relying on its decision in St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983), relating to the question of lesser included offense, the Supreme Court affirmed the lower court decision that misdemeanor assault is not a lesser included offense of sexual assault. St. v. Long, 223 M 502, 726 P2d 1364, 43 St. Rep. 1948 (1986).

Conviction for Aggravated Assault, Escape, and Obstructing a Peace Officer — No Double Jeopardy: There was no double jeopardy when defendant was convicted of aggravated assault, escape, and obstructing a peace officer, all of which arose out of the same event, as each offense contains an element not common to the other offenses. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985).

Two Counts of Theft Found: The defendant was charged with theft of a big-screen television and the theft of a few appliances. While all these items were loaded on a moving van at the same time, thereby completing the execution of unauthorized control over them, they were acquired through different schemes and thereby constituted different crimes. The District Court properly found defendant guilty and sentenced him for two counts of theft. St. v. Holmes, 207 M 176, 674 P2d 1071, 40 St. Rep. 1973 (1983).

Theft and Criminal Mischief — Conviction From Same Act — No Error: Conviction of a defendant of both the crime of felony theft and the crime of felony criminal mischief as a result of the defendant's involvement in one criminal incident is permissible under 46-11-502 (renumbered 46-11-410) and is not a violation of the U.S. constitutional prohibition against double jeopardy. St. v. Palmer, 207 M 152, 673 P2d 1234, 40 St. Rep. 1957 (1983).

Felony Theft — Not Lesser Included Offense of Robbery: LaMere was convicted of felony theft and robbery of the Dumas Hotel in Butte. On appeal, he contended that the District Court erred in not treating theft as a lesser included offense of the charge of robbery. Applying the "Blockburger test" as explained in Iannelli v. U.S., 420 US 770, 43 L Ed 2d 616, 95 S Ct 1284 (1975), the Supreme Court looked to determine if each offense required proof of a fact the other did not. The proof of robbery was complete if, as an element of the offense, the State proved the threat of injury in the commission of misdemeanor or felony theft. In order to prove felony theft, the State must prove that the value of the property taken exceeds $150 (raised to $300 by 1983 amendment). There is an additional element required to prove felony theft not required for conviction of the charge of robbery. The theft in this case was not a lesser included offense within

the charge of robbery. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983). Madera was followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

Double Jeopardy — Legislative Intent of Multiple Punishment: Defendant contended that his guarantees against double jeopardy were violated when he was convicted of both aggravated burglary and aggravated assault. In determining whether multiple punishments should be allowed for offenses arising out of the same transaction, the dispositive question is whether the Legislature intended to provide for multiple punishments. The court found several bases for concluding that the Legislature intended to permit punishment for both offenses, including the fact that one could commit either offense without committing the other. St. v. Wells, 202 M 337, 658 P2d 381, 40 St. Rep. 127 (1983), followed in St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Aggravated Kidnapping and Aggravated Assault — Conviction From Same Act: Defendant held off police by holding a victim at gunpoint and threatening to kill him. Defendant's convictions of both aggravated kidnapping and aggravated assault stemming from this action were upheld, following Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932). Each crime requires proof of a fact which the other does not; aggravated kidnapping does not entail the victim's apprehension of serious bodily injury or the use of a weapon by the accused, whereas aggravated assault does not entail a showing of restraint or the intent to hold another as a hostage or shield. Furthermore, aggravated assault is not a general type of conduct, a specific instance of which aggravated kidnapping prohibits. As charged, one prohibits apprehension of serious injury by use of a weapon; the other prohibits the restraining of another by use or threat of force of any kind. St. v. Buckman, 193 M 145, 630 P2d 743, 38 St. Rep. 1007 (1981).

Aggravated Assault Not a Lesser Included Offense of Robbery: When, in the course of a robbery, the defendant fired a shotgun in the direction of a bartender, the District Court did not err in imposing sentences for both offenses following the defendant's conviction of robbery and aggravated assault. Under Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), as applied by St. v. Close, 191 M 229, 623 P2d 940 (1981), and other Montana cases, the "facts" referred to in provision in 46-11-501(2) (now repealed), that an offense is an included offense if it is established by proof of the same or less than all the facts required to establish the offense charged, are the statutory elements of the crime rather than the individual facts of each case. Here, because the aggravated assault statute requires proof of at least one element that is not needed to establish the offense of robbery, aggravated assault is not a lesser included offense in the crime of robbery. St. v. Ritchson, 193 M 112, 630 P2d 234, 38 St. Rep. 1015 (1981).

Reckless Driving and Criminal Mischief From Same Transaction: The state of Montana is barred from prosecuting a criminal mischief charge under 46-11-504 where the defendant was previously convicted of reckless driving. The acts that are concerned with reckless driving are also those necessary to establish the felony crime of criminal mischief; the "same transaction" test of this section is met. St. v. Houser, 192 M 164, 626 P2d 256, 38 St. Rep. 538 (1981).

Conviction for Both Solicitation and Criminal Mischief Barred by Statute — Failure to Object When Error Occurred After Judgment: In a prosecution of the defendant for soliciting another to set fire to a mobile home and for felony criminal mischief, the District Court erred in convicting the defendant of both offenses when the solicitation constituted acts in preparation of the criminal mischief. Because the conviction and the error did not arise until after the District Court rendered a final judgment of conviction on both counts of the information, the failure of the defendant to object to the submission of both counts to the jury does not preclude the defendant from raising the issue on appeal. St. v. Mitchell, 192 M 16, 625 P2d 1155, 38 St. Rep. 487 (1981).

Multiple Counts of Charge Arising Out of Single Incident: Petitioner objected to being charged with multiple counts of robbery arising out of the same incident. The State is permitted to do so by the express provisions of this section. Although the propriety of filing such multiple charges has been criticized in some cases, it is within the discretion of the prosecution to do so under Montana law, and accordingly there was no error. Parker v. Crist, 190 M 376, 621 P2d 484, 37 St. Rep. 2048 (1980).

Deliberate Homicide and Aggravated Kidnapping Distinct: The offenses of deliberate homicide and aggravated kidnapping are separate and distinct offenses in our codes, and each requires proof of elements the other does not. Therefore, a defendant may be convicted and sentenced for both deliberate homicide and aggravated kidnapping without violating the double jeopardy prohibition even though the counts arose from the same conduct or episode. Because each offense requires proof of elements that the other does not, aggravated kidnapping is not a lesser included offense and defendant's double jeopardy claim must fail on this point as well. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979), affirmed in St. v. Coleman, 249 M 128, 814 P2d 48, 48 St. Rep. 610 (1991).

Rejection of So-Called "Same Transaction" Test: In State ex rel. McKenzie v. District Court the traditional "same facts" rule was not abandoned in favor of the so-called "same transaction" test. The failure of the State to elect between charges alleging practicing medicine without a license and practicing chiropractic without a license did not subject the defendant to double jeopardy under this section because he was convicted of both offenses. St. v. Blinzler, 183 M 300, 599 P2d 349 (1979).

Same Transaction Bar — Proper Time for Objection: The prosecution of the defendant was not barred by the double jeopardy provision of the United States Constitution or by the Montana "same transaction" statutes even though the defendant had been tried in another county on a similar charge. The information filed in the other county named different defendants and was filed after the information in the present case. If a valid objection did exist in this area, it would have been proper to make the objection upon the filing of the second information in the other county. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Conviction of Lesser Included Offense as Bar to Subsequent Prosecution: A subsequent prosecution is barred by a prior conviction if the subsequent prosecution: (1) is based upon the same acts as was the prior conviction; (2) is for an offense of which the offense in the prior conviction is a lesser included offense; and (3) is in a court which is part of the same sovereign as the court involved in the prior conviction. Because the offense of disturbing the peace essentially requires no proof beyond that required for conviction of first-degree assault, it is a lesser included offense of the greater offense of assault. Yother v. St., 182 M 351, 597 P2d 79 (1979).

Included Offense: The charge of possession of a weapon by a prisoner does not constitute an offense included in the charge of aggravated assault. Therefore, a conviction on both charges does not violate prohibitions against double jeopardy. St. v. Perry, 180 M 364, 590 P2d 1129 (1979).

Separate Offense for Each Drug: When a defendant is in possession of more than one kind of prohibited drug at any one time, he may be prosecuted and convicted of a separate offense for each kind of prohibited drug he possesses. St. v. Meadors, 177 M 100, 580 P2d 903 (1978).

DWI — Involuntary Manslaughter: The defendant's conviction of driving while intoxicated and operating a motor vehicle with improper brakes did not bar a subsequent prosecution for involuntary manslaughter. St. v. McDonald, 158 M 307, 491 P2d 711 (1971).

Charge of Several Counts of Same Offense:

An information in five counts, three of which alleged larceny of more than one cow, did not violate the "former jeopardy" provision of the 1889 Montana Constitution in that each count stated a separate offense. St. v. Johnson, 149 M 173, 424 P2d 728 (1967).

When the defendant was charged with 22 counts of statutory rape and convicted on nine of the counts, it was proper that each charge be set forth in a separate count in the information, and there was no violation of the state or federal constitutional guaranty against double jeopardy. St. v. Boe, 143 M 141, 388 P2d 372 (1963), followed in St. v. Hamilton, 2007 MT 223, 339 M 92, 167 P3d 906 (2007).

Test for Determination of Former Jeopardy: The test to be applied in determining whether the plea of former jeopardy should be sustained is whether the matter set out in the second information was admissible as evidence and would have sustained a conviction under the first information. The court held that a second information filed charging the defendant with embezzlement of city funds was dismissed and that it was error to refuse to entertain defendant's plea. St. v. Parmenter, 112 M 312, 116 P2d 879 (1941), followed in St. v. Hall, 224 M 187, 728 P2d 1339, 43 St. Rep. 2120 (1986).

Same Transaction — Larceny of Several Articles: The rule that there is but one larceny if several articles are stolen at different times and from different places under a single design, impulse, or purpose is applicable only if the different subjects involved are so related in point of time and location as to make it physically possible for actual control to be exercised over both at the same time. The court held that the taking of a bunch of horses a mile east of a ranch and another bunch three-quarters of a mile south, corralled at the same place but belonging to different persons, were independent offenses. St. v. Akers, 106 M 105, 76 P2d 638 (1938).

New Trial Not Double Jeopardy: In a prosecution for the larceny of one of four colts, all stolen at the same time and place, the defendant was convicted and served about a month in the state prison when a new trial was granted him for want of proper proof of ownership of the colt. Thereupon a new information was filed charging the theft of one of the other three colts, and the defendant interposed a plea of once in jeopardy, which was properly denied, not because of a different offense, theft of four colts at the same time constituting but one offense, but because in the granting of a new trial he is in the same jeopardy. St. v. Aus, 105 M 82, 69 P2d 584 (1937).

Law Review Articles

Two Crimes for the Price of One: Reshaping Felony Homicide in State v. Russell, Henkel, 71 Mont. L. Rev. 205 (2010).

Double Jeopardy: This article discusses Montana's rule on double jeopardy as determined in St. v. Cunningham, 166 M 530, 535 P2d 186 (1975), in view of the U.S. Supreme Court's decision in Benton v. Maryland, 395 US 784 (1969), and discusses future challenges to Montana's rule. Rotering, 37 Mont. L. Rev. 238 (1976).

Collateral References

Collateral estoppel: contempt finding as precluding substantive criminal charges relating to same transaction. 26 ALR 4th 950.

Solicitation to commit crime against more than one person or property, made in single conversation, as single or multiple crimes. 24 ALR 4th 1324.

Part 5
Effect of Former Prosecutions

Part Commission Comments

1991 Part Comments: This part retains the essential 1987 code provisions concerning a defendant's statutory protection from double jeopardy. The Commission recommended moving some of the code provisions to the definition statute, 46-1-202. Those provisions that were confusing or unnecessary have been eliminated.

Neither the Federal Rules of Criminal Procedure nor the Uniform Rules of Criminal Procedure contains express provisions governing the double jeopardy situation. The principal model for the statutes was the 1987 code.

Part Case Notes

Suspending Less of Sentence After Retrial Than After First Trial — Court's Belief Time Needed to Complete Ordered Programs: If a judge imposes a more severe sentence upon a defendant after a new trial than that imposed in the former trial, the reasons for doing so must appear in the record and be based on objective information concerning identifiable conduct of defendant occurring after the time of the original sentencing. Otherwise, there is a presumption that the greater sentence was for a vindictive purpose, and the presumption must be rebutted. It was constitutionally legitimate for the court to reduce, after a second trial resulting in the same incarceration term, the amount of time that the sentence was suspended after the first trial. The court believed that defendant needed the time to complete rehabilitative programs that the court ordered him to complete in each sentence and suspended less time to ensure that there was sufficient time to complete the programs. St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Same Transaction Bar — Proper Time for Objection: The prosecution of the defendant was not barred by the double jeopardy provision of the United States Constitution or by the Montana "same transaction" statutes even though the defendant had been tried in another county on a similar charge. The information filed in the other county named different defendants and was filed after the information in the present case. If a valid objection did exist in this area, it would have been proper to make the objection upon the filing of the second information in the other county. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Contempt Proceedings: Under former law, while a contempt proceeding was criminal in its nature, it was not a criminal prosecution and, when such a proceeding was dismissed before a hearing without prejudice and a new one was thereafter instituted by an attorney as relator, the dismissal of the first citation did not constitute a bar to any further prosecution. State ex rel. Hall v. Niewoehner, 116 M 437, 155 P2d 205 (1944).

Part Law Review Articles

Criminal Procedure—Montana Law and the Federal Impact: Paragraph IV.B. discusses amendment of the charging document. Elison, 38 Mont. L. Rev. 53 (1977).

Part Collateral References

Disposition: prosecution or conviction of one conspirator as affected by disposition of case against coconspirators. 19 ALR 4th 192.

Retrial on greater offense following reversal of plea-based conviction of lesser offense. 14 ALR 4th 970.

46-11-503. Prosecution based on same transaction barred by former prosecution.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-11-503. The first two provisions of this statute state the primary situations in which a former prosecution will bar all other prosecutions. Subsection (1)(a) provides such protection when a former prosecution resulted in an acquittal. Subsection (1)(b) provides such protection for cases in which a conviction is the final result. Both subsections preserve the 1987 code but eliminate confusing and unnecessary provisions. Compare subsections (1)(a) and (1)(b) and 1987 MCA 46-11-503(1) and (3).

When a former prosecution has been terminated for other reasons by a final order or judgment that has not been set aside, reversed, or vacated, continued prosecution for offenses arising out of the same transaction is also barred. This statute, codified at 1987 MCA 46-11-503(2) and preserved in subsection (1)(c), maintains the 1987 code provisions but eliminates those that were confusing and unnecessary.

Subsection (1)(d) preserves the general rule that a former prosecution will bar a subsequent prosecution based on the same transaction when the original prosecution ends for reasons other than an acquittal. This provision was changed to comport with the United States Supreme Court's decision in Crist v. Bretz, 437 US 28 (1978).

Subsection (2) retains the 1987 code provision describing those terminations that do not bar a subsequent prosecution.

Compiler's Comments

1999 Amendment: Chapter 110 in (1)(d)(i) substituted "when the jury is impaneled and sworn" for "after the first witness is sworn but before a verdict is returned"; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 110, L. 1999, provided: "WHEREAS, in Keating v. Sherlock, 278 Mont. 218, 924 P.2d 1297, 53 St. Rep. 855 (1996), the Montana Supreme Court held that section 46-11-503(1)(d)(i), MCA, has been unconstitutional since the decision in Crist v. Bretz, 437 U.S. 28 (1978)."

1991 Amendment: In (1), after "known to the", substituted "prosecutor, are supported by probable cause" for "attorney prosecuting upon sufficient evidence to justify the filing of an information or the issuance of a warrant of arrest and were", near end, after "prosecution" deleted "based upon the same transaction as a former prosecution", and after "barred" deleted "by such former prosecution under the following circumstances"; in (1)(b), after "prosecution", substituted "resulted in a conviction" for "was terminated, after a complaint had been filed on a misdemeanor charge or after an information had been filed or an indictment found on a felony charge, by a final order of judgment for the defendant which", and at end, after "vacated", deleted "and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense"; deleted former (3) that read: "(3) The former prosecution resulted in a conviction. There has been a conviction whenever the prosecution resulted in:

(a) a judgment of conviction which has not been reversed or vacated;

(b) a verdict of guilty which has not been set aside and which is capable of supporting a judgment, so long as failure to enter judgment was for a reason other than a motion of the defendant; or

(c) a plea of guilty accepted by the court, so long as failure to enter judgment was for a reason other than a motion of the defendant"; inserted (1)(c) concerning termination by final order or judgment for defendant; at beginning of (1)(d) substituted "the former prosecution was terminated" for former introductory language of (4) that read: "(4) The former prosecution was improperly terminated. Except as provided in this subsection (4), there is an improper termination of a prosecution whenever the termination is"; at beginning of (1)(d)(i) inserted "in a jury trial" and at end inserted "is returned"; inserted (1)(d)(ii) concerning termination in a nonjury trial; in (2)(b), after "court", deleted "in the exercise of its discretion"; in (2)(b)(iii), after "conduct", deleted "in or outside the courtroom"; and made minor changes in style.

Case Notes

Defendant's Acquiescence in Termination of Trial — Waiver of Right to Object to Trial Termination — Retrial Not Barred: A mistrial was declared during Cates' trial for sexual intercourse without consent, and the state amended the information, refiled the charges, and sought a second trial. Cates moved to dismiss on double jeopardy grounds, but the motion was denied pursuant to St. v. Carney, 219 M 412, 714 P2d 532 (1986), which holds that a second criminal trial is barred unless there is a manifest necessity to terminate the trial or the

defendant acquiesces in the termination. Cates appealed, but the Supreme Court affirmed. If the totality of the circumstances and the affirmative conduct of the defendant show that the right to object to trial termination has been waived, then a retrial is not barred on double jeopardy grounds. Here, Cates twice expressed willingness to terminate the proceedings by offering two mistrial motions, and Cates never wavered or expressed any misgivings, even when given the opportunity to do so. Thus, Cates waived the right to object to termination of the proceedings, and under 46-11-503(2)(a), retrial under the amended information was not barred and Cates' motion to dismiss was properly denied. St. v. Cates, 2009 MT 94, 350 M 38, 204 P3d 1224 (2009). See also U.S. v. Dinitz, 424 US 600 (1976), Peretz v. U.S., 501 US 923 (1991), and Keating v. Sherlock, 278 M 218, 924 P2d 1297 (1996).

Statements Made in Another State Without Effect on Montana Homicide Proceedings — Right to Counsel "Offense Specific": Schneider was stopped in Arizona while trying to gain entry into Mexico, and while detained, Schneider confessed to two murders in Montana. At the time of arrest, Schneider was on probation for felony theft in Montana and was prohibited from leaving the state without permission. Arizona charged Schneider with being a fugitive from justice and appointed a public defender. A Montana court moved to revoke Schneider's probation, and Montana officers went to Arizona to interrogate Schneider regarding the murders. Schneider waived his Miranda rights and did not request counsel during questioning, during which he made incriminating statements regarding involvement in the murders. Montana subsequently charged Schneider with two counts of accountability for deliberate homicide. Schneider moved to suppress the statements made in Arizona on grounds that his right to counsel was violated, but the motion was denied based on the holding in Texas v. Cobb, 532 US 162 (2001), and on appeal the Supreme Court affirmed. Under Cobb, the right to counsel is "offense specific", meaning that it only applies with respect to the charged or related offense and cannot be invoked once for all future prosecutions. Because the right to counsel in the Montana Constitution is consistent with Art. VI of the U.S. Constitution, the court declined Schneider's request to extend any further protection under Montana law beyond that expressed in Cobb. The constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those charged with other offenses. In addition, regarding Schneider's argument that the Arizona statement should be suppressed under the "same transaction" rule, the Arizona case was not before the Montana court and had no effect on the disposition of the issues. Thus, Schneider's statements made in connection with the Arizona fugitive charge were admissible in the Montana homicide proceedings, and Schneider's motion to suppress was properly denied. St. v. Schneider, 2008 MT 408, 347 M 215, 197 P3d 1020 (2008), following St. v. Reavley, 2003 MT 298, 318 M 150, 79 P3d 270 (2003).

Defendant's Double Jeopardy Argument Fails: The City Court's granting of the state's motion to dismiss charges to which the defendant wished to plead guilty had no effect on his pending District Court charges as the defendant had no constitutional right to use a double jeopardy argument to defend against District Court charges. St. v. Milligan, 2008 MT 375, 346 M 491, 197 P3d 956 (2008).

No Triple Jeopardy in Prosecution of Misdemeanor Absent Prosecutorial Intent to Provoke Mistrial: At Mouat's misdemeanor DUI trial, the city prosecutor presented a videotape of Mouat's arrest, which showed the arresting officer asking Mouat about previous DUI arrests. Mouat moved for and was granted a mistrial. The trial court found that admission of the offending statement was an inadvertent oversight by both parties and ordered the city to redact the statement from the tape. Nevertheless, despite the city's efforts, at the next trial, the statement was still slightly audible, and Mouat again moved for and was granted a mistrial. Mouat then asserted that, based on double jeopardy and fundamental fairness grounds, the prosecution should not be granted a third trial in a misdemeanor case when the cause was negligence on the part of the government. The Supreme Court disagreed, citing St. v. Mallak, 2005 MT 49, 326 M 165, 109 P3d 209 (2005), for the proposition that when a mistrial is declared on a defendant's motion, double jeopardy does not bar a subsequent trial unless the governmental conduct in question was intended to goad defendant into moving for a mistrial. Billings v. Mouat, 2008 MT 66, 342 M 79, 180 P3d 1121 (2008).

Violation of Motion In Limine in First Trial Not Grounds for Double Jeopardy Dismissal in Second Trial: Mallak contended that the state goaded him into moving for a mistrial by purposely violating a motion in limine prohibiting testimony of Mallak's prior violent conduct and that under Oreg. v. Kennedy, 456 US 667 (1982), and St. v. Laster, 223 M 152, 724 P2d 721 (1986), a second trial was a violation of double jeopardy. The Supreme Court disagreed. The part of the testimony that Mallak objected to was a product of the prosecutor's inadvertence, not intention, and did not inevitably lead to a violation of the motion in limine, unlike the inherently

violative questioning in Laster. Thus, double jeopardy did not apply, and the trial court did not err in denying Mallak's motion to dismiss the charges. St. v. Mallak, 2005 MT 49, 326 M 165, 109 P3d 209 (2005), followed in Billings v. Mouat, 2008 MT 66, 342 M 79, 180 P3d 1121 (2008), regarding the principle that when a mistrial is declared on a defendant's motion, double jeopardy does not bar a subsequent trial unless the governmental conduct in question was intended to goad defendant into moving for a mistrial, and followed in Helena v. Whittinghill, 2009 MT 343, 353 M 131, 219 P3d 1244 (2009), to the extent that it is insufficient to bar a retrial absent intent on the part of the prosecutor to subvert the protections afforded by the double jeopardy clause, even when the prosecutor's conduct prompting the mistrial motion constitutes harassment or overreaching.

Reprosecution of Homicide Charges Precluded by Double Jeopardy After Initial Finding of Innocence: Demontiney was charged with deliberate homicide, mitigated deliberate homicide, and negligent homicide. The jury returned a verdict of not guilty on deliberate homicide and guilty on mitigated deliberate homicide. The Supreme Court vacated the conviction because a mitigated deliberate homicide conviction without a deliberate homicide conviction is logically impossible. The state sought a retrial, but the Supreme Court disallowed a retrial on any of the three charges on double jeopardy grounds. Demontiney was found not guilty of deliberate homicide and could not be retried on that charge. The mitigated deliberate homicide conviction was vacated, so that charge could not be retried. Further, under this section, the state may not prosecute a defendant on the same transaction when two or more offenses are known to the prosecutor, supported by probable cause, and consummated prior to the original charge when the former prosecution resulted in an acquittal. The negligent homicide charge was known, supported, and consummated, and the original prosecution ultimately resulted in an acquittal, so retrial on negligent homicide was also prohibited. Demontiney v. District Court, 2002 MT 161, 310 M 406, 51 P3d 476 (2002).

Criminal Counts Part of Same Transaction Not Subject to Further Prosecution: In arguing that defendant's conduct attributable to Munchausen Syndrome by Proxy (MSBP) was part of the same transaction that led to joinder of offenses of similar character under 46-11-404, the state could not adopt a contrary position and argue that the counts were not part of the same transaction for purposes of further prosecution under this section. Although 46-11-404 does allow joinder of offenses of the same or similar character as well as those arising out of the same transaction, the distinction was irrelevant in this case because the state's theory was always that defendant's conduct attributable to MSBP was part of the same transaction. The Supreme Court held that MSBP is a criminal objective—namely, seeking of attention through harming one's children—so defendant's actions toward two children came within the same transaction; thus, further prosecution for one child's death was barred by a former prosecution that resulted in a conviction for criminal endangerment of another child. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000). See also St. v. Waldrup, 264 M 456, 872 P2d 772 (1994).

DUI and Negligent Homicide Arising From Same Accident Not Part of Same Transaction — No Double Jeopardy: Booth pleaded guilty in Justice's Court to a DUI charge and claimed double jeopardy when he was subsequently charged in District Court with two counts of negligent homicide arising out of the accident that led to the DUI charge and conviction. Neither 46-11-504 nor this section barred the District Court charges. Under each section, double jeopardy requires that the offenses arise out of the same transaction. Because Booth's conduct in allegedly causing the two deaths was not motivated by a purpose to accomplish the criminal objective of DUI, the DUI and negligent homicide offenses did not arise out of the same transaction within the meaning of the statutory definition of "same transaction" as conduct consisting of a series of acts that are motivated by a purpose to accomplish a criminal objective and that are necessary or incidental to the accomplishment of that objective. State ex rel. Booth v. District Court, 1998 MT 344, 292 M 371, 972 P2d 325, 55 St. Rep. 1395 (1998), followed in St. v. Condo, 2008 MT 114, 342 M 468, 182 P3d 57 (2008).

Negligent Homicide Charges After DUI Guilty Plea — Supervisory Control to Avoid Double Jeopardy Trial: If the District Court's conclusion that the Justice's Court plea of guilty to DUI did not bar subsequent prosecution of two negligent homicide charges arising out of the same auto accident as the DUI charge is proved, on appeal, to be incorrect, the defendant will have been subjected to prosecution even though double jeopardy entitled him to avoid prosecution altogether. Thus, it is clear that an appeal would not be an adequate remedy, and the defendant's application to the Supreme Court for a writ of supervisory control presented legal issues appropriate for the Supreme Court's consideration and would be accepted and decided. State ex rel. Booth v. District Court, 1998 MT 344, 292 M 371, 972 P2d 325, 55 St. Rep. 1395 (1998).

"Offenses Lie in a Single Court" — Does Not Mean They Occur in Same Court: The reference in this section to two or more offenses in regard to which "jurisdiction and venue of the offenses lie in a single court" requires that jurisdiction and venue lie in a single court; the phrase does not require that, when double jeopardy is claimed, the former and subsequent prosecutions occur in the same court. State ex rel. Booth v. District Court, 1998 MT 344, 292 M 371, 972 P2d 325, 55 St. Rep. 1395 (1998), followed in St. v. Condo, 2008 MT 114, 342 M 468, 182 P3d 57 (2008).

No Double Jeopardy — Initial Single Count Misdemeanor Charge Converted to Felony Bad Check Common Scheme: Vargas was charged with a single count of misdemeanor issuing a bad check despite the fact that the complaint alleged that he had written 10 bad checks over a 3-week period. He pleaded guilty and was given a 6-month suspended jail sentence. Several months later, the County Attorney was notified that Vargas had written an additional 18 bad checks during the same 3-week period. In light of the new information, Vargas was charged with a felony for issuing all 28 bad checks, common scheme. Vargas moved to dismiss this information, claiming that under double jeopardy protections, his prior misdemeanor conviction prevented additional punishment for the same conduct for which he had been convicted. The District Court denied the motion to dismiss. Vargas changed his plea to guilty but reserved the right to appeal on double jeopardy grounds and, in doing so, maintained that the state violated his right to be free from a second prosecution for the same offense when it charged him with felony common scheme based in part on a check that had formed the basis for a prior misdemeanor conviction. Pursuant to Brown v. Ohio, 432 US 161, 53 L Ed 2d 187, 97 S Ct 2221 (1977), the general rule is that the double jeopardy clause prohibits the state or federal government from trying a defendant for a greater offense after it has convicted that defendant of a lesser included offense. Although Vargas's argument was consistent with Brown, it did not take into account the significant exceptions to the general rule that were set out in Jeffers v. U.S., 432 US 137, 53 L Ed 2d 168, 97 S Ct 2207 (1977). Under Jeffers, a subsequent prosecution for a greater crime is allowed if: (1) all the elements necessary to the greater crime had not taken place at the time prosecution for the lesser crime had begun; or (2) the facts necessary to show the greater crime had not been discovered by the state before the first trial, despite the exercise of due diligence. Pursuant to U.S. v. Stricklin, 591 F2d 1112 (5th Cir. 1979), once the defendant makes a prima facie case of double jeopardy, it is the state's responsibility to demonstrate by a preponderance of the evidence that it exercised due diligence in discovering all relevant facts before the first trial or, as in this case, before the guilty plea. The case was remanded for further proceedings on the question of whether the state exercised due diligence. St. v. Vargas, 279 M 357, 928 P2d 165, 53 St. Rep. 1184 (1996).

Indecent Exposure to Different Victims on Different Dates Not Considered Same Transaction — Prosecution Not Barred: After charging Waldrup with three counts of indecent exposure, to which he pleaded guilty on two counts, police continued to investigate previous reports of a man exposing himself. Waldrup was a suspect. After Waldrup was identified from a photographic lineup, he was charged with four additional counts of indecent exposure in incidents involving four different victims. Under 45-5-504, a third or subsequent conviction of indecent exposure allows for enhancement of punishment to a felony. Waldrup moved to dismiss the charges on the grounds that prosecution was barred for reasons of fundamental fairness and violation of constitutional provisions. The District Court granted the dismissal motion on the basis of double jeopardy. About 1 week after dismissal, the Supreme Court decided St. v. Berger, 259 M 364, 856 P2d 552 (1993), holding that the 1991 amendments to this section did not eliminate the "same transaction" requirement or expand statutory protection to unrelated offenses. Because the charges against Waldrup were based on incidents that were not part of the same transaction, within the meaning of 46-1-202, the incidents could not be considered part of a plan resulting in the repeated commission of the same offense against the same person. Thus, prosecution of the four later counts was not precluded. St. v. Waldrup, 264 M 456, 872 P2d 772, 51 St. Rep. 344 (1994).

Double Jeopardy — Vacating Trial When Defendant Requested Attorney After First Witness Was Sworn: After the first witness was sworn and testified in a prosecution for two misdemeanors, the judge asked defendant about a letter in the court file indicating that defendant had a public defender. Defendant said that he had not been in touch with the public defender and that he wanted a lawyer. The court vacated the trial to allow defendant a chance to obtain counsel. At a trial held 11 months later, a motion to dismiss because jeopardy attached after the first witness was sworn in the first trial was properly denied. Defendant's request for counsel prompted the vacation of the first trial, and the vacation worked to his advantage because he secured the public defender's representation. Found to be without merit was defendant's claim that the legal defect at the first trial, which the court feared might arise from

lack of counsel, would not have occurred because the consequence of failure to appoint counsel would only prohibit the judge, under 46-8-101, from including jail time in the sentence. St. v. Stringer, 263 M 295, 868 P2d 588, 51 St. Rep. 63 (1994).

No Double Jeopardy From Drug Transactions: Defendant, who pleaded guilty to possession of dangerous drugs, was also charged with criminal sale of dangerous drugs (now criminal distribution of dangerous drugs)—an offense that was not a part of the "same transaction". Defendant appealed the criminal sale conviction, arguing that recent amendments to the double jeopardy law eliminated the "same transaction" requirement and expanded the protection of the law to unrelated offenses. Affirming the District Court decision, the Supreme Court ruled that this section does not bar unrelated prosecutions that result from separate transactions. St. v. Berger, 259 M 364, 856 P2d 552, 50 St. Rep. 836 (1993).

Trying Defendant Twice in Five-Year Period for Second Offense DUI Not Double Jeopardy: The defendant was convicted of DUI at 17 years of age. Several months later when he was 18, the defendant was arrested for a second incident and tried and convicted for DUI, second offense. Two years later, the defendant was arrested for a third time, initially with a third offense DUI. The prosecution amended the charge to a second offense DUI upon learning that the defendant had been a juvenile when convicted the first time. The defendant argued that charging him twice within a 5-year period under Montana's DUI scheme for second offense DUI constituted double jeopardy. The Supreme Court held that it was not double jeopardy because the defendant was not being tried twice for the same occurrence. Each charge arose from a separate set of facts. The court further stated that although the first conviction for second offense DUI might not have been correct since the first DUI conviction had occurred when the defendant was a minor, the second charge for a second offense DUI was proper. St. v. Chasse, 240 M 341, 783 P2d 1370, 46 St. Rep. 2178 (1989).

Sexual Intercourse Without Consent Not Lesser Included Offense of Aggravated Kidnapping: Under the rationale of 46-11-502 (renumbered 46-11-410) and the standard set out in St. v. Thornton, 218 M 317, 708 P2d 273 (1985), sexual intercourse without consent is not a lesser included offense of aggravated kidnapping. St. v. Clawson, 239 M 413, 781 P2d 267, 46 St. Rep. 1792 (1989).

Failure of Hung Jury to Decide Issue — No Bar to Subsequent Prosecution: Defendant was prosecuted for felony escape, which required a finding of assault, but the jury hung on the issue and explicitly failed to come to any conclusion regarding whether an assault occurred. The jury convicted him of misdemeanor escape, which did not involve a finding of assault, and because there was no determination of whether an assault occurred, the issue was a proper subject for a second trial and not blocked by res judicata. St. v. Hawkins, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989).

Offenses Revealed in Treatment as Part of Plea Bargain — Further Prosecution Barred: As a prerequisite to a plea bargain, defendant was required to participate in a treatment program. In order to be accepted for treatment, he had to undergo an evaluation of his amenability to treatment. An indication of his amenability was his willingness to admit his past behavior. Unless the evaluator believed defendant had admitted all offenses, defendant would not be accepted into the program. If not accepted, plea negotiations would cease and defendant would face a prison sentence or fine. Hence, in order to ensure the continuance of negotiations, defendant waived his right to silence and underwent evaluation. When defendant admitted further crimes during evaluation, the state sought a sentence in excess of that agreed upon in the plea bargain. The Supreme Court held that fundamental fairness forbade the state from prosecuting the defendant for offenses for which he had essentially already been punished. St. v. Thiel, 236 M 63, 768 P2d 343, 46 St. Rep. 182 (1989).

Midtrial Dismissal of Jury Upon Appeal by State of Adverse Evidentiary Ruling — Second Trial as Double Jeopardy: After a DUI negligent homicide trial began, the state decided to appeal the trial court's order sustaining objection to the admissibility of blood analyses based on improper chain of custody of the blood samples. The trial court dismissed the jury upon the state's decision to initiate the interlocutory appeal. The Supreme Court held that these circumstances do not show a manifest necessity to terminate the trial, in accordance with Wade v. Hunter, 336 US 684 (1949), and therefore a second trial would constitute double jeopardy. The court further stated that, as a general rule, a ruling on the admission of evidence which is adverse to the state does not constitute an urgent circumstance or a plain and obvious case constituting manifest necessity to discontinue the trial and allow an interlocutory appeal. St. v. Carney, 219 M 412, 714 P2d 532, 43 St. Rep. 54 (1986), distinguished in St. v. Yarns, 252 M 45, 826 P2d 543, 49 St. Rep. 132 (1992).

Pretrial Dismissal of Case Following Conviction in Similar Case — Use of Evidence Seized Upon Arrest on Dismissed Charge: After tribal court ordered defendant to stay away from a certain residence, he broke into it and was convicted in tribal court of criminal contempt of the court. He was then charged in the Justice's Court with criminal mischief and criminal trespass, arrested, searched, and charged in the District Court with illegal possession of dangerous drugs found during the search. The Justice's Court action was then dismissed. Defendant argued the arrest and search were illegal as the arrest was for a crime growing out of an action that was the subject of a prior conviction and that double jeopardy attached and the evidence obtained during the search was illegal. A second jeopardy did not attach because the Justice's Court action was dismissed before either a jury was empaneled and sworn or the court began to hear evidence. Thus, there was no double jeopardy requiring suppression of the evidence. St. v. Caye, 203 M 6, 659 P2d 841, 40 St. Rep. 258 (1983).

Conviction of Nonexistent Crime: Hembd was convicted of a nonexistent crime, attempted negligent arson. The jury was given instruction on several crimes, some of which existed. In this case, the jury's verdict is an implicit acquittal of the other charges. It would be a violation of the guarantee against being twice put in jeopardy for the same offense if Hembd were tried. The conviction was therefore reversed with instructions to dismiss the action. St. v. Hembd, 197 M 438, 643 P2d 567, 39 St. Rep. 653 (1982).

Lost Trial Notes — New Trial Granted — No Double Jeopardy: Defendant did not oppose an order granting him a new trial because the court reporter lost his trial notes but alleged double jeopardy when he failed to get acquitted at the second trial. No valid double jeopardy claim existed because the defendant was not forced to accept retrial. He had available to him procedures under 46-20-304, albeit not totally sufficient, to appeal without benefit of an actual verbatim transcript. Allegations of violation of the right to a speedy trial were unfounded since the initial trial was timely. St. v. Hodgson, 184 M 394, 603 P2d 246 (1979).

Jeopardy — When Attaches in Jury Trial — United States Constitution:

This section's provision that jeopardy does not attach until the first witness is sworn cannot constitutionally be applied in a jury trial. The federal rule that jeopardy attaches in a jury trial when the jury is empaneled and sworn is an integral part of the United States Constitution's guaranty against double jeopardy (similar to Art. II, sec. 25, Mont. Const.) and is binding on the states. Crist v. Bretz, 437 US 28, 57 L Ed 2d 24, 98 S Ct 2156 (1978), followed in St. v. Carney, 219 M 412, 714 P2d 532, 43 St. Rep. 54 (1986), and Keating v. Sherlock, 278 M 218, 924 P2d 1297, 53 St. Rep. 855 (1996).

The federal procedural rule that the trial commences on the swearing of the jury is not mandatory on states. The Montana rule that the trial commences on the swearing of the first witness is not a violation of the double jeopardy prohibition as the real protection against prosecutorial manipulation is the discretion of the trial judge in granting or denying dismissal. Cunningham v. District Court, 406 F. Supp. 430 (D.C. Mont. 1975); overruled by Crist v. Bretz, 437 US 28, 57 L Ed 2d 24, 98 S Ct 2156 (1978).

This section is not in conflict with the federal double jeopardy provision because the federal rule as to when jeopardy attached is not constitutionally mandatory and is not in conflict with Art. II, sec. 25, Mont. Const., because that provision left the Legislature free to make the determination of when jeopardy attaches. St. v. Cunningham, 166 M 530, 535 P2d 186 (1975); overruled by Crist v. Bretz, 437 US 28, 57 L Ed 2d 24, 98 S Ct 2156 (1978).

Acquittal — Double Jeopardy: An acquittal is not appealable by the State without putting the defendant twice in jeopardy. St. v. Cool, 174 M 99, 568 P2d 567 (1977).

Same Transaction — Later Charge Not Particularized: An information that did not particularize the charge against the defendant was not fatally defective since prosecution for the same transaction that resulted in the earlier conviction is expressly barred. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

Double Jeopardy — Two Informations Pending: The mere pendency of a prior information does not sustain the plea of former jeopardy. When there are two informations pending charging the same offense, until there has been a trial or the defendant has been placed in jeopardy under one information, the plea of former jeopardy is not available as against the other. St. v. Aus, 105 M 82, 69 P2d 584 (1937).

New Trial Not Double Jeopardy: In a prosecution for the larceny of one of four colts, all stolen at the same time and place, the defendant was convicted and served about a month in the state prison when a new trial was granted him for want of proper proof of ownership of the colt. Thereupon a new information was filed charging the theft of one of the other three colts, and the defendant interposed a plea of once in jeopardy, which was properly denied, not because of a

different offense, theft of four colts at the same time constituting but one offense, but because in the granting of a new trial he is in the same jeopardy. St. v. Aus, 105 M 82, 69 P2d 584 (1937).

Law Review Articles

Time of Attachment of Jeopardy, (Bretz v. Crist, 546 F2d 1336 (9th Cir. 1976)), Rotering, 38 Mont. L. Rev. 426 (1977).

Criminal Procedure—Montana Law and the Federal Impact: Paragraph IV.D. discusses double jeopardy. Elison, 38 Mont. L. Rev. 56 (1977).

Double Jeopardy: This article discusses Montana's rule on double jeopardy as determined in St. v. Cunningham, 166 M 530, 535 P2d 186 (1975), in view of the U.S. Supreme Court's decision in Benton v. Maryland, 395 US 784 (1969), and discusses future challenges to Montana's rule. Rotering, 37 Mont. L. Rev. 238 (1976).

Collateral References

Determination that state failed to prove charges relied upon for revocation of probation as barring subsequent criminal action based on same underlying charges. 2 ALR 5th 262.

Former jeopardy as bar to retrial of criminal defendant after original trial court's sua sponte declaration of a mistrial—state cases. 40 ALR 4th 741.

Disagreement of jury: propriety of court's dismissing indictment or prosecution because of failure of jury to agree after successive trials. 4 ALR 4th 1274.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial. 98 ALR 3d 997.

Perjury: acquittal as bar to a prosecution of accused for perjury committed at trial. 89 ALR 3d 1098.

Contempt: acquittal of criminal charges other than contempt as precluding contempt proceedings relating to same transaction. 88 ALR 3d 1089.

Propriety of trial court's declaration of mistrial or discharge of jury, without accused's consent, on ground of prosecution's disclosure of prejudicial matter, or making prejudicial remarks in presence of jury. 77 ALR 3d 1143.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery committed of another person at the same time. 51 ALR 3d 693.

Nonjury trial: when does jeopardy attach in a nonjury trial. 49 ALR 3d 1039.

Kidnapping: seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR 3d 699.

Increased punishment: propriety of increased punishment on new trial for same offense. 12 ALR 3d 978.

Homicide: earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide. 11 ALR 3d 834.

Modern status of doctrine of res judicata in criminal cases. 9 ALR 3d 203.

Stopping trial: subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy. 6 ALR 3d 905.

46-11-504. Former prosecution in another jurisdiction.

Commission Comments

1991 Comment: This statute preserves 1987 MCA 46-11-504 and qualifies what may otherwise appear as a blanket protection against further prosecution by adding the phrase "under the same circumstances barring further prosecution in this state". Subsection (1) adopts 1987 MCA 46-11-504(1) but eliminates a reference to another code section.

Subsection (2) has been changed to eliminate unnecessary language.

Compiler's Comments

1997 Amendment: Chapter 162 in introductory clause substituted present language concerning prosecution in another jurisdiction for former language that read: "When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or of two courts of separate, overlapping, or concurrent jurisdiction in this state, a prosecution in any other jurisdiction is a bar to a subsequent prosecution in this state under the same circumstances barring further prosecution in this state if". Amendment effective March 26, 1997.

Preamble: The preamble attached to Ch. 162, L. 1997, provided: "WHEREAS, the Montana Supreme Court has suggested in State v. Pierce, 199 Mont. 57 (1982), State v. Sword, 229 Mont. 370 (1987), and State v. Tadewaldt, 53 St. Rep. 635 (1996), that the concurrent jurisdiction provisions of section 46-11-504, MCA, be clarified."

Applicability: Section 2, Ch. 162, L. 1997, provided: "[Section 1] [46-11-504] applies to offenses occurring on or after [the effective date of this act]." Effective March 26, 1997.

1991 Amendment: At end of introductory clause inserted "barring further prosecution in this state if"; in (1), after "conviction", deleted "as defined in 46-11-503"; near beginning of (2) substituted "charge" for "complaint" and after "filed" deleted "on a misdemeanor charge or after the information had been filed or the indictment found on a felony charge"; and made minor changes in style.

Case Notes

Conviction of Sexual Exploitation of Children and Child Pornography in Federal Court Barring State Prosecution of Sexual Intercourse Without Consent: Neufeld began having sexual intercourse with a 13-year-old child in 2002 or 2003, which continued until Neufeld joined the army in 2005. Neufeld was charged with sexual intercourse without consent in Montana in 2006, and the same day he was charged in federal court with sexual exploitation of children and receipt and possession of child pornography. Neufeld was ultimately convicted in federal court and sentenced to 262 months in federal prison. Neufeld moved to dismiss the state charges, and the motion was granted. The state appealed, but the Supreme Court affirmed. Neufeld's sexual contacts with the minor constituted a crime under both state and federal law, and the federal sentence incorporated the same prohibited conduct. Therefore, the Montana prosecution was barred under 46-11-504. St. v. Neufeld, 2009 MT 235, 351 M 389, 212 P3d 1063 (2009).

Bond Forfeiture Not Generally Synonymous With Conviction — No Double Jeopardy for Assault Proceedings: Toth forfeited bond for disorderly conduct that occurred on the same day that he was charged with assault with a weapon. Toth claimed that if the bond forfeiture arose from the same events that led to the assault charge, double jeopardy would bar further conviction for assault. The Supreme Court disagreed. Absent specific legislation to that effect, bond forfeiture is not generally synonymous with a conviction for double jeopardy purposes. Bond forfeiture is essentially a civil action and is not admissible as evidence in any other civil action, but bond forfeiture is included within the definition of conviction for particular statutorily delineated purposes only, not including assault. Thus, even if Toth's felony assault charge bond forfeiture arose out of the same transaction as the disorderly conduct, jeopardy did not attach by the bond forfeiture, so Toth's claim failed. St. v. Toth, 2008 MT 404, 347 M 184, 197 P3d 1013 (2008). See also Scott v. S. Carolina, 513 SE 2d 100 (S.C. 1999).

Revocation of Federal Probation Not Considered Prosecution Under State Law — No Double Jeopardy Violation: In 1991, Maki was convicted in federal court of five offenses. While on supervised probation for the federal offenses in 2006, Maki violated the terms of supervised release by manufacturing and distributing drugs in Montana and his federal probation was revoked. Maki was subsequently charged with felony drug violations in Montana. Maki moved to dismiss the state charges on double jeopardy grounds, asserting that he would face double punishment for the same conduct that formed the basis for the federal revocation if the state prosecution was continued. The District Court reasoned that Maki had not faced new charges in federal court, so double jeopardy did not apply with respect to the federal court's use of the state violation as a basis for revocation. Therefore, the District Court denied the motion, and on appeal the Supreme Court affirmed. Under 46-11-504, when conduct constitutes an offense within the jurisdiction of a state or federal court, a prosecution in any jurisdiction is a bar to subsequent prosecution in Montana if the prosecution resulted in an acquittal or conviction and a subsequent prosecution is based on an offense arising out of the same transaction. However, the federal revocation proceeding was not a prosecution as contemplated in 46-11-504, so the state was not barred from prosecuting Maki for felony drug charges. Additionally, the basis of a revocation proceeding is a violation of a sentencing condition and is not a second punishment for the underlying offense, so Maki's double jeopardy argument failed. St. v. Maki, 2008 MT 379, 347 M 24, 196 P3d 1281 (2008).

Defendant's Double Jeopardy Argument Fails: The City Court's granting of the state's motion to dismiss charges to which the defendant wished to plead guilty had no effect on his pending District Court charges as the defendant had no constitutional right to use a double jeopardy argument to defend against District Court charges. St. v. Milligan, 2008 MT 375, 346 M 491, 197 P3d 956 (2008).

Conviction of Possessing Stolen Vehicle in Washington Barring Prosecution for Theft of Same Vehicle in Montana: Cech stole a car in Montana and drove it to Washington where he was arrested and convicted of possession of stolen property. Cech was subsequently charged in Montana for theft of the same vehicle. At the Montana trial, Cech asserted double jeopardy. The trial court determined prosecution was not prohibited because the offenses were not the same and because Cech did not meet the first part of the three-part test in St. v. Tadewaldt, 277 M 261,

922 P2d 463 (1996), which provides that subsequent prosecution is barred if a defendant's conduct constitutes an offense within the jurisdiction of the court in which the first prosecution occurred and within the jurisdiction of the court in which the subsequent prosecution is pursued. On appeal, the Supreme Court disagreed and reversed. The underlying conduct that served as a basis for both prosecutions sought to accomplish the same criminal objective of controlling the stolen vehicle that led to the filing of analogous charges directed at that conduct in both states. Cech could not have been charged with possession of the stolen car in Washington if he had not first stolen the car in Montana and taken it to Washington. Thus, the charges arose out of the same transaction, and the double jeopardy provisions of this section barred the subsequent prosecution for theft in Montana. St. v. Cech, 2007 MT 184, 338 M 330, 167 P3d 389 (2007). See also St. v. Sword, 229 M 370, 747 P2d 206 (1987).

State Deliberate Homicide Prosecution Not Barred by Federal Conviction for Firearm Possession: Gazda, a felon, was charged in federal court with unlawful possession of a firearm and ammunition. Prior to the federal trial, Gazda was charged in Montana with deliberate homicide. Following the federal conviction, Gazda moved to dismiss the state charge, arguing that he was placed twice in jeopardy because the prosecution had presented evidence in the federal case that he had committed the homicide. To determine if the subsequent prosecution was barred under this section, the Supreme Court applied the three-part test in St. v. Tadewaldt, 277 M 261, 922 P2d 463 (1996), which sets out that subsequent prosecution is barred if: (1) a defendant's conduct constitutes an offense within the jurisdiction of the court in which the first prosecution occurred and within the jurisdiction of the court in which the subsequent prosecution is pursued; (2) the first prosecution results in acquittal or conviction; and (3) the subsequent prosecution is based on an offense arising out of the same transaction. The District Court found that the first and third factors were not met, and the Supreme Court agreed. The concurrent jurisdiction factor failed because the state and federal courts lacked authority to prosecute equivalent offenses based on the same underlying conduct. The same transaction factor failed because the conduct to support the criminal objective of the state deliberate homicide charge was distinct from the federal weapons charge. Thus, double jeopardy did not bar the subsequent state prosecution. St. v. Gazda, 2003 MT 350, 318 M 516, 82 P3d 20 (2003).

DUI and Negligent Homicide Arising From Same Accident Not Part of Same Transaction — No Double Jeopardy: Booth pleaded guilty in Justice's Court to a DUI charge and claimed double jeopardy when he was subsequently charged in District Court with two counts of negligent homicide arising out of the accident that led to the DUI charge and conviction. Neither 46-11-503 nor this section barred the District Court charges. Under each section, double jeopardy requires that the offenses arise out of the same transaction. Because Booth's conduct in allegedly causing the two deaths was not motivated by a purpose to accomplish the criminal objective of DUI, the DUI and negligent homicide offenses did not arise out of the same transaction within the meaning of the statutory definition of "same transaction" as conduct consisting of a series of acts that are motivated by a purpose to accomplish a criminal objective and that are necessary or incidental to the accomplishment of that objective. State ex rel. Booth v. District Court, 1998 MT 344, 292 M 371, 972 P2d 325, 55 St. Rep. 1395 (1998), followed in St. v. Condo, 2008 MT 114, 342 M 468, 182 P3d 57 (2008).

Misdemeanor Traffic Offenses in Tribal Court and Felony DUI in State District Court Not Arising From Same Transaction — No Double Jeopardy: Couture was cited for two misdemeanor traffic offenses in tribal court. A few days later he was moved to state District Court and charged with felony DUI, sixth offense. He pleaded guilty to the tribal court misdemeanors and then sought dismissal of the District Court felony on grounds of double jeopardy. He contended that because the offenses all arose from the same transaction and he had been convicted in tribal court, prosecution in District Court was barred under this section. The District Court properly held that the misdemeanors—driving without a license and without proof of insurance—were unrelated to the criminal objective of DUI. Because by definition the offenses did not arise out of the same transaction, the District Court felony prosecution did not constitute double jeopardy. St. v. Couture, 1998 MT 137, 289 M 215, 959 P2d 948, 55 St. Rep. 548 (1998), following St. v. Sword, 229 M 370, 747 P2d 206 (1987).

Prosecution for Possession Not Barred by Prior Conviction for DUI as Arising From Same Transaction: Tadewaldt argued that he could not be tried for felony possession of dangerous drugs because that charge arose out of the same transaction that resulted in his DUI conviction. The Supreme Court upheld the second conviction on the grounds that the DUI resulted from his being arrested for drugs that he had ingested. The DUI was not the same transaction as the charge for drugs in his possession that were found on his person subsequent to his being stopped

for DUI. St. v. Tadewaldt, 277 M 261, 922 P2d 463, 53 St. Rep. 635 (1996), following the rationale of St. v. Sword, 229 M 370, 747 P2d 206 (1987).

Failure to Raise Double Jeopardy Argument at Trial — Insufficient Record: The Supreme Court refused to consider a double jeopardy argument that was not raised in a timely fashion at trial, given that the record presented for review was insufficient to establish a double jeopardy defense. St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992).

Bear Killed Unlawfully — State Prosecution Barred: Defendant was charged in state District Court for subscribing to a materially false statement on an application for a grizzly bear trophy license and was charged and convicted in federal District Court for violating the Endangered Species Act for taking the same trophy. The federal court and the state court have concurrent jurisdiction, and the state prosecution is barred as it is based on an offense arising out of the same transaction as the federal charge. (See 1997 amendment). St. v. Sword, 229 M 370, 747 P2d 206, 44 St. Rep. 2053 (1987).

Trial for Federal Offense Following State Conviction: This section did not preclude a federal prosecution for being a felon in possession of a firearm, following a state felony conviction for criminal mischief. Even if this section did preclude the federal prosecution, the section would be void to the extent of any conflict with federal law. U.S. v. Engesser, 788 F2d 1401 (9th Cir. 1986).

Pretrial Dismissal of Case Following Conviction in Similar Case — Use of Evidence Seized Upon Arrest on Dismissed Charge: After tribal court ordered defendant to stay away from a certain residence, he broke into it and was convicted in tribal court of criminal contempt of the court. He was then charged in the Justice's Court with criminal mischief and criminal trespass, arrested, searched, and charged in the District Court with illegal possession of dangerous drugs found during the search. The Justice's Court action was then dismissed. Defendant argued the arrest and search were illegal as the arrest was for a crime growing out of an action that was the subject of a prior conviction and that double jeopardy attached and the evidence obtained during the search was illegal. A second jeopardy did not attach because the Justice's Court action was dismissed before either a jury was empaneled and sworn or the court began to hear evidence. Thus, there was no double jeopardy requiring suppression of the evidence. St. v. Caye, 203 M 6, 659 P2d 841, 40 St. Rep. 258 (1983).

Double Jeopardy — Assault Conviction in District Court — Driving Under the Influence Conviction in Justice's Court: The defendant's involvement in a vehicular accident resulted in his conviction in Justice's Court of driving under the influence of alcohol and his conviction in District Court of aggravated assault. The defendant's constitutional right against being placed in double jeopardy was not violated as each offense requires proof of a fact the other does not. Driving under the influence requires proof of intoxication, while assault does not. Assault requires proof of bodily injury, while driving under the influence does not. (See 1997 amendment.) St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982).

Reckless Driving and Criminal Mischief From Same Transaction: The state of Montana is barred from prosecuting a criminal mischief charge under 46-11-504 where the defendant was previously convicted of reckless driving. The acts that are concerned with reckless driving are also those necessary to establish the felony crime of criminal mischief; the "same transaction" test of 46-11-501 (now repealed) is met. St. v. Houser, 192 M 164, 626 P2d 256, 38 St. Rep. 538 (1981).

State Prosecution Barred: The defendant's conduct constituted an offense within the concurrent jurisdiction of the United States and Montana raising the bar against subsequent state prosecution under this section. The fact that federal authorities chose to prosecute and convict the defendant for making false statements to secure funds (18 U.S.C. §1001) rather than for appropriating funds to his own use (embezzlement under section 94-1501, R.C.M. 1947, which is now found in 45-6-301, 45-7-208, and 45-7-401, MCA) did not destroy the required concurrent jurisdiction. However, this rule was applied prospectively to further proceedings in the case and not retrospectively. St. v. Zimmerman, 175 M 179, 573 P2d 174 (1977), distinguished in St. v. Gruendemann, 282 M 128, 935 P2d 1110, 54 St. Rep. 275 (1997). See also St. v. Sword, 229 M 370, 747 P2d 206, 44 St. Rep. 2053 (1987).

Same Offense: Conviction on federal indictment charging the making of false statements regarding misuse of grant money awarded defendant to do research does not bar a subsequent state prosecution for embezzlement, as a single act may be an offense against two statutes. If each statute requires proof of an additional fact which the other does not a conviction under either statute does not exempt the defendant from prosecution and punishment under the other. To establish the federal crime of making a false statement only evidence that a false statement was made is required; while embezzlement requires evidence of an unlawful appropriation of

state funds for defendant's own use. State ex rel. Zimmerman v. District Court, 168 M 289, 541 P2d 1215 (1975).

Law Review Articles

Double Jeopardy: This article discusses Montana's rule on double jeopardy as determined in St. v. Cunningham, 166 M 530, 535 P2d 186 (1975), in view of the U.S. Supreme Court's decision in Benton v. Maryland, 395 US 784 (1969), and discusses future challenges to Montana's rule. Rotering, 37 Mont. L. Rev. 238 (1976).

Collateral References

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts—modern view. 97 ALR 5th 201.

46-11-505. Former prosecution not a bar.

Commission Comments

1991 Comment: This statute retains the provisions established in 1987 MCA 46-11-505. In adopting this statute, 1987 MCA 46-11-505(2) was not retained because it provided for such an unlikely situation that inclusion was considered unnecessary.

No changes in established procedure are intended with the adoption of this statute.

Compiler's Comments

1991 Amendment: At end of introductory clause deleted "within the meaning of 46-11-503 and 46-11-504 under any one or more of the following circumstances"; deleted former (2) that read: "(2) The former prosecution was procured by the defendant without the knowledge of the proper prosecuting officer or with the purpose of avoiding the sentence which might otherwise be imposed"; and made minor changes in style.

Case Notes

Pretrial Dismissal of Case Following Conviction in Similar Case — Use of Evidence Seized Upon Arrest on Dismissed Charge: After tribal court ordered defendant to stay away from a certain residence, he broke into it and was convicted in tribal court of criminal contempt of the court. He was then charged in the Justice's Court with criminal mischief and criminal trespass, arrested, searched, and charged in the District Court with illegal possession of dangerous drugs found during the search. The Justice's Court action was then dismissed. Defendant argued the arrest and search were illegal as the arrest was for a crime growing out of an action that was the subject of a prior conviction and that double jeopardy attached and the evidence obtained during the search was illegal. A second jeopardy did not attach because the Justice's Court action was dismissed before either a jury was empaneled and sworn or the court began to hear evidence. Thus, there was no double jeopardy requiring suppression of the evidence. St. v. Caye, 203 M 6, 659 P2d 841, 40 St. Rep. 258 (1983).

Retrial — Collateral Estoppel: Collateral estoppel applies only when an issue of ultimate fact has been previously determined by a valid and final judgment and only if the applicability inquiry is set in a practical frame and viewed with an eye to all the circumstances of the proceedings. The court examined the record of the prior proceedings, took into account the pleadings, evidence, charge, and other relevant matters, and concluded that the first jury could have grounded its verdict of guilty of robbery on issues other than those required for deliberate homicide. The retrial was ordered because the jury had been erroneously instructed that the defendant could be acquitted of deliberate homicide even though he was guilty of the underlying felony robbery. Collateral estoppel did not apply. St. v. Bad Horse, 185 M 507, 605 P2d 1113 (1980).

Retrial — Double Jeopardy: A defendant is not subjected to double jeopardy by virtue of his retrial after reversal of his judgment of conviction. The original conviction of robbery could have been sustained except for errors. The court did not believe that because the defendant was not guilty of deliberate homicide that he was likewise guiltless of the underlying charge of robbery. The remand was founded on the right of receiving a trial with a properly instructed jury. Double jeopardy did not apply. St. v. Bad Horse, 185 M 507, 605 P2d 1113 (1980).

Mistrial — Claim of Double Jeopardy: After a motion for a mistrial was granted, the defendant's petition to the Supreme Court for dismissal of the subsequent trial on the ground of double jeopardy was dismissed, since the defendant had not yet been adjudged guilty of any offense. State ex rel. LaFlesch v. District Court, 165 M 302, 529 P2d 1403 (1974), overruled in Keating v. Sherlock, 278 M 218, 924 P2d 1297, 53 St. Rep. 855 (1996).

New Trial Not Double Jeopardy: When one convicted of crime is granted a new trial, he is not placed in new jeopardy by the second trial but is in the same jeopardy he was in when the first trial was had. St. v. Aus, 105 M 82, 69 P2d 584 (1937).

Law Review Articles

Double Jeopardy: This article discusses Montana's rule on double jeopardy as determined in St. v. Cunningham, 166 M 530, 535 P2d 186 (1975), in view of the U.S. Supreme Court's decision in Benton v. Maryland, 395 US 784 (1969), and discusses future challenges to Montana's rule. Rotering, 37 Mont. L. Rev. 238 (1976).

Collateral References

"Manifest necessity": what constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached. 14 ALR 4th 1014.

Jurisdiction: conviction or acquittal of one defense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense. 4 ALR 3d 874.

Part 6
Ensuring Availability of Material Witness Preserving Testimony

46-11-601. Recognizance by or deposition of witness.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 109-3.

The section is controlled by [1889] Montana Constitution, Article III, section 17 [slightly modified in Art. II, sec. 23, 1972 Mont. Const.]. The language was expanded to cover any type of procedure used to hold the defendant although it is in the preliminary examination section. The only change from the constitutional language allows the court to retain witnesses for the defendant as well as for the state. The section is a partial duplication of [Title 46, ch. 15, part 2], however, because it is a special application of the procedure, it was included here.

Compiler's Comments

1993 Amendment: Chapter 262 in two places in (3) substituted "prosecutor" for "county attorney"; and made minor changes in style.

Case Notes

Effect Upon Rights of Accused: The accused's rights were not violated on the theory that the witness was intimidated into giving damaging testimony against the accused by the County Attorney's threat to hold the witness unless she gave a statement. Petition of Gallagher, 150 M 476, 436 P2d 530 (1968).

Collateral References

Bail *key* 49; Depositions *key* 11; Witnesses *key* 19.

26B C.J.S. Depositions §§7 through 9, 20; 97 C.J.S. Witnesses §3, et seq.

Part 7
Pretrial Proceedings — Confidentiality

46-11-701. Pretrial proceedings — exclusion of public and sealing of records.

Commission Comments

1991 Comment: This statute adopts the American Bar Association (ABA) Standard for Criminal Justice 8-3.2 (1978) as the appropriate test for the closure of pretrial proceedings. The Montana Supreme Court has stated that this standard will be applied when reviewing pretrial closure issues. See State ex rel. Smith v. District Court, 201 Mont. 376 (1982). In Smith, the court indicated that it was abandoning a previously applied standard of "strict and irreparable necessity". Id. at 384, citing Great Falls Tribune v. District Court, 186 Mont. 433 (1980). The court noted that the ABA standard "is a *revised and more exacting standard* than the one proposed by the defendant". Smith at 385 (emphasis added).

However, the Montana Supreme Court has appeared to revitalize the irreparable necessity standard. See St. v. Nichols, 225 Mont. 438 (1987). The ABA standard is more appropriate and better defined than any other applied by the court. Therefore, the ABA Standard for Criminal Justice 8-3.2 (1978) has been adopted to control the closure of pretrial proceedings.

Compiler's Comments

1995 Amendment: Chapter 125 inserted (5) relating to victim's presence at pretrial proceedings; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

1993 Amendments: Chapter 10 deleted (6) that read: "(6) An affidavit filed in support of a motion for leave to file a charge or warrant must be sealed unless the judge determines that

disclosure of the information in the affidavit is required to protect the health, safety, or welfare of the public."

Chapter 262 in (3), before "motion to suppress", inserted "hearing on a"; and deleted (6) that read: "(6) An affidavit filed in support of a motion for leave to file a charge or warrant must be sealed unless the judge determines that disclosure of the information in the affidavit is required to protect the health, safety, or welfare of the public."

Case Notes

Lack of Evidentiary Hearing to Determine Whether Dissemination of Trial Information Would Jeopardize Trial Fairness — Media Involvement — "Pretrial Proceeding" Construed: The District Court did not conduct an evidentiary hearing or consider reasonable alternatives before issuing an order barring anyone involved in a criminal case from disseminating evidentiary information to the press or public and sealing evidentiary documents. The Missoulian newspaper sought to reverse the gag order. The Supreme Court, exercising supervisory control, applied the phrase "pretrial proceeding" in this section to include all documents filed in conjunction with the pretrial process, regardless of whether the documents constitute records of a specific court hearing. Even though the gag order was entered with the consent of both counsel, that consent did not override the clear intent of this section to balance the public's right to know with the defendant's right to a fair trial, a balancing that can only be accomplished by including the media in the decisionmaking process. Evidentiary materials filed with the court also fall within the public's constitutional right to know. Based on the District Court's failure to comply with this section, the Supreme Court reversed the order sealing court documents and remanded. State ex rel. The Missoulian v. District Court, 281 M 285, 933 P2d 829, 54 St. Rep. 175 (1997).

Participant Gag Order — Indirect Restraint of Media — Conditions for Issuance of Gag Order: A participant gag order is not as intrusive as a prior restraint upon publication or as intrusive as an order restricting news sources through closure of court proceedings or sealing of court documents, but instead constitutes an indirect restraint. A participant gag order does nevertheless impinge on the media's right to access news and the public's right to know. Prior restraints on publication consist of court-imposed restrictions that are directed at the media and interfere with the media's right to publish material already in its possession. Indirect restraints of the media include, without limitation, restraints that are aimed at the media's ability to gather information or to access official proceedings but that do not intrude on the media's prerogative to publish or edit information already in its possession and include restraints that are not directed at the media but at the sources of information. When the rights of the accused to a fair trial are asserted, a gag order may issue only when the following conditions have been met: (1) the press and general public are given an opportunity to be heard on the question before issuance of the order; (2) the court describes what alternatives have been considered and explains why those alternatives cannot adequately protect the defendant's fair trial rights; (3) the order is narrowly tailored to protect the defendant's fair trial rights; and (4) the court has made specific findings that there is a substantial probability that fair trial rights will be prejudiced by publicity that the gag order would otherwise prevent. A participant gag order is subject to a heightened scrutiny analysis. State ex rel. The Missoulian v. District Court, 281 M 285, 933 P2d 829, 54 St. Rep. 175 (1997), following N.Y. Times Co. v. Sullivan, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710 (1964), and distinguishing Great Falls Tribune v. District Court, 186 M 433, 608 P2d 116 (1980), and State ex rel. Smith v. District Court, 201 M 376, 654 P2d 982 (1982).

Affidavit Supporting Motion to File Criminal Charge or Warrant Subject to Public's Right to Know: The portion of this section sealing affidavits filed to support motions for leave to file criminal charges or warrants was unconstitutional because the public's right to know outweighed the privacy concerns of the persons charged. (See 1993 amendments.) Assoc. Press v. St., 250 M 299, 820 P2d 421, 48 St. Rep. 958 (1991).

CHAPTER 12
ARRAIGNMENT OF DEFENDANT

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the

Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

1991 Chapter Comments: This chapter establishes provisions relating to the entry of a plea or a plea agreement. Some of the provisions are new and are based primarily on Rule 11 of the Federal Rules of Criminal Procedure. Other changes recognize or facilitate established procedure.

The chapter includes more detail relative to the plea colloquy between the court and the defendant and expands the 1987 statute to include subsequent case law requirements.

Chapter Case Notes

No Error in Refusing to Dismiss Charges for Failure to Hold Timely Probable Cause Hearing: Brown was arrested on February 13, but no probable cause hearing was held until February 18. Brown moved for dismissal on due process grounds of failure to hold a probable cause hearing within 48 hours of arrest, citing County of Riverside v. McLaughlin, 500 US 44, 114 L Ed 2d 49, 111 S Ct 1161 (1991), but the dismissal motion was denied. Brown appealed. The Supreme Court pointed out that the question to be decided was not whether Brown was accorded a timely probable cause determination, but rather whether the District Court erred in refusing to dismiss the charges as a remedy for failure to hold a probable cause hearing. Dismissal of charges is not the correct remedy for failure to timely charge a person who was arrested without a warrant. Under St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), the proper remedy is the exclusion of evidence acquired as a result of the delay. The trial court did not err in refusing the motion to dismiss. St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999). See also St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982).

Delay in Initial Appearance — Exclusion of Confession: The defendant was arrested on a misdemeanor charge in Louisiana and incarcerated for several days before he was taken before a magistrate there for arraignment. Before he was arraigned he was questioned by Louisiana police concerning a murder which had occurred in Montana several years earlier. After being advised of his Miranda rights several times, the defendant confessed to the murder. At trial he moved to suppress evidence of his confession on the basis it was obtained after he was denied his right to be taken before a magistrate or judge to be arraigned on the misdemeanor charge and advised of his rights. The rule in this regard is the "McNabb-Mallory" rule, which has been adopted by the Montana Supreme Court and which requires the exclusion of any confession obtained as a result of unnecessary delay in the initial appearance. The test for determining whether the delay was unnecessary is set forth in St. v. Benbo, 174 M 252, 570 P2d 894, 34 St. Rep. 1140 (1977). Under Benbo, the defendant has the initial burden of showing the delay was unnecessary. If established, the burden shifts to the prosecution to show that evidence obtained during the delay was not unreasonably related to the delay. In the present case the defendant has not established an unnecessary delay in arraignment, and even if it were assumed that there was such a delay, the prosecution has established the voluntariness of the defendant's statements by a preponderance of the evidence. The defendant's burden with regard to establishing an unnecessary delay is not met merely by establishing that the authorities could have presented him earlier. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), followed in St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999).

Jury Instructions — Presumption of Innocence: In a criminal prosecution based on theft of an automobile in which the defendant timely requested and was twice denied an instruction on presumption of innocence, it was per se reversible error to deny the instruction. The purpose of the instruction is to caution the jury against conclusions based only on the arrest and

prosecution of the defendant, and an instruction on the State's burden of proof can therefore not supplant the instruction requested. St. v. Williams, 184 M 111, 601 P2d 1194 (1979).

Part 1
General Provisions

46-12-102. Place of arraignment.

Commission Comments

1991 Comment: This statute amends the 1987 code provision to require that the defendant be arraigned only before the court having trial jurisdiction. The statute should not result in a significant change in established procedure and is an effort to avoid repetitive arraignments.

Source: R.C.M. 1947, section 94-6501.

This section is essentially the same as the existing law. If specifies the court in which the arraignment is to take place.

Compiler's Comments

1991 Amendment: After "court" substituted "that has trial jurisdiction of the charge" for "in which the indictment, information, or complaint is filed unless before arraignment the cause has been removed to another court, in which case he shall be arraigned in that court".

Case Notes

Arraignment — Waiver by Defending: Appellant, convicted of aggravated assault, contended on appeal that he was improperly arraigned. It appeared that at the time of his arraignment defendant was only informed of a deliberate homicide charge and the possible punishment for it. The court held that the purposes of arraignment, to call the defendant into court to answer the charges against him and to inform him of certain rights, were waived by the defendant when he proceeded to trial and defended against the aggravated assault charge. The court also held that arraignment may be waived without violating due process so long as the accused has sufficient notice of the accusation and an adequate opportunity to defend himself. St. v. Longneck, 201 M 367, 654 P2d 977, 39 St. Rep. 2170 (1982).

46-12-104. Bringing defendant into court.

Commission Comments

Source: R.C.M. 1947, section 94-6503.

No change.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

46-12-105. Joint defendants.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 113-2.

Part 2
Procedure on Arraignment

Part Commission Comments

Source: Chapter 65, R.C.M. 1947.

This [part] sets forth the procedure to be followed by the courts in conducting an arraignment. The procedure set forth in this section is essentially the same as the procedure provided for in the present code.

Part Case Notes

Erroneous Language in Verification of Arraignment Form Constituting Sufficient Irregularity to Void Waiver of Right to Counsel — Remand for Resentencing: The state attempted to enhance Mann's DUI to a felony based on his pleading guilty to two prior DUIs. Mann challenged the enhancement based on Mann's alleged waiver of the right to counsel contained in a verification of arraignment form. The District Court held that Mann had waived the right to counsel. On appeal, the Supreme Court reversed. The language of the verification of arraignment form was so erroneous, intimidating, and virtually indecipherable that Mann could not be considered to have entered into a knowing, intelligent, or voluntary waiver of the right to counsel. The language in the form was prima facie evidence of irregularity. Because the state had already exercised its opportunity to establish that the prior convictions were not obtained in violation of Mann's constitutional right, the Supreme Court vacated the prior convictions and

remanded for resentencing in accordance with misdemeanor DUI charges. St. v. Mann, 2006 MT 33, 331 M 137, 130 P3d 164 (2006).

Breach of Plea Agreement by State — Defendant's Right to Choose Remedy: The state conceded that it breached a plea agreement that had been offered to Munoz, so the order of the District Court denying Munoz's motion to withdraw his guilty plea was erroneous. The question then became whether the sentencing court or Munoz should have the right to choose the remedy. Generally, when the state breaches a plea agreement, one of two equitable remedies is available to safeguard the defendant's due process rights. The notion of an equitable remedy for a breach is guided by the general principles of contract law. The first remedy is specific performance by the government, requiring the state to uphold its end of the bargain and, before a new sentencing judge, comply with the terms of the plea agreement by recommending a specific sentence, moving for dismissal of other charges, or simply not opposing the defendant's requested sentence. When specific performance is imposed, a defendant enjoys no contractual right or entitlement to a specific sentence. The second equitable remedy is rescission, requiring that a defendant be allowed to withdraw the guilty plea and then face trial on the original charge as if the plea agreement had never been entered. In cases of rescission, a defendant's constitutional rights that were waived by the guilty plea are reinstated. However, the seminal federal case that established these remedies, Santobello v. N.Y., 404 US 257 (1971), never reached the question of choice of remedies, leaving to the discretion of the state court the decision as to which remedy would be appropriate under the circumstances. Federal circuit courts and various state courts have also split on the question of choice of remedies. Until now, the Montana Supreme Court has also applied two lines of reasoning—in some cases leaving the choice of remedies to the discretion of the sentencing court and in other cases providing instructions that a defendant be allowed to choose the remedy. In light of the underlying principles of contract law, a nonbreaching defendant must be afforded the initial right to choose from available remedies when the state breaches a plea agreement. As the breaching party, the state bears the substantial burden of demonstrating through clear and convincing evidence that a defendant's choice of remedy would result in a miscarriage of justice, and only upon such a showing may a District Court disallow a defendant's choice. St. v. Munoz, 2001 MT 85, 305 M 139, 23 P3d 922 (2001), following St. v. Bowley, 282 M 298, 938 P2d 592 (1997), and St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015 (1999), and overruling St. v. Persak, 256 M 404, 847 P2d 280 (1993), and St. v. Rardon, 1999 MT 220, 296 M 19, 986 P2d 424 (1999).

Breach of Plea Agreement by Prosecutor — Prejudice to Defendant Cured by Resentencing by Another Judge: Persak was charged with four counts of felony sexual assault. He agreed to plead guilty to two counts if two were dismissed and if the prosecutor would not seek a prison term. Two counts were dismissed, but the prosecutor breached the agreement and recommended a prison term. To remedy the prosecutor's breach, the judge disqualified himself and ordered Persak to be immediately resentenced by another District Judge. The Supreme Court held that the District Court did not err by refusing to dismiss the charges against Persak. The remedy for breach of a plea agreement is within the sound discretion of the court, and the court did not abuse that discretion by requiring specific performance of the agreement. Defendant was entitled to be sentenced by an impartial court without recommendation for a prison term by the prosecutor and received that impartiality and lack of recommendations, notwithstanding the fact that the new judge sentenced him to a prison term. St. v. Persak, 256 M 404, 847 P2d 280, 50 St. Rep. 123 (1993), followed in St. v. Rardon, 1999 MT 220, 296 M 19, 986 P2d 424, 56 St. Rep. 861 (1999). Persak and Rardon were overruled, to the extent that the choice of remedy following the state's breach of a plea agreement is with the defendant, in St. v. Munoz, 2001 MT 85, 305 M 139, 23 P3d 922 (2001).

Part Collateral References

Criminal Law *key* 267, 272.

22 C.J.S. Criminal Law §478.

21 Am. Jur. 2d Criminal Law §§545 through 554.

46-12-201. Manner of conducting arraignment — use of two-way electronic audio-video communication — exception.

Commission Comments

1991 Comment: This statute combines elements from the 1987 code section and the federal rule. Subsection (1) is based on Rule 10 of the Federal Rules of Criminal Procedure, which more accurately reflects prevailing practice. [Subsections (4) and (5) were inserted by Ch. 710, L. 1991, and were not proposed by the Commission.]

Compiler's Comments

2005 Amendment: Chapter 222 in (1) in third sentence near middle after "to be" deleted "observed and" and near end after "present" inserted "and allowing the party to be seen"; in (4) in first sentence near middle after "may" substituted "be satisfied by" for "in the discretion of the court, be satisfied either by the defendant's physical appearance before the court or by" and at end inserted "if neither party objects and the court agrees to its use and has informed the defendant that the defendant has the right to object to its use"; in (5) near middle after "defendant" substituted "unless the defendant is" for "who is not" and at end inserted "or is appearing before the court by means of two-way electronic audio-video communication"; and made minor changes in style. Amendment effective July 1, 2005.

1999 Amendment: Chapter 395 in (5) after "guilty" inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendments: Chapter 710 in (1) inserted third sentence allowing an arraignment made by two-way electronic audio-video communication to be considered an arraignment in open court; inserted (4) allowing an arraignment to be made either physically or by two-way electronic audio-video communication; inserted (5) allowing a judge to order defendant's physical appearance in court for arraignment and disallowing acceptance of a guilty plea in a felony case from a defendant not physically present in the courtroom; and made minor changes in style.

Chapter 800 in (1) inserted "and must consist of reading the charge to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead to the charge. The defendant must be given a copy of the charging document before being called upon to plead"; in (2) deleted second sentence that read: "The subsequent proceedings must be conducted with the defendant charged under that name, but in the discretion of the court, the defendant may also be referred to by the name by which he was first charged"; and made minor changes in style.

Source of 1991 Amendment: The 1991 amendment made by Ch. 710 to this section is based in part on California Penal Code, section 977.2, and in part on Rule 43.1, Idaho Court Rules.

Case Notes

No Error in Denial of Motion to Withdraw Nolo Contendere Pleas Made Knowingly: White asserted that the District Court erred in denying a motion to withdraw nolo contendere pleas, arguing that he could not have made a knowing waiver of his rights because he was not in possession of all evidence that might have influenced his decision, including inconsistent statements by a witness. The Supreme Court held that even if White did not know of the statement, the lack of knowledge was irrelevant to the criteria in 46-12-210 regarding whether the pleas were made knowingly. White was clearly informed of the nature of the charges, the mandatory minimum penalty, the maximum penalty, and the possibility of the imposition of restitution. Under the good cause factors in St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812 (1999), White's nolo contendere pleas were made knowingly, and the District Court did not err in disallowing withdrawal of the pleas. St. v. White, 2004 MT 103, 321 M 45, 88 P3d 1258 (2004). See also St. v. Bowley, 282 M 298, 938 P2d 592 (1997).

Arraignment After Jury Empaneled and Sworn — No Double Jeopardy: The trial court arraigned Beavers on an amended charge after the jury was empaneled and sworn, which Beavers claimed was a violation of his constitutional protection against double jeopardy. However, this situation does not constitute a successive prosecution. Beavers was prosecuted only once for the offense, so double jeopardy protections did not apply. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999), distinguishing Crist v. Bretz, 437 US 28, 57 L Ed 2d 24, 98 S Ct 2156 (1978).

Change of Plea Agreement Properly Denied — Application of Contract Law Standards — Agreement Not to Prosecute Father — Benefit Derived by Defendant: Keys agreed to accept a motorcycle as collateral for a loan, but the motorcycle, which Keys subsequently sold, turned out to belong to the father of the individual to whom Keys made the loan. Both Keys and his father were charged with theft, but through his attorney, Keys negotiated an Alford plea with the prosecutor whereby the charges against Keys' father would be dropped and the prosecutor would recommend to the court that Keys' sentence be deferred for 4 years. At the hearing on the plea agreement, Keys, who could not read, had difficulty understanding that the District Court was not bound by and did not have to accept the agreement. However, after a lengthy colloquy with the District Court Judge, Keys eventually did state that he understood the agreement. The District Court then ordered that Keys' sentence be deferred for 6 years, and Keys requested that his plea be withdrawn, based upon his lack of understanding and a lack of consideration for his guilty plea. The District Court refused to allow the withdrawal, and the Supreme Court affirmed that refusal. The Supreme Court held that Keys did benefit from the agreement, that the

benefits included the dismissal of charges against his father, and that in dismissing those charges, the state suffered the deprivation of a right (to pursue the conviction of Keys' father) that the law did not require. The Supreme Court also held that even though there was some confusion in Keys' mind over the role of the District Court in the agreement, the record showed by Keys' responses to questions by the District Court that Keys understood, at least at one point in time, that the court was not bound by the agreement. St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812, 56 St. Rep. 44 (1999), followed in St. v. D'Amico, 2000 MT 63, 299 M 57, 997 P2d 773, 57 St. Rep. 297 (2000), St. v. White, 2004 MT 103, 321 M 45, 88 P3d 1258 (2004), and Lout v. St., 2005 MT 93, 326 M 485, 111 P3d 199 (2005).

Guilty Plea Not to Be in Writing: Both this section, regarding the arraignment of an accused, and 46-17-201, regarding the procedure applicable to a plea in Justice's Court, require that a defendant appear in open court, that there be actual communication between the judge and defendant, that the judge first make the requisite inquiries of and provide mandated information to the defendant, and that a plea be accepted as part of that communicative process. There is no provision in either statute that allows a judge to accept a guilty plea from a defendant in either a felony or misdemeanor case through the expedient of the defendant or defendant's counsel simply filing a written plea with the court. The Supreme Court expressed its disapproval of the practice and admonished state courts to comply with the statutory mandates. However, in this case, defendant was at all times represented by counsel, who was personally involved in the written plea. Because defendant's substantive rights were not affected, acceptance of the written guilty plea by the trial court was allowed to stand. St. v. Schneiderhan, 261 M 161, 862 P2d 37, 50 St. Rep. 1242 (1993).

Failure to Arraign on Amended Information — No Error When Amendment Not Affecting Original Charges: Defendant contended the District Court erred when it accepted an information amended to add a reference to the requisite mental states but did not arraign him on the amended information. The amendment was in form only and did not make substantial changes in the charges set out in the original information. Failure to arraign defendant on charges set forth in the amended information did not constitute reversible error. St. v. Cameron, 253 M 95, 830 P2d 1284, 49 St. Rep. 150 (1992).

Five-Day Delay During Hospitalization: Appellant had the burden of showing that the 5-day delay between arrest and arraignment constituted unnecessary delay. He showed that a Justice of the Peace was available. However, appellant was in a hospital for that period, which suggested that the delay was neither unreasonable nor prejudicial. There was nothing to suggest that the delay influenced the voluntariness of appellant's statements made to police during the period of delay. The statements were properly admitted, and motion to suppress them due to the delay was properly denied. St. v. Plouffe, 198 M 379, 646 P2d 533, 39 St. Rep. 1064 (1982).

Collateral References

Standing of media representatives or organizations to seek review of, or to intervene to oppose, order closing criminal proceedings to public. 74 ALR 4th 476.

46-12-203. Time allowed to answer.

Commission Comments

Source: R.C.M. 1947, section 94-6516.

The section does not change the present law.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Entry of Not Guilty When Defendant Silent: Requiring the defendant to plead to the information, even though in the absence of counsel, was not an error, and when the defendant stood mute, the District Court properly entered a plea of not guilty for him. St. v. Stevens, 119 M 169, 172 P2d 299 (1946).

Collateral References

Criminal Law *key* 265.

22 C.J.S. Criminal Law §482.

21 Am. Jur. 2d Criminal Law §555, et seq.

46-12-204. Plea alternatives.

Commission Comments

1991 Comment: Subsection (1) incorporates the principle of 1987 MCA 46-12-204(1), using the more concise language of Rule 11 of the Federal Rules of Criminal Procedure. The possible

inclusion of the nolo contendere plea recognized in the federal rule was considered at length but was rejected as unnecessary, particularly in view of the defendant's plea option under N.C. v. Alford, 400 US 25 (1970). However, the conditional plea provisions of Rule 11(a)(2) of the Federal Rules of Criminal Procedure are included as a method of expediting criminal cases and conserving prosecutorial and judicial resources.

Subsection (2) is a restatement of Rule 11(d) of the Federal Rules of Criminal Procedure. The reference to the nolo contendere plea has been deleted as well as references to personally addressing the defendant in open court, which was redundant.

Compiler's Comments

2002 Amendment: Chapter 22 in (4) at end inserted "except an offense under 45-5-301 through 45-5-303". Amendment effective August 21, 2002.

Applicability: Section 9, Ch. 22, Sp. L. August 2002, provided: "[This act] applies to convictions on or after [the effective date of this act]." Effective August 21, 2002.

1999 Amendment: Chapter 395 in (1) in first sentence inserted "or, with the consent of the court and the prosecutor, nolo contendere"; in (2) in two places inserted "or nolo contendere"; in (3) in first sentence inserted "or nolo contendere"; inserted (4) prohibiting a nolo contendere plea in a case involving a sexual offense; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendment: In (1), at end of first sentence, deleted "to the indictment, information, or complaint"; and in second sentence, after "plead", deleted "to the indictment, information, or complaint" and inserted "or if a defendant corporation fails to appear, the court"; in (2), in first sentence after "voluntary", deleted "with an understanding of the charge" and inserted "and not the result of force or threats or of promises apart from the plea agreement" and inserted last sentence concerning prior discussions with prosecutor; deleted former (3) that read: "(3) (a) A plea bargain agreement is an agreement between a defendant and a prosecutor that in exchange for a particular plea the prosecutor will recommend to the court a particular sentence. A judge may not participate in the making of, and is not bound by, a plea bargain agreement. If a judge does not impose a sentence recommended by a prosecutor pursuant to a plea bargain agreement, the judge is not required to allow the defendant to withdraw a plea of guilty.

(b) Before a judge accepts a plea of guilty, he must advise the defendant:

(i) of all the provisions of subsection (3)(a);

(ii) of the punishment as set forth by statute for the crime charged;

(iii) that prior to entering a plea of guilty, the defendant and his counsel should have carefully reviewed Title 46, chapter 18, and considered the most severe sentence that can be imposed for a particular crime; and

(iv) that the judge may impose any sentence allowed by law"; inserted (3) concerning entering guilty plea while reserving right to appeal; and made minor changes in style.

Coordination Instruction — Amendment Void: Section 3, Ch. 73, L. 1991, provided: "If Senate Bill No. 51 is passed and approved and if it includes a section that amends 46-12-204, then [section 2 of this act], amending 46-12-204, is void." Senate Bill No. 51 was approved May 23, 1991, as Ch. 800, L. 1991, and included an amendment to 46-12-204. Therefore, the amendment to 46-12-204 contained in sec. 2, Ch. 73, L. 1991, is void.

1985 Amendment: Inserted (3) stating what an agreement is and regulating the judge's actions.

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GENERAL

Right to Reserve Pretrial Rulings for Appeal Dependent Upon Plea of Guilty or Nolo Contendere and Adverse Ruling: Although this section allows a defendant to enter a plea and reserve the right to appeal certain pretrial rulings, it also requires that the plea be either guilty or nolo contendere and that there be an adverse ruling on the motion prior to the plea. In this case, defendant did not enter a guilty plea but rather entered a plea of not guilty by reason of mental disease or defect, and the plea was entered without first obtaining an adverse ruling on defendant's motion to dismiss on speedy trial grounds. Therefore, defendant's attempt to enter a plea and preserve the speedy trial issue fell outside the letter and spirit of the rules of criminal

and appellate procedure. St. v. Violette, 2009 MT 19, 349 M 81, 201 P3d 804 (2009), following Hagan v. St., 265 M 31, 873 P2d 1385, 51 St. Rep. 230 (1994).

Statutory Right to Plead Guilty to DUI and Related Misdemeanor Citations Not Violated by City Court's Refusal to Accept Pleas: There was no prejudice and any error was harmless when the state dismissed DUI charges prior to the District Court trial on one felony count and two misdemeanor charges of negligent vehicular assault. St. v. Milligan, 2008 MT 375, 346 M 491, 197 P3d 956 (2008).

Failure of Trial Court to Address Issues Raised in Defendant's Pro Se Petition — Reversible Error: After being charged with failure to register as a sexual offender, Samples was granted the opportunity to file a pretrial pro se petition addressing the ex post facto application of Title 46, ch. 23, part 5, as well as a variety of other constitutional challenges to the sexual offender registration law. The District Court substantively discussed and rejected Samples' ex post facto argument, refused to discuss the other constitutional concerns, and denied the petition. Following denial of the petition, Samples pleaded guilty, but reserved the right to appeal the ruling on the petition. On appeal, the Supreme Court held that, even though the District Court could have refused to allow the pro se motion, once the District Court expressly authorized Samples to file a pro se motion challenging the constitutionality of the sexual offender registration law, the court was obligated to address the constitutional issues raised in the petition. Failure of the District Court to consider all of the constitutional issues raised in the petition was reversible error, and the case was remanded for consideration of all issues raised by Samples in the petition. St. v. Samples, 2005 MT 210, 328 M 242, 119 P3d 1191 (2005).

Defense Attorney's Remarks Constituting Entry of Plea Without Defendant's Consent and Undermining Plea Agreement — Prejudice Warranting New Trial: Jefferson indicated in a pretrial letter to the District Court that he wished to withdraw from a plea agreement to plead guilty to felony assault in order to have the opportunity to either be acquitted or be convicted of a lesser offense than felony assault. However, in both opening statements and in closing arguments, Jefferson's defense counsel admitted Jefferson's guilt to felony assault, undermining the very purpose for which Jefferson withdrew from the plea agreement and directly contravening the reason Jefferson accepted the risk involved in facing the more serious charge of attempted deliberate homicide in a jury trial. Counsel's statements had the effect of entering a plea for Jefferson without Jefferson's consent and by which the jury was not bound. The admission could not be considered a trial strategy or tactical decision under the circumstances, and counsel's conduct fell below the reasonable range of professional conduct required. The question under the Strickland test then became whether Jefferson was prejudiced by counsel's conduct. Counsel precluded Jefferson from making a case for a lesser offense by admitting Jefferson's guilt of felony assault, denying Jefferson of both the right to deny guilt and to have the benefit of the previous agreement to admit guilt. There would have been no reason for Jefferson to withdraw from the plea agreement or to go to trial if he had been aware that his counsel would initiate the trial with an admission of guilt to felony assault. This prejudicial conduct by counsel rendered the criminal proceeding fundamentally unfair, and the Supreme Court reversed for a new trial. St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003).

Right of Defendant to Plead Guilty Over State's Objection — Erroneous Refusal to Accept Guilty Plea: Peplow was charged with and convicted of DUI, driving with a suspended or revoked license, driving without insurance, failing to report an accident, and tampering with evidence. Prior to trial, Peplow tried to enter guilty pleas to the driving with a suspended or revoked license and driving without insurance counts, but the trial court ruled that it was not required to accept the pleas because Peplow's actions giving rise to the counts were part of the res gestae and probative of the issue of impairment; the trial court proceeded to trial on all counts. Peplow appealed on grounds that the trial court erred in refusing the guilty pleas. In a case of first impression, the Supreme Court considered a defendant's right to plead guilty over the state's objection. The court noted the numerous statutory procedural safeguards in place to ensure that: (1) a guilty plea is made knowingly, voluntarily, and intelligently; (2) there is a factual basis for the plea; (3) the court is not bound by any plea agreements; and (4) a defendant may not withdraw a guilty plea if the plea agreement is not accepted. The Supreme Court cited Lamb v. Missoula Imports, 230 M 183, 748 P2d 965 (1988), for the proposition that when the word "may" is used to confer power upon an officer, court, or tribunal and the public or a third person has an interest in the exercise of power, then the exercise of power becomes imperative. Under 46-16-105, a plea of guilty "may" be accepted before or during trial. The Supreme Court construed this language to mandate the acceptance of a guilty plea as long as the statutory requirements are met. Further, under this section, a defendant may plead guilty or not guilty

without limitation on the right to plead. St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

Indian Defendant — Failure to Challenge Transfer to District Court and Failure to Reserve Right to Appeal Issues — District Court Jurisdiction Upheld: After the state filed an amended petition in Youth Court to have Spotted Blanket declared a delinquent youth and a serious juvenile offender, the state and Spotted Blanket stipulated to transferring the case to District Court. Later, Spotted Blanket objected to the jurisdiction of the District Court, arguing that the Youth Court abused its discretion in making the transfer because there was insufficient evidence that the juvenile facilities were inadequate, as required by 41-5-206(1)(d)(ii) (see 1997 amendment), and because the District Court failed to make a finding of probable cause concerning some of the counts against him, as required by the same statute. The Supreme Court declined to address those issues, noting that: (1) Spotted Blanket's notice of appeal was limited to the District Court order denying his motion to dismiss and did not include the order transferring the case to District Court; (2) Spotted Blanket never challenged the propriety of the transfer to District Court and, citing the requirements of St. v. Weeks, 270 M 63, 891 P2d 477 (1995), St. v. Swoboda, 276 M 479, 918 P2d 296 (1996), and this section, holding that claims of error not properly preserved in the trial court are barred from appellate review; (3) Spotted Blanket stipulated to the transfer and that a probable cause hearing would not be necessary; and (4) Spotted Blanket pleaded guilty to the felony counts and noting that the plea acts as a waiver of nonjurisdictional defects under the Supreme Court's prior opinions in St. v. Butler, 272 M 286, 900 P2d 908 (1995), and Stilson v. St., 278 M 20, 924 P2d 238 (1996). St. v. Spotted Blanket, 1998 MT 59, 288 M 126, 955 P2d 1347, 55 St. Rep. 253 (1998).

Defendant Need Not Be Apprised of Parole Eligibility Limits: Section 46-16-105 requires the District Court to advise a defendant of the consequences of a guilty plea and of the maximum sentence that may be imposed, and 46-12-202 (renumbered 46-12-210) and this section outline other specific items of which a defendant must be advised by the court. However, these statutes do not require the court to advise a defendant of any possibility of limitations on his parole eligibility. St. v. Buckman, 236 M 37, 768 P2d 1361, 46 St. Rep. 163 (1989), followed in St. v. Wilson, 1999 MT 52, 293 M 429, 976 P2d 962, 56 St. Rep. 220 (1999).

Motion to Withdraw Guilty Plea Denied — Plea Bargain Statute Constitutional: Defendant alleged that because the trial judge would not allow him to withdraw his guilty plea after rejecting the sentence recommended as part of a plea bargain, defendant was deprived of his constitutional rights, and therefore this section was unconstitutional. In affirming the constitutionality of this section, the Supreme Court noted that when a defendant makes a voluntary and intelligent plea, he knowingly waives certain constitutional rights, regardless of whether or not the judge accepts the recommended sentence. If there has been a proper colloquy regarding the defendant's rights and the liabilities of a guilty plea, he has been informed of his constitutional rights, he is aware that he is giving up those rights, and the plea bargain agreement is clear as to its limitations, then the judge does not have to accept a guilty plea withdrawal attempt. St. v. Martz, 233 M 136, 760 P2d 65, 45 St. Rep. 1370 (1988), followed in St. v. Yother, 253 M 128, 831 P2d 1347, 49 St. Rep. 387 (1992).

Sufficient Knowledge to Plead Guilty — Burden on Defendant — Federal Habeas Corpus: Prior to pleading guilty defendant had been advised, as shown by the record, of his privilege against self-incrimination, his right to a jury trial, and his right to confront accusers. He applied for federal postconviction relief based on the grounds that the effect of the words used and events that occurred precluded his informed consent to a guilty plea. After the record discloses that the defendant was accorded his basic constitutional rights, the U.S. District Court will presume that the state court did not commit errors. The burden then is on the defendant to come forward with at least some evidence to disclose he was not informed of some element of the crime that had some relevant relationship to the plea or that he was subjected to some external coercion. When defendant had a state habeas corpus hearing yet produced no evidence on his behalf and cross-examined no state witnesses, the record disclosed no evidence to overcome the presumption in favor of the state court. Brown v. Crist, 492 F. Supp. 965 (D.C. Mont. 1980).

Alleged Punishment for Failure to Plead Guilty: The defendants did not demonstrate a similarity to the disparity between the sentences the prosecutor was willing to recommend and the sentences actually given and the disparity in sentences between the defendants themselves that was present in St. v. Sather, 172 M 428, 564 P2d 1306 (1977). Thus, the facts of this case did not justify an inference that the defendants were punished for not pleading guilty. St. v. Gallaher, 177 M 150, 580 P2d 930 (1978).

PLEA OTHER THAN "GUILTY" OR "NOT GUILTY"

Defendant's Refusal to Plead:

Defendant's rights were not prejudiced and the law was complied with when the court entered a plea of not guilty upon refusal of defendant to plead. St. v. Barnes, 232 M 405, 758 P2d 264, 45 St. Rep. 1150 (1988).

It was not error for the court, in the absence of counsel, to enter a plea of not guilty for the defendant, when he stood mute. St. v. Stevens, 119 M 169, 172 P2d 299 (1946).

When the record discloses that the defendant refused to plead, the statute is sufficiently complied with by the action of the court in ordering a plea of not guilty. St. v. Clancy, 20 M 498, 52 P 267 (1898).

Conditional Pleas Not Authorized:

A plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violations of constitutional rights made prior to the plea. St. v. Turcotte, 164 M 426, 524 P2d 787 (1974), followed in Stilson v. St., 278 M 20, 924 P2d 238, 53 St. Rep. 572 (1996), and in St. v. Kelsch, 2008 MT 339, 346 M 260, 194 P3d 670, (2008). Stilson was followed in St. v. Spotted Blanket, 1998 MT 59, 288 M 126, 955 P2d 1347, 55 St. Rep. 253 (1998). See also St. v. Hoots, 2005 MT 346, 330 M 144, 127 P3d 369 (2005).

The court has no authority to receive a conditional plea, and its entry is a nullity. St. v. Dow, 71 M 291, 229 P 402 (1924).

Written "Special Plea in Bar" Not Authorized: The Justice of the Peace was acting within his jurisdiction and in accordance with the law in overruling the defendant's written special plea in bar and ordering the defendant to answer to the complaint. State ex rel. Borberg v. District Court, 125 M 481, 240 P2d 854 (1952).

Plea Applied to Information as a Whole: When the defendant was charged with liquor violations in four counts and entered a plea of not guilty "to the offense charged", he was held to have pleaded to the information as a whole. St. v. Grasswick, 77 M 326, 250 P 613 (1926).

ACCEPTANCE OF GUILTY PLEA

Verbatim Use of Statute Not Prejudicial: Defendant, charged with two counts of deliberate homicide, pleaded guilty. In exchange for this plea, the state agreed not to seek the death penalty, and defendant was sentenced to two concurrent life sentences. The defendant appealed, alleging that the District Court's failure to use the words "most severe sentence" in instructing the defendant during the guilty plea hearing prejudiced the defendant's rights by depriving the defendant of essential information to which he was entitled. Affirming the District Court's decision to accept the guilty plea, the Supreme Court ruled that although the court failed to use the exact words "most severe sentence", the defendant was informed of the "maximum possible penalty". The difference was semantic and did not amount to prejudicial error. St. v. Miller, 278 M 231, 924 P2d 690, 53 St. Rep. 861 (1996).

Acceptance of Guilty Plea but Not Recommended Sentence — Misdemeanor Violations While Defendant Free on Recognizance: Defendant pleaded guilty in accordance with a plea bargain agreement and was released on his own recognizance until the sentencing hearing, but he was arrested for various misdemeanor crimes before sentencing. It was not error for the court to accept the guilty plea but reject the recommended sentence after finding that a suspended sentence was not proper under the circumstances. St. v. Martz, 233 M 136, 760 P2d 65, 45 St. Rep. 1370 (1988).

Accepting or Refusing Guilty Plea Where Defendant Denies Guilt:

The trial court properly refused to accept a burglary defendant's guilty plea because the defendant stated several times during extensive questioning that it was not his intent to commit a theft. Although a court may accept a guilty plea under these circumstances, it is not required to so accept. See N.C. v. Alford, 400 US 25, 27 L Ed 2d 162, 91 S Ct 160 (1970). St. v. Welling, 199 M 135, 647 P2d 852, 39 St. Rep. 1215 (1982).

A defendant's claim that it was error to accept his guilty plea because he professed innocence on some charges and could not recall whether he committed another crime charged was rejected. The Supreme Court held that there is no constitutional prohibition against accepting the guilty plea of a defendant who denied his actual guilt. Since there is no set standard to be applied by a court in handling motions to withdraw a guilty plea, the trial court's decision is subject to review only upon a showing of abuse of discretion. When the trial court record included a substantial factual basis for the plea and further showed the defendant's almost obstinate insistence that he be allowed to plead guilty to all five counts, there was no abuse of discretion. The State's affidavit of probable cause to support its motion for leave to file an information and the arraignment transcript established an adequate basis for the defendant's plea. In re Brown, 185 M 200, 605 P2d 185 (1980), followed in St. v. Cameron, 253 M 95, 830 P2d 1284, 49 St. Rep. 150 (1992).

Explanation by Judge or Lawyer Necessary — Federal Habeas Corpus: When a state prisoner makes specific and detailed factual assertions which are improbable, but cannot be called incredible, and the record shows that no preguilty plea explanation of the elements of the charge and of possible defenses which his attorney or the court is aware of was made to the prisoner, a hearing must be held on the question of whether the guilty plea was voluntary in the sense of being intelligently made. If the State contends but cannot prove that an explanation of the plea was made in private, and the prisoner denies it, a hearing must be held. And a hearing must be held in federal courts if the state courts do not hold a hearing. Federal habeas corpus is appropriate in such instances. Sober v. Crist, 644 F2d 807 (9th Cir. 1981).

Determination of Voluntariness — Untimely Request to Withdraw Bargained Plea: Petitioner contended the District Court did not adequately inform and interview him when he pleaded guilty to burglary and felony theft charges. The colloquy between the District Judge and petitioner was inadequate, but that is only one element to consider. In determining if a guilty plea was entered voluntarily, a three-element test was set out in St. v. Haynie, 186 M 374, 607 P2d 1128 (1980): (1) the adequacy of the court's interrogation; (2) the timeliness of the motion to withdraw; and (3) whether a plea bargaining agreement was made and, if made, whether the petitioner's motion will allow the defendant to escape the obligations of his agreement after accepting the benefits thereof. Here the prolonged delay in seeking to withdraw the plea and the fulfillment of a negotiated plea agreement justified the denial of petitioner's request for relief. (See 1985 amendment note.) St. v. Myers, 192 M 205, 627 P2d 860, 38 St. Rep. 712 (1981).

Standard to Judge Validity of Guilty Plea:

The standard under which the validity of a guilty plea is judged is whether the plea represents a voluntary and intelligent choice among the alternate courses of action open to the defendant as affirmatively disclosed by the record. Schantle v. Crist, 188 M 176, 612 P2d 673 (1980), following St. v. Griffin, 167 M 11, 535 P2d 498 (1975).

The standard by which the validity of a guilty plea is judged is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant as affirmatively disclosed by the record. While it is clear that courts are not required to articulate specific rights when accepting a guilty plea (see 1985 amendment note), an in-depth examination by the trial court is desirable and mandatory in cases in which the record requires it. Yother v. St., 182 M 351, 597 P2d 79 (1979), followed in St. v. Day, 195 M 151, 635 P2d 568, 38 St. Rep. 1718 (1981).

Pleading Guilty to Get Out of Jail — Accepting Plea — Issue of Voluntariness: The defendant asserted trial court error in the failure to inquire into the voluntariness of the defendant's pleas when he stated his guilty pleas were made to get out of jail and out of the county. The defendant's objection to his confinement in maximum security quarters was stated, but there was no suggestion that conditions in the jail were substandard or in any way abusive. There is nothing in the record to suggest that the jail conditions coerced the defendant into entering his plea. In any case, a prisoner's dislike of the security quarters is not per se a factor in determining the voluntariness of his plea. Under these circumstances, there was no error committed by the District Court in accepting defendant's guilty plea without further inquiry. (See 1985 amendment note.) In re Brown, 185 M 200, 605 P2d 185 (1980).

Understanding Charge and Consequences — Knowledge of Possibility of Mitigating Charge: Defendant was charged with and pleaded guilty to various crimes, including felony theft. The argument that the trial court had a duty to inform him that he might mitigate the charge and reduce his sentence was rejected because the arraignment record showed that defendant had been informed by counsel that the acts he had committed might constitute only a misdemeanor. The Supreme Court held that the trial court's repetition of this explanation to the defendant would not have added to his understanding of the charge and was not required. Defendant's argument that the record fails to establish that he understood the consequences of a guilty plea to deliberate homicide and that the trial court had a duty to inform him that he might mitigate this charge was also rejected. Defendant had been charged with both willful and deliberate murder and felony murder. The affidavit of probable cause stated that the defendant confessed to entering a service station with the intent to rob and had shot the deceased in the course of the robbery. Thus, it was clearly on the record that the State had a case on the charge of felony murder. (See 1985 amendment note.) In re Brown, 185 M 200, 605 P2d 185 (1980).

Retroactive Application of Criminal Procedure Rule: The decision made in St. v. Azure, 175 M 189, 573 P2d 179 (1977), requires that the trial court must advise a defendant of matters relating to lesser included offenses before accepting a guilty plea. This is a new procedural requirement that will not be applied retroactively. To apply it retroactively would seriously hamper the administration of justice by requiring conformity to as yet unannounced requirements. St. v. Campbell, 182 M 521, 597 P2d 1146 (1979).

Voluntariness of Guilty Plea — Knowledge of Lesser Included Offenses: Defendant contends that his guilty plea was not voluntary because he did not understand the difference between aggravated assault and the lesser included offense of misdemeanor assault. The Supreme Court said that this argument only applies where there is a fundamental mistake such as where the defendant pleads guilty to nighttime burglary, a felony, when the burglary was committed in the daytime, a lesser offense. There is no fundamental mistake in this case where the defendant was informed of all the elements of aggravated assault. St. v. Campbell, 182 M 521, 597 P2d 1146 (1979).

Adequacy of Interrogation Related to Guilty Plea: Under the circumstances, the failure to specify the name of the victim, the date, or the place of the alleged offense or the particular crime or to determine if the defendant was satisfied with his appointed counsel caused the District Court's interrogation concerning a guilty plea to be inadequate. St. v. Huttinger, 182 M 50, 595 P2d 363 (1979).

Change of Plea to Guilty: When a court has done all that it can to determine that the proposed plea of guilty is voluntarily made and that the defendant understands what he is doing and is advised of the consequences of his plea, including the nature and extent of his punishment, has been adequately advised by counsel, and has been treated fairly at all stages of the prosecution against him, and in fact the defendant states he is guilty of the charges made, then this court has a duty to support the District Court when it allows a plea of guilty to be entered in place of a plea of not guilty. St. v. Lewis, 177 M 474, 582 P2d 346 (1978).

Improper Acceptance of Guilty Plea: Because the court did not determine whether the defendant understood the different elements and effects of deliberate homicide and mitigated deliberate homicide, acceptance of his guilty plea was improper. The court should have granted the defendant's motion for leave to withdraw the guilty plea. St. v. Azure, 175 M 189, 573 P2d 179 (1977).

Voluntariness of Guilty Plea — Examination of Defendant: Although examination by the court as to the voluntariness of a guilty plea is desirable and in some cases mandatory (see 1985 amendment note), when the record indicated that the defendant's guilty plea was entered voluntarily with full understanding of the charge and with full appreciation of his constitutional rights and the possible penalty, the fact that the trial court did not specifically question the defendant at the time of the plea change did not amount to reversible error. St. v. Griffin, 167 M 11, 535 P2d 498 (1975).

Doubt That Guilty Plea Voluntary: On the hearing of an application of the defendant for permission to change his plea of guilty to not guilty, any doubt that the first plea was not voluntary should be resolved in his favor and in favor of a trial on the merits. The plea should be entirely voluntary by one competent to know the consequences and should not be induced by fear, persuasion, promise, or ignorance. St. v. Casaras, 104 M 404, 66 P2d 774 (1937).

WITHDRAWAL OF GUILTY PLEA

Inability of District Court to Impose Sentence in Plea Agreement — Withdrawal of Guilty Plea Allowed: Deserly negotiated a plea agreement on a felony assault with a weapon charge wherein the state would recommend a 10-year sentence with the Department of Corrections and Deserly would be designated a persistent felony offender. However, after the plea was entered, the District Court and Deserly discovered that under 46-18-201, all but the first 5 years of a department commitment must be suspended, so the sentence in the plea agreement was not one that could be legally imposed. Deserly then moved to withdraw the guilty plea on grounds of good cause, but the District Court denied the motion, and Deserly appealed. The Supreme Court reversed. Under St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), a defendant's plea is not voluntary if the court, the prosecutor, defense counsel, or some other party induced the plea, however slightly, by misrepresentation, including unfulfilled or unfulfillable promises. At the time Deserly entered the plea, it was reasonable for him to expect that the District Court could at least consider, if not actually impose, the recommended sentence, and Deserly was induced, at least in part, by the prospect of being able to receive the sentence that he and the prosecutor had negotiated and agreed to recommend. Because Deserly was induced by an unfulfillable promise of an illegal sentence, albeit unintentionally, his plea was not voluntary, and the case was remanded for further proceedings to allow Deserly to withdraw the guilty plea. St. v. Deserly, 2008 MT 242, 344 M 468, 188 P3d 1057 (2008).

No Error in Refusal to Allow Withdrawal of Voluntary Guilty Plea: McFarlane contended that his guilty plea was entered both involuntarily and unintelligently because trial counsel provided ineffective assistance in explaining a guilty plea and because he did not understand what acts amount to being guilty of burglary. The Supreme Court declined to address the ineffective assistance claims because they were raised for the first time on appeal. Regarding the

voluntariness issue, the court applied the Brady standard to determine whether McFarlane was fully aware of the direct consequences of a guilty plea. The court noted that during the plea colloquy, McFarlane expressed understanding of the charges, the maximum penalties, and the waiver of the right to a trial and stated that he had discussed the consequences of a guilty plea with counsel and was satisfied with counsel's services. McFarlane's argument that he misunderstood or was confused about the meaning of a guilty plea was further belied by the fact that McFarlane fled the jurisdiction for more than 2 years to avoid imposition of a sentence and by the fact that McFarlane had a criminal history of 13 counts of burglary in six separate proceedings spanning nearly 40 years and was thus well acquainted with the criminal justice system and burglary charges in particular. Denial of the motion to withdraw the guilty plea was affirmed. St. v. McFarlane, 2008 MT 18, 341 M 166, 176 P3d 1057 (2008).

No Ineffective Assistance in Counsel's Failure to Cite Proper Standard for Plea Withdrawal and to Challenge Plea Colloquy: McFarlane contended that he received ineffective assistance of counsel for his motion to withdraw a guilty plea when counsel cited the test in St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), rather than the more lenient test in Brady v. U.S., 397 US 742 (1970), which replaced the Huttinger test (see St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005)). The Supreme Court held that despite counsel's improper reliance on Huttinger, the outcome would have been the same if counsel had relied on Brady, so McFarlane's challenge failed because he did not show that but for counsel's deficient performance, he would not have entered a guilty plea. McFarlane also contended that he received ineffective assistance because counsel failed to challenge the adequacy of the plea colloquy when the colloquy was flawed by the District Court's failure to enumerate lesser included offenses of which McFarlane might have been convicted had he proceeded to trial. The Supreme Court noted that although the District Court did not enumerate lesser included offenses, McFarlane was clearly informed that by pleading guilty, the opportunity to be convicted of a lesser offense would be lost. Additionally, pursuant to St. v. Thee, 2001 MT 294, 307 M 450, 37 P3d 741 (2001), the court had no duty to inform McFarlane about the possibility of lesser included offenses if none existed, and McFarlane failed to demonstrate any lesser included offenses to burglary that would have been applicable under the circumstances of his charge. Thus, McFarlane's ineffective assistance claim was without merit, and denial of the motion to withdraw the guilty plea was affirmed. St. v. McFarlane, 2008 MT 18, 341 M 166, 176 P3d 1057 (2008).

Custodial Interrogation of Youth Without Consent — Miranda Warning Required — Suppression of Confession and Withdrawal of Guilty Plea Required: A 14-year-old boy's mother called his school, reported that he had not returned home the previous night, and requested that he be picked up. The school resource officer notified police and asked that the boy be brought to school if found. An officer later found the boy on the street smelling of alcohol and took the boy to the police station where it was discovered that several town businesses had been burglarized during the night, including a bowling alley where money and liquor had been stolen. Although there was no record that the youth was advised of his Miranda rights, during interrogation both prior to and after arrival of his parents, the youth confessed to robbing the bowling alley and subsequently pleaded guilty to felony burglary. The Youth Court summarily determined that the confessions were voluntary, denied a motion to suppress, found the youth was delinquent, and ordered 2 years' probation. On appeal, the Supreme Court addressed the voluntariness of the confessions and reversed. Given the absence of a tangible record that the officer read Miranda rights to the youth or that the youth or the parents consented in writing to a waiver of Miranda rights or agreed to the interview, the requirement in 41-5-331 that a youth be advised of the right against self-incrimination and the right to counsel was violated. Thus, the confessions could not be considered voluntary and should have been suppressed by the Youth Court. The Supreme Court also ordered that on remand, the youth be allowed to withdraw the guilty plea In re Z.M., 2007 MT 122, 337 M 278, 160 P3d 490 (2007).

Motion to Correct Sentence Not Considered Motion to Withdraw Guilty Plea — Plain Error Review of Nolo Contendere Plea Inappropriate: Attorney Holt pleaded not guilty to five counts of felony theft of clients' funds. Pursuant to a subsequent plea agreement, Holt pleaded nolo contendere to the contested counts, but reserved the right to withdraw the plea if the agreed sentences were not imposed. Following conviction, Holt asked the Supreme Court to exercise plain error review, find that the plea agreement was violated, and allow Holt to withdraw the nolo contendere guilty plea. The court declined. Holt made no motion in trial court to review the guilty plea, so that issue was not properly before the Supreme Court. Holt's speculation that he would not have entered the plea agreement had he considered the possibility of good time did not implicate Holt's fundamental constitutional rights, and failure to apply plain error review did not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental

fairness of the proceedings, or compromise the integrity of the judicial process. The Supreme Court refused to consider Holt's District Court motion to correct the sentence as a motion to withdraw the guilty plea and thus declined to consider Holt's argument that he be allowed to withdraw the nolo contendere plea based on plain error review. St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006), distinguishing St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

Voluntary Nolo Contendere Guilty Plea — No Good Cause to Withdraw Plea: Although maintaining innocence to sexual assault charges, Leitheiser sought to avoid trial and possible sex offender treatment, so Leitheiser entered plea negotiations, and the state agreed to amend the information to consist of charges of felony assault on a minor and to remain silent regarding sex offender treatment in exchange for Leitheiser's guilty plea. At the change of plea hearing, Leitheiser entered a voluntary guilty plea to the amended charges. The trial court did not accept the guilty plea at that time, but ordered Leitheiser to undergo a presentence interview. The probation officer recommended sexual offender treatment, and Leitheiser moved to withdraw the nolo contendere guilty plea. The motion was denied, and Leitheiser appealed, contending that the plea to nonsexual charges combined with the bargain that the prosecution would not recommend sexual offender treatment induced the guilty plea. The Supreme Court disagreed. Leitheiser's guilty plea was voluntary, and the state kept its part of the plea bargain. Leitheiser's grievance was with the probation officer, who was not a party to the plea bargain, rather than with the prosecution. Denial of Leitheiser's motion to withdraw the guilty plea was affirmed. St. v. Leitheiser, 2006 MT 70, 331 M 464, 133 P3d 185 (2006). See also St. v. Bowley, 282 M 298, 938 P2d 592 (1997).

Error in Refusal to Allow Withdrawal of Involuntary Guilty Plea — Remand: Chase entered a guilty plea after being told by the trial court that his defense to a DUI charge would probably have failed and after Chase's counsel unilaterally withdrew the defense without notifying Chase. There was a legitimate basis for Chase's belief that his defense had not been adequately pursued, giving rise to uncertainty regarding Chase's guilt, and the colloquy conducted by the trial court appeared to have unintentionally prompted a guilty plea from Chase that was not knowing and intelligent. Chase's fundamental misunderstanding concerning the availability of his defense, coupled with the questionable voluntariness of the plea, was sufficient to allow withdrawal of the plea, and the trial court committed reversible error in denying Chase's motion to withdraw the plea. St. v. Chase, 2006 MT 13, 331 M 1, 127 P3d 1038 (2006), following St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26 (1998).

Effect of Alford Plea on Subsequent Appeals — Request to Withdraw Alford Plea to Be Made in District Court: Hoots entered an Alford plea to DUI charges and later sought to withdraw the plea on appeal, contending that the plea was made only because Hoots was forced to plead guilty after the trial court denied a request for new counsel. However, Hoots did not request to withdraw the plea at any time during the District Court proceedings. Because a motion to withdraw an Alford plea must be made in District Court, the Supreme Court declined to address the issue on appeal. St. v. Hoots, 2005 MT 346, 330 M 144, 127 P3d 369 (2005), following St. v. Butler, 272 M 286, 900 P2d 908 (1995).

Lack of Participation in Sexual Offender Programs Warranting Revocation of Suspended Sentence: Van Haele contended that because he was not adequately advised by the District Court that one consequence of a guilty plea was that failure to complete a sexual offender program would be denial of probation status, he should be allowed to withdraw the guilty plea and that the District Court erroneously denied his motion to withdraw the plea. Reviewing the case to determine whether the District Court's findings were erroneous, the Supreme Court disagreed with the factual predicate of Van Haele's argument. It was not Van Haele's failure to complete the prison sex offender program that resulted in Van Haele's denial of admission to an outpatient treatment program, but rather it was Van Haele's recantation of his admission of guilt and his various behavioral problems that placed insurmountable obstacles in the way of acceptance into an outpatient program, although Van Haele's refusal to participate in the prison program contributed to the problem. The District Court had adequate evidence at Van Haele's revocation hearing to determine that the lack of participation in sexual offender programs was adequate to warrant revocation of Van Haele's suspended sentence. St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005).

Failure of Trial Court to Inquire About Satisfaction of Counsel at Hearing on Change of Plea Not Error — No Bearing Between Satisfaction With Counsel and Voluntariness of Plea: A court may permit withdrawal of a guilty plea upon a showing of good cause, including involuntariness of the plea or other criteria. In this case, defendant contended that good cause existed because the trial court failed to inquire regarding defendant's satisfaction with counsel and with

counsel's advice when defendant had expressed dissatisfaction with counsel shortly before a change of plea hearing. The Supreme Court held that defendant's dissatisfaction with counsel had no bearing on whether defendant understood the consequences of the plea or whether the plea was induced by threats, misrepresentations, or an improper promise. Finding no other factors to bear upon voluntariness or implicate good cause, the trial court's denial of defendant's motion to withdraw the guilty plea was affirmed. St. v. Warclub, 2005 MT 149, 327 M 352, 114 P3d 254 (2005), distinguishing St. v. Bowley, 282 M 298, 938 P2d 592 (1997).

Adoption of Federal Test for Voluntariness of Guilty Pleas — Huttinger Overruled — Standard of Review: Since St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), the Supreme Court has applied a good cause test in determining whether to permit a plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted. The good cause test involved a balancing of three conflicting factors: (1) the adequacy of the interrogation by the District Court of the defendant at the entry of the guilty plea as to the defendant's understanding of the consequences of the plea; (2) the promptness with which the defendant attempted to withdraw the prior plea; and (3) the fact that the defendant's plea was apparently the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge. None of the factors required a court to consider the voluntariness, knowledge, or intelligence of a defendant's plea, although a defendant has been allowed to withdraw a guilty plea upon a showing that the plea was made unknowingly or involuntarily. Citing Bousley v. U.S., 523 US 614 (1998), the Supreme Court concluded that the ultimate test for withdrawal of a plea is voluntariness, which subsumes the relevant elements of the Huttinger test, so Huttinger was overruled. Therefore, a guilty plea may be withdrawn only upon a showing that the plea was made involuntarily, and the Supreme Court will review questions of voluntariness in pleas and plea agreements de novo. St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), overruling St. v. Miller, 248 M 194, 810 P2d 308 (1991), and overruling St. v. Martin, 2004 MT 288, 323 M 320, 100 P3d 146 (2004), and other cases that have applied the abuse of discretion standard, and followed in Duffy v. St., 2005 MT 228, 328 M 369, 120 P3d 398 (2005), and St. v. McFarlane, 2008 MT 18, 341 M 166, 176 P3d 1057 (2008). See also St. v. Warclub, 2005 MT 149, 327 M 352, 114 P3d 254 (2005), in which the Supreme Court clarified Lone Elk and held that, with respect to appeals of denials of motions to withdraw guilty pleas, the court will review the findings of fact to determine if they are clearly erroneous and the conclusions of law to determine if they are correct. When voluntariness of the plea is at issue, the court will review that ultimate mixed question of law and fact de novo to determine if the trial court was correct in holding that the plea was voluntary. Warclub was followed in St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005), and Maldonado v. St., 2008 MT 253, 345 M 69, 190 P3d 1043 (2008). Warclub and Lone Elk were followed in St. v. Leitheiser, 2006 MT 70, 331 M 464, 133 P3d 185 (2006). In St. v. Deserly, 2008 MT 242, 344 M 468, 188 P3d 1057 (2008), the Supreme Court noted that the standard for reviewing the voluntariness of a guilty plea adopted in St. v. Miller, 248 M 194, 810 P2d 308 (1991) (overruled in St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005)), under which a plea would be considered involuntary when it appeared that defendant was laboring under such a strong inducement, fundamental mistake, or serious mental condition that the possibility existed that defendant may have pleaded guilty to a crime for which he was innocent, had been followed in other cases. To avoid confusion, the court overruled the following cases to the extent that they may be read as supporting the Miller standard: St. v. Pelke, 143 M 262, 389 P2d 154 (1964), St. v. LeMay, 144 M 315, 396 P2d 83 (1964), St. v. Griffin, 167 M 11, 535 P2d 498 (1975), State ex rel. Gladue v. District Court, 175 M 509, 575 P2d 65 (1978), St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), St. v. Campbell, 182 M 521, 597 P2d 1146 (1979), St. v. Hilton, 183 M 13, 597 P2d 1171 (1979), St. v. Nelson, 184 M 491, 603 P2d 1050 (1979), Benjamin v. McCormick, 243 M 252, 792 P2d 7 (1990), St. v. Milinovich, 248 M 373, 812 P2d 338 (1991), St. v. Cameron, 253 M 95, 830 P2d 1284 (1992), St. v. Barker, 257 M 31, 847 P2d 300 (1993), St. v. Skroch, 267 M 349, 883 P2d 1256 (1994), St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682 (1998), St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26 (1998), St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015 (1999), St. v. Kellames, 2002 MT 41, 308 M 347, 43 P3d 293 (2002), St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002), St. v. Chase, 2006 MT 13, 331 M 1, 127 P3d 1038 (2006), and St. v. Milligan, 2008 MT 36, 341 M 316, 177 P3d 500 (2008). Lone Elk and Deserly were overruled in St. v. Brinson, 2009 MT 200, 351 M 136, 210 P3d 164 (2009), to the extent that application of the "however slightly" language in the analysis of the voluntariness of a plea is disapproved.

Effects of Fear and Medication Not Affecting Voluntariness of Guilty Plea — Denial of Motion to Withdraw Plea Proper: Lone Elk contended that he should have been allowed to withdraw a guilty plea because: (1) he was unduly influenced by hope and fear and pleaded guilty to a burglary charge because he was afraid that if he went to trial and was convicted of sexual

intercourse without consent he would be required to complete sex offender treatment; and (2) the guilty plea was involuntary because he was not stabilized on his antidepressant medication at the time that the plea was entered. The Supreme Court held that the effect of neither fear nor medication affected the voluntariness of Lone Elk's guilty plea, so the trial court did not err in denying the motion to withdraw the plea. St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), followed in Duffy v. St., 2005 MT 228, 328 M 369, 120 P3d 398 (2005), and St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005). See also Brady v. U.S., 397 US 742 (1970), and St. v. Allen, 265 M 293, 876 P2d 639 (1994).

No Error in Denial of Motion to Withdraw Nolo Contendere Pleas Made Knowingly: White asserted that the District Court erred in denying a motion to withdraw nolo contendere pleas, arguing that he could not have made a knowing waiver of his rights because he was not in possession of all evidence that might have influenced his decision, including inconsistent statements by a witness. The Supreme Court held that even if White did not know of the statement, the lack of knowledge was irrelevant to the criteria in 46-12-210 regarding whether the pleas were made knowingly. White was clearly informed of the nature of the charges, the mandatory minimum penalty, the maximum penalty, and the possibility of the imposition of restitution. Under the good cause factors in St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812 (1999), White's nolo contendere pleas were made knowingly, and the District Court did not err in disallowing withdrawal of the pleas. St. v. White, 2004 MT 103, 321 M 45, 88 P3d 1258 (2004). See also St. v. Bowley, 282 M 298, 938 P2d 592 (1997).

Question of Adequacy of Advisement Regarding Waiver of Appeal Rights Resolved in Favor of Defendant: The first factor in determining whether good cause existed in allowing the withdrawal of a guilty plea and whether a court abused its discretion in denying a motion to withdraw the guilty plea, as set out in St. v. Bowley, 282 M 298, 938 P2d 592 (1997), is the adequacy of the court's interrogation at the time that the plea was entered regarding the defendant's understanding of the consequences of the plea. The plea must be a voluntary, knowing, and intelligent choice among the alternative courses of action open to the defendant. In the present case, Boucher was charged with DUI, and at his initial appearance, the Justice's Court had Boucher acknowledge in writing that he understood the waivers that he would make if he pleaded guilty. Boucher pleaded not guilty and waived no rights. Five months later, the state amended the complaint, and Boucher changed his plea to guilty, but at the time that the plea was entered, the Justice's Court did not reiterate the information provided at the initial appearance and failed to question Boucher regarding his understanding of the waiver of his constitutional rights. The Supreme Court concluded that the court's colloquy was inadequate and that good cause existed to permit Boucher to withdraw his guilty plea. Any doubt about the voluntariness of Boucher's plea was resolved in his favor, and the Supreme Court remanded to Justice's Court for further proceedings. St. v. Boucher, 2002 MT 114, 309 M 514, 48 P3d 21 (2002).

Defendant's Failure to Show Doubt as to Voluntariness of Plea — Denial of Motion to Withdraw Guilty Plea Affirmed: Kellames contended that the District Court erred in denying a motion to withdraw a guilty plea. Kellames maintained that the plea was involuntary because of his mother's influence over him, and because he suffered from a bipolar disorder that required medication, which his attorney failed to mention to the sentencing court. However, Kellames conceded that in response to questioning at the sentencing hearing, he denied that he was suffering from a disability, stated that he felt no threat or coercion to plead guilty, and admitted that the decision to plead guilty was his alone. Thus, Kellames failed to state a claim of pressure from his mother that rose to the level of coercion sufficient to render his subsequent responses to questioning in open court involuntary, and raised no doubt about whether his guilty plea was voluntarily or intelligently made. The Supreme Court found no abuse of discretion by the District Court in denying Kellames's motion to withdraw the guilty plea. St. v. Kellames, 2002 MT 41, 308 M 347, 43 P3d 293 (2002). See also St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812 (1999).

No Error in Denial of Motion to Withdraw Guilty Plea Made Four Years After Plea Entered—Bowley Factors Applied: In determining whether the District Court erred in denying Garner's motion to withdraw guilty pleas, the Supreme Court applied the factors in St. v. Bowley, 282 M 298, 938 P2d 592 (1997): (1) the adequacy of the court's interrogation when the plea was entered as to defendant's understanding of the plea; (2) the promptness of the motion to withdraw; and (3) the fact that the plea resulted from plea bargaining. Garner was adequately questioned regarding the desire to plead guilty, fully informed of the right to continue with a plea of not guilty, informed of the ramifications of a guilty plea, and admitted the facts of the charged offenses. Although Garner's wait of almost 4 years before attempting to withdraw the guilty pleas was not per se a bar to plea withdrawal, the District Court did not err in determining that

the delay, together with Garner's ample opportunity to raise the withdrawal issue while raising other claims during that 4 years when represented by counsel, could only lead to the conclusion that Garner's motion to withdraw the guilty pleas did not satisfy the requirement of promptness. Last, there was no plea bargain, so that factor was not relevant. St. v. Garner, 2001 MT 222, 306 M 462, 36 P3d 346 (2001).

Pro Se Motion to Withdraw Guilty Plea Not Considered Critical Stage of Proceedings to Which Right to Counsel Attaches: Garner moved pro se to withdraw his guilty plea nearly 4 years after entering the plea and nearly 3 years after filing a petition for postconviction relief, arguing that a motion to withdraw a guilty plea constitutes a critical stage of the proceedings at which the right to counsel attaches, and that that right must be expressly waived, which was not done. Garner cited numerous non-Montana cases in which the right to counsel was found to attach to a motion to withdraw a guilty plea, but the Supreme Court noted that it had not established any bright line as to when in the sequence of proceedings the right to counsel attaches. The court noted the holding in Ranta v. St., 1998 MT 95, 288 M 391, 958 P2d 670 (1998), that a critical stage is defined as any step of the proceedings in which there is potential for substantial prejudice to the defendant. Here, Garner was represented by three different counsel during the course of the proceedings. Given the length of time since trial and the ample opportunities of representation that Garner enjoyed, the pro se motion did not raise the potential for substantial prejudice to Garner; thus, the motion did not constitute a critical stage of the proceedings, and the right to counsel did not attach. St. v. Garner, 2001 MT 222, 306 M 462, 36 P3d 346 (2001).

No Authority to Appeal Justice's Court Order Denying Motion to Withdraw Guilty Plea: The Feights got into a fight with a highway patrol officer at a high school basketball game and were charged with misdemeanor assault. They were informed of their rights in Justice's Court, waived their right to counsel, and pleaded guilty. More than a month later, they moved through counsel to withdraw their guilty pleas, claiming good cause under 46-16-105. The Justice's Court denied the motion, holding that the Feights had been given due process and had voluntarily, knowingly, and willingly entered guilty pleas. The Feights appealed the denial of their motion to withdraw their guilty pleas to District Court. The state moved to dismiss the appeal, contending that the District Court lacked jurisdiction to review denial of the motion to withdraw a plea. The District Court dismissed the appeal but remanded to Justice's Court with a recommendation that the Feights be allowed to withdraw their pleas. Instead, the Justice's Court reinstated judgment, and the Feights appealed to the Supreme Court. The Supreme Court affirmed. The statutes that provide for and determine the jurisdiction of a District Court to entertain an appeal from a Justice's Court include 3-5-303, 46-17-203, 46-17-311, and this section. However, none of these statutes provide authority for appeal to the District Court from the denial of a motion to withdraw a guilty plea. Further, the specific language of these sections prevails over the general language in 46-20-104 defining the scope of appeal by a criminal defendant. The Legislature has not created a statutory right of appeal from a Justice's Court denial of a motion to withdraw a guilty plea, and the Supreme Court refrained from creating one. St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), distinguishing St. v. Rogers, 267 M 190, 883 P2d 115 (1994), and followed in St. v. Fox, 2001 MT 209, 306 M 353, 34 P3d 484 (2001).

Breach of Plea Agreement by State — Defendant's Right to Choose Remedy: The state conceded that it breached a plea agreement that had been offered to Munoz, so the order of the District Court denying Munoz's motion to withdraw his guilty plea was erroneous. The question then became whether the sentencing court or Munoz should have the right to choose the remedy. Generally, when the state breaches a plea agreement, one of two equitable remedies is available to safeguard the defendant's due process rights. The notion of an equitable remedy for a breach is guided by the general principles of contract law. The first remedy is specific performance by the government, requiring the state to uphold its end of the bargain and, before a new sentencing judge, comply with the terms of the plea agreement by recommending a specific sentence, moving for dismissal of other charges, or simply not opposing the defendant's requested sentence. When specific performance is imposed, a defendant enjoys no contractual right or entitlement to a specific sentence. The second equitable remedy is rescission, requiring that a defendant be allowed to withdraw the guilty plea and then face trial on the original charge as if the plea agreement had never been entered. In cases of rescission, a defendant's constitutional rights that were waived by the guilty plea are reinstated. However, the seminal federal case that established these remedies, Santobello v. N.Y., 404 US 257 (1971), never reached the question of choice of remedies, leaving to the discretion of the state court the decision as to which remedy would be appropriate under the circumstances. Federal circuit courts and various state courts have also split on the question of choice of remedies. Until now, the Montana Supreme Court has also applied two lines of reasoning—in some cases leaving the choice of remedies to the discretion

of the sentencing court and in other cases providing instructions that a defendant be allowed to choose the remedy. In light of the underlying principles of contract law, a nonbreaching defendant must be afforded the initial right to choose from available remedies when the state breaches a plea agreement. As the breaching party, the state bears the substantial burden of demonstrating through clear and convincing evidence that a defendant's choice of remedy would result in a miscarriage of justice, and only upon such a showing may a District Court disallow a defendant's choice. St. v. Munoz, 2001 MT 85, 305 M 139, 23 P3d 922 (2001), following St. v. Bowley, 282 M 298, 938 P2d 592 (1997), and St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015 (1999), overruling St. v. Persak, 256 M 404, 847 P2d 280 (1993), and St. v. Rardon, 1999 MT 220, 296 M 19, 986 P2d 424 (1999), and followed in St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002).

Failure to Present Motion to Withdraw Voluntary Guilty Plea, Based on Hope or Fear, Not Considered Ineffective Assistance of Counsel: Osterloth contended that he was denied effective assistance of counsel when his attorney failed to premise a motion to withdraw a guilty plea on Osterloth's having entered the plea out of hope of avoiding the mandatory minimum sentence for sexual assault by being admitted to a community-based sex offender treatment program and on Osterloth's fear of incarceration. Osterloth was relying on St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682 (1998), for the proposition that an assertion that a guilty plea was influenced by hope or fear is a proper basis for withdrawing a guilty plea. Under the two-prong Strickland test for evaluating effectiveness of counsel, a defendant must establish that counsel's performance was deficient and that the deficient performance prejudiced the defendant. A guilty plea is not involuntary simply because it was entered to avoid a greater punishment, nor is counsel's performance deficient for failure to raise an issue that lacks merit. Thus, because Osterloth's plea was not involuntary, his counsel's performance was not deficient in failing to raise the issue of Osterloth's hope or fear in the motion to withdraw. Having failed to establish the first prong of the Strickland test, the Supreme Court did not address the second prong in finding that Osterloth was not denied the right to effective assistance of counsel. St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000).

Nonspecific Colloquy Regarding Lesser Included Offenses as Insufficient Notice of Defendant's Options — Reversible Error: When interrogating Sanders regarding his understanding of the consequences of a guilty plea, the District Court informed Sanders that there might be lesser included offenses but did not specifically inform him that there were in fact lesser included offenses, so Sanders' subsequent guilty plea was not made intelligently. To make an intelligent choice as to whether to plead guilty, a defendant is entitled to know the precise nature of the alternatives. If a defendant does not know about lesser included offenses, it is not possible to evaluate whether a jury could be convinced that the defendant was guilty of those offenses. The court's interrogation, which comprised a nonspecific colloquy regarding lesser included offenses, was insufficient and, coupled with the prosecutor's breach of a plea agreement, constituted reversible error. The Supreme Court remanded with instructions either to allow Sanders' withdrawal of the guilty plea or to sentence Sanders in accordance with the plea agreement. St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015, 56 St. Rep. 551 (1999), following St. v. Bowley, 282 M 298, 938 P2d 592, 54 St. Rep. 353 (1997). See also Benjamin v. McCormick, 243 M 252, 792 P2d 7, 47 St. Rep. 887 (1990).

Court Misstatement of Maximum Possible Penalty at Change of Plea Hearing — Error in Refusal to Allow Withdrawal of Noncompliant Plea: Roach requested a hearing to change his plea to guilty on burglary and theft charges. Roach was questioned regarding his understanding of his constitutional rights, and a discussion was held concerning possible penalties. The District Court Judge erroneously informed Roach that the maximum penalty for both crimes was 10 years and $50,000. Neither Roach's counsel nor the County Attorney, who were both present, responded or objected in any way to the court's misstatement of the maximum possible penalty. Roach was sentenced 2 months later to consecutive sentences of 20 years suspended for burglary and 10 years with no time suspended for theft, plus restitution. Roach later asserted that he was misled by the District Court, that his change of plea was coerced and based on misinformation, and that he should have been granted postconviction relief allowing him to either withdraw the guilty plea or be sentenced in conformity with the penalty that he was advised of at the change of plea hearing. The Supreme Court agreed. Because Roach was misinformed about the maximum possible sentence, his plea was neither knowing nor in compliance with statutory requirements. The District Court erred in refusing to allow withdrawal of the guilty plea; the Supreme Court remanded with instructions to allow withdrawal. St. v. Roach, 1999 MT 38, 293 M 311, 975 P2d 817, 56 St. Rep. 161 (1999), following St. v. Brown, 262 M 499, 865 P2d 282, 50 St. Rep. 1658 (1993).

Change of Plea Agreement Properly Denied — Application of Contract Law Standards — Agreement Not to Prosecute Father — Benefit Derived by Defendant: Keys agreed to accept a motorcycle as collateral for a loan, but the motorcycle, which Keys subsequently sold, turned out to belong to the father of the individual to whom Keys made the loan. Both Keys and his father were charged with theft, but through his attorney, Keys negotiated an Alford plea with the prosecutor whereby the charges against Keys' father would be dropped and the prosecutor would recommend to the court that Keys' sentence be deferred for 4 years. At the hearing on the plea agreement, Keys, who could not read, had difficulty understanding that the District Court was not bound by and did not have to accept the agreement. However, after a lengthy colloquy with the District Court Judge, Keys eventually did state that he understood the agreement. The District Court then ordered that Keys' sentence be deferred for 6 years, and Keys requested that his plea be withdrawn, based upon his lack of understanding and a lack of consideration for his guilty plea. The District Court refused to allow the withdrawal, and the Supreme Court affirmed that refusal. The Supreme Court held that Keys did benefit from the agreement, that the benefits included the dismissal of charges against his father, and that in dismissing those charges, the state suffered the deprivation of a right (to pursue the conviction of Keys' father) that the law did not require. The Supreme Court also held that even though there was some confusion in Keys' mind over the role of the District Court in the agreement, the record showed by Keys' responses to questions by the District Court that Keys understood, at least at one point in time, that the court was not bound by the agreement. St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812, 56 St. Rep. 44 (1999), followed in St. v. D'Amico, 2000 MT 63, 299 M 57, 997 P2d 773, 57 St. Rep. 297 (2000), St. v. White, 2004 MT 103, 321 M 45, 88 P3d 1258 (2004), and Lout v. St., 2005 MT 93, 326 M 485, 111 P3d 199 (2005).

Role of Repressed Memory Therapy in Voluntariness of Alford Plea — Withdrawal of Plea: Ereth was charged with three counts of sexual intercourse without consent and two counts of sexual assault. Ereth claimed that she could not recall committing the crimes but was willing to undergo psychotherapy to determine whether she was repressing memories of the offenses. The public defender stated that Ereth was not capable of admitting guilt, despite the facts of the case, and that the only defense that could be brought forward was an Alford plea, which was entered. Following unsuccessful memory recall therapy and testimony of another therapist regarding the questionable science of repressed memory therapy, Ereth sought to withdraw her guilty pleas, alleging that she had been coerced into the pleas by the public defender and stating that had she known of the controversy surrounding the validity of the therapy, she would not have entered the pleas. Her motion to withdraw the pleas was denied. On appeal, the Supreme Court held that, given the role that repressed memory therapy played in Ereth's decisionmaking process and the air of uncertainty regarding the validity of the therapy, there was doubt as to whether the Alford pleas had been made voluntarily, knowingly, and intelligently and held that the trial court erred in refusing to allow withdrawal of the pleas. The case was reversed and remanded. St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26, 55 St. Rep. 831 (1998).

What Constitutes "Good Cause" Allowing Withdrawal of Guilty Plea — Doubt Resolved in Favor of Defendant: A District Court may permit a defendant to withdraw a guilty plea at any time, before or after judgment, for good cause shown. Although the determination of good cause is discretionary, the guiding principle is that a change of plea will be permitted if it fairly appears that: (1) defendant was ignorant of the defendant's rights and the consequences of the act; (2) defendant was influenced unduly and improperly either by hope or by fear in making the plea; or (3) the plea was entered under some mistake or misapprehension. If there is any doubt that a plea was involuntary, the doubt should be resolved in favor of defendant. St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682, 55 St. Rep. 396 (1998), clarifying St. v. McAllister, 96 M 348, 30 P2d 821 (1934), St. v. Haynie, 186 M 374, 607 P2d 1128 (1980), St. v. Mesler, 210 M 92, 682 P2d 714 (1984), Benjamin v. McCormick, 243 M 252, 792 P2d 7 (1990), St. v. Miller, 248 M 194, 810 P2d 308 (1991), and St. v. Cameron, 253 M 95, 830 P2d 1284 (1992), and followed in St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000). See also St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812, 56 St. Rep. 44 (1999). The good cause standard was replaced by the federal voluntariness standard in St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005).

Failure to Adequately Inform Defendant of Rights Prior to Eliciting Factual Basis for Change of Plea and Breach of Plea Agreement by Prosecutor — Reversible Error: The District Court summarily denied Bowley's timely oral motion to withdraw a guilty plea three times. On appeal, the Supreme Court found that the trial court erred in failing to inform Bowley of his constitutional rights, in neglecting to inquire as to the competency of counsel, and in not investigating whether Bowley was under the influence of alcohol or drugs before eliciting from Bowley the factual basis of his guilty plea at a change of plea hearing. Further, the record showed

that the prosecutor, although following the recommendation of the probation officer, breached the plea agreement by suggesting a sentence different from that contained in the pretrial agreement. The motion to withdraw the guilty plea was timely. Having applied the three factors in St. v. Enoch, 269 M 8, 887 P2d 175 (1994), the Supreme Court found that good cause existed to permit withdrawal of the guilty plea and reversed and remanded with instructions to allow Bowley to withdraw the plea if desired or, alternatively, to sentence Bowley in accordance with the pretrial agreement. St. v. Bowley, 282 M 298, 938 P2d 592, 54 St. Rep. 353 (1997), followed in St. v. Schoonover, 1999 MT 7, 293 M 54, 973 P2d 230, 56 St. Rep. 30 (1999), and St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015, 56 St. Rep. 551 (1999).

Denial of Motion to Withdraw Guilty Plea — No Error: The defendant was charged with five counts of criminal sale of dangerous drugs (now criminal distribution of dangerous drugs) and pleaded guilty to all five counts. The defendant was sentenced and then made a motion to withdraw the guilty pleas. The motion was denied. The Supreme Court stated that the standard in reviewing a denial of a motion to withdraw a guilty plea is whether the District Court abused its discretion. Applying three factors, the Supreme Court found that the District Court had not abused its discretion by denying the motion. St. v. Johnson, 274 M 124, 907 P2d 150, 52 St. Rep. 1186 (1995).

Lower Court Error in Not Allowing Withdrawal of Alford Guilty Plea: Enoch argued that the lower court erred in not allowing him to withdraw his *Alford* plea of guilty. The Supreme Court held that the lower court should have allowed the plea withdrawal based on the facts that: (1) the court's interrogation at the time that the plea was entered was inadequate; (2) Enoch's request to withdraw the plea within 2 months of entering the plea was timely; and (3) the court did not give enough weight to the fact that the plea was not the result of a plea bargain in which the guilty plea was given in exchange for the dismissal of another charge. St. v. Enoch, 269 M 8, 887 P2d 175, 51 St. Rep. 1306 (1994), following St. v. Radi, 250 M 155, 818 P2d 1203 (1991), as to factors to be weighed in determining whether to allow withdrawal of a guilty plea, followed in St. v. Johnson, 274 M 124, 907 P2d 150, 52 St. Rep. 1186 (1995), St. v. Gruendemann, 282 M 128, 935 P2d 1110, 54 St. Rep. 275 (1997), St. v. Bowley, 282 M 298, 938 P2d 592, 54 St. Rep. 353 (1997), and St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26, 55 St. Rep. 831 (1998). Bowley was followed in St. v. Schoonover, 1999 MT 7, 293 M 54, 973 P2d 230, 56 St. Rep. 30 (1999).

Adequate Interrogation as to Consequences of Plea — No Mistake or Misunderstanding — Proper Guilty Plea as Waiver of Factual Defenses: Defendant contended that denial of a motion to withdraw a guilty plea was improper because the court's interrogation at an omnibus hearing was insufficient, because he was induced to enter the guilty plea, and because statements made by the victim after the plea was entered amounted to a recantation that required the court to allow withdrawal of the plea. However, denial of the motion was affirmed on appeal when the Supreme Court's examination of the record showed that: (1) the trial court's interrogation was adequate pursuant to St. v. Mahoney, 264 M 89, 870 P2d 65 (1994), despite the occurrence of some harmless error in the court's failure to inform defendant of the maximum and mandatory sentences for the crime; (2) evidence demonstrated that the guilty plea was timely and voluntary and entered without mistake or misunderstanding; and (3) the victim's statements were not exculpatory as to the crime to which defendant pleaded guilty. The Supreme Court cited St. v. Hilton, 183 M 13, 597 P2d 1171 (1979), in holding that by properly pleading guilty, defendant waived all factual defenses that occurred prior to the plea. St. v. Skroch, 267 M 349, 883 P2d 1256, 51 St. Rep. 1092 (1994), distinguishing State ex rel. Gladue v. District Court, 175 M 509, 575 P2d 65 (1978).

Applicability of Statutory Scheme for Withdrawal of Guilty Plea: Defendant pleaded guilty to deliberate homicide approximately 3 ½ months before 46-12-211, the statute that requires that a court inform the defendant of certain alternatives when contemplating withdrawal of a guilty plea, went into effect. The applicable statute in effect at the time was this section, which specifically stated that a judge was not required to allow the defendant to withdraw a guilty plea. Defendant's contention that the court was required to apply a statute that was not yet in effect was without merit. The District Court did not err in denying defendant's motion to withdraw the guilty plea. St. v. Strecker, 267 M 311, 883 P2d 841, 51 St. Rep. 1067 (1994).

Reinstatement of Charge Following Withdrawal of Plea — Not Double Jeopardy: The parties agreed that the state would recommend a 30-year sentence with 25 years suspended if Losson would plead guilty to mitigated deliberate homicide and that they would argue any additional sentence for weapon enhancement at the sentencing hearing, with the state arguing for the maximum 10-year sentence. After Losson pleaded guilty, the state informed her that it would introduce recently discovered evidence to prove that her motive was to gain $106,000 in life insurance and that it would use the evidence in support of its argument for weapon

enhancement. Losson then withdrew her plea, and the state recharged her with deliberate homicide. Losson was ultimately convicted of mitigated deliberate homicide, but on appeal, she contended that the state breached the plea agreement and violated her double jeopardy protection by reinstating the deliberate homicide charge. The Supreme Court affirmed, noting that the state did not breach the plea agreement, but rather Losson chose to withdraw her plea. Double jeopardy protection does not relieve a defendant from the consequences of the voluntary choice of plea withdrawal. Further, Losson's double jeopardy argument was moot because she was only convicted on mitigated deliberate homicide and thus could not challenge the deliberate homicide charge. St. v. Losson, 262 M 342, 865 P2d 255, 50 St. Rep. 1588 (1993).

Intelligent, Voluntary Guilty Plea — Record and Memos Fully Supporting Refusal to Set Plea Aside: The record showed that the guilty plea accepted by the District Court explained the charge, the minimum and maximum punishment, defendant's rights, what rights he waived by pleading guilty, the consequences of a guilty plea, that the County Attorney agreed not to seek the death penalty but could recommend any sentence, and the factual basis for the guilty plea. It also stated he was competent, was not under the influence of alcohol or drugs, and had been well-advised. Three days prior to the entry of the guilty plea in open court, he signed two memoranda to file. One memorandum described the events leading up to the murder and the murder itself; discussed the conferences defendant had with his attorneys during which the possibility of a guilty plea was discussed; stated that after pondering this decision in many conferences, he instructed his attorneys to make arrangements for the entry of his plea; and stated that his attorneys repeatedly advised that the decision to plead guilty was entirely in his control and that decision was made independently. The other memorandum discussed the possible sentence for deliberate homicide and that the County Attorney agreed to not recommend the death penalty in exchange for a guilty plea but reserved the right to recommend any sentence, including imprisonment for 100 years, and stated that his attorneys made no recommendation for or against a guilty plea but that after consideration he decided to plead guilty to avoid the trauma of trial for his parents, children, family, and wife. Given the evidence in the record that the defendant gave his guilty plea intelligently and voluntarily, the District Court did not err in refusing to set aside his guilty plea. St. v. Docken, 222 M 58, 720 P2d 679, 43 St. Rep. 1058 (1986), followed in St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990).

Withdrawal of Guilty Plea Request Based on Ineffective Assistance of Counsel: The Supreme Court applied the rule for allowing withdrawal of a guilty plea as set forth in St. v. Laverdure, 212 M 31, 685 P2d 375, 41 St. Rep. 1570 (1984), and held that defendant's motion was properly refused by the trial court. The trial judge's interrogation at the time he took defendant's plea was adequate. Defendant's request was not timely. It was made more than a year after entering the plea. Defendant's plea was clearly the result of a plea bargain. Furthermore, defendant's reasons for wanting to withdraw his guilty plea centered around his ineffective assistance of counsel claim, which the Supreme Court rejected. St. v. LaTray, 220 M 358, 715 P2d 52, 43 St. Rep. 429 (1986).

Guilty Plea Not Equivalent to Coercion: Plea bargaining is not equivalent to coercion, and a guilty plea entered to avoid increased punishment as a persistent felony offender was not coerced. Although defendant's attorney's advice regarding use of a prior felony conviction for designation as a persistent felony offender was erroneous, this did not amount to ineffective assistance of counsel. Because defendant was charged with two additional felonies, the District Court did not err in denying the motion to withdraw the plea. St. v. Williamson, 218 M 242, 707 P2d 530, 42 St. Rep. 1551 (1985).

Guilty Plea Withdrawal Requested on Petition to Revoke Suspension of Sentence — Denied: Order denying motion to withdraw guilty plea was affirmed when: (1) there was no evidence the plea was coerced; (2) the plea was apparently the result of a plea bargain; (3) at the time of the plea the judge interrogated defendant about nearly all the issues involved, such as voluntariness and competency; (4) his attorney at the time stated he was satisfied defendant was acting voluntarily; and (5) defendant did not promptly attempt to withdraw the plea, the attempt coming only when, 3 years after the plea was entered, he was in danger of having his suspended sentence revoked. St. v. Flamm, 215 M 466, 697 P2d 1371, 42 St. Rep. 547 (1985).

Factors: There are three important factors to be considered when a defendant attempts to withdraw a bargained plea: (1) adequacy of the court's interrogation when the plea was entered as to defendant's understanding of the plea; (2) that the plea resulted from plea bargaining; and (3) the promptness of the motion to withdraw. A plea change will be permitted only if it fairly appears that defendant was ignorant of his rights and the consequences of his act or was unduly and improperly influenced by hope or fear in making the plea or that the plea was entered under some mistake or misapprehension. (See 1985 amendment note.) St. v. Mesler, 210 M 92, 682 P2d

714, 41 St. Rep. 939 (1984). However, see St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), in which the factors were replaced by the federal voluntariness standard. See also St. v. Radi, 250 M 155, 818 P2d 1203, 48 St. Rep. 903 (1991), St. v. Johnson, 274 M 124, 907 P2d 150, 52 St. Rep. 1186 (1995), St. v. Bowley, 282 M 298, 938 P2d 592, 54 St. Rep. 353 (1997), St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015, 56 St. Rep. 551 (1999), and St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000). Bowley was followed in St. v. Schoonover, 1999 MT 7, 293 M 54, 973 P2d 230, 56 St. Rep. 30 (1999), and St. v. Garner, 2001 MT 222, 306 M 462, 36 P3d 346 (2001).

Prison's Custody Classification as Alleged Violation of Plea Bargaining Agreement — Withdrawal of Plea Denied: Under a plea bargain agreement, defendant was sentenced to 10 years as a nondangerous offender (see 1995 repeal of 46-18-404) without parole. Upon entering prison, he was held in close custody for 24 months under prison rules calling for dangerous offenders and those sentenced without parole to serve 24 months in close custody prior to being considered for transfer to lower, more amenable custody levels. The prosecution, defense counsel, defendant, and judge were all unaware of those rules. Defendant was not entitled to withdraw his plea on the ground he was kept in close custody for 24 months in violation of his plea agreement. There was no violation of the agreement, nor was he entitled to the additional good time credits he would have received had he not been held so long in close custody. Prison officials take many factors into account in making custody reclassifications, and there was no guarantee he would have been held in close custody only for the time he claimed he should have been upon entry to the prison. St. v. Mesler, 210 M 92, 682 P2d 714, 41 St. Rep. 939 (1984).

Plea Based on Promised Lenience — Inadmissible: Plaintiff pleaded guilty to sexual intercourse without consent. He later withdrew the plea, which was based on plea bargaining, and went to trial. At the trial, plaintiff's confession upon entering the plea was used to impeach him. The Montana Supreme Court upheld plaintiff's conviction, on the ground that the plea was voluntary, in St. v. Hansen, 194 M 197, 633 P2d 1202, 38 St. Rep. 1541 (1981). Plaintiff brought this action, contending that the admission of his confession violated his rights under the fifth amendment to the United States Constitution (similar to Art. II, sec. 25, Mont. Const.). The court held that where a plea is brought about by thoughts of promised lenience, it cannot be admitted into evidence when it has been withdrawn. The court ordered a new trial. Hansen v. Risley, 40 St. Rep. 2100 (D.C. Mont. 1983) (apparently not reported in Federal Supplement).

Withdrawal of Guilty Plea Properly Refused:

The defendant entered a plea of guilty to the offense of forgery after having been carefully interrogated by the court. The court had determined that the defendant was competent and not under the influence of drugs or alcohol, that the plea was voluntarily entered, and that the defendant understood the charges, the possible punishment, and his right to a jury trial. The District Court did not abuse its discretion in denying the defendant's pro se motion to withdraw his guilty plea, the standards set forth in St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), having been met. St. v. Gates, 199 M 256, 648 P2d 285, 39 St. Rep. 1329 (1982).

It is the sole province of the trial court to determine whether a motion to withdraw a guilty plea should be granted. The abuse of discretion required to reverse the lower court is not present in this case in light of petitioner's continual insistence on a guilty plea, the evidence against him, and the careful and explicit explanation given the petitioner by the court. In re Hardy, 188 M 506, 614 P2d 528 (1980).

The denial of a motion to withdraw a plea of guilty was upheld when the chief contention was that the defendant was misled by the erroneous advice of counsel as to his guilt under the law and when from the record there was evidence that would have justified a finding of guilty, regardless of the correctness of the counsel's interpretation of the law. St. v. Nance, 120 M 152, 184 P2d 554 (1947), distinguished in St. v. Holt, 121 M 459, 194 P2d 651 (1948).

When the defendant pleaded guilty to two charges of murder, was sentenced to life imprisonment on each, and 3 years later filed motions for leave to withdraw his pleas of guilty and substitute pleas of not guilty by reason of insanity caused by alcoholism, alleging in his affidavit that he pleaded on the advice of his attorney and was unaware of the effect of a former section requiring consecutive terms if a person had been convicted of two or more offenses before sentence had been pronounced for either, it was held that the evidence was sufficient to deny the motions, that the court did not abuse its discretion in finding him sane when he pleaded, that he was faithfully represented, and that he was aware that he couldn't escape a jury trial and a possible death sentence if he had done otherwise. St. v. Hukoveh, 115 M 125, 139 P2d 538 (1943).

Voluntariness of Withdrawal of Guilty Plea Against Advice of Counsel: The defendant persisted in pleading guilty in spite of his counsel's advice to plead not guilty. The defendant

could not later request a withdrawal of the plea, claiming he had not made a voluntary and intelligent choice. St. v. Wilson, 198 M 305, 645 P2d 958, 39 St. Rep. 1000 (1982)

Withdrawal of Guilty Plea — Competence of Defendant to Plead Not in Issue: The competence of the defendant to plead guilty was not at issue even though the defendant withdrew his notice of intent to rely on mental defect as a defense, requested to confer with the County Attorney without his counsel, and pleaded guilty against the advice of his counsel. Because the defendant outlined the facts of the crimes at the time of entry of his plea and 5 months later gave the same testimony at another trial, he was in full possession of his mental faculties. St. v. Wilson, 198 M 305, 645 P2d 958, 39 St. Rep. 1000 (1982).

Withdrawal of Guilty Plea — Failure of Court to Explain Differences Among Counts: After pleading guilty to multiple counts arising from a homicide, the defendant made a voluntary statement to the court clearly showing he was guilty on two counts of deliberate homicide. Failure of the District Court to explain the differences between deliberate homicide, mitigated homicide, and aggravated assault did not provide grounds for withdrawal of the guilty plea. St. v. Wilson, 198 M 305, 645 P2d 958, 39 St. Rep. 1000 (1982).

Notice Requirements for Guilty Plea: Defendant and three friends had been drinking and taking LSD. Defendant planned to get valuable coins from one friend and not pay for them. The friend found out about defendant's plan. Defendant stabbed him to death and sank the body through a hole in the ice on the Tongue River. Defendant was arrested and arraigned. He pleaded not guilty to deliberate homicide. He underwent psychiatric evaluation and was found competent to stand trial. Defendant then requested that he be allowed to change his plea to guilty. The District Court questioned him at length on the voluntariness of his decision and his understanding of the consequences accompanying the changed plea. On appeal, defendant contended it was error not to later allow him to withdraw the guilty plea. Defendant was advised of the elements of deliberate homicide and mitigated deliberate homicide. He was also advised of the required mental state for the offense charged. The Supreme Court held that the combination of the District Judge's examination and the explanation by defendant's attorney was sufficient to show that defendant had "real notice" of all that was required to make a voluntary and understanding plea of guilty to deliberate homicide. It was not error to later deny the request to withdraw the plea. St. v. White, 194 M 421, 632 P2d 1118, 38 St. Rep. 1417 (1981).

Discretion of Court: A view of the record indicates no new or additional evidence that would entitle petitioner to a new hearing or any reversal by the District Court of its 1979 order. Petitioner shows no reason why the District Court abused its discretion in denying withdrawal of his plea; and petitioner having presented no new facts, the issue is without merit. Additionally, the Supreme Court rejected petitioner's contention that he was denied due process in sentencing because he did not understand the consequences of his plea. Gardipee v. Blodgett, 193 M 314, 631 P2d 1270, 38 St. Rep. 909 (1981).

Denial of Motion to Withdraw Guilty Plea — 5 ½ Years After Plea: The District Court did not err in refusing to grant defendant's motion to withdraw a plea of guilty to one charge of rape, which was arrived at after extensive plea bargaining, accompanied by a dismissal of 10 remaining counts. Though the court's interrogation of defendant at time he entered the plea of guilty was inadequate, the defendant waited 5 ½ years before he expressed dissatisfaction with his plea, and he may not, after this length of time, escape the obligations of a plea bargain and accept its benefits. (See 1985 amendment note.) St. v. Haynie, 186 M 374, 607 P2d 1128 (1980), followed in St. v. Bigsmoke, 197 M 307, 642 P2d 1068, 39 St. Rep. 581 (1982).

Doubt as to Requisite Mental State and Lack of Notice of Crime's Elements: The defendant was not made aware of the differing elements of assault as set forth in 45-5-201 and 45-5-202, and the District Court had before it evidence indicating that defendant was under the influence of a combination of drugs and alcohol and was possibly suffering from mental distress or instability at the time of the alleged assault. Under these circumstances the judge should not have accepted defendant's guilty plea, and defendant should be allowed to withdraw the plea. St. v. Nelson, 184 M 491, 603 P2d 1050, 36 St. Rep. 2228 (1979).

Factors: An appeal of a court's refusal to permit a defendant to withdraw a guilty plea involved a balancing of three conflicting factors: (1) the adequacy of the interrogation by the District Court of the defendant at the entry of the guilty plea as to the defendant's understanding of the consequences of his plea; (2) the promptness with which the defendant attempted to withdraw the prior plea; and (3) the fact that the defendant's plea was apparently the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge. (See 1985 amendment note.) St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), followed in St. v. Bigsmoke, 197 M 307, 642 P2d 1068, 39 St. Rep. 581 (1982), and St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682, 55 St. Rep. 396 (1998), and overruled in St. v. Lone Elk, 2005 MT 56, 326 M

214, 108 P3d 500 (2005), which replaced the Huttinger factors and adopted the federal voluntariness test as the ultimate test for withdrawal of a plea.

Improper Refusal to Permit: Because there was evidence that the petitioner had always maintained his innocence, pleaded guilty only after being induced to do so by his attorney of record, and feared he had no chance of proving his innocence in a jury trial, the District Court abused its discretion in not allowing a withdrawal of the guilty plea and ordering a trial on the merits. State ex rel. Gladue v. District Court, 175 M 509, 575 P2d 65 (1978), followed in St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26, 55 St. Rep. 831 (1998).

Motion Granted: The District Court did not err in reversing an order of the Justice's Court denying a motion for the withdrawal of a guilty plea made inadvisedly without an understanding of the consequences, since doubts should be resolved in favor of a trial on the merits. There was no impropriety sufficient to invoke the supervisory control of the Supreme Court, even though it would have been a proper form of review. St. v. Doty, 173 M 233, 566 P2d 1388 (1977), distinguished in St. v. Fox, 2001 MT 209, 306 M 353, 34 P3d 484 (2001).

Denial of Motion to Withdraw: When, after originally pleading not guilty, the defendant, on advice of counsel, pleaded guilty to a charge of burglary as part of a plea bargaining arrangement, after which time evidence of the burglary was returned to its owner, he could not change his plea back to not guilty upon recapture after his escape from jail. St. v. Sattler, 170 M 35, 549 P2d 1080 (1976).

Renewed Charge After Withdrawal: A defendant who pleaded guilty to a lesser offense after the jury was seated, but prior to the calling of any witnesses, and then 2 months later withdrew his guilty plea was properly recharged with the original greater offense without violation of his protection against double jeopardy. St. v. Cunningham, 166 M 530, 535 P2d 186 (1975).

Erroneous Refusal to Permit:

The court held, on the facts of the particular case, that when the defendant at the time of entering his plea of guilty thought that he had an understanding as to what his sentence would be and no direct commitment was made to him by any of the officers, but the officers had made statements to others who were in contact with the defendant and upon whose advice he relied, the ends of justice would be best served by permitting the defendant to change his plea. St. v. Morgan, 131 M 58, 307 P2d 244 (1957), distinguished in St. v. Mack, 134 M 301, 330 P2d 968 (1958).

When the evidence discloses that there was a grave doubt that the defendant had the mental capacity to appreciate and understand what he was doing and the consequences thereof and when, without benefit of counsel, he pleaded guilty to the charge of murder, the defendant should have been allowed to withdraw his plea of guilty and enter a plea of not guilty. St. v. Dryman, 125 M 500, 241 P2d 821 (1952), distinguished in St. v. Bischert, 131 M 152, 308 P2d 969 (1957).

The defendant, a Mexican without education and unfamiliar with court procedure, stood charged with murder in the first degree. When he asked for a jury trial, his first attorney asked to be relieved of his assignment; the second advised the defendant to plead guilty and take a life sentence because, if he were tried by jury, the sentence would be one of death. The defendant's plea was guilty, and the trial court imposed the death sentence. The court held that the trial court abused its discretion in refusing to grant the defendant's motion for permission to change his plea to one of not guilty. St. v. Casaras, 104 M 404, 66 P2d 774 (1937).

Discretion of Court: The granting or refusal of permission to withdraw a plea of guilty and substitute a plea of not guilty rests in the discretion of the trial court and is subject to review only when an abuse of discretion is shown. St. v. Nance, 120 M 152, 184 P2d 554 (1947), distinguished in St. v. Holt, 121 M 459, 194 P2d 651 (1948).

PLEA BARGAIN

Plea Agreement as Contract: The state charged Smietanka with the felony offense of sexual intercourse without consent. Smietanka and the state subsequently entered into a plea agreement pursuant to which the state agreed to amend the information to charge misdemeanor offenses of assault and negligent endangerment and eliminate the sexual intercourse without consent offense. The state further agreed to recommend that the District Court sentence Smietanka to a 6-month suspended sentence on each count, with the sentences to run concurrently, and with credit for 200 days for time served in jail. In return, Smietanka agreed to plead guilty to the two misdemeanor offenses and to pay a fine, public defender fees, and costs as determined by the court. Smietanka appeared in District Court and pleaded guilty to the two misdemeanor offenses. The court accepted the guilty pleas and proceeded directly to sentencing. The state then recommended a 6-month suspended sentence on the assault offense and a concurrent 12-month suspended sentence on the negligent endangerment offense, with 200 days credit for time served. The state also requested the court impose restitution payable to the

Montana Department of Justice's crime victims compensation program. A plea agreement is a contract between the state and a defendant. Prosecutors are required to meet strict and meticulous standards in both promise and performance when fulfilling the state's obligations pursuant to a plea agreement. A prosecutor's violation of a plea agreement is unacceptable, even when made inadvertently in a good faith pursuit of a just outcome. The case was reversed and remanded to the District Court for resentencing. St. v. Smietanka, 2008 MT 357, 346 M 353, 195 P3d 797, (2008).

Sentence Based on Recommendation of Sexual Offender Evaluator — State Breach of Plea Agreement by Presenting Conflicting Testimony of Different Evaluator: In a plea agreement, the state agreed to recommend one sentence if Rahn was designated by a sexual offender evaluator as a level 2 or lower offender and a harsher sentence if Rahn was designated as a level 3 offender. An evaluator who personally evaluated Rahn opined that Rahn should be designated as a level 2 offender. At the sentencing hearing, the state presented testimony by a different evaluator, who had not evaluated Rahn, attacking the level 2 designation and arguing that Rahn should be designated as a level 3 offender. Rahn objected on grounds that the state witness's testimony breached the plea agreement, but the sentencing court overruled the objection and subsequently designated Rahn as a level 3 offender and imposed the harsher sentence. Rahn appealed, and the Supreme Court reversed. Rahn complied with the plea agreement, but the state's conduct in presenting alternate testimony and recommending a level 3 designation was not what was agreed upon in the plea bargain; therefore, the state breached the plea agreement. The state was obligated to make the recommendation as agreed upon in the plea bargain, and the Supreme Court remanded for resentencing with a different judge pursuant to the terms of the plea agreement. St. v. Rahn, 2008 MT 201, 344 M 110, 187 P3d 622 (2008).

Adequate Notice of Amount of Support Owed — Guilty Plea Not Involuntary Based on Defendant's Belief That Different Amount Owed: Milligan contended that he would not have pleaded guilty to felony nonsupport if he had known that he would be liable for $55,404.65 in restitution rather than $45,000 indicated in the affidavit attached to the charging information. However, when the information and affidavit were considered in conjunction with the plea agreement, statements of the District Court at the change of plea hearing, and the presentence investigation report, all of which apprised Milligan that the actual amount due was $55,404.65, Milligan was reasonably notified that he could be required to pay the full amount due, including restitution owing during the 2 years that had elapsed after the information was filed. Milligan was not laboring under a fundamental mistake when he pleaded guilty, and his plea was not involuntary. Restitution of $55,404.65 was affirmed. St. v. Milligan, 2008 MT 36, 341 M 316, 177 P3d 500 (2008).

No Right to Be Informed of Possibility of Lesser Included Offense When No Such Possibility Exists: Defendant was charged with felony attempted sexual assault, but ultimately pleaded nolo contendere to a charge of felony attempted kidnapping. After being sentenced to 10 years in prison, defendant appealed the conviction on grounds that the trial court erred by failing to inform defendant that he could have been convicted on a lesser charge of unlawful restraint and by failing to allow withdrawal of the guilty plea. However, only those lesser included offenses applicable to the charge of felony attempted sexual assault were relevant to defendant's decision to plead nolo contendere. The court and the state could not be faulted for failing to inform defendant of any lesser included offense that was not relevant to defendant's decision, and defendant had no right to be informed of the possibility of submitting a lesser included offense instruction to the jury when no such possibility existed. Absent anything in the record that an omission, misinformation, or mental incapacity hindered defendant's ability to enter knowingly and intelligently into a plea agreement, the trial court did not err in holding that defendant failed to establish good cause to withdraw the plea, and the Supreme Court affirmed. St. v. Iafornaro, 2007 MT 77, 336 M 489, 155 P3d 1238 (2007).

State Breach of Plea Agreement — Remand for Resentencing in Conformity With Sentencing Stipulation: Pursuant to a plea bargain, a youth was placed on probation until age 18 with a sentencing stipulation that if the youth did not follow treatment plans or meet other requirements, the matter would be transferred to District Court and adult supervision. The youth subsequently violated probation and was sent to the Pine Hills correctional facility. The youth reoffended at Pine Hills, and the state moved to transfer the case to District Youth Court. Despite the sentencing stipulation, the state moved for a custodial sentence, and the Youth Court concurred with the state's recommendation and sentenced the youth to the Department of Corrections until age 25, with the last 3 years suspended. The youth appealed. The Supreme Court reversed. Both parties were bound by the terms of the plea agreement, and although the case was transferred to District Court as per the agreement, the state failed to follow the terms of

the agreement when it sought a custodial sentence rather than adult supervision for the youth. Upon resentencing following the subsequent revocation for violation of sentencing conditions, the youth was entitled to receive the sentence that was presented to and approved by the Youth Court, and the Youth Court abused its discretion by failing to hold the state to the terms of the sentencing stipulation and by ordering the custodial sentence. On remand, the Youth Court was ordered to resentence the youth in accordance with the terms of the sentencing stipulation. In re H.C.R., 2007 MT 64, 336 M 369, 155 P3d 1221 (2007), following St. v. Rardon, 1999 MT 220, 296 M 19, 986 P2d 424 (1999), and St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002).

State Allowed to Present Evidence Regarding Veracity of Information Defendant Raises in Arguing for Sentence Without Breaching Plea Agreement: At a sentencing hearing, Bartosh testified regarding information in the presentence investigation report, asserting that he had complied with his treatment plan and that certain transcripts of telephone conversations attached to the report should be stricken because they undermined the plea agreement. The District Court declined to strike the transcripts and allowed the probation officer who prepared the report to testify in response to Bartosh's testimony. On appeal, Bartosh contended that it was error to allow the probation officer to testify because the testimony undermined the plea agreement. The Supreme Court held that the telephone transcripts were relevant and properly allowed as indicative of Bartosh's acts. The court also affirmed the sentencing court's decision to allow the probation officer's testimony. Once Bartosh testified as to his conduct concerning compliance with the treatment plan, the state was justified in presenting the probation officer who had conflicting information. If a defendant chooses to present information in support of a sentence, the state may counter with testimony to the effect that the information is misleading or untrue without breaching a plea agreement. St. v. Bartosh, 2007 MT 59, 336 M 212, 154 P3d 58 (2007).

No Challenge to Legality of Sentence on Direct Appeal — Postconviction Relief Barred: Hardin claimed in a petition for postconviction relief that the District Court lacked jurisdiction to accept a nolo contendere plea to a sexual offense because such a plea is prohibited under this section. The petition was denied, and on appeal, the Supreme Court affirmed. Hardin failed to challenge the legality of the sentence on direct appeal, so the claim was procedurally barred by 46-21-105 from postconviction relief. Hardin v. St., 2006 MT 272, 334 M 204, 146 P3d 746 (2006).

No Ineffective Assistance of Counsel When Defendant Benefits From Nolo Contendere Plea for Sexual Offense: In a claim for postconviction relief, Hardin asserted that he was denied effective assistance when his counsel successfully negotiated a nolo contendere plea for a sexual offense because the plea was illegal pursuant to this section. The Supreme Court noted that just because a sentence is illegal does not necessarily mean that there is merit to a claim of ineffective counsel. Rather, the defendant must meet both prongs of the Strickland test, requiring a showing both that counsel was deficient and that the defendant was prejudiced by the deficient performance. Here, Hardin could not demonstrate prejudice. By being allowed to enter a nolo contendere plea, Hardin actually benefited from the plea agreement without an express acknowledgement of guilt. Hardin could not show that counsel's performance was deficient when he received a more lenient, albeit illegal, sentence. Hardin v. St., 2006 MT 272, 334 M 204, 146 P3d 746 (2006).

Sufficient Accurate Information to Support Sentence for Distribution of Methamphetamine: Harper was sentenced to 20 years in prison with 10 years suspended and fined $12,000 after pleading guilty to possession of dangerous drugs with intent to distribute. Harper appealed on grounds that the sentencing court based the sentence on inaccurate and insufficient evidence that Harper was the center of the drug operation. Harper had a right to be sentenced based on correct evidence, but also had the affirmative duty to show, beyond mere unsupported contentions, that the alleged misinformation was materially inaccurate and to present information establishing inaccuracies in the presentence investigation report. In this case, the sentencing court did nothing more than consider relevant information relating to the nature and circumstances of the possession of drugs found during the search of Harper's home, including unrefuted information that Harper was at the center of a methamphetamine distribution business conducted from the home. Information in the presentence investigation report simply underscored Harper's involvement in drug distribution and supported that charge to which Harper pleaded guilty. The information was properly before the sentencing court, and the court did not err in imposing a sentence within the statutory parameters. The sentence was affirmed. St. v. Harper, 2006 MT 259, 334 M 138, 144 P3d 826 (2006), followed in St. v. Walker, 2007 MT 205, 338 M 529, 167 P3d 879 (2007), with respect to defendant's affirmative duty to show, beyond mere unsupported contentions, that alleged misinformation in a presentence investigation report was materially inaccurate and to present information establishing inaccuracies in the presentence investigation report.

No Right to Appeal Judgment Absent Adverse Determination of Specific Pretrial Motion: Defendant filed a pretrial motion to dismiss a felony deviate sexual conduct offense on equal protection grounds, but prior to a ruling on the motion, defendant entered a plea agreement, pleaded guilty, and reserved the right to appeal the constitutional issue. The District Court accepted the plea, but did not accept the terms of the plea agreement, and following conviction, defendant appealed the equal protection issue. Although a defendant who knowingly and voluntarily pleads guilty generally waives the right to appeal any nonjurisdictional defects and defenses that occurred prior to the plea, under subsection (3) of this section, a defendant may enter a guilty plea and reserve the right to appeal an adverse determination of any specified pretrial motion. However, the District Court did not rule against the pretrial motion to dismiss, so defendant's reservation of the right to appeal did not meet the statutory condition. Defendant's conditional guilty plea was invalid because the state was not authorized to consent to it and the District Court was not authorized to approve it, so the Supreme Court vacated the guilty plea and sentence and reversed for further proceedings. St. v. Rytky, 2006 MT 134, 332 M 364, 137 P3d 530 (2006).

Plea Bargain Rejected — Imposition of State-Recommended Maximum Sentence Not Violative of Due Process: Killam was charged with felony aggravated assault with a weapon. The state entered into plea negotiations, but Killam rejected the proposed agreement. Killam ultimately pleaded guilty. At sentencing, the state recommended the maximum sentence, which was greater than the sentence offered in the plea agreement, and the sentencing court imposed the maximum statutory sentence. On appeal, Killam contended that the state acted vindictively and violated Killam's due process rights by recommending a more severe sentence than was offered in the plea negotiations, citing N.C. v. Pearce, 395 US 711 (1969), and Blackledge v. Perry, 417 US 21 (1974). The Supreme Court distinguished both federal cases because they dealt with vindictiveness based on harsher sentences imposed following retrial, while Killam argued vindictiveness during initial sentencing. The court noted that a defendant is free to accept or reject a plea offer, but if the offer is rejected, the prosecution may proceed with the case and make any legal sentencing recommendation because there is no agreement to the contrary. When Killam entered a guilty plea, the District Court informed him of the maximum sentence and the state was free to recommend the maximum statutory sentence. Thus, imposition of the maximum sentence did not violate Killam's due process rights. St. v. Killam, 2005 MT 255, 329 M 50, 122 P3d 439 (2005), following Bordenkircher v. Hayes, 434 US 357 (1978).

Consideration at Sentencing of Alleged Crimes Dismissed by Plea Bargain Not Violative of Due Process: At sentencing, the District Court considered allegations of other crimes for which Mason had been initially charged but that had been dismissed by plea agreement. Mason contended that consideration of statements related to unproved conduct violated the right to due process. The Supreme Court noted that due process protects a defendant from being sentenced based on misinformation and requires that a defendant be given an opportunity to rebut any information that may lead to deprivation of life, liberty, or property, but does not protect against all misinformation unless the sentence is premised on materially false misinformation. The court also noted that St. v. Collier, 277 M 46, 919 P2d 376 (1996), allows a sentencing court to consider any evidence that has probative force, including other acts that have been dismissed by plea agreement, as in St. v. Baldwin, 192 M 521, 629 P2d 222 (1981). Nothing in Mason's plea agreement prevented the state from presenting the facts of the case during the sentencing hearing, and in fact, that inquiry is required as part of the presentence investigation report under 46-18-112. Mason failed to show that the sentencing court relied on misinformation and thus was not entitled to resentencing on due process grounds. Further, the plea agreement required relinquishment of Mason's parental rights, so the sentencing court properly considered evidence of the danger Mason posed to the other children in order to approve that portion of the agreement. St. v. Mason, 2003 MT 371, 319 M 117, 82 P3d 903 (2003), followed in St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005), and St. v. Phillips, 2007 MT 117, 337 M 248, 159 P3d 1078 (2007).

Improper Prosecutorial Solicitation of Testimony Intended to Undermine Plea Agreement — Choice of Remedies on Remand: The prosecutor in Rardon's sexual assault trial gave lip service to the letter of a plea agreement by recommending the sentence suggested in the presentence investigation, but then went on to solicit inflammatory testimony from the victims that would almost undoubtedly cause the court to question the appropriateness of the recommended sentence, which effectively undercut the plea agreement. Although it is appropriate for a prosecutor to questions victims and solicit their testimony at a sentencing hearing and for victims to express their fears and feelings, it is not acceptable for a prosecutor to aggressively solicit testimony that is clearly intended to undermine a plea agreement and to convince the

sentencing court that a bargained sentence agreement should not be accepted. A plea agreement is subject to contract law standards, and prosecutors must meet strict and meticulous standards of both promise and performance. A guilty plea resting on an unfulfilled promise in a plea bargain is involuntary, and prosecutorial violations, even if made inadvertently or in good faith to obtain a just and mutually desired end, are unacceptable. When the prosecution breaches a plea agreement, the sentencing judge may determine the appropriate remedy, which may include withdrawal of the guilty plea or specific performance of the plea agreement in a new sentencing hearing with a different prosecutor and judge. St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002). On remand, the prosecutor's presentation of the state's case did not undermine the plea bargained sentence recommendation or violate the contract law standards of the plea agreement. The sentencing judge was entitled to consider evidence of Rardon's abusive history and violent tendencies, as well as Rardon's daughter's opinion that Rardon should receive a lengthy sentence. None of the prosecutorial improprieties identified in previous hearings were present in the third sentencing hearing, nor did Rardon demonstrate any other kind of prosecutorial impropriety, so Rardon's third sentence was affirmed. St. v. Rardon, 2005 MT 129, 327 M 228, 115 P3d 182 (2005). The 2005 Rardon decision was followed in St. v. Bartosh, 2007 MT 59, 336 M 212, 154 P3d 58 (2007), and St. v. Rahn, 2008 MT 201, 344 M 110, 187 P3d 622 (2008). See also St. v. Lamere, 272 M 355, 900 P2d 926 (1995), St. v. Bowley, 282 M 298, 938 P2d 592 (1997), and St. v. Munoz, 2001 MT 85, 305 M 139, 23 P3d 922 (2001).

Additional Sentence Condition Added Following Plea Agreement — Error in Not Allowing Withdrawal of Guilty Plea: Afterbuffalo pleaded guilty to criminal endangerment pursuant to a plea agreement. The sentencing court imposed the recommended 3-year suspended sentence, but also added a requirement that Afterbuffalo be placed in either a prerelease or an intensive supervision program. Afterbuffalo claimed that the sentence was outside the scope of the plea agreement and moved to withdraw the guilty plea because the requirement was not a standard condition of probation. The motion was denied. On appeal, the Supreme Court agreed that the additional requirement was outside the scope of the plea agreement. In entering the plea agreement, Afterbuffalo bargained for the benefit of an ordinary suspended sentence, but the additional requirement was not a standard condition of probation and materially changed the impact of the suspended sentence. Addition of the probation requirement constituted a rejection of the agreement by the sentencing court. Thus, pursuant to 46-12-211, the sentencing court was required to allow withdrawal of the guilty plea, and abused its discretion in failing to do so. St. v. Afterbuffalo, 2002 MT 14, 308 M 163, 40 P3d 375 (2002).

Guilty Plea Constituting Waiver of Nonjurisdictional Defects and Defenses: Gordon was charged in Montana with the murder, aggravated kidnapping, and robbery of an Idaho man. Gordon sought a ruling on a motion to require enforcement of the second of two plea agreements entered into with Idaho authorities regarding a sentence that might be imposed if Gordon's implicity was proved in the homicide or if he was not truthful in the ongoing investigation. The state argued that Idaho could not bind Montana to a pretrial agreement in which Montana had not participated and contended that Idaho had previously voided the second plea agreement because of Gordon's untruthfulness. The District Court denied the motion. Gordon subsequently entered a plea agreement with Montana. The court obtained Gordon's understanding of the rights that he would give up by pleading guilty, including the right to an appeal. The court accepted Gordon's guilty plea to aggravated kidnapping and dismissed the other charges, ultimately imposing an 80-year sentence as recommended in the state plea agreement. On appeal, Gordon asserted that his constitutional rights were violated when the District Court did not sentence him pursuant to the second Idaho plea agreement. Citing St. v. Wheeler, 285 M 400, 948 P2d 698, 54 St. Rep. 1213 (1997), the Supreme Court held that after a criminal defendant pleads guilty of the offense charged, only the voluntary and intelligent character of the guilty plea may be attacked and that independent claims relating to prior deprivations of constitutional rights may not be raised. A voluntary and intelligent guilty plea constitutes a waiver of nonjurisdictional defects and defenses. St. v. Gordon, 1999 MT 169, 295 M 183, 983 P2d 377, 56 St. Rep. 654 (1999).

Plea to Lesser Included Offense — Introduction at Sentencing of Evidence of Commission of Charged Offense — Language of Plea Agreement: Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged the state's introduction of evidence tending to prove her commission of the originally charged offense. The Supreme Court upheld the introduction of the evidence, noting not only that the rules of evidence do not apply in sentencing, but also that the plea agreement provided that "counsel for the State may make any

recommendation and may introduce . . . evidence in support thereof at the time of sentencing". St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

Imposition of Sentence Different From That Recommended by Plea Bargain Agreement — No Error: Larson argued that the trial court's granting of the state's motion to amend a count from attempted sexual intercourse without consent to sexual assault constituted the court's approval of the charging part of a plea agreement and that the court thus erred in failing to follow the sentencing part of the agreement by imposing a greater sentence than recommended. A plea agreement is between the prosecutor and the defendant. A judge may not participate in and is not bound by the plea agreement. The court's grant of the motion to amend the charge did not signify that the court would or did approve of the agreement, nor is there any case law or statute that requires the court to inform a defendant of the sentence that will be imposed before a guilty plea is withdrawn. St. v. Larson, 266 M 28, 878 P2d 886, 51 St. Rep. 638 (1994).

Failure of State to Honor Plea Bargain — Remand: Owens was charged in two informations, alleging theft and forgery, both felonies. A plea bargain stated that the County Attorney would recommend a 15-year sentence for both charges and not seek a persistent offender designation. The state did not contest Owens' understanding of the agreement that Owens would receive a total of 15 years for the two charges, with the sentences running concurrently. At the state's suggestion and over objection, Owens was subsequently sentenced to 15 years with 5 suspended for forgery and 10 years with 5 suspended for theft, a total of 25 years with 10 suspended, with the sentences to run consecutively. Owens' decision to plead guilty based on the promise of concurrent sentencing, coupled with the differences in the restraints of freedom that often accompany suspended sentences, amounted to a prosecutorial violation of the plea bargain agreement warranting remand and resentencing consistent with the plea agreement. St. v. Owens, 254 M 224, 836 P2d 595, 49 St. Rep. 744 (1992). See also Santobello v. New York, 404 US 257, 30 L Ed 2d 427, 92 S Ct 495 (1971), and Correale v. U.S., 479 F2d 944 (1st Cir. 1973).

Court Not Bound by Plea Agreement: The express purpose of the 1985 amendment to this section was to overturn St. v. Cavanaugh, 207 M 237, 673 P2d 482 (1983), and to make it clear that a plea bargain is an agreement between the prosecutor and the accused only. The District Court is not bound by the agreement. If the court chooses not to follow the prosecutor's recommendation pursuant to the plea bargain, it is not required to allow the defendant to withdraw his plea of guilty. St. v. Buckman, 236 M 37, 768 P2d 1361, 46 St. Rep. 163 (1989), followed in St. v. Jacobson, 252 M 94, 826 P2d 555, 49 St. Rep. 178 (1992).

Rejection of Part of Bargain — Right to Withdraw Plea and Plead Not Guilty: Petitioner for postconviction relief had engaged in plea bargaining and pled guilty to aggravated kidnapping and aggravated assault. No one told him that the judge might impose a restriction that petitioner be ineligible for parole or the supervised release program, which the judge did on sentencing. The petitioner was not fully informed of the consequences of his plea, and he should have been permitted to withdraw it upon petitioning for postconviction relief. A judge accepting a plea and rejecting any other part of a plea bargain must afford defendant the opportunity to withdraw his plea and plead not guilty. In this case, the decision was applied prospectively only, beginning with petitioner. Since more than 6 years had elapsed since sentencing and crucial witnesses might not be available, the State would be allowed on remand to elect either to have petitioner withdraw his plea with the State having the right to revive its dismissed charges or to have petitioner sentenced in accordance with the plea bargain. (See 1985 amendment note.) St. v. Cavanaugh, 207 M 237, 673 P2d 482, 40 St. Rep. 2007 (1983), followed in St. v. Hendricks, 213 M 507, 691 P2d 1333, 41 St. Rep. 315 (1984), and impliedly overruled in St. v. Buckman, 236 M 37, 768 P2d 1361, 46 St. Rep. 163 (1989).

Plea Agreement — Not Recorded in Conformance With Court Rules — Defendant to Replead: Defendant pleaded guilty on the assumption that an agreement had been reached that in return for the guilty plea the prosecution would make no recommendation to the court on sentencing. On the plea of guilty, the prosecutor recommended 10 years and the defendant was so sentenced. On the motion to withdraw the guilty plea, it was error for the judge to determine that there was no agreement solely because court rules require that such an agreement must be made on the record by a court reporter and in this case no such record was made. St. v. Dinndorf, 202 M 308, 658 P2d 372, 40 St. Rep. 106 (1983).

Plea Bargain Refused by Judge — Sentence Imposed Larger Than Plea Bargain: A judge participated in a plea bargain involving a proposed agreement for a 5-year sentence but ultimately refused to accept the proposal. After the trial the judge sentenced the defendant to 13 years. When a plea bargain is not completed, the participating judge must state for the record the reasons supporting a sentence greater than that offered by the defendant prior to trial. (See 1985 amendment note.) St. v. Welling, 199 M 135, 647 P2d 852, 39 St. Rep. 1215 (1982).

Plea Bargain Agreement Asserted After Sentence Imposed: A criminal defendant was sentenced to 20 years in prison. Two months later, his defense counsel alleged a plea bargain agreement in which the County Attorney promised to recommend a suspended sentence. The purported agreement was contained in a letter from defense counsel to the County Attorney. The case was appealed and remanded for an evidentiary hearing on the terms of the plea bargaining agreement and to determine whether the prosecutor violated the agreement in St. v. Allen, 197 M 64, 645 P2d 380, 38 St. Rep. 2192 (1981). Because the defendant failed to assert the plea bargain agreement until 2 months after sentencing and because there was evidence of plea bargain negotiations subsequent to the letter, the original sentence was upheld. A plea bargain will be enforced only if it is based upon expectations reasonably formed in reliance upon a promise of the County Attorney. (See 1985 amendment note.) St. v. Allen, 685 P2d 333, 39 St. Rep. 899 (1982) (first decision erroneously reproduced at 199 M 204 (1982)).

Fundamental Fairness and Safeguards Necessary: The plea bargaining process and the adjudicative element inherent in accepting a plea of guilty must be attended by fundamental fairness and safeguards insuring defendant what is reasonably due him under the circumstances, which may vary. However, a constant factor is that when a bargained plea rests to any significant degree on a promise or agreement of the prosecutor which can be said to be part of the inducement or consideration, the promise or agreement must be fulfilled. (See 1985 amendment note.) St. v. Allen, 197 M 64, 645 P2d 380, 38 St. Rep. 2192 (1981), followed in St. v. Lamere, 272 M 355, 900 P2d 926, 52 St. Rep. 828 (1995), and St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015, 56 St. Rep. 551 (1999).

Prosecutor to Fulfill Promises: Prosecutors engaging in plea bargaining must meet strict and meticulous standards of promise and performance, as a plea of guilty resting to any significant degree on an unfulfilled plea bargain is involuntary and subject to vacation, and a prosecutor's violation of a promise, even if inadvertent or in good faith to obtain a just and mutually desired end, is unacceptable. (See 1985 amendment note.) St. v. Allen, 197 M 64, 645 P2d 380, 38 St. Rep. 2192 (1981), followed in St. v. Lamere, 272 M 355, 900 P2d 926, 52 St. Rep. 828 (1995), and St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015, 56 St. Rep. 551 (1999).

Remand for Resolution of Facts Based on Intent: On appeal from denial of motion to set aside sentence or allow withdrawal of plea for prosecutor's alleged violation of plea bargain, where prosecution and defense agreed that a plea bargain existed but there was an unresolved factual dispute concerning the terms of the bargain and whether prosecutor violated the bargain and the unresolved factual issues rested upon the intent of the parties, the Supreme Court remanded for resolution of the issues in an evidentiary hearing with directions to enter findings, conclusions, and an order and certify them to Supreme Court for review. (See 1985 amendment note.) St. v. Allen, 197 M 64, 645 P2d 380, 38 St. Rep. 2192 (1981).

Existence of a Plea Bargain — Statements Made in Anticipation of Bargain: When the existence of a plea bargain was disputed and there was substantial evidence that none was made, there was nothing to enforce. The trial court's denial of a motion to withdraw the defendant's plea or to enforce an alleged plea bargain under these circumstances was upheld. With no contention or proof of bad faith by the State in its discussions with defense counsel about a plea bargain or in its efforts to secure the approval of the Sheriff or the victim's parents, any statements made in anticipation of a plea bargain by defense counsel concerning weaknesses in the State's case or defense positions in connection therewith were gratuitous and premature. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Immunity Agreement Versus Plea Bargain: The Supreme Court held that there was sufficient evidence of record to support the finding of the District Court that there existed no oral immunity agreement between the appellant and the State and that the agreement made was actually a plea bargain, which was fully honored. St. v. Evans, 178 M 96, 582 P2d 1211 (1978).

Misuse of Plea Bargaining Process and Habitual Criminal Statute: Without declaring the plea bargaining process constitutionally infirm or the habitual criminal statute unconstitutional on its face, the Supreme Court held that the defendant was denied due process under federal and state provisions when he realistically was sentenced to 10 years for attempted burglary and 40 years for refusing to plead guilty and insisting upon a jury trial. St. v. Sather, 172 M 428, 564 P2d 1306 (1977).

Enforceability of Plea Bargaining Agreement: A plea bargain was held to be unenforceable under the particular fact situation. (See 1985 amendment note.) St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Guilty Plea Under Agreement With Prosecutor: While the Supreme Court will not encourage the making of bargains with persons charged with crime, when a defendant has changed his plea of not guilty to a plea of guilty on an agreement with the prosecuting attorney as to the

recommendation for sentences, which was carried out, the Supreme Court will not, after the defendant obtained the benefits of the agreement, aid him in escaping its obligations by ordering a withdrawal of the guilty plea. St. v. Nance, 120 M 152, 184 P2d 554 (1947), distinguished in St. v. Holt, 121 M 459, 194 P2d 651 (1948), and followed in St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812, 56 St. Rep. 44 (1999).

Law Review Articles

In Re Ests. of Swansons: The Slayer Statute and the Impact of a Guilty Plea on Collateral Estoppel in Montana, Arant, 71 Mont. L. Rev. 217 (2010).

Guilty Plea Colloquies: Let the Record Show . . ., Wheeler, 45 Mont. L. Rev. 295 (1984).

Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, Alschuler, 50 U. Chi. L. Rev. 931-1050 (Summer 1983).

Collateral References

Waiver of right to jury trial: sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea. 23 ALR 4th 251.

Stipulations: guilty plea safeguards as applicable to stipulation allegedly amounting to guilty plea in state criminal trial. 17 ALR 4th 61.

Entry of plea: right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 ALR 4th 1089.

46-12-210. Advice to defendant.

Commission Comments

1991 Comment: This statute is essentially a restatement of Rule 11(c) of the Federal Rules of Criminal Procedure. When appropriate, some changes have been made to accommodate Montana statutory and case law decisions. The statute presents a more concise and coherent approach to the plea colloquy.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (1)(b) after "will be" deleted "appointed" and inserted reference to attorney assigned pursuant to Montana Public Defender Act; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1999 Amendment: Chapter 395 in (1) near beginning inserted "or nolo contendere"; in (1)(d) inserted "or nolo contendere"; in (1)(e) in two places inserted "or nolo contendere"; and in (1)(f) inserted "or nolo contendere". Amendment effective October 1, 1999.

1993 Amendment: Chapter 262 inserted (2) allowing accomplishment of notice requirements by defendant's filing of written acknowledgment; and made minor changes in style.

1991 Amendments: Chapter 73 inserted (6) requiring that an alien defendant be advised that a guilty plea might result in deportation from or exclusion from admission to the United States or denial of naturalization under federal law; and made minor change in style.

Chapter 800 substituted present language concerning issues court is required to determine that defendant understands for former text that read: "(1) The defendant shall be advised by the court as follows:

(a) of the nature of the crime charged against him;

(b) of the punishment as set forth by statute for the crime charged;

(c) if the defendant intends to enter into a plea bargain agreement:

(i) that under 46-12-204, the court is not bound by such agreements;

(ii) that under 46-12-204, if the court does not impose the sentence recommended by the prosecution pursuant to a plea agreement, the court is not required to allow the defendant to withdraw a plea of guilty;

(iii) that criminal sentencing is governed by Title 46, chapter 18; and

(iv) that the defendant and his counsel should carefully review Title 46, chapter 18, and consider the most severe sentence that can be imposed for a particular crime;

(d) if the defendant appears for arraignment without counsel, of his right to counsel and of his right to assigned counsel if he is unable to employ counsel. If counsel is or has been waived by the defendant, the court shall ascertain if the waiver is or was voluntary before proceeding.

(e) of the time prescribed by statute to enter a plea;

(f) of his right to secure bail to release him from custody.

(2) The court, or the clerk or county attorney under its direction, must:

(a) deliver to the defendant a true copy of the indictment, information, or complaint, including the endorsements thereon and the list of witnesses when required;

(b) read the indictment, information, or complaint to the defendant unless the defendant or his counsel waives such reading; and

(c) ask him whether he pleads guilty or not guilty to the indictment, information, or complaint".

1985 Amendment: Inserted (1)(c) reading: "If the defendant intends to enter into a plea bargain agreement".

Case Notes

Voluntary Guilty Plea — Withdrawal of Plea Properly Denied: Usrey pleaded guilty through a plea agreement to sexual intercourse without consent with a 6-year-old girl but later sought to withdraw the plea on grounds that it was involuntary because Usrey did not understand the plea agreement and because the District Court did not explain the rights Usrey was waiving. The Supreme Court examined the plea bargain language and affirmed. Although the written plea agreement did not state the specific maximum penalty upon conviction of sexual intercourse without consent and the District Court did not state the penalty when Usrey pleaded guilty, the court did ask Usrey if he was mindful of the maximum penalty, which was clearly stated in the information, and Usrey replied affirmatively. Also, the plea bargain called for a sentence far less than the maximum penalty, and the sentence that Usrey bargained for and that was imposed was far less than the maximum. Additionally, Usrey was not misled to his detriment simply because the District Court did not use the exact words of 46-12-210(1)(d) in telling Usrey that he might not be allowed to withdraw the guilty plea if the plea bargain was rejected. The record contained substantial evidence supporting the District Court's conclusions that Usrey understood the proceedings and was mentally competent to enter a voluntary guilty plea, and the District Court did not err in denying the motion to withdraw the plea on grounds of involuntariness. St. v. Usrey, 2009 MT 227, 351 M 341, 212 P3d 279 (2009).

Acknowledgment and Waiver of Right to Stand on Nolo Contendere Plea Required: Under 46-12-211, the state can agree in a plea agreement to: (1) move for dismissal of other charges; (2) agree that a specific sentence is the appropriate disposition of the case; or (3) recommend or agree to not oppose a defendant's request for a particular sentence. The court may reject any of the three types of plea agreement. If the court rejects a plea agreement, the provisions of the agreement determine whether a defendant can withdraw a plea of guilty or nolo contendere. If the plea contains provisions wherein the state recommends or agrees to not oppose a defendant's request for a particular sentence, a defendant is not entitled to withdraw a guilty plea if the agreement is rejected. However, if the state agrees to dismissal of other charges or agrees that a specific sentence is appropriate, a defendant may elect to stand on the previously entered plea or to withdraw it, and the court must be satisfied that the defendant understands the statutory right to stand on the guilty plea as well as the possible consequences of waiving that right. In the present case, the plea agreement contained both a dismissal of other charges and a recommendation for a specific sentence, so when the agreement was rejected, the court was required to afford Bullplume an opportunity to withdraw the plea. Bullplume chose to withdraw a nolo contendere plea, but the court erred in not obtaining an acknowledgment that Bullplume understood his rights and was making an intentional and voluntary waiver of the right to stand on the nolo contendere plea to the charge of mitigated deliberate homicide. The proper remedy for failing to allow Bullplume to effectively withdraw the nolo contendere plea was to remand for sentencing on the mitigated deliberate homicide charge, with the sentencing court not being bound by the rejected plea agreement. St. v. Bullplume, 2009 MT 145, 350 M 350, 208 P3d 378 (2009).

Statutory Right to Plead Guilty to DUI and Related Misdemeanor Citations Not Violated by City Court's Refusal to Accept Pleas: There was no prejudice and any error was harmless when the state dismissed DUI charges prior to the District Court trial on one felony count and two misdemeanor charges of negligent vehicular assault. St. v. Milligan, 2008 MT 375, 346 M 491, 197 P3d 956 (2008).

Voluntariness of Plea — Defendant's Subjective Perceptions of Possible Sentence to Be Supported in Record: Humphrey claimed that the sentencing court conveyed the impression that it had agreed to be bound by the terms of a plea agreement, and that only because Humphrey's subjective perception was incorrect did he plead guilty; therefore, the guilty plea was involuntary. The Supreme Court agreed that a defendant's subjective perceptions shed light on the defendant's state of mind, which in turn bears on the voluntariness of the plea, but allegations of having had certain mental impressions at the time of the plea must be supported by objective proof in the record, and the mental impressions must be reasonably justified under the circumstances. In this case, Humphrey was being sentenced for numerous felonies and misdemeanors associated with four separate cases, and Humphrey's mistaken impression arose when the court corrected an error in the plea agreement concerning only one of the cases, but nothing in the record objectively proved that Humphrey was being assured of a particular

sentence or that the court led Humphrey to believe that it would follow the plea agreement. Under the circumstances, Humphrey failed to establish that his pleas were involuntary and the sentence was affirmed. St. v. Humphrey, 2008 MT 328, 346 M 150, 194 P3d 643 (2008).

Defendant's Right to Counsel and Right to Trial Not Violated During Four Prior DUI Prosecutions — Enhancement of New DUI Charge to Felony Proper: Walker's 2005 DUI arrest was enhanced to a felony charge when driving records indicated that Walker had six prior DUI convictions. Walker alleged that four of the prior convictions were constitutionally infirm because Walker had not been advised of the right to counsel, the right to compel attendance of witnesses, the right to a trial by a jury, and penalty enhancement provisions. The District Court concluded that the four convictions did not violate Walker's constitutional rights and held that the prior convictions could be used to enhance the 2005 DUI to a felony. Walker appealed, and the Supreme Court considered each assertion in turn to determine whether Walker's waiver of the right to counsel and right to trial during the prior prosecutions was made knowingly, intelligently, and voluntarily. The initial appearance/arraignment documents that Walker signed after being charged with the prior DUI offenses adequately informed Walker of the right to counsel, and Walker indicated an understanding of that right and that an attorney was not desired. A waiver of rights form and a waiver of counsel form that Walker signed evidenced that understanding. It was also sufficient that Walker was informed of the right to call witnesses to attend the proceedings, even though the constitution does not confer a right to compel witnesses to testify. Walker was also adequately informed of the right to a trial by jury and to a unanimous verdict, but it was unnecessary for the District Court to explain all the nuances or effects of waiving the right to a trial by jury. Lastly, the documents informed Walker that there might be indirect consequences of a guilty plea, including the possible loss of driving privileges and the use of the conviction in the event Walker was convicted of a crime in the future, but the District Court was not required to specifically inform Walker of the indirect consequence that a fourth or subsequent DUI might result in a felony charge, because whether Walker committed a fourth or subsequent DUI was clearly within Walker's sole control and was an indirect consequence of guilty pleas to the prior DUI offenses. Thus, Walker's prior guilty pleas were entered knowingly, intelligently, and voluntarily, and the District Court did not err in allowing the use of the prior convictions to elevate Walker's 2005 DUI to a felony. St. v. Walker, 2008 MT 244, 344 M 477, 188 P3d 1069 (2008).

Court's Sua Sponte Withdrawal of Defendant's Guilty Plea Following Judgment Considered Mistake of Law: Friedt pleaded guilty to a stop sign violation and to a charge of failing to carry proof of insurance in the vehicle and was sentenced in Municipal Court. During sentencing, the County Attorney failed to raise any issues of restitution. After judgment was entered, the court was advised by a victim of a claim of damages associated with Friedt's offenses. The court, sua sponte, withdrew Friedt's guilty pleas, appointed counsel, and set an omnibus hearing. Friedt then petitioned the Supreme Court for supervisory control, asserting that the Municipal Court lacked jurisdiction to vacate or modify the sentence once a valid sentence was pronounced and thus proceeded under a mistake of law in withdrawing the guilty pleas, which would result in a gross injustice and unnecessary expense if Friedt was required to stand trial on charges to which she knowingly and voluntarily pleaded guilty and on which she had been sentenced. The County Attorney argued that the Municipal Court retained jurisdiction under 46-16-702 and that the interests of justice to the victim and the mandatory restitution provision in 46-18-201 required the Municipal Court to remedy the situation sua sponte. The Supreme Court noted that 46-16-702 allows a new trial, following judgment, for a defendant in the interests of justice, but that the statute does not authorize a new proceeding to benefit a victim or a prosecutor who fails to timely raise a sentencing matter. Further, although 46-16-105 allows a court for good cause to allow withdrawal of a guilty plea within 1 year after judgment if evidence supports a fundamental miscarriage of justice, nothing in the statute allows a court to forcibly withdraw a defendant's guilty plea sua sponte under any circumstances. Therefore, the Supreme Court agreed that the Municipal Court's action constituted a mistake of law. Friedt's petition for supervisory control was granted, and the Municipal Court was instructed to vacate the order withdrawing Friedt's guilty pleas. Friedt v. Billings Municipal Court, 2008 MT 174, 343 M 386, 184 P3d 1032 (2008).

Misinformation in Plea Agreement and Incomplete Information Provided by District Court Raising Doubt as to Intelligent Guilty Plea — Denial of Withdrawal of Plea Reversed: Rave was charged with sexual assault with bodily injury. Following advice of counsel, Rave accepted a plea agreement and pleaded guilty. Prior to sentencing, Rave moved to withdraw the guilty plea, but the motion was denied, and Rave was sentenced pursuant to the plea agreement. On appeal, the Supreme Court found that the plea agreement erroneously advised Rave that sexual assault may

be a lesser included felony offense and that the penalty was the same as for sexual assault with bodily injury when, in fact, the lesser included offense was a misdemeanor. In addition, the District Court did not correct the misinformation in the plea agreement when accepting the guilty plea, so Rave could not have made a knowing, intelligent, and voluntary plea. Thus, the Supreme Court reversed the denial of Rave's motion to withdraw the guilty plea and remanded for further proceedings. St. v. Rave, 2005 MT 78, 326 M 398, 109 P3d 753 (2005).

No Error in Denial of Motion to Withdraw Nolo Contendere Pleas Made Knowingly: White asserted that the District Court erred in denying a motion to withdraw nolo contendere pleas, arguing that he could not have made a knowing waiver of his rights because he was not in possession of all evidence that might have influenced his decision, including inconsistent statements by a witness. The Supreme Court held that even if White did not know of the statement, the lack of knowledge was irrelevant to the criteria in this section regarding whether the pleas were made knowingly. White was clearly informed of the nature of the charges, the mandatory minimum penalty, the maximum penalty, and the possibility of the imposition of restitution. Under the good cause factors in St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812 (1999), White's nolo contendere pleas were made knowingly, and the District Court did not err in disallowing withdrawal of the pleas. St. v. White, 2004 MT 103, 321 M 45, 88 P3d 1258 (2004). See also St. v. Bowley, 282 M 298, 938 P2d 592 (1997).

Question of Adequacy of Advisement Regarding Waiver of Appeal Rights Resolved in Favor of Defendant: The first factor in determining whether good cause existed in allowing the withdrawal of a guilty plea and whether a court abused its discretion in denying a motion to withdraw the guilty plea, as set out in St. v. Bowley, 282 M 298, 938 P2d 592 (1997), is the adequacy of the court's interrogation at the time that the plea was entered regarding the defendant's understanding of the consequences of the plea. The plea must be a voluntary, knowing, and intelligent choice among the alternative courses of action open to the defendant. In the present case, Boucher was charged with DUI, and at his initial appearance, the Justice's Court had Boucher acknowledge in writing that he understood the waivers that he would make if he pleaded guilty. Boucher pleaded not guilty and waived no rights. Five months later, the state amended the complaint, and Boucher changed his plea to guilty, but at the time that the plea was entered, the Justice's Court did not reiterate the information provided at the initial appearance and failed to question Boucher regarding his understanding of the waiver of his constitutional rights. The Supreme Court concluded that the court's colloquy was inadequate and that good cause existed to permit Boucher to withdraw his guilty plea. Any doubt about the voluntariness of Boucher's plea was resolved in his favor, and the Supreme Court remanded to Justice's Court for further proceedings. St. v. Boucher, 2002 MT 114, 309 M 514, 48 P3d 21 (2002).

No Requirement That Defendant Be Informed of Federal Firearms Prohibitions Resulting From State Conviction of Partner Assault — Direct Versus Collateral Consequences of Plea — Denial of Motion to Withdraw Guilty Plea Affirmed: Liefert pleaded guilty in Justice's Court to charges of partner assault and was subsequently charged under federal law 18 U.S.C. 922 with unlawfully possessing a firearm, following a hunting investigation. After federal charges were filed, Liefert moved to withdraw the guilty plea, contending that good cause existed because the Justice's Court did not inform him of the federal prohibition on possessing a firearm as a result of the plea under Montana law. The motion was denied in Justice's Court and in District Court, which cited St. v. Reynolds, 253 M 386, 833 P2d 153 (1992), and held that Liefert did not need to be informed of the federal prohibition because it was a collateral consequence of Liefert's sentence. Liefert appealed to the Supreme Court, which affirmed. Although the Supreme Court has previously held that there is no appeal to District Court from the denial of a motion to withdraw a guilty plea in Justice's Court, in this case, Liefert's appeal was treated as a motion for postconviction relief, and the Supreme Court proceeded to determine whether Liefert had good cause to withdraw the plea. The court determined whether the District Court erred in disallowing withdrawal of the plea by applying the factors in St. v. Bowley, 282 M 298, 938 P2d 592 (1997). The only applicable Bowley factor was the adequacy of the plea colloquy. Liefert did not assert that a judge must inform every defendant of the effect of a guilty plea on gun possession, but presented only the issue of whether a defendant must be informed when charged with partner assault and contended that state sentencing statutes require a judge to inform a defendant of the punishment that can result from a violation. Although never explicitly adopted, the Supreme Court has previously applied the prevailing rule in Torrey v. Estelle, 842 F2d 234 (9th Cir. 1988), that because it is impossible for a judge to inform a defendant of every possible consequence of a guilty plea, judges are required to inform defendants of direct consequences, but are not required to inform of collateral consequences. A consequence is considered direct if it has a definite, immediate, and largely automatic effect and is considered collateral if a defendant

has control over whether or not the consequence occurs, if it is not under the control of the sentencing judge, or if it is a procedure under the control of a different sovereign or agency. Notwithstanding Liefert's due process, federal preemption, and negative implication arguments, Liefert had discretionary control over whether he would be in violation of federal law upon entry of a guilty plea for partner assault, and the consequence in this case was under the control of the federal government and thus collateral. Further, the guilty plea was not involuntary simply because it may have been entered to avoid the possibility of a greater punishment at trial or because Liefert may have viewed punishment under the guilty plea as lesser than his immediate personal consequences. Therefore, the District Court did not err in denying Liefert's motion to withdraw the plea. St. v. Liefert, 2002 MT 48, 309 M 19, 43 P3d 329 (2002), followed in Duffy v. St., 2005 MT 228, 328 M 369, 120 P3d 398 (2005).

Extraordinary Circumstances Constituting Good Cause to Permit Withdrawal of Guilty Pleas: In 1982, Mallak entered the United States from Iraq as a refugee. In 1989, Mallak entered guilty pleas to two felony counts of sale of dangerous drugs (now criminal distribution of dangerous drugs); however, the record of the proceedings was destroyed. Mallak served a 5-year suspended sentence, and 5 years later applied for U.S. citizenship. When federal immigration officials discovered the drug conviction, deportation proceedings were instituted against Mallak, who resisted deportation by filing for asylum and by filing a petition for postconviction relief requesting that he be allowed to withdraw his guilty pleas. Without a hearing, the District Court denied Mallak's petition on grounds that it was time-barred, and Mallak appealed. The Supreme Court reversed. There is no bright-line rule on the timeliness of a motion to withdraw a guilty plea, and each case must be considered in light of its unique record. Rather, under 46-16-105, a guilty plea may be withdrawn at any time for good cause. In St. v. Koepplin, 213 M 55, 689 P2d 921 (1984), the Supreme Court set out the factors to be considered when determining whether good cause exists to withdraw a guilty plea: (1) the adequacy of the District Court's interrogation as to the defendant's understanding of the plea; (2) the promptness of the motion to withdraw the prior plea; and (3) whether the defendant's plea was apparently the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge. The circumstances in Mallak's case were extraordinary, including his documented mental incapacity, his unfamiliarity with the English language at the time of the change of plea, and the absence of a record of the plea proceedings, all of which raised serious doubts about the voluntariness of Mallak's guilty pleas. Further, it was not until 1991 that the Legislature passed this section requiring that foreign defendants be told during plea proceedings that a guilty plea could result in deportation. Given the unique combination of factors, the Supreme Court concluded that the District Court abused its discretion in denying Mallak's petition for leave to withdraw his guilty pleas, so the case was remanded to allow Mallak to withdraw his prior pleas. Mallak v. St., 2002 MT 35, 308 M 314, 42 P3d 794 (2002).

Right of Defendant to Plead Guilty Over State's Objection — Erroneous Refusal to Accept Guilty Plea: Peplow was charged with and convicted of DUI, driving with a suspended or revoked license, driving without insurance, failing to report an accident, and tampering with evidence. Prior to trial, Peplow tried to enter guilty pleas to the driving with a suspended or revoked license and driving without insurance counts, but the trial court ruled that it was not required to accept the pleas because Peplow's actions giving rise to the counts were part of the res gestae and probative of the issue of impairment; the trial court proceeded to trial on all counts. Peplow appealed on grounds that the trial court erred in refusing the guilty pleas. In a case of first impression, the Supreme Court considered a defendant's right to plead guilty over the state's objection. The court noted the numerous statutory procedural safeguards in place to ensure that: (1) a guilty plea is made knowingly, voluntarily, and intelligently; (2) there is a factual basis for the plea; (3) the court is not bound by any plea agreements; and (4) a defendant may not withdraw a guilty plea if the plea agreement is not accepted. The Supreme Court cited Lamb v. Missoula Imports, 230 M 183, 748 P2d 965 (1988), for the proposition that when the word "may" is used to confer power upon an officer, court, or tribunal and the public or a third person has an interest in the exercise of power, then the exercise of power becomes imperative. Under 46-16-105, a plea of guilty "may" be accepted before or during trial. The Supreme Court construed this language to mandate the acceptance of a guilty plea as long as the statutory requirements are met. Further, under 46-12-204, a defendant may plead guilty or not guilty without limitation on the right to plead. St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

No Error in Refusal to Allow Withdrawal of Guilty Plea — Parents of Sexual Assault Victim Not Parties to Plea Agreement: Following a guilty plea and conviction of sexual assault, Knox moved to withdraw the guilty plea, arguing that the County Attorney violated the terms of a plea

agreement, which had recommended a 30-year suspended sentence and dropping a second sexual assault charge in exchange for the guilty plea, and indicated that the parents of the 5-year-old victim would not recommend incarceration in the victim impact statement of the presentence investigation. During the colloquy required by this section, the District Court informed Knox that, like the court itself, the parents were not bound by the plea agreement and could change their minds at any time as far as recommending future imprisonment, adding that if the parents did change their minds, that fact would not suffice as grounds for withdrawal of a guilty plea. Nevertheless, Knox voluntarily accepted the possible consequences of the plea and pleaded guilty. The parents then recommended imprisonment, and Knox was sentenced to 40 years with 18 suspended. A District Court may permit the withdrawal of a guilty plea upon a showing of good cause, but the determination of good cause is discretionary, and each case is considered on its merits. Here, the District Court subsequently denied the withdrawal motion pursuant to the colloquy, and Knox appealed, but the Supreme Court affirmed. After applying the factors in St. v. Bowley, 282 M 298, 938 P2d 592 (1997), the Supreme Court found that there was no abuse of discretion in the denial of the motion to withdraw and that Knox's guilty plea thus met the constitutional standard of a voluntary, intelligent, and knowing choice among options. The District Court acted according to statutory requirements when it made clear that the parents could make known their opinion and change their minds regarding Knox's incarceration because they were not parties to the plea agreement, pursuant to the court's duties in 46-18-115. Further, other evidence in a psychological evaluation indicated that Knox had violent tendencies that presented complications to successful treatment, had high-risk factors for violent recidivism, and had resisted treatment for chemical dependency in the past, so the parents' incarceration request was not a determinative basis for the sentence. St. v. Knox, 2001 MT 232, 307 M 1, 36 P3d 383 (2001).

Failure to Adequately Inform Defendant of Maximum Possible Penalty — Reversible Error in Failing to Allow Withdrawal of Guilty Plea: After offering an Alford plea but prior to a change of plea hearing, Melone signed an acknowledgment of waiver of rights, stating that he understood the maximum possible penalty for felony assault and that his sentence could be enhanced for using a deadly weapon and because of his prior criminal record. At the change of plea hearing, the court informed Melone that the weapon enhancement penalty would not apply and that the maximum penalty for felony assault was "ten years in the Montana State Prison or a $50,000 fine". The court then allowed Melone to withdraw his guilty plea and enter the Alford plea. The court later sentenced Melone to 10 years in prison, plus 10 years to be served consecutively as a persistent offender. Melone moved for a hearing on the persistent offender enhancement and requested that he be allowed to withdraw his plea. The court rejected the motion to withdraw the plea, but vacated the sentence and granted a new sentencing hearing to allow Melone to present evidence regarding applicability of the persistent offender enhancement. Following the hearing, the court affirmed its original sentence. Melone appealed, contending that he was never informed that he could receive up to 100 years because of his potential status as a persistent offender and that, as a consequence, his plea was not knowing and voluntary. The Supreme Court agreed. Under 46-16-105 and this section, a defendant must be informed of the maximum penalty, including the effect of any penalty enhancement provision. The fact that the *prosecutor* informed Melone of a possible persistent offender penalty immediately prior to questioning did not satisfy the statutory requirement that the *court* inform the defendant of the maximum penalty. Melone's statements in the written acknowledgment were insufficient to satisfy the doubts of the Supreme Court that Melone was aware that his sentence could be enhanced by up to 100 years as a result of his plea. Rather, it appeared that Melone was under the mistaken belief that he risked sentence enhancement only if he proceeded to trial. Resolving their doubt that the plea was voluntary in favor of Melone, the Supreme Court reversed and remanded the case to District Court to allow Melone to withdraw the plea. St. v. Melone, 2000 MT 118, 299 M 442, 2 P3d 233, 57 St. Rep. 493 (2000).

Guilty Plea Constituting Waiver of Nonjurisdictional Defects and Defenses: Gordon was charged in Montana with the murder, aggravated kidnapping, and robbery of an Idaho man. Gordon sought a ruling on a motion to require enforcement of the second of two plea agreements entered into with Idaho authorities regarding a sentence that might be imposed if Gordon's implicity was proved in the homicide or if he was not truthful in the ongoing investigation. The state argued that Idaho could not bind Montana to a pretrial agreement in which Montana had not participated and contended that Idaho had previously voided the second plea agreement because of Gordon's untruthfulness. The District Court denied the motion. Gordon subsequently entered a plea agreement with Montana. The court obtained Gordon's understanding of the rights that he would give up by pleading guilty, including the right to an appeal. The court

accepted Gordon's guilty plea to aggravated kidnapping and dismissed the other charges, ultimately imposing an 80-year sentence as recommended in the state plea agreement. On appeal, Gordon asserted that his constitutional rights were violated when the District Court did not sentence him pursuant to the second Idaho plea agreement. Citing St. v. Wheeler, 285 M 400, 948 P2d 698, 54 St. Rep. 1213 (1997), the Supreme Court held that after a criminal defendant pleads guilty of the offense charged, only the voluntary and intelligent character of the guilty plea may be attacked and that independent claims relating to prior deprivations of constitutional rights may not be raised. A voluntary and intelligent guilty plea constitutes a waiver of nonjurisdictional defects and defenses. St. v. Gordon, 1999 MT 169, 295 M 183, 983 P2d 377, 56 St. Rep. 654 (1999).

Court Misstatement of Maximum Possible Penalty at Change of Plea Hearing — Error in Refusal to Allow Withdrawal of Noncompliant Plea: Roach requested a hearing to change his plea to guilty on burglary and theft charges. Roach was questioned regarding his understanding of his constitutional rights, and a discussion was held concerning possible penalties. The District Court Judge erroneously informed Roach that the maximum penalty for both crimes was 10 years and $50,000. Neither Roach's counsel nor the County Attorney, who were both present, responded or objected in any way to the court's misstatement of the maximum possible penalty. Roach was sentenced 2 months later to consecutive sentences of 20 years suspended for burglary and 10 years with no time suspended for theft, plus restitution. Roach later asserted that he was misled by the District Court, that his change of plea was coerced and based on misinformation, and that he should have been granted postconviction relief allowing him to either withdraw the guilty plea or be sentenced in conformity with the penalty that he was advised of at the change of plea hearing. The Supreme Court agreed. Because Roach was misinformed about the maximum possible sentence, his plea was neither knowing nor in compliance with statutory requirements. The District Court erred in refusing to allow withdrawal of the guilty plea; the Supreme Court remanded with instructions to allow withdrawal. St. v. Roach, 1999 MT 38, 293 M 311, 975 P2d 817, 56 St. Rep. 161 (1999), following St. v. Brown, 262 M 499, 865 P2d 282, 50 St. Rep. 1658 (1993).

Failure to Advise — Discretionary Parole Restrictions Not Specifically Provided for by Statute: The court rejected Thomas's argument that his guilty plea was unknowingly and involuntarily entered because he was not advised of the possibility that the court might impose a discretionary parole restriction making Thomas ineligible for parole for 30 years. This section, requiring that before accepting a guilty plea, the court must determine that the defendant understands, among other things, the effect of any special parole restrictions provided by law, does not refer to discretionary parole restrictions that the court might impose. It is impossible to know what discretionary restrictions the court might impose. Only those restrictions specifically defined by a statute can be known. The statute does not require the defendant to be advised of possible discretionary limitations on parole. St. v. Thomas, 285 M 112, 946 P2d 140, 54 St. Rep. 1068 (1997).

Failure to Adequately Inform Defendant of Rights Prior to Eliciting Factual Basis for Change of Plea and Breach of Plea Agreement by Prosecutor — Reversible Error: The District Court summarily denied Bowley's timely oral motion to withdraw a guilty plea three times. On appeal, the Supreme Court found that the trial court erred in failing to inform Bowley of his constitutional rights, in neglecting to inquire as to the competency of counsel, and in not investigating whether Bowley was under the influence of alcohol or drugs before eliciting from Bowley the factual basis of his guilty plea at a change of plea hearing. Further, the record showed that the prosecutor, although following the recommendation of the probation officer, breached the plea agreement by suggesting a sentence different from that contained in the pretrial agreement. The motion to withdraw the guilty plea was timely. Having applied the three factors in St. v. Enoch, 269 M 8, 887 P2d 175 (1994), the Supreme Court found that good cause existed to permit withdrawal of the guilty plea and reversed and remanded with instructions to allow Bowley to withdraw the plea if desired or, alternatively, to sentence Bowley in accordance with the pretrial agreement. St. v. Bowley, 282 M 298, 938 P2d 592, 54 St. Rep. 353 (1997), followed in St. v. Schoonover, 1999 MT 7, 293 M 54, 973 P2d 230, 56 St. Rep. 30 (1999), and St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015, 56 St. Rep. 551 (1999).

Denial of Motion to Withdraw Guilty Plea — No Abuse of Discretion: After Moddison filed pro se motions with the Supreme Court that amounted to a request to withdraw his guilty plea, the case was remanded to District Court for a hearing on the request. Following the hearing, the request was denied. Moddison appealed, contending that the District Court abused its discretion in denying the motion to withdraw the guilty plea: (1) by conducting an inadequate interrogation of Moddison regarding his understanding of the consequences of pleading guilty; (2) by not

dealing promptly with Moddison's efforts to withdraw the plea; (3) because the plea was the result of an *Alford* plea bargain in which the guilty plea was given in exchange for dismissal of another charge; and (4) because Moddison's guilty plea was based on the mistaken advice of his attorneys. The Supreme Court found that Moddison did not establish good cause for withdrawal of the plea and affirmed, holding that: (1) the fact that Moddison's attorney, rather than the court, conducted the plea interrogation was not reversible error when the interrogation achieved its fundamental purpose and consisted of essentially the same questions that the Supreme Court held to be adequate in St. v. Allen, 265 M 293, 876 P2d 639 (1994); (2) an 8-month delay between entry of the plea and the motion to withdraw was within the allowable timeframe; (3) Moddison's plea was based in large part on the overwhelming evidence against him and was ultimately not part of a "package deal" with the other defendants or conditioned on their pleas; and (4) despite the fact that some advice Moddison received from his attorneys was not accurate and merely explained what they thought potential remedies were for one sentence out of many that Moddison could have received, Moddison nevertheless clearly understood that the sentencing court had unfettered discretion to impose any sentence within the statutory range, could restrict his eligibility for parole, and could order him to undergo sexual offender treatment. St. v. Moddison, 278 M 384, 926 P2d 253, 53 St. Rep. 961 (1996).

Plea to Lesser Included Offense — Introduction at Sentencing of Evidence of Commission of Charged Offense — Language of Plea Agreement: Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged the state's introduction of evidence tending to prove her commission of the originally charged offense. The Supreme Court upheld the introduction of the evidence, noting not only that the rules of evidence do not apply in sentencing, but also that the plea agreement provided that "counsel for the State may make any recommendation and may introduce . . . evidence in support thereof at the time of sentencing". St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

Defendant's Misunderstanding as to Release on Own Recognizance Not Grounds for Setting Aside Guilty Plea — Basis for Withdrawal of Plea to Be Raised at Trial Level: Nelson argued that he should have been allowed to withdraw his guilty plea to assault charges because he believed that part of the plea bargain was release on his own recognizance pending sentencing. He also argued that he had not been adequately advised that he could be designated a dangerous offender, thus restricting his eligibility for parole. The Supreme Court stated that Nelson had not, at the trial level, moved to have his guilty plea set aside on the grounds that he had not been adequately advised that he could be designated a dangerous offender. Therefore, he could not raise the issue for the first time on appeal. The Supreme Court held that Nelson's argument that he believed that his plea agreement included release pending sentencing was not related to the voluntary nature of his guilty plea and therefore was not grounds for withdrawal of the plea. St. v. Nelson, 274 M 11, 906 P2d 663, 52 St. Rep. 1069 (1995).

Adequate Interrogation as to Consequences of Plea — No Mistake or Misunderstanding — Proper Guilty Plea as Waiver of Factual Defenses: Defendant contended that denial of a motion to withdraw a guilty plea was improper because the court's interrogation at an omnibus hearing was insufficient, because he was induced to enter the guilty plea, and because statements made by the victim after the plea was entered amounted to a recantation that required the court to allow withdrawal of the plea. However, denial of the motion was affirmed on appeal when the Supreme Court's examination of the record showed that: (1) the trial court's interrogation was adequate pursuant to St. v. Mahoney, 264 M 89, 870 P2d 65 (1994), despite the occurrence of some harmless error in the court's failure to inform defendant of the maximum and mandatory sentences for the crime; (2) evidence demonstrated that the guilty plea was timely and voluntary and entered without mistake or misunderstanding; and (3) the victim's statements were not exculpatory as to the crime to which defendant pleaded guilty. The Supreme Court cited St. v. Hilton, 183 M 13, 597 P2d 1171 (1979), in holding that by properly pleading guilty, defendant waived all factual defenses that occurred prior to the plea. St. v. Skroch, 267 M 349, 883 P2d 1256, 51 St. Rep. 1092 (1994), distinguishing State ex rel. Gladue v. District Court, 175 M 509, 575 P2d 65 (1978).

Error by Original Judge on Maximum Sentence — Improper Guilty Plea: Prior to accepting a plea agreement, defendant was incorrectly advised by the original presiding judge that the maximum sentence possible for two counts of felony assault (now assault with a weapon) arising from the same incident was 30 years rather than 40 years. When the original judge recused himself, a second judge sentenced the defendant to 40 years. On appeal, the Supreme Court held that the District Court erred in imposing a 40-year sentence and instructed the District Court to modify the sentencing order to provide defendant a sentence no longer than the maximum

sentence that had been advised by the original judge. St. v. Brown, 262 M 499, 865 P2d 282, 50 St. Rep. 1658 (1993), followed in St. v. Roach, 1999 MT 38, 293 M 311, 975 P2d 817, 56 St. Rep. 161 (1999), and distinguished in St. v. Wilson, 1999 MT 52, 293 M 429, 976 P2d 962, 56 St. Rep. 220 (1999).

Failure to Arraign on Amended Information — No Error When Amendment Not Affecting Original Charges: Defendant contended the District Court erred when it accepted an information amended to add a reference to the requisite mental states but did not arraign him on the amended information. The amendment was in form only and did not make substantial changes in the charges set out in the original information. Failure to arraign defendant on charges set forth in the amended information did not constitute reversible error. St. v. Cameron, 253 M 95, 830 P2d 1284, 49 St. Rep. 150 (1992).

Defendant Need Not Be Apprised of Parole Eligibility Limits: Section 46-16-105 requires the District Court to advise a defendant of the consequences of a guilty plea and of the maximum sentence that may be imposed, and 46-12-204 and this section outline other specific items of which a defendant must be advised by the court. However, these statutes do not require the court to advise a defendant of any possibility of limitations on his parole eligibility. St. v. Buckman, 236 M 37, 768 P2d 1361, 46 St. Rep. 163 (1989), followed in St. v. Wilson, 1999 MT 52, 293 M 429, 976 P2d 962, 56 St. Rep. 220 (1999).

Arraignment — Waiver by Defending: Appellant, convicted of aggravated assault, contended on appeal that he was improperly arraigned. It appeared that at the time of his arraignment defendant was only informed of a deliberate homicide charge and the possible punishment for it. The court held that the purposes of arraignment, to call the defendant into court to answer the charges against him and to inform him of certain rights, were waived by the defendant when he proceeded to trial and defended against the aggravated assault charge. The court also held that arraignment may be waived without violating due process so long as the accused has sufficient notice of the accusation and an adequate opportunity to defend himself. St. v. Longneck, 201 M 367, 654 P2d 977, 39 St. Rep. 2170 (1982).

Judge Not Required to Advise Defendant of Statutory Defenses: The facts in this case did not make it incumbent upon the trial judge to advise the defendant regarding statutory defenses potentially available to her. The defendant was represented by counsel, and the responsibilities of advising the defendant of potential statutory and constitutional defenses are a defense strategy properly vested in defense counsel, not in the trial judge. St. v. Day, 195 M 151, 635 P2d 568, 38 St. Rep. 1718 (1981).

Sufficient Knowledge to Plead Guilty — Burden on Defendant — Federal Habeas Corpus: Prior to pleading guilty defendant had been advised, as shown by the record, of his privilege against self-incrimination, his right to a jury trial, and his right to confront accusers. He applied for federal postconviction relief based on the grounds that the effect of the words used and events that occurred precluded his informed consent to a guilty plea. After the record discloses that the defendant was accorded his basic constitutional rights, the U.S. District Court will presume that the state court did not commit errors. The burden then is on the defendant to come forward with at least some evidence to disclose he was not informed of some element of the crime that had some relevant relationship to the plea or that he was subjected to some external coercion. When defendant had a state habeas corpus hearing yet produced no evidence on his behalf and cross-examined no state witnesses, the record disclosed no evidence to overcome the presumption in favor of the state court. Brown v. Crist, 492 F. Supp. 965 (D.C. Mont. 1980).

Pro Se Counsel Held to Same Standards: A defendant who elects to represent himself cannot complain on appeal that the quality of his own defense acted to his detriment by not amounting to effective counsel. Here, defendant knowingly and intelligently relinquished his right to counsel and proceeded with his defense in his own behalf. He cannot complain that rules of procedure and laws should be applied less strictly against him. St. v. Poncelet, 187 M 528, 610 P2d 698 (1980).

Standard to Judge Validity of Guilty Plea: The standard by which the validity of a guilty plea is judged is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant as affirmatively disclosed by the record. While it is clear that courts are not required to articulate specific rights when accepting a guilty plea (see 1985 amendment note), an in-depth examination by the trial court is desirable and mandatory in cases in which the record requires it. Yother v. St., 182 M 351, 597 P2d 79 (1979).

Mandatory Duties on Arraignment: The provisions of the predecessor section were mandatory, and it was the duty of the District Court to inform the defendant that he had a right to counsel and that, if he was without means to employ counsel, counsel would be provided for him by the State without cost, and to inform him of the extent of the penalty provided by law. The

record was required to show that the statutory provisions as to the period of time between plea and sentence were complied with. State ex rel. Biebinger v. Ellsworth, 147 M 512, 415 P2d 728 (1966).

True Copy of Information: When the defendant raised the objection that the copy of the information furnished him was materially different from the information on which he was about to be tried, and the court sustained the objection and required that the defendant be furnished with a true copy, a refusal of the request constituted reversible error. The record showed that no plea was entered at the trial. St. v. De Wolfe, 29 M 415, 74 P 1084 (1904), overruled on other grounds in St. v. Penna, 35 M 535, 90 P 787 (1907).

Attorney General's Opinions

Duty of Judge to Notify Defendant of Potential Forfeiture of Hunting, Fishing, and Trapping Privileges — Notification of Loss of Privileges Duty of Department: In order to ensure that a knowing plea is entered by a defendant accused of a fish and game violation, a judge must inform the defendant of the potential forfeiture of hunting, fishing, and trapping privileges as a result of a conviction, guilty plea, or forfeiture of bond in the case of offenses for which the loss of privileges is a direct and immediate consequence of the violation. Notification of the loss of hunting, fishing, and trapping privileges is statutorily delegated to the Department of Fish, Wildlife, and Parks. 49 A.G. Op. 20 (2002).

Law Review Articles

Guilty Plea Colloquies: Let the Record Show . . ., Wheeler, 45 Mont. L. Rev. 295 (1984).

Collateral References

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law—newly discovered or available evidence, and possible defense. 14 ALR 6th 517.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment—modern state cases. 28 ALR 4th 1121.

Assistance of counsel at or prior to arraignment, accused's right to. 5 ALR 3d 1269.

46-12-211. Plea agreement procedure — use of two-way electronic audio-video communication.

Commission Comments

1991 Comment: This statute is based on Rule 11(e) of the Federal Rules of Criminal Procedure. The 1987 statute governing the plea agreement process was so general that it did not adequately control or explain the process. The reference in 1987 MCA 46-12-204(3)(a) to a plea bargain agreement is inappropriate and redundant. The statute retains prosecutorial discretion in arranging plea agreements but provides a better framework for their development.

Subsection (1) identifies the parties involved in the plea agreement process. The Commission recognized that the 1987 statute precluded judicial participation in the plea negotiations, but the new statute neither prohibits nor authorizes judicial involvement. The Commission believed that circumstances sometimes warrant judicial participation in such discussions.

Subsection (2) specifies the court's responsibilities in considering plea agreements and retains in substance the concept that the defendant has no right to withdraw his plea if the court rejects the sentence recommendation. This is also consistent with Rule 11(e)(2) of the Federal Rules of Criminal Procedure.

Subsections (3) and (4) are simply restatements of Rules 11(e)(3) and 11(e)(4) of the Federal Rules of Criminal Procedure. The more specific aspects of these rules are preferred over the 1987 statutory provisions because they allow for a clearer understanding of the process by the parties and the court.

Compiler's Comments

2005 Amendment: Chapter 222 in (5) in first sentence near beginning after "section" deleted "in cases in which the defendant is charged with a misdemeanor offense", near middle after "to be" deleted "observed and", and after "present" inserted "and allowing the party speaking to be seen" and in second sentence at end inserted "and has informed the defendant that the defendant has the right to object to its use"; and made minor changes in style. Amendment effective July 1, 2005.

1999 Amendment: Chapter 395 in (1) in introductory clause near end inserted "or nolo contendere"; and in (4) near end inserted "or nolo contendere". Amendment effective October 1, 1999.

1997 Amendment: Chapter 163 in (2), at beginning, inserted "Subject to the provisions of subsection (5)"; inserted (5) regarding the acceptability of an agreement disclosed through audio-video communications; and made minor changes in style. Amendment effective March 26, 1997.

Applicability: Section 6, Ch. 163, L. 1997, provided: "[This act] [46-12-211, 46-16-105, 46-17-203, 46-18-102, and 46-18-115] applies to guilty pleas entered and sentences pronounced after [the effective date of this act]." Effective March 26, 1997.

1993 Amendment: Chapter 262 near beginning of (4), after "agreement", inserted "of the type specified in subsection (1)(a) or (1)(b)"; and made minor changes in style.

Case Notes

Acknowledgment and Waiver of Right to Stand on Nolo Contendere Plea Required: Under 46-12-211, the state can agree in a plea agreement to: (1) move for dismissal of other charges; (2) agree that a specific sentence is the appropriate disposition of the case; or (3) recommend or agree to not oppose a defendant's request for a particular sentence. The court may reject any of the three types of plea agreement. If the court rejects a plea agreement, the provisions of the agreement determine whether a defendant can withdraw a plea of guilty or nolo contendere. If the plea contains provisions wherein the state recommends or agrees to not oppose a defendant's request for a particular sentence, a defendant is not entitled to withdraw a guilty plea if the agreement is rejected. However, if the state agrees to dismissal of other charges or agrees that a specific sentence is appropriate, a defendant may elect to stand on the previously entered plea or to withdraw it, and the court must be satisfied that the defendant understands the statutory right to stand on the guilty plea as well as the possible consequences of waiving that right. In the present case, the plea agreement contained both a dismissal of other charges and a recommendation for a specific sentence, so when the agreement was rejected, the court was required to afford Bullplume an opportunity to withdraw the plea. Bullplume chose to withdraw a nolo contendere plea, but the court erred in not obtaining an acknowledgment that Bullplume understood his rights and was making an intentional and voluntary waiver of the right to stand on the nolo contendere plea to the charge of mitigated deliberate homicide. The proper remedy for failing to allow Bullplume to effectively withdraw the nolo contendere plea was to remand for sentencing on the mitigated deliberate homicide charge, with the sentencing court not being bound by the rejected plea agreement. St. v. Bullplume, 2009 MT 145, 350 M 350, 208 P3d 378 (2009).

Voluntariness of Plea — Defendant's Subjective Perceptions of Possible Sentence to Be Supported in Record: Humphrey claimed that the sentencing court conveyed the impression that it had agreed to be bound by the terms of a plea agreement, and that only because Humphrey's subjective perception was incorrect did he plead guilty; therefore, the guilty plea was involuntary. The Supreme Court agreed that a defendant's subjective perceptions shed light on the defendant's state of mind, which in turn bears on the voluntariness of the plea, but allegations of having had certain mental impressions at the time of the plea must be supported by objective proof in the record, and the mental impressions must be reasonably justified under the circumstances. In this case, Humphrey was being sentenced for numerous felonies and misdemeanors associated with four separate cases, and Humphrey's mistaken impression arose when the court corrected an error in the plea agreement concerning only one of the cases, but nothing in the record objectively proved that Humphrey was being assured of a particular sentence or that the court led Humphrey to believe that it would follow the plea agreement. Under the circumstances, Humphrey failed to establish that his pleas were involuntary and the sentence was affirmed. St. v. Humphrey, 2008 MT 328, 346 M 150, 194 P3d 643 (2008).

Existence of Plea Agreement: Following discussions on a possible plea agreement, the day before a scheduled trial on deliberate homicide charges Maldonado filed an acknowledgment of waiver of rights and intent to file an Alford plea. The acknowledgment detailed Maldonado's rights under an Alford plea, the maximum sentence that Maldonado could receive, a statement that Maldonado had discussed the case fully and completely with counsel, the state's recommendations for a sentence, the sentence that Maldonado would ask the court to impose, and a purported agreement by the state not to involve itself in parole matters. Although the state did not actually sign the agreement, the state did subsequently file an offer of proof claiming that the agreement was limited to four main points: (1) the state's recommended sentence for deliberate homicide; (2) the state's recommended sentence for use of a weapon enhancement; (3) that Maldonado would likely recommend a lesser sentence; and (4) that Maldonado could withdraw the guilty plea if the sentence was greater than that recommended by the state. At the change of plea hearing, the court accepted Maldonado's plea and sentenced Maldonado to concurrent sentences despite the state's recommendation that the sentences be consecutive. At Maldonado's parole hearing, the state declined involvement pursuant to the agreement. On a petition for postconviction relief, Maldonado asserted that no plea agreement existed because the agreement between the parties did not contain all the material terms. The Supreme Court disagreed. Based on the language of Maldonado's acknowledgment and the state's conduct at the

plea hearing and the parole hearing, the parties did have a plea agreement that was limited to the terms enumerated in the state's offer of proof plus the state's agreement not to involve itself in parole matters, which were the terms that the parties mutually agreed to. Thus, the District Court did not err in denying Maldonado's petition for postconviction relief on grounds that the parties had no plea agreement. Maldonado v. St., 2008 MT 253, 345 M 69, 190 P3d 1043 (2008).

Sentence Based on Recommendation of Sexual Offender Evaluator — State Breach of Plea Agreement by Presenting Conflicting Testimony of Different Evaluator: In a plea agreement, the state agreed to recommend one sentence if Rahn was designated by a sexual offender evaluator as a level 2 or lower offender and a harsher sentence if Rahn was designated as a level 3 offender. An evaluator who personally evaluated Rahn opined that Rahn should be designated as a level 2 offender. At the sentencing hearing, the state presented testimony by a different evaluator, who had not evaluated Rahn, attacking the level 2 designation and arguing that Rahn should be designated as a level 3 offender. Rahn objected on grounds that the state witness's testimony breached the plea agreement, but the sentencing court overruled the objection and subsequently designated Rahn as a level 3 offender and imposed the harsher sentence. Rahn appealed, and the Supreme Court reversed. Rahn complied with the plea agreement, but the state's conduct in presenting alternate testimony and recommending a level 3 designation was not what was agreed upon in the plea bargain; therefore, the state breached the plea agreement. The state was obligated to make the recommendation as agreed upon in the plea bargain, and the Supreme Court remanded for resentencing with a different judge pursuant to the terms of the plea agreement. St. v. Rahn, 2008 MT 201, 344 M 110, 187 P3d 622 (2008).

Plea Agreement Not Formally Rejected — Withdrawal of Guilty Plea Properly Denied — Illegal Fine or Surcharge Stricken From Sentence: Stephenson plea bargained for suspended sentences in exchange for a guilty plea, but there was no agreement that the court would impose any particular fine. However, Stephenson did agree to undertake certain financial obligations, such as restitution, fines, court costs, and fees. In the presentence investigation (PSI) report, the probation officer recommended that Stephenson pay a fine of $85 to the community service program. At sentencing, the court imposed the agreed suspended sentences, but also followed the PSI and imposed the $85 fine, although characterizing the fine as a surcharge. Stephenson objected to the fine/surcharge and asserted that because the court rejected the plea agreement, he should be allowed to withdraw the guilty plea and proceed to trial. The motion to withdraw the guilty plea was denied, and Stephenson appealed. Shortly after the appeal was filed, the state conceded that the fine was illegal and recommended that the case be remanded for purposes of striking the fine/surcharge from Stephenson's sentence. The Supreme Court found nothing to indicate that the plea agreement was effectively rejected or that the state failed to support the agreement, allowing withdrawal of the guilty plea. The sentencing court did not err in disallowing withdrawal of the plea. Instead, the issue was the legality of the $85 fine/surcharge, which was unlawfully imposed without statutory authority. The case was remanded with instructions to strike the illegal fine/surcharge from the sentence. St. v. Stephenson, 2008 MT 64, 342 M 60, 179 P3d 502 (2008), followed in St. v. VanWinkle, 2008 MT 208, 344 M 175, 186 P3d 1258 (2008).

State Allowed to Present Evidence Regarding Veracity of Information Defendant Raises in Arguing for Sentence Without Breaching Plea Agreement: At a sentencing hearing, Bartosh testified regarding information in the presentence investigation report, asserting that he had complied with his treatment plan and that certain transcripts of telephone conversations attached to the report should be stricken because they undermined the plea agreement. The District Court declined to strike the transcripts and allowed the probation officer who prepared the report to testify in response to Bartosh's testimony. On appeal, Bartosh contended that it was error to allow the probation officer to testify because the testimony undermined the plea agreement. The Supreme Court held that the telephone transcripts were relevant and properly allowed as indicative of Bartosh's acts. The court also affirmed the sentencing court's decision to allow the probation officer's testimony. Once Bartosh testified as to his conduct concerning compliance with the treatment plan, the state was justified in presenting the probation officer who had conflicting information. If a defendant chooses to present information in support of a sentence, the state may counter with testimony to the effect that the information is misleading or untrue without breaching a plea agreement. St. v. Bartosh, 2007 MT 59, 336 M 212, 154 P3d 58 (2007).

Misinformation in Plea Agreement and Incomplete Information Provided by District Court Raising Doubt as to Intelligent Guilty Plea — Denial of Withdrawal of Plea Reversed: Rave was charged with sexual assault with bodily injury. Following advice of counsel, Rave accepted a plea agreement and pleaded guilty. Prior to sentencing, Rave moved to withdraw the guilty plea, but

the motion was denied, and Rave was sentenced pursuant to the plea agreement. On appeal, the Supreme Court found that the plea agreement erroneously advised Rave that sexual assault may be a lesser included felony offense and that the penalty was the same as for sexual assault with bodily injury when, in fact, the lesser included offense was a misdemeanor. In addition, the District Court did not correct the misinformation in the plea agreement when accepting the guilty plea, so Rave could not have made a knowing, intelligent, and voluntary plea. Thus, the Supreme Court reversed the denial of Rave's motion to withdraw the guilty plea and remanded for further proceedings. St. v. Rave, 2005 MT 78, 326 M 398, 109 P3d 753 (2005).

Sentence Under Plea Bargain Within Statutory Maximum Not Cruel and Unusual Punishment — Cruel and Unusual Punishment Claim Not Raised on Direct Appeal Barred in Postconviction Proceedings: In exchange for dismissal of a charge of assault with a bodily fluid, Basto entered a plea agreement to plead guilty of possession of a deadly weapon by a prisoner. Basto was sentenced to 5 years in prison and subsequently filed a timely petition for postconviction relief on grounds that the sentence was disproportionately severe when compared to the sentences of other defendants in the case, constituting cruel and unusual punishment. The state responded that there is no guarantee of proportionality under the constitutional prohibition against cruel and unusual punishment and that even if there were, Basto's sentence was still within statutory parameters. The Supreme Court agreed with the state. A sentence that is within maximum statutory guidelines does not violate the constitutional prohibition against cruel and unusual punishment. Basto received the sentence that he bargained for, and there was nothing in the plea agreement that indicated that Basto would receive the same sentence as the other defendants. Further, Basto failed to raise any cruel and unusual punishment argument on direct appeal, so the argument was barred in postconviction proceedings under 46-21-105. Basto v. St., 2004 MT 257, 323 M 80, 97 P3d 1113 (2004). See also St. v. DeSalvo, 273 M 343, 903 P2d 202 (1995), and St. v. Mingus, 2004 MT 24, 319 M 349, 84 P3d 658 (2004).

Improper Prosecutorial Solicitation of Testimony Intended to Undermine Plea Agreement — Choice of Remedies on Remand: The prosecutor in Rardon's sexual assault trial gave lip service to the letter of a plea agreement by recommending the sentence suggested in the presentence investigation, but then went on to solicit inflammatory testimony from the victims that would almost undoubtedly cause the court to question the appropriateness of the recommended sentence, which effectively undercut the plea agreement. Although it is appropriate for a prosecutor to questions victims and solicit their testimony at a sentencing hearing and for victims to express their fears and feelings, it is not acceptable for a prosecutor to aggressively solicit testimony that is clearly intended to undermine a plea agreement and to convince the sentencing court that a bargained sentence agreement should not be accepted. A plea agreement is subject to contract law standards, and prosecutors must meet strict and meticulous standards of both promise and performance. A guilty plea resting on an unfulfilled promise in a plea bargain is involuntary, and prosecutorial violations, even if made inadvertently or in good faith to obtain a just and mutually desired end, are unacceptable. When the prosecution breaches a plea agreement, the sentencing judge may determine the appropriate remedy, which may include withdrawal of the guilty plea or specific performance of the plea agreement in a new sentencing hearing with a different prosecutor and judge. St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002). On remand, the prosecutor's presentation of the state's case did not undermine the plea bargained sentence recommendation or violate the contract law standards of the plea agreement. The sentencing judge was entitled to consider evidence of Rardon's abusive history and violent tendencies, as well as Rardon's daughter's opinion that Rardon should receive a lengthy sentence. None of the prosecutorial improprieties identified in previous hearings were present in the third sentencing hearing, nor did Rardon demonstrate any other kind of prosecutorial impropriety, so Rardon's third sentence was affirmed. St. v. Rardon, 2005 MT 129, 327 M 228, 115 P3d 182 (2005). The 2005 Rardon decision was followed in St. v. Bartosh, 2007 MT 59, 336 M 212, 154 P3d 58 (2007), and St. v. Rahn, 2008 MT 201, 344 M 110, 187 P3d 622 (2008). See also St. v. Lamere, 272 M 355, 900 P2d 926 (1995), St. v. Bowley, 282 M 298, 938 P2d 592 (1997), and St. v. Munoz, 2001 MT 85, 305 M 139, 23 P3d 922 (2001).

Additional Sentence Condition Added Following Plea Agreement — Error in Not Allowing Withdrawal of Guilty Plea: Afterbuffalo pleaded guilty to criminal endangerment pursuant to a plea agreement. The sentencing court imposed the recommended 3-year suspended sentence, but also added a requirement that Afterbuffalo be placed in either a prerelease or an intensive supervision program. Afterbuffalo claimed that the sentence was outside the scope of the plea agreement and moved to withdraw the guilty plea because the requirement was not a standard condition of probation. The motion was denied. On appeal, the Supreme Court agreed that the additional requirement was outside the scope of the plea agreement. In entering the plea

agreement, Afterbuffalo bargained for the benefit of an ordinary suspended sentence, but the additional requirement was not a standard condition of probation and materially changed the impact of the suspended sentence. Addition of the probation requirement constituted a rejection of the agreement by the sentencing court. Thus, pursuant to this section, the sentencing court was required to allow withdrawal of the guilty plea, and abused its discretion in failing to do so. St. v. Afterbuffalo, 2002 MT 14, 308 M 163, 40 P3d 375 (2002).

Breach of Plea Agreement by State — Defendant's Right to Choose Remedy: The state conceded that it breached a plea agreement that had been offered to Munoz, so the order of the District Court denying Munoz's motion to withdraw his guilty plea was erroneous. The question then became whether the sentencing court or Munoz should have the right to choose the remedy. Generally, when the state breaches a plea agreement, one of two equitable remedies is available to safeguard the defendant's due process rights. The notion of an equitable remedy for a breach is guided by the general principles of contract law. The first remedy is specific performance by the government, requiring the state to uphold its end of the bargain and, before a new sentencing judge, comply with the terms of the plea agreement by recommending a specific sentence, moving for dismissal of other charges, or simply not opposing the defendant's requested sentence. When specific performance is imposed, a defendant enjoys no contractual right or entitlement to a specific sentence. The second equitable remedy is rescission, requiring that a defendant be allowed to withdraw the guilty plea and then face trial on the original charge as if the plea agreement had never been entered. In cases of rescission, a defendant's constitutional rights that were waived by the guilty plea are reinstated. However, the seminal federal case that established these remedies, Santobello v. N.Y., 404 US 257 (1971), never reached the question of choice of remedies, leaving to the discretion of the state court the decision as to which remedy would be appropriate under the circumstances. Federal circuit courts and various state courts have also split on the question of choice of remedies. Until now, the Montana Supreme Court has also applied two lines of reasoning—in some cases leaving the choice of remedies to the discretion of the sentencing court and in other cases providing instructions that a defendant be allowed to choose the remedy. In light of the underlying principles of contract law, a nonbreaching defendant must be afforded the initial right to choose from available remedies when the state breaches a plea agreement. As the breaching party, the state bears the substantial burden of demonstrating through clear and convincing evidence that a defendant's choice of remedy would result in a miscarriage of justice, and only upon such a showing may a District Court disallow a defendant's choice. St. v. Munoz, 2001 MT 85, 305 M 139, 23 P3d 922 (2001), following St. v. Bowley, 282 M 298, 938 P2d 592 (1997), and St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015 (1999), overruling St. v. Persak, 256 M 404, 847 P2d 280 (1993), and St. v. Rardon, 1999 MT 220, 296 M 19, 986 P2d 424 (1999), and followed in St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002).

Guilty Plea Constituting Waiver of Nonjurisdictional Defects and Defenses: Gordon was charged in Montana with the murder, aggravated kidnapping, and robbery of an Idaho man. Gordon sought a ruling on a motion to require enforcement of the second of two plea agreements entered into with Idaho authorities regarding a sentence that might be imposed if Gordon's implicity was proved in the homicide or if he was not truthful in the ongoing investigation. The state argued that Idaho could not bind Montana to a pretrial agreement in which Montana had not participated and contended that Idaho had previously voided the second plea agreement because of Gordon's untruthfulness. The District Court denied the motion. Gordon subsequently entered a plea agreement with Montana. The court obtained Gordon's understanding of the rights that he would give up by pleading guilty, including the right to an appeal. The court accepted Gordon's guilty plea to aggravated kidnapping and dismissed the other charges, ultimately imposing an 80-year sentence as recommended in the state plea agreement. On appeal, Gordon asserted that his constitutional rights were violated when the District Court did not sentence him pursuant to the second Idaho plea agreement. Citing St. v. Wheeler, 285 M 400, 948 P2d 698, 54 St. Rep. 1213 (1997), the Supreme Court held that after a criminal defendant pleads guilty of the offense charged, only the voluntary and intelligent character of the guilty plea may be attacked and that independent claims relating to prior deprivations of constitutional rights may not be raised. A voluntary and intelligent guilty plea constitutes a waiver of nonjurisdictional defects and defenses. St. v. Gordon, 1999 MT 169, 295 M 183, 983 P2d 377, 56 St. Rep. 654 (1999).

Plea to Lesser Included Offense — Introduction at Sentencing of Evidence of Commission of Charged Offense — Language of Plea Agreement: Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged the state's introduction of

evidence tending to prove her commission of the originally charged offense. The Supreme Court upheld the introduction of the evidence, noting not only that the rules of evidence do not apply in sentencing, but also that the plea agreement provided that "counsel for the State may make any recommendation and may introduce . . . evidence in support thereof at the time of sentencing". St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

Applicability of Statutory Scheme for Withdrawal of Guilty Plea: Defendant pleaded guilty to deliberate homicide approximately 3 ½ months before this section, which requires that a court inform the defendant of certain alternatives when contemplating withdrawal of a guilty plea, went into effect. The applicable statute in effect at the time was 46-12-204, which specifically stated that a judge was not required to allow the defendant to withdraw a guilty plea. Defendant's contention that the court was required to apply a statute that was not yet in effect was without merit. The District Court did not err in denying defendant's motion to withdraw the guilty plea. St. v. Strecker, 267 M 311, 883 P2d 841, 51 St. Rep. 1067 (1994).

Imposition of Sentence Different From That Recommended by Plea Bargain Agreement — No Error: Larson argued that the trial court's granting of the state's motion to amend a count from attempted sexual intercourse without consent to sexual assault constituted the court's approval of the charging part of a plea agreement and that the court thus erred in failing to follow the sentencing part of the agreement by imposing a greater sentence than recommended. A plea agreement is between the prosecutor and the defendant. A judge may not participate in and is not bound by the plea agreement. The court's grant of the motion to amend the charge did not signify that the court would or did approve of the agreement, nor is there any case law or statute that requires the court to inform a defendant of the sentence that will be imposed before a guilty plea is withdrawn. St. v. Larson, 266 M 28, 878 P2d 886, 51 St. Rep. 638 (1994).

46-12-212. Determining accuracy of plea.

Commission Comments

1991 Comment: Subsection (1) is based on Rule 11(f) of the Federal Rules of Criminal Procedure and embodies Montana case law requirements. Subsection (2) was developed to allow formal recognition of what is commonly called the "Alford plea". This procedure, arising from the United States Supreme Court case of N.C. v. Alford, 400 US 25 (1970), allows a defendant to plead guilty without actually admitting to the charge if he has reviewed the evidence against him, if he is capable of making a voluntary, knowing, and intelligent choice, and if the record contains strong evidence of guilt.

Compiler's Comments

1999 Amendment: Chapter 395 in (2) near middle after "guilty" inserted "or may, with the consent of the court and the prosecutor, enter a plea of nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

Case Notes

Criminal Mischief Guilty Plea Based on Quality of Construction Work — Lack of Factual Basis for Plea Casting Doubt on Voluntariness — Remand: Wise was charged with elder abuse by exploitation and criminal mischief for allegedly performing shoddy construction work on an elderly woman's property. Wise agreed to plead guilty to criminal mischief in exchange for dismissal of the elder abuse charge. At the change of plea hearing, Wise acknowledged performing shoddy construction work but did not admit guilt sufficient to be convicted of criminal mischief. Nevertheless, the trial court did not allow Wise to withdraw the guilty plea and Wise was convicted. On appeal, the Supreme Court reversed. Although a court need not extract an admission from a defendant of every element of a crime in order to establish a factual basis for a guilty plea, the court must ascertain from the defendant's admissions that the defendant's acts generally satisfy the elements of the crime to which the defendant is pleading guilty. In this case, shoddy construction work, without more, did not constitute criminal mischief, and the trial court incorrectly concluded that there was a factual basis for Wise's plea, which cast doubt on the voluntariness of the plea, warranting reversal and remand for further proceedings. St. v. Wise, 2009 MT 32, 349 M 187, 203 P3d 741 (2009), following St. v. Frazier, 2007 MT 40, 336 M 81, 153 P3d 18 (2007).

Alford Plea Entered Voluntarily — Motion to Withdraw Plea Properly Denied: Locke moved to withdraw his Alford plea to felony robbery, but the motion was denied. On appeal, Locke argued that the District Court failed to establish a factual basis for the Alford plea when it reviewed only the information and affidavit and that failure to establish a factual basis provided good cause to withdraw the plea. The statutory procedure in 46-12-212 allows a defendant to plead guilty without actually admitting the charge if the defendant has reviewed the evidence and is capable of making a voluntary, knowing, and intelligent choice and if the record contains

strong evidence of guilt. In this case, the statutory factors were met. Locke was fully aware of the direct consequences of the plea, and nothing in the record indicated that Locke was incapable of making a voluntary, knowing, and intelligent choice. Because Locke failed to establish that the plea was involuntary, the Supreme Court affirmed denial of Locke's motion to withdraw the plea. St. v. Locke, 2008 MT 423, 347 M 387, 198 P3d 316 (2008), distinguishing St. v. Frazier, 2007 MT 40, 336 M 81, 153 P3d 18 (2007).

Failure to Inform Defendant of Elements of Partner or Family Member Assault Prior to Guilty Plea — Reversible Error: At arraignment in Justice's Court on charges of partner or family member assault, the court asked defendant if he understood that by pleading guilty, he was admitting facts in the complaint, but the court did not ask defendant what the factual basis was for the plea. One day after defendant's guilty plea, he moved to withdraw the plea, but the Justice's Court denied the motion. On appeal, the District Court affirmed. On appeal to the Supreme Court, defendant asserted that the plea colloquy was inadequate, that there was no plea bargain, and that there was evidence of his innocence. The court considered the contention of the inadequate plea colloquy. Although defendant did not specifically raise the inadequate plea colloquy, defendant did adequately raise the issue in the motion to withdraw the guilty plea, and the District Court committed reversible error by not allowing defendant to withdraw the guilty plea by failing to advise defendant that by pleading guilty, the right to appeal would be waived. St. v. Frazier, 2007 MT 40, 336 M 81, 153 P3d 18 (2007), following St. v. Boucher, 2002 MT 114, 309 M 514, 48 P3d 21 (2002).

Plea Colloquy to Include Admission of Elements of Offense: A court must solicit admission from a defendant regarding what acts the defendant committed that constitute the offense charged. The court need not extract an admission of every element of the crime in order to establish a factual basis for a guilty plea, but the court must ascertain, from admissions made by the defendant at the plea colloquy, that the defendant's acts satisfy in a general sense the requirements of the crime. If the defendant is unwilling to admit any element of the crime, the court must reject the guilty plea or treat the plea as an Alford plea and apply the stricter standards of subsection (2) of this section that require strong evidence of guilt. In this case, the Justice's Court's interrogation of defendant was inadequate to determine whether there was a factual basis for defendant's guilty plea to partner or family member assault, and on appeal, the District Court should have resolved any doubt as to the voluntariness of the plea by allowing withdrawal of the plea. Failure to do so was reversible error, and the Supreme Court remanded for further proceedings. St. v. Frazier, 2007 MT 40, 336 M 81, 153 P3d 18 (2007), followed in St. v. Wise, 2009 MT 32, 349 M 187, 203 P3d 741 (2009). See also St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005).

Question of Adequacy of Advisement Regarding Waiver of Appeal Rights Resolved in Favor of Defendant: The first factor in determining whether good cause existed in allowing the withdrawal of a guilty plea and whether a court abused its discretion in denying a motion to withdraw the guilty plea, as set out in St. v. Bowley, 282 M 298, 938 P2d 592 (1997), is the adequacy of the court's interrogation at the time that the plea was entered regarding the defendant's understanding of the consequences of the plea. The plea must be a voluntary, knowing, and intelligent choice among the alternative courses of action open to the defendant. In the present case, Boucher was charged with DUI, and at his initial appearance, the Justice's Court had Boucher acknowledge in writing that he understood the waivers that he would make if he pleaded guilty. Boucher pleaded not guilty and waived no rights. Five months later, the state amended the complaint, and Boucher changed his plea to guilty, but at the time that the plea was entered, the Justice's Court did not reiterate the information provided at the initial appearance and failed to question Boucher regarding his understanding of the waiver of his constitutional rights. The Supreme Court concluded that the court's colloquy was inadequate and that good cause existed to permit Boucher to withdraw his guilty plea. Any doubt about the voluntariness of Boucher's plea was resolved in his favor, and the Supreme Court remanded to Justice's Court for further proceedings. St. v. Boucher, 2002 MT 114, 309 M 514, 48 P3d 21 (2002).

Right of Defendant to Plead Guilty Over State's Objection — Erroneous Refusal to Accept Guilty Plea: Peplow was charged with and convicted of DUI, driving with a suspended or revoked license, driving without insurance, failing to report an accident, and tampering with evidence. Prior to trial, Peplow tried to enter guilty pleas to the driving with a suspended or revoked license and driving without insurance counts, but the trial court ruled that it was not required to accept the pleas because Peplow's actions giving rise to the counts were part of the res gestae and probative of the issue of impairment; the trial court proceeded to trial on all counts. Peplow appealed on grounds that the trial court erred in refusing the guilty pleas. In a case of first impression, the Supreme Court considered a defendant's right to plead guilty over the

state's objection. The court noted the numerous statutory procedural safeguards in place to ensure that: (1) a guilty plea is made knowingly, voluntarily, and intelligently; (2) there is a factual basis for the plea; (3) the court is not bound by any plea agreements; and (4) a defendant may not withdraw a guilty plea if the plea agreement is not accepted. The Supreme Court cited Lamb v. Missoula Imports, 230 M 183, 748 P2d 965 (1988), for the proposition that when the word "may" is used to confer power upon an officer, court, or tribunal and the public or a third person has an interest in the exercise of power, then the exercise of power becomes imperative. Under 46-16-105, a plea of guilty "may" be accepted before or during trial. The Supreme Court construed this language to mandate the acceptance of a guilty plea as long as the statutory requirements are met. Further, under 46-12-204, a defendant may plead guilty or not guilty without limitation on the right to plead. St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

Establishment of Every Element of Offense Not Required Before Guilty Plea Accepted: This section does not require a defendant to establish every element of the offense charged in order for a guilty plea to be accepted. In the present case, the fact that a defendant made no admission concerning the mental state element of an offense did not, of itself, render the trial court's interrogation inadequate or the guilty plea involuntary. St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682, 55 St. Rep. 396 (1998).

Alford Plea in Sexual Assault Case — Revocation of Suspended Sentence: In a sexual assault case, the defendant sufficiently raised the issue of the fifth amendment right against self-incrimination to warrant review on appeal. The defendant entered an Alford plea, and sexual offender evaluation and treatment were conditions of the suspended sentence. The District Court did not abuse its discretion when it revoked the defendant's suspended sentence for violations of the conditions of the suspended sentence, including sexual offender evaluation and treatment. St. v. Butler, 272 M 286, 900 P2d 908, 52 St. Rep. 745 (1995).

Law Review Articles

In Re Ests. of Swansons: The Slayer Statute and the Impact of a Guilty Plea on Collateral Estoppel in Montana, Arant, 71 Mont. L. Rev. 217 (2010).

State v. Cameron: Making the Alford Plea an Effective Tool in Sex Offense Cases, Hinshaw, 55 Mont. L. Rev. 281 (1994).

46-12-213. Harmless error.

Commission Comments

1991 Comment: This statute is a restatement of Rule 11(h) of the Federal Rules of Criminal Procedure and embodies the intent of 1987 MCA 46-12-206.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 113-6.

The real question in all criminal cases [on appeal] is whether the substantial rights of the defendant have been adversely affected. The purpose of this section is to prevent reversal where the court has strayed from the procedure set forth, but the failure has not hindered the defense.

The burden is upon the defendant to object if any irregularity in connection with the arraignment is going to affect his defense. This does not intend to override any of the defendant's substantial constitutional rights even though not objected to during the procedure.

Compiler's Comments

1991 Amendment: At beginning substituted "Any variance from the procedure required by 46-12-211 that" for "No irregularity in the arraignment which" and after "defendant" substituted "must be disregarded" for "shall affect the validity of any proceeding in the cause if the defendant pleads to the charge or proceeds to trial without objecting to such irregularity".

Case Notes

Voluntary Guilty Plea — Withdrawal of Plea Properly Denied: Usrey pleaded guilty through a plea agreement to sexual intercourse without consent with a 6-year-old girl but later sought to withdraw the plea on grounds that it was involuntary because Usrey did not understand the plea agreement and because the District Court did not explain the rights Usrey was waiving. The Supreme Court examined the plea bargain language and affirmed. Although the written plea agreement did not state the specific maximum penalty upon conviction of sexual intercourse without consent and the District Court did not state the penalty when Usrey pleaded guilty, the court did ask Usrey if he was mindful of the maximum penalty, which was clearly stated in the information, and Usrey replied affirmatively. Also, the plea bargain called for a sentence far less than the maximum penalty, and the sentence that Usrey bargained for and that was imposed was far less than the maximum. Additionally, Usrey was not misled to his detriment simply because the District Court did not use the exact words of 46-12-210(1)(d) in telling Usrey that he might not be allowed to withdraw the guilty plea if the plea bargain was rejected. The record

contained substantial evidence supporting the District Court's conclusions that Usrey understood the proceedings and was mentally competent to enter a voluntary guilty plea, and the District Court did not err in denying the motion to withdraw the plea on grounds of involuntariness. St. v. Usrey, 2009 MT 227, 351 M 341, 212 P3d 279 (2009).

Lack of Formal Plea: Although formal entry of a plea by the defendant was never completed, the defendant did not object to any irregularity before proceeding to trial and suffered no prejudice from the irregularity. St. v. Petko, 177 M 229, 581 P2d 425 (1978).

Collateral References

Admissibility of confession or other statement made by defendant as affected by delay in arraignment—modern state cases. 28 ALR 4th 1121.

CHAPTER 13
PRETRIAL MOTIONS

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

1991 Chapter Comments: This chapter is a consolidation of code principles generally affecting the use of pretrial motions and notices. The 1987 code required only that pretrial motions be raised prior to trial. This chapter, while recognizing the court's discretion to accept motions at any time, establishes that motions and notices will generally be raised at or before the pretrial omnibus hearing or will be considered waived.

Chapter Law Review Articles

Pre-Trial Issues, Everly & Mullowney, 42 Mont. L. Rev. 390 (1981).

Part 1
General Provisions

46-13-101. Pretrial motions and notices.

Commission Comments

1991 Comment: This statute establishes general time restraints on pretrial motion and notice practices. These provisions are modeled after the 1987 code, but changes have been made to establish the pretrial omnibus hearing as the fulcrum of pretrial practice. The statute continues to recognize the court's wide discretion in controlling pretrial motion practice.

Subsection (1) retains the basic provision of 1987 MCA 46-13-101. The subsection requires that all pretrial motions capable of being determined before trial be submitted at or before the pretrial omnibus hearing. The statute also allows for exceptions to that standard, including instances otherwise provided for under Title 46 or instances in which good cause for the delay is shown. The court has discretion to conduct a hearing on the motions either at the pretrial omnibus hearing or at a later date.

Subsection (3) recognizes the exceptions to the waiver provided in subsection (2). It allows the court to grant relief from a waiver for good cause. It also recognizes that lack of jurisdiction or failure to state an offense are the two defenses that cannot be waived.

Subsection (4) requires that all pretrial notices be made at the pretrial omnibus hearing. The notices required at the omnibus hearing are provided for in 46-13-108.

Source: New.

Although the pre-trial motion is located at this point in the general arrangement of the code, various pre-trial motions will likely be made prior to the plea. The section is intended to cover the multitude of objections which can be raised before the commencement of trial. It is intended to include all the presently used objections as well as any valid objection the ingenuity of counsel can provide. The general theory of the entire chapter is to simplify the procedure for testing the validity of the information, indictment or complaint and the processes employed by the police, the prosecution and the judiciary in bringing a case to trial.

Compiler's Comments

1991 Amendment: In (1), at beginning, inserted exception clause, after "objection" inserted "or request", and at end, after "raised", substituted "at or before the omnibus hearing unless otherwise provided by Title 46" for "before trial by motion to dismiss or for other appropriate relief"; inserted (2) concerning waiver by failure to timely raise defense or objection; inserted (3) providing for court relief from waiver; inserted first sentence of (4) requiring written motions; and made minor changes in style.

Case Notes

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ATTACKING INDICTMENT OR INFORMATION

Elements of Issuing Bad Checks Supportive of Information: The County Attorney filed an information against McWilliams for issuing bad checks in connection with a construction business. McWilliams asserted that the information should be dismissed because the series of transactions involving the checks were an illegal series of deferred deposit loans, so McWilliams could not be criminally prosecuted. However, 31-1-723, which prohibits deferred deposit loans, applies only to licensees under Title 31, ch. 1, part 7. None of the parties involved were licensees, so the statute did not apply. McWilliams also contended that the checks did not meet the definition of negotiable instruments in 30-3-104 because they were not payable on demand, but rather were in the nature of a future promise. However, the checks contained no restrictive endorsement, and although the parties to whom the checks were written agreed to refrain from cashing them immediately, the checks were in fact payable on demand and met the statutory definition. McWilliams also cited 45-2-211 in arguing a consent defense because the parties consented to take the checks and hold them, but that argument also failed because even though the parties agreed to hold the checks, they did not consent to nonpayment or to having McWilliams stop payment altogether. McWilliams next asserted that under St. v. Patterson, 75 M 315, 243 P 355 (1926), the information was defective because it contained no assertion of an intent to defraud. The statutory language under which Patterson was charged in 1926 required a showing of intent to defraud, but the current statute, 45-6-316, contains no intent to defraud element, so the information was not defective in that regard. There was sufficient evidence to charge McWilliams with issuing bad checks, and the District Court did not err in denying McWilliams' pretrial motion to dismiss the information. St. v. McWilliams, 2008 MT 59, 341 M 517, 178 P3d 121 (2008).

Failure of Trial Court to Address Issues Raised in Defendant's Pro Se Petition — Reversible Error: After being charged with failure to register as a sexual offender, Samples was granted the opportunity to file a pretrial pro se petition addressing the ex post facto application of Title 46, ch. 23, part 5, as well as a variety of other constitutional challenges to the sexual offender registration law. The District Court substantively discussed and rejected Samples' ex post facto argument, refused to discuss the other constitutional concerns, and denied the petition. Following denial of the petition, Samples pleaded guilty, but reserved the right to appeal the ruling on the petition. On appeal, the Supreme Court held that, even though the District Court could have refused to allow the pro se motion, once the District Court expressly authorized Samples to file a pro se motion challenging the constitutionality of the sexual offender registration law, the court was obligated to address the constitutional issues raised in the petition. Failure of the District Court to consider all of the constitutional issues raised in the petition was reversible error, and the case was remanded for consideration of all issues raised by Samples in the petition. St. v. Samples, 2005 MT 210, 328 M 242, 119 P3d 1191 (2005).

Abuse of Discretion Standard of Review of Denial of Relief From Waiver: Relief from a waiver under this section may be granted by a District Court for good cause. What constitutes good cause for granting relief from waiver is fact-specific and falls under the sound discretion of the District Court, including a request for relief based on substitution of counsel. The Supreme Court reviews a District Court's denial of relief from waiver under an abuse of discretion standard. St. v. VonBergen, 2003 MT 265, 317 M 445, 77 P3d 537 (2003).

Pretrial Motion to Dismiss Burglary and Stalking Charges Properly Denied as Premature: Tichenor was charged with three counts of felony burglary and two counts of stalking for entering his girlfriend's apartment. Following arraignment, Tichenor moved to dismiss the charges for lack of sufficient evidence, claiming that he lacked the necessary intent required for the stalking charges and that he had license to enter the apartment, so the burglary charges were unfounded. The motion was denied, and Tichenor appealed. The Supreme Court noted that the questions of Tichenor's requisite intent and whether he was unlawfully in the apartment were questions for the jury. It would have been improper for the court to step into the jury's place and resolve the issues before trial, so the motion to dismiss was premature and properly dismissed. St. v. Tichenor, 2002 MT 311, 313 M 95, 60 P3d 454 (2002), distinguishing St. v. David, 266 M 365, 880 P2d 1308 (1994), and followed in St. v. McWilliams, 2008 MT 59, 341 M 517, 178 P3d 121 (2008).

Failure to Raise Double Jeopardy Argument at Trial — Insufficient Record: The Supreme Court refused to consider a double jeopardy argument that was not raised in a timely fashion at trial, given that the record presented for review was insufficient to establish a double jeopardy defense. St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992).

Charge Unsupported by Probable Cause Showing — Plain Error: Petitioner was convicted of assault. The charge was not supported by any probable cause showing, and nothing contained in the affidavit filed with the original information related to assault. An amended information was filed without an affidavit. This is "plain error" of constitutional magnitude that requires reversal of petitioner's conviction of assault, notwithstanding statute then in effect and providing for waiver of defects in the institution of prosecution if they are not raised before trial. Petitioner had not raised the issue prior to trial. Parker v. Crist, 190 M 376, 621 P2d 484, 37 St. Rep. 2048 (1980).

Original Charge Supported by Probable Cause Showing — Amended Charge Not Supported: The original information filed against petitioner, with an affidavit establishing probable cause, charged him with one count of armed robbery, naming as victims all seven persons later named in the seven counts of the amended information. Before petitioner entered a plea to the original information, the County Attorney filed an amended information, with leave of court but without an affidavit establishing probable cause. No objection was made by petitioner, who simply pleaded not guilty to each of the charges and went to trial. At the time of petitioner's trial, the statute in effect provided that defects in instituting the prosecution of the case or in the information had to be raised before trial and that failure to do so constituted a waiver of any defects. Thus, the alleged defects in filing the amended information were waived by petitioner's failure to object prior to trial. More importantly, probable cause was shown by the affidavit filed with the original information. Parker v. Crist, 190 M 376, 621 P2d 484, 37 St. Rep. 2048 (1980).

Motion to Strike Information for Lack of Specificity: In prosecution for attempted deliberate homicide, the court did not err in denying defendant's motion to strike the information for lack of specificity of the applicable statutes. The motion was properly denied in that it was not made before the defendant's plea was entered, and the information was sufficiently clear even though it cited only the attempt statute, as it contained an allegation that the defendant attempted deliberate homicide. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Entrapment: Casual offer to buy unaccompanied by pleading, begging, or coercing of the accused does not constitute entrapment. State ex rel. Hamlin v. District Court, 163 M 16, 515 P2d 74 (1973).

Absence of Supporting Affidavit — Leave to File Information: Absence of a supporting affidavit for leave to file an information, contrary to 46-11-201, was not a fatal error since it is a procedural matter and does not affect the substantial rights of the defendant. St. v. Logan, 156 M 48, 473 P2d 833 (1970).

Waiver of Objection to Information — Generally:

The failure to object in the trial court that the application for permission to file an information was not accompanied by a supporting affidavit waived the objection. St. v. Logan, 156 M 48, 473 P2d 833 (1970).

By his failure to object to the information before demurrer or plea on the ground that it was filed prior to a preliminary hearing, the defendant waived his right to challenge the foundation of the information. St. v. Sorenson, 65 M 65, 210 P 752 (1922).

By pleading to the information without interposing a demurrer that the facts stated did not constitute a public offense, the defendant waived objections to its sufficiency. St. v. Fowler, 59 M 346, 196 P 992 (1921).

By entering his plea without a written motion to set aside the information and consenting to go to trial, the defendant waived his right to question the propriety of proceedings prior to the filing of the information. St. v. Vinn, 50 M 27, 144 P 773 (1914).

The defendant's failure to raise the objection that an information charged two distinct offenses, contrary to a former statute, constituted a waiver of such objection. St. v. Rodgers, 40 M 248, 106 P 3 (1909); St. v. Mahoney, 24 M 281, 61 P 647 (1900).

Failure to move to set aside the information on the ground that it had not been subscribed by the County Attorney waived the objection to the action of the court in permitting the information to be subscribed before demurrer or plea. St. v. Peterson, 24 M 81, 60 P 809 (1900).

If a defendant, on a second trial, does not ask to withdraw the plea of not guilty interposed at the first trial, and have another and different plea substituted, it is a waiver of any grounds of objection to the information. St. v. McCaffery, 16 M 33, 40 P 63 (1895).

Test of Sufficiency of Information:

The test of the sufficiency of an information is whether the defendant is apprised of the charges brought against him and whether he will be surprised. St. v. Bogue, 142 M 459, 384 P2d 749 (1963), overruling St. v. Hale, 129 M 449, 291 P2d 229 (1955).

The test of the sufficiency of an information is whether a person of common understanding would know what is intended to be charged. St. v. Board, 135 M 139, 337 P2d 924 (1959), followed in St. v. Brogan, 261 M 79, 862 P2d 19, 50 St. Rep. 1204 (1993).

Former Jeopardy: Defendant charged with sale of intoxicating liquor to a minor was not placed in former jeopardy by a dismissal of the complaint without any further proceedings. St. v. Moore, 138 M 379, 357 P2d 346 (1960).

Attacking Charge on Remand: When a first conviction is set aside, the defendant is not precluded upon a remand for a new trial from attacking the indictment or information. St. v. Hale, 129 M 449, 291 P2d 229 (1955), overruled on other grounds in St. v. Bogue, 142 M 459, 384 P2d 749 (1963).

Waiver of Objection to Amendment of Information: When, after a plea of not guilty, the County Attorney asked permission to amend the information and counsel for the defendant stated there was no objection, any objection to the amendment of the information to include a prior conviction was waived. State ex rel. Treat v. District Court, 122 M 249, 200 P2d 248 (1948).

Sufficiency of Charge: Ordinarily, an information charging a public offense in the language of the statute is sufficient; if considered insufficient as to details and facts, the remedy of the defendant was formerly a request for a bill of particulars. St. v. Hahn, 105 M 270, 72 P2d 459 (1937).

When Insufficiency of Information Does Not Warrant Dismissal: Insufficiency of the information does not warrant a dismissal of the action if in the opinion of the court the objection may be avoided by an amended information. State ex rel. Freebourn v. District Court, 105 M 77, 69 P2d 748 (1937).

Dismissal Before Plea Not a Bar: Dismissal of an information before the defendant is called upon to plead or before the jury is impaneled and sworn does not bar a subsequent prosecution for the same offense. St. v. Knilans, 69 M 8, 220 P 91 (1923).

Improper Joinder of Counts — Remedy: The objection that several offenses are improperly united under separate counts in an information cannot be raised by a motion to require the prosecution to elect upon which one count it would rely for conviction but must be taken by demurrer. St. v. Marchindo, 65 M 431, 211 P 1093 (1922).

Objection That Facts Do Not Constitute an Offense — When Taken: Under former law, the objection that the facts stated in an information do not constitute a public offense could be taken by demurrer, at the trial under a plea of not guilty, or after the trial in arrest of judgment. St. v. Smith, 58 M 567, 194 P 131 (1920).

Waiver of Objection Based on Former Indictment: When an accused person pleads to an information without interposing the objection, by motion, that, having already been prosecuted by indictment, he cannot be prosecuted by information, that objection is waived. St. v. Vinn, 50 M 27, 144 P 773 (1914).

Waiver of Irregularity in Filing Information:

The objection to a failure to timely file the information must be made in writing and before the demurrer or plea or it is waived. St. v. Chevigny, 48 M 382, 138 P 257 (1914).

When the County Attorney fails to comply with 46-11-203, any advantage thereof must be taken by the defendant by motion to set aside the information, and failure to so take advantage of the irregularity waives it. St. v. Lagoni, 30 M 472, 76 P 1044 (1904).

How to Object to Information on Grounds of Duplicity: An objection to an information on the grounds of duplicity is addressed to the jurisdiction of the District Court rather than to the form of the information and may be raised by an objection to the introduction of evidence and a motion to compel an election. St. v. Mjelde, 29 M 490, 75 P 87 (1903).

Count Containing Differing Forms of Offense — Waiver of Objection: Any objection to the inclusion of one count of the statement of different forms of the same offense must be made in the District Court before plea; otherwise it is waived. St. v. Mahoney, 24 M 281, 61 P 647 (1900).

Remedy When Information Has Been Filed Without Leave of Court: When an information has been filed without leave of court and before the examination and commitment of the defendant, an appropriate remedy is by a motion to quash. St. v. McCaffery, 16 M 33, 40 P 63 (1895).

OBJECTIONS TO PROSECUTION

No Grounds Asserted for Speedy Trial Argument — Motion Properly Dismissed: Cybulski filed a pretrial motion to dismiss a DUI case for lack of a speedy trial, but the motion was denied. On appeal, the Supreme Court affirmed. Cybulski's motion consisted of one paragraph and no brief in support of the motion. The statutory requirements for filing pretrial motions are that a motion must state with particularity the grounds for the motion and the order or relief sought. Cybulski's motion consisted of only an assertion that because more than 1 year had elapsed, a speedy trial analysis was required. Without more, the requirements for pretrial motions were not met and the motion was properly dismissed. St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009). See also St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004).

Waiver of Right to Raise Issue of Unreasonable Delay — Failure to Move Court for Ruling at or Before Omnibus Hearing: Approximately 4 hours after Kummerfeldt was involved in a single-vehicle accident, his blood was drawn for a BAC test, which produced a 0.14% result. At trial, he moved for a judgment of acquittal on the DUI per se charge, based on the state's failure to prove his BAC result was 0.08 or greater at the time he was driving and because under St. v. McGowan, 2006 MT 163, 332 M 490, 139 P3d 841 (2006), 4 hours was an unreasonable delay between the driving and the drawing of blood. However, not only did Kummerfeldt fail to raise this objection at the omnibus hearing, he also entered into a pretrial stipulation as to the admissibility of the BAC report. Therefore, Kummerfeldt waived his arguments. St. v. Kummerfeldt, 2008 MT 333, 346 M 187, 194 P3d 662, (2008).

Failure of Trial and Appellate Counsel to Adequately Assert Prejudice Element of Motion to Sever Constituting Ineffective Assistance of Counsel Warranting Reversal: Trial counsel failed to properly form a motion to sever sexual assault charges from pornography charges in a manner to demonstrate that failure to sever the criminal counts would result in prejudice to defendant. Following conviction on all counts, appellate counsel argued in St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004), that the trial court erred in failing to sever, but did not raise the issue of ineffective assistance of trial counsel, so the Supreme Court declined to consider the issue. On a petition for postconviction relief, new counsel argued the ineffective assistance of both trial and appellate counsel, and the District Court agreed. However, the petition was dismissed on grounds that counsels' conduct did not prejudice defendant in a manner that denied defendant a fair trial. Defendant appealed denial of the petition, and the Supreme Court reversed. Trial counsel's failure to allege the nature or type of prejudice that would occur absent a severance constituted ineffective assistance, and appellate counsel's failure to raise ineffective assistance of trial counsel could not be viewed as a legitimate appellate strategy. Defendant received inadequate assistance of both trial and appellate counsel and was entitled to a new trial on the sexual assault charges. Yecovenko v. St., 2007 MT 338, 340 M 251, 173 P3d 684 (2007).

Issue of Particularized Suspicion for Traffic Stop to Be Raised Prior to Trial: At the close of Vincent's DUI trial, Vincent moved for acquittal on grounds that the officer lacked a particularized suspicion to make the stop. The motion was denied, and on appeal, the Supreme Court affirmed. This section requires that, unless good cause exists, any defense, objection, or request that is capable of determination without trial of the general issues must be raised at or before the omnibus hearing. The defense of lack of a particularized suspicion to make a traffic stop is an issue that is capable of such determination. When Vincent made the motion at the end of the trial, it was too late to seek a judgment of acquittal based on a defense that could have been made before the trial. St. v. Vincent, 2007 MT 94, 337 M 87, 155 P3d 1292 (2007).

No Error in Trial Court's Failure to Sever Counts of Sexual Assault and Sexual Abuse of Children — Defendant's Failure to Show Prejudice: Prior to trial, Yecovenko moved to sever charges of sexual abuse of his stepdaughters from charges of sexual abuse of children related to Yecovenko's downloading of child pornography from the Internet, asserting that prejudice would result, but failing to assert the type of prejudice that would occur if the charges were not severed, as required by St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002). Because Yecovenko

failed in District Court to satisfy the threshold requirement of alleging the nature or type of prejudice that would occur, the Supreme Court declined to consider Yecovenko's prejudice arguments on appeal, and denial of the motion to sever was affirmed. St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004).

Failure to Meet Statutory Duty to Bring Defense, Objection, or Request at or Before Omnibus Hearing Constituting Waiver: A party has a statutory duty to bring any defense, objection, or request that is capable of determination without trial of the general issue, including motions to suppress, at or before the omnibus hearing or by a later date if ordered by the court, and failure to do so constitutes a waiver. Here, defendant's motion to suppress was filed after both the date of the omnibus hearing and a later deadline for motions set by the District Court, but 6 months before the actual trial. Nevertheless, the motion was untimely as a matter of law, and the District Court did not err in denying relief from the waiver. St. v. VonBergen, 2003 MT 265, 317 M 445, 77 P3d 537 (2003), followed in St. v. Adkins, 2009 MT 71, 349 M 444, 204 P3d 1 (2009).

Waiver of Issue of Probable Cause Based on Failure to Raise Issue Prior to Omnibus Hearing: Landis was charged with felony theft and felony deceptive practices. At arraignment, Landis entered not guilty pleas to both charges. About 2 months later, an omnibus hearing was held. Approximately 3 months after the hearing, Landis moved for a probable cause hearing, which the District Court denied as untimely. Landis moved to dismiss, arguing lack of probable cause, and that motion was also denied. Landis was ultimately convicted of both charges, but appealed on grounds that the District Court erred in refusing to dismiss the case for lack of probable cause. The Supreme Court disagreed. Allegations of lack of probable cause to support criminal charges, whether raised by motion to dismiss or motion for a probable cause hearing, are defenses or objections that can be determined without trial on the general issue, and thus must be raised at or before the omnibus hearing pursuant to this section. Failure by Landis to raise the probable cause issue until 3 months after the omnibus hearing constituted waiver of the issue. The District Court properly dismissed the motions as untimely. St. v. Landis, 2002 MT 45, 308 M 354, 43 P3d 298 (2002).

Lack of Subject Matter Jurisdiction Nonwaivable Defect: LaPier argued that the lower court's finding that he was guilty of the felony offense of violation of a protective order because it was his third such violation was error because the court lacked jurisdiction to do so because one of the prior convictions was constitutionally infirm. The state argued that LaPier could not raise the issue for the first time on appeal. The Supreme Court held that although the general rule was that an issue could not be raised for the first time on appeal, lack of subject matter jurisdiction is a nonwaivable defect and may be raised at any stage of the proceedings. St. v. LaPier, 1998 MT 174, 289 M 392, 961 P2d 1274, 55 St. Rep. 707 (1998), overruled in Slavin v. St., 2005 MT 306, 329 M 424, 127 P3d 350 (2005).

No Error in Denial of Untimely Midtrial Motion to Suppress Evidence: Motions to suppress are expressly among pretrial matters that must be raised at or before the omnibus hearing. Griffing indicated an intent to file motions to suppress his confession and physical evidence pursuant to this section and 46-13-302, but the motions were not made until trial had commenced. Failure to raise the issues at or before the omnibus hearing constituted a waiver under this section. Thus, the trial court did not err in denying the midtrial motion to suppress as untimely. St. v. Griffing, 1998 MT 75, 288 M 213, 955 P2d 1388, 55 St. Rep. 309 (1998), following St. v. Greywater, 282 M 28, 939 P2d 975 (1997).

Failure to Raise Objection Prior to Trial — Waiver of Objection: Defendant was convicted of tampering with a witness, defendant's child. In the reply brief to the Supreme Court, defendant contended that the crime of witness tampering does not apply to the constitutionally protected relationship of parent and child and that the District Court thus did not have subject matter jurisdiction over the issue. Under this section, lack of jurisdiction must be noticed by the court at any time during the pendency of the proceedings. However, the Supreme Court held that the challenge went not to the fundamental authority of a District Court to adjudicate a witness tampering case but rather to the constitutionality of applying the witness tampering statute to this particular case. Because the issue was not actually jurisdiction but rather constitutionality, the Supreme Court declined to address it because it was not raised until defendant filed the reply brief, therefore waiving the defense. St. v. Williams-Rusch, 279 M 437, 928 P2d 169, 53 St. Rep. 1224 (1996).

Refusal to Grant Defense Access to Witness Statement Used to Refresh Memory Prior to Pretrial Hearing — No Abuse of Discretion: It was within the discretion of the District Court to refuse to allow defense counsel to inspect a written statement used by a witness to refresh his memory prior to a pretrial hearing when there was nothing in the statement that would have aided the defense's cross-examination and the statement was subsequently provided to the

defense after the hearing and prior to trial. It would have been nonsensical to allow the defense access to the statement at the same hearing at which defense access to the statement was at issue. St. v. Briner, 253 M 158, 831 P2d 1365, 49 St. Rep. 402 (1992).

Denial of Motion to Disqualify County Prosecutor for Alleged Conflict of Interest: Defendant sought to disqualify the County Attorney who was prosecuting his criminal case based on an alleged conflict of interest arising from the County Attorney's representation of the county in defendant's pro se civil suit against the county and its officers filed subsequent to defendant's arrest but prior to trial. Lacking a showing that defendant's prosecution was handled any differently because of his pending civil suit, the trial judge was well within his discretion in denying defendant's motion to disqualify the County Attorney. St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992). See also St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107, 57 St. Rep. 185 (2000).

Authority to Dismiss: A judge had no authority under 46-13-101 to grant the defendant's motion to dismiss based on a defense that went to the general issue to be determined at trial or under 46-13-201 (renumbered 46-13-401) because he did not set forth the reasons for dismissal in an order entered on the minutes. St. v. Cole, 174 M 380, 571 P2d 87 (1977).

Timeliness of Motion to Suppress Evidence:

If evidence was obtained by unlawful search and seizure, it was necessary for the accused, who desired to exclude such evidence from his trial, to make a timely objection to its introduction and not wait until the first day of trial after voir dire of the jury. St. v. Briner, 173 M 185, 567 P2d 35 (1977), followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

If accused has had opportunity to suppress illegally obtained evidence before trial and fails to do so, objection to the evidence at trial will not avail him. St. v. Gotta, 71 M 288, 229 P 405 (1924).

Off-the-Record Statements — Prosecutorial Misconduct: Allegations of improper statements by an Assistant Attorney General and prosecutorial misconduct do not reach the merits of the charges and are a weak basis for seeking dismissal of the charges. St. v. Scanlon, 33 St. Rep. 1355 (1976), replaced by opinion in 174 M 139, 569 P2d 368 (1977).

Bill of Particulars: In a criminal case no bill of particulars may be required or ordered. St. v. Bosch, 125 M 566, 242 P2d 977 (1952).

Objection Based on Statute of Limitations:

Under former law, the defendant was charged with taking and using an automobile without the consent of the owner, which offense was punishable by fine or imprisonment in the county jail or by imprisonment in the state penitentiary not exceeding 5 years. The information was not filed until 14 months after the commission of the offense. The court held that the District Court erred in sustaining a demurrer to the pleading on the grounds that, the offense being a misdemeanor, the limitation of 1 year within which the information could be filed had expired, and in holding that it was without jurisdiction to proceed. St. v. Atlas, 75 M 547, 244 P 477 (1926).

Under former law, when an information for a misdemeanor was filed more than 1 year and 10 months after the alleged offense, and it alleged that on or about that time the defendant left the state and afterwards resided outside the state, the defendant could properly demur to the information on the grounds that prosecution was barred by the Statute of Limitations. St. v. Clemens, 40 M 567, 107 P 896 (1910).

Objection That Facts Do Not Constitute an Offense — When Taken: Under former law, the objection that the facts stated in an information do not constitute a public offense could be taken by demurrer, at the trial under a plea of not guilty, or after the trial in arrest of judgment. St. v. Smith, 58 M 567, 194 P 131 (1920).

Collateral References

Criminal Law *key* 105, 265; Indictment and Information *key* 133(7), 137 through 139.

22A C.J.S. Criminal Law §§606 through 618; 42 C.J.S. Indictments and Informations §§225, 226.

41 Am. Jur. 2d Indictments and Informations §§276 through 285.

Disqualification or recusal of prosecuting attorney because of relationship with alleged victim or victim's family. 12 ALR 5th 909.

Res judicata, modern status of doctrine in criminal cases. 9 ALR 3d 203.

Preconviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory. 4 ALR 3d 404.

46-13-104. Ruling on motions.

Commission Comments

1991 Comment: This statute combines elements of both the 1987 code and the Federal Rules of Criminal Procedure to establish a single statute governing the determination of pretrial motions. The statute continues to recognize the court's discretion in this area but imposes certain requirements upon the court not stated in the 1987 code.

Subsection (1) adopts the initial sentence of the federal rule providing for the determination of pretrial motions. See Rule 12(e), Fed. R. Crim. P. The statute reflects 1987 MCA 46-13-104 but more clearly identifies the court's discretion in deferring the determination of certain pretrial motions.

Subsection (2) provides the court with certain discretion to conduct hearings on motions, although in certain cases a hearing is mandatory.

Subsection (3) is a new requirement that the determination of any pretrial motion either be written or stated on the record so as to be available for review.

Source: Federal [Rules of Criminal Procedure,] Rule 12(b)(4).

Compiler's Comments

1991 Amendment: In (1), near beginning after "trial", deleted "raising defenses or objections", after "court" inserted "for good cause", and at end inserted "or until after the verdict, but a determination may not be deferred if a party's right to appeal is adversely affected"; inserted (2) concerning hearing on motion; inserted (3) requiring court's statement of findings of fact and conclusions of law; and made minor changes in style.

Case Notes

Hearing on Suppression Motion Unnecessary When Facts Uncontested: In Justice's Court, Schulke moved to suppress evidence, but the motion was denied. Schulke stated that an evidentiary hearing on the motion would be superfluous and thus did not request a hearing. On appeal, the District Court declined to hold a hearing on the suppression motion and Schulke asserted error, but the Supreme Court affirmed. Schulke did not contest the facts in the investigating officer's report in Justice's Court and argued that a hearing was necessary only when the Justice's Court and the District Court ruled against him. An evidentiary hearing is unnecessary when facts are uncontested and the court is asked to make a decision as a matter of law. The District Court did not abuse its discretion in denying a hearing on the suppression motion when a hearing was not requested in Justice's Court. St. v. Schulke, 2005 MT 77, 326 M 390, 109 P3d 744 (2005). See also St. v. Shook, 2002 MT 347, 313 M 347, 61 P3d 863 (2002).

Objectionable Testimony Elicited by Defendant's Own Actions — Right to Allege Error on Appeal Waived: Smith was charged with stealing his mother's credit card and using the card to withdraw money from her bank account and charge items for his personal use. Pretrial, Smith moved in limine to preclude witnesses at trial from testifying regarding Smith's prior criminal convictions, and the motion was granted. When his mother testified, Smith's counsel asked what efforts she made to locate Smith after discovering that her credit card was gone, and the mother responded that she had checked with Smith's parole officer to see if the officer knew where Smith was. Smith immediately moved for a mistrial, asserting that the comment violated the motion in limine, but the motion was denied. On appeal, the Supreme Court affirmed. Because the objectionable testimony was elicited by Smith's own actions, he waived the right to allege error on appeal because he actively participated in creating the error. St. v. Smith, 2005 MT 18, 325 M 374, 106 P3d 553 (2005), following St. v. Gafford, 172 M 380, 563 P2d 1129 (1977).

No Pretrial Determination Regarding Whether Statement Admissible for Impeachment Purposes — Waiver of Right to Object to Admissibility: At the time of arrest, Harris admitted an act of sexual intercourse with his adopted daughter. Prior to trial, Harris moved to suppress the statement on grounds that it was involuntary and obtained in violation of his fifth amendment rights under the United States Constitution. The District Court agreed that the statement could not be used, but expressly stated that its limited suppression order did not address whether it could be used by the state for impeachment purposes in the event that Harris testified, essentially reserving its ruling for a later time, as authorized in this section. Harris's testimony about the statement during direct examination brought the statement into evidence by his own volition, constituting waiver of the right to appeal the admissibility of the statement for use as impeachment. St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), distinguishing St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996), and St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Motion In Limine Not Ruled on Until After Defense Witness Called — Opening Statement Not Impaired — Requirements of Statute: Huerta was charged with felony assault (now assault with

a weapon) of a juvenile. At his trial, Huerta tried to introduce testimony from witnesses that the juvenile's mother, Brenda, was in the habit of severely punishing her son. The District Court required Huerta to prepare summaries of the testimony expected from his witnesses, but it was not until the second day of trial, after Huerta had called his first witness, that the District Court ruled on the state's motion in limine to exclude the testimony. Huerta claimed that the delay in the ruling was error because of the confusion that it caused and that it had prevented him from making an effective opening statement. Huerta also claimed that the District Court violated this section because the District Court did not state its intention to delay ruling on the state's motion until trial with a statement of good cause. The Supreme Court held that this section cannot be read to require the District Court to make a statement of good cause at any particular time but only to require that the court have good cause for taking the motion under advisement. The Supreme Court reviewed the record and held that the District Court had good cause in delaying the ruling on the state's motion until trial because the District Court needed to determine the motion in light of the cross-examination of Brenda and to decide the relevance of any character or habit evidence in light of her testimony. St. v. Huerta, 285 M 245, 947 P2d 483, 54 St. Rep. 1133 (1997).

46-13-108. Notice by prosecutor seeking persistent felony offender status.

Commission Comments

1991 Comment: This statute retains the requirement contained in 1987 MCA 46-18-503 that the prosecutor notify the defendant that he is seeking persistent felony offender status. Subsection (1) requires that the notice be given at or before the omnibus hearing and references 46-13-101. Subsection (2) retains the 1987 code's requirement for notice that the prosecutor is seeking persistent felony offender status. See 1987 MCA 46-18-503(2). Subsection (3) reflects the statute change that requires notice at or before the omnibus hearing. Subsection (4) retains the 1987 code's hearing requirements. See 1987 MCA 46-18-503(4).

Source: Revised Sections of Nebraska, 1943 (29-2221(2)).

The section is a new approach to charging prior convictions and is intended to give the defendant the requisite notice and to avoid infecting any trial of the case with the potentially prejudicial information of the defendant's prior criminal record.

Compiler's Comments

1999 Amendment: Chapter 395 in (5) inserted "or nolo contendere". Amendment effective October 1, 1999.

1993 Amendment: Chapter 262 at end of (1) substituted "46-13-110" for "46-13-101".

1991 Amendment: In (1), at beginning, inserted exception clause, before "seeks" substituted "prosecution" for "state", after "offender" deleted "under 46-18-502", and after "given" substituted "at or before the omnibus hearing pursuant to 46-13-101" for "in writing to the accused or his attorney before the entry of a plea of guilty by the accused or before the case is called for trial upon a plea of not guilty"; in (2) substituted "and may not be" for "The notice and the charges of prior convictions contained therein shall not be made public or in any manner", after "returned" deleted "upon the felony charge", and at end substituted "except as allowed by the Montana Rules of Evidence" for "However, if the defendant testifies in his own behalf, he is subject to impeachment as provided in the Montana Rules of Evidence"; in (3), at beginning, substituted "defendant objects to the allegations contained in" for "accused is convicted upon the felony charge", after "notice" deleted "together with proper proof of timely service, shall be filed with the court before the time fixed for sentencing", and at end substituted "the judge shall conduct a hearing to determine if the allegations in the notice are true" for "the court shall then fix a time for hearing with at least 3 days' notice to the accused"; in (4), in two places, substituted "judge" for "court" and at end substituted "as provided by law" for "under the provisions of 46-18-502"; inserted (5) regarding filing and sealing of notice; and made minor changes in style.

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GENERAL

Alternative Sentence for Drug Offense Not Precluded by Persistent Felony Offender Statutes, but Incarceration Not Error: Brendal pleaded guilty to fraudulently obtaining dangerous drugs and was sentenced to 25 years in prison with 15 years suspended. Based on prior convictions for the same offense, the sentencing court designated Brendal as a persistent felony offender and imposed a mandatory 10-year prison sentence. Brendal appealed the sentence on grounds that

the sentencing court should have considered a sentence to a drug treatment program pursuant to the alternative sentencing authority in 45-9-202. However, the Supreme Court affirmed. The persistent felony offender statutes do not preclude a District Court from providing an alternative sentence under 45-9-202 for a person convicted of a drug-related offense, as long as the required criteria for imposing an alternative sentence are satisfied. Therefore, although the District Court could have provided an alternative sentence, it was not error to sentence Brendal to incarceration. St. v. Brendal, 2009 MT 236, 351 M 395, 213 P3d 448 (2009).

Failure to Object to Persistent Felony Offender Notice — No Hearing or Findings Required: If a defendant fails to object to a persistent felony offender notice, no hearing or findings regarding alleged prior convictions are required. St. v. Minez, 2003 MT 344, 318 M 478, 82 P3d 1 (2003), followed in St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

District Court Jurisdiction to Apply Persistent Felony Offender Designation to Felony DUI: Yorek pleaded guilty to and was sentenced on a felony DUI charge. The District Court determined that it had jurisdiction and imposed a persistent felony offender designation. Yorek sought postconviction relief on grounds that the District Court lacked subject matter jurisdiction to impose a persistent felony offender designation for felony DUI. The District Court denied the petition for postconviction relief, concluding that sentencing for felony DUI is not solely governed by 61-8-731 and 61-8-734, that nothing in the persistent felony offender statute excludes felony DUI offenders from its application, and that Yorek waived any jurisdiction claim by pleading guilty. The Supreme Court affirmed. Nothing in 46-18-502 distinguishes between or among the types of felonies to which it applies, or excludes DUI offenders. Rather, if the underlying charge meets the definition of a felony and if the state has provided proper notice of its intent to seek persistent felony offender status under this section, a District Court has the statutory authority to designate and sentence an offender as a persistent felony offender. Yorek's crime met the definition of a felony, and Yorek fell squarely within the persistent felony offender statute. The state met the notice provisions, and the District Court possessed subject matter jurisdiction to designate Yorek as a persistent felony offender. Because the jurisdiction question was dispositive, the Supreme Court did not reach the question of whether Yorek's guilty plea was a procedural bar against bringing the claim. St. v. Yorek, 2002 MT 74, 309 M 238, 45 P3d 872 (2002), followed in St. v. Pettijohn, 2002 MT 75, 309 M 244, 45 P3d 870 (2002), and St. v. Damon, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005).

Sentencing Hearings — Montana Rules of Evidence Not Applicable: Rule 101(c)(3), Montana Rules of Evidence, exempts sentencing proceedings from evidentiary constraints, and because felony offender hearings are part of the sentencing proceedings, they too are subject to the Montana Rules of Evidence. St. v. Lamere, 202 M 313, 658 P2d 376, 40 St. Rep. 110 (1983).

Similar Break-Ins on Same Day Admissible: Defendant was charged with felony theft for stealing a pickup, burglary for a break-in at the Ulm Bar, burglary for a break-in at the Mountain Palace Bar, and theft of personal property from the Ulm Bar break-in. On the same day these break-ins occurred, the Craig Bar was broken into and burglarized. The District Court denied defendant's motion in limine to exclude evidence from similar crimes committed on the same date as those with which defendant was charged. On appeal the Supreme Court said that applying the four-part test set forth in St v. Just, 184 M 262, 602 P2d 957 (1979), the evidence was admissible, that the proper procedure was followed as to the form and content of the notice, and that the jury was properly instructed. St. v. Van Natta, 200 M 312, 651 P2d 57, 39 St. Rep. 1771 (1982).

Admissibility of Evidence of Prior Crimes or Acts: To introduce evidence of prior uncharged offenses for the limited purposes allowed, the potential for prejudice to the defendant requires the prospective application of a three-part procedure in addition to any other requirements: (1) the defendant must be given notice of planned introduction and its purpose, following the form and procedure in 46-18-503 (renumbered as this section); (2) the court must give a cautionary instruction on the purpose of the evidence; and (3) the court must charge the jury that the defendant is not being tried and may not be convicted for any other offense. St. v. Just, 184 M 262, 602 P2d 957 (1979).

Statutes Construed Together: The Supreme Court saw no problem in construing 46-18-502 and 46-18-503 (renumbered as this section) together to provide both the procedural requirements and substantive basis for implementing persistent felony offender sanctions since that is precisely what the Legislature intended. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

Not Retroactive: The statute precluding disclosure to the jury in a criminal proceeding of any prior convictions does not apply retroactively to a criminal trial prior to the effective date of the statute. St. v. Gray, 152 M 145, 447 P2d 475 (1968).

NOTICE

Filing of Amended Information — New Omnibus Hearing or Persistent Felony Offender Notice Not Required: Potter asserted that because he was not notified anew that the state would seek a persistent felony offender designation following the filing of an amended information adding an additional felony charge, the trial court erred in sentencing him as a persistent felony offender. The Supreme Court disagreed. Nothing in statute requires either a new omnibus hearing or a new persistent felony offender notice upon the filing of an amended information. Potter knew for over a year that the state would seek a persistent felony offender designation, and nothing in the record indicated that he was prejudiced by the timing of the notice. The persistent felony offender designation was affirmed. St. v. Potter, 2008 MT 381, 347 M 38, 197 P3d 471 (2008).

Adequate Notice of State's Intention to File Persistent Felony Offender Status — Failure of Defendant to File Objection to Prior Offense Despite Opportunity to Do So: Shults asserted that the state failed to properly notify of its intention to seek persistent felony offender (PFO) status by not specifying the alleged prior convictions before or at the omnibus hearing. The Supreme Court held that notice was adequate. The Supreme Court will not overturn a PFO designation if a defendant has ample opportunity to object to PFO treatment, including the underlying charge on which the statute is based, and the defendant is not prejudiced by the timing of the filing. Here, Shults had 4 months to file an objection to the alleged prior offense prior to sentencing, but failed to do so. The sentencing designation was affirmed. St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006), followed in St. v. Ramsey, 2007 MT 31, 336 M 44, 152 P3d 710 (2007), and St. v. Dodson, 2009 MT 419, 354 M 28, 221 P3d 687 (2009).

Belated Notice to Seek Persistent Felony Offender Status Based on "Good Cause": Fields, charged with felony theft and DUI, negotiated a plea agreement under which the state agreed not to seek persistent felony offender status and recommended a 7-year suspended sentence. After the signing of the agreement and the filing of an omnibus status report, the state reinstituted its intent to seek persistent felony offender status after Fields informed officials that he would not abide by the agreement and would be seeking a jury trial. When upon conviction, the District Court sentenced Fields to a prison term as a persistent felony offender, Fields appealed, alleging that the District Court erred when it determined that the state had "good cause" to increase Fields' sentence as a persistent felony offender because the state had not given Fields notice of that intent at the omnibus hearing. In affirming the District Court decision, the Supreme Court ruled that there was "good cause" for allowing the state to file its intent to seek persistent felony offender status as a result of Fields' decision not to follow through with the negotiated plea agreement. St. v. Fields, 2000 MT 328, 303 M 56, 15 P3d 400, 57 St. Rep. 1391 (2000).

Guilty Plea Constituting Waiver of Nonjurisdictional Defects and Defenses: Following Niederklopfer's omnibus hearing on charges of deliberate homicide, the state filed a notice to seek increased punishment of Niederklopfer as a persistent felony offender. Niederklopfer subsequently waived his rights, pleaded guilty to mitigated deliberate homicide pursuant to a plea agreement, and was sentenced to 80 years as a persistent felony offender. Niederklopfer later sought postconviction relief on grounds that the state did not give sufficient notice that it would seek persistent felony offender status. The Supreme Court affirmed the sentence. The District Court had jurisdiction to consider Niederklopfer a persistent felony offender when notice was filed to designate him as such, even though the notice was filed late. Timeliness of the notice was not jurisdictional, but rather the late notice was a procedural defect that Niederklopfer did not object to when filed. Niederklopfer's voluntary and intelligent guilty plea constituted a waiver of nonjurisdictional or procedural defects, including the timeliness of the notice. Because Niederklopfer failed to allege that he would have gone to trial but for his counsel's failure to object, the second prong of the Strickland test (466 US 668) for ineffective assistance of counsel was not met, and the District Court did not err in denying his petition for postconviction relief. St. v. Niederklopfer, 2000 MT 187, 300 M 397, 6 P3d 448, 57 St. Rep. 742 (2000).

Notice of Intent to Seek Increased Punishment Not Filed With Court Until After Trial — No Error in Persistent Felony Offender Designation: The state timely served defense counsel with notice of its intent to seek increased punishment for McQuiston as a persistent felony offender but did not file the notice with the court until after trial was concluded, 5 months before sentencing. McQuiston contended that timely filing of the notice was a jurisdictional prerequisite and that failure to so do constituted reversible error. However, the state's notice to defense counsel 5 months before trial and to the court 5 months before sentencing did not prejudice McQuiston, and the persistent felony offender designation was not made in error. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Notice to Specify Purpose of Proposed Evidence: The prosecution's notice to the defendant of the state's intent to introduce evidence of prior conduct stated that the evidence was to be introduced for the purpose of showing "opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in committing the offenses charged". The Supreme Court held that the introduction of the evidence was reversible error because the prosecution had used a "shotgun" approach in listing reasons for introducing the evidence rather than giving the defendant a specific purpose for the evidence's admission. St. v. Croteau, 248 M 403, 812 P2d 1251, 48 St. Rep. 484 (1991).

Prejudice of Untimely Notice Not Cured by Right to Continuance: On the first day of trial, the prosecution gave the defense notice of additional evidence of prior acts that the state intended to introduce. The Supreme Court held that the defendant had the right to a speedy trial and to proper notice and that the defendant could not be compelled due to untimely notice to choose between the two. St. v. Croteau, 248 M 403, 812 P2d 1251, 48 St. Rep. 484 (1991).

Time of Giving:

The state could give defendant who pleaded not guilty notice of intent to seek increased punishment at any point prior to the beginning of the trial and did not have to give the notice before or at the pretrial omnibus hearing. St. v. Scheffelman, 225 M 408, 733 P2d 348, 44 St. Rep. 357 (1987).

When notice of the invocation of the persistent felony offender statute was given 12 days before the case came to trial, the State's invocation adequately conformed with the statute and due process. St. v. Seitzinger, 180 M 136, 589 P2d 655 (1979).

The county attorney had the right to seek increased punishment under 46-18-502, whether plea bargaining negotiations were in progress or not. There was no record of retaliation on his part. The only question presented was whether the giving of the notice required by 46-18-503 (renumbered as this section) violated due process when given on a Friday afternoon when the trial was to commence the following Monday. The Supreme Court held that notice can be given any time before the case is "called for trial", meaning the beginning of the trial. St. v. Johnson, 179 M 61, 585 P2d 1328 (1978).

Notice of Exact Crimes and Form of Testimony Required: Defendant was charged with slashing his ex-wife's tires. During the trial, evidence was introduced that the wife had had a total of 36 tires slashed since her divorce from defendant. Additionally, men she had dated testified to having their tires slashed during the dating period. Defense counsel challenged this evidence of prior conduct because the defense had not received notice that the State would introduce such evidence. The State said that there was no prejudice as defendant was aware the State intended to introduce such evidence. The Supreme Court said prejudice was found in the fact that defendant did not know exactly what acts or crimes he would have to be prepared to defend against at trial, nor did he know the form of such testimony. The case was remanded for retrial. St. v. Brown, 209 M 502, 680 P2d 582, 41 St. Rep. 852 (1984).

Notice as Jurisdictional or Procedural: This section, which provides for sentencing persons designated as persistent felony offenders, requires that two notices be given to the accused or his attorney. The first notice must be given prior to the entry of a guilty plea or before a trial is called upon a not guilty plea. The second notice applies when a defendant is convicted. The first notice is jurisdictional and was clearly given in this case. The second notice is procedural. The record does not show any prejudice due to lack of the second notice, because defendant appeared at the hearing with counsel and did not contest the lack of notice. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983). See also St. v. Hawkins, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989).

Written Notice Required: Although the defendant was aware of the State's intention to have him designated as a persistent felony offender, the State did not file written notice of its intent until the day of sentencing. The case was remanded for sentencing, with written notice of the State's intent to be given at least 3 days prior to sentencing. St. v. Welling, 199 M 135, 647 P2d 852, 39 St. Rep. 1215 (1982).

Failure to Object to Lack of Notice: Failure to object to lack of notice at the time of sentencing as a persistent felony offender does not constitute a waiver of the requirement of notice to the defendant. In re Davis, 179 M 196, 587 P2d 30 (1978).

Notice Not Error When Jury Uninformed: When the State, pursuant to this section, gave proper notice to the defendant of its intention to seek increased punishment if the defendant was convicted on a charge of rape, on the basis of the defendant's prior conviction of a felony, there was no error since the jury was not in possession of such information. St. v. Metcalf, 153 M 369, 457 P2d 453 (1969).

Alleging Previous Conviction: Under former law, in an information charging, among other things, a prior conviction of an offense in another state which in this state was punishable by imprisonment in the state prison, it was unnecessary to allege the facts constituting the crime in the foreign state, and it was immaterial whether the offense of which the defendant was alleged to have been previously convicted in the sister state was a felony there. St. v. Paisley, 36 M 237, 92 P 566 (1907).

HEARING

Finding of No Mitigating Factors Supported in Record: Where the trial court considered defendant's drinking and sexual problems but concluded that those conditions did not excuse defendant from accountability for his acts, and the evidence presented at the hearing and in the presentence investigation report supported the trial court's conclusion, there was no abuse of discretion in sentencing defendant as a persistent felony offender. St. v. Metz, 184 M 533, 604 P2d 102 (1979).

Specific Objection to Evidence Required: By failing to make a specific objection, the defendant waived his right to assert that the State's certificate of prior conviction was not competent evidence without proof that he was the person named in the certificate. The defendant was informed well in advance of the time he entered his guilty plea that he would be tried as a persistent felony offender. At the hearing to determine whether the defendant was a persistent felony offender, he had an opportunity to object to the State's lack of identification but failed to do so. St. v. Metz, 184 M 533, 604 P2d 102 (1979).

Impeachment of Defendant's Testimony: Subsection (2)(b) of this section does not change any law relative to informing the jury of a defendant's prior record for impeachment purposes. A prior record of the defendant may still be used to impeach his testimony should he decide to testify in his own behalf. St. v. Romero, 161 M 333, 505 P2d 1207 (1973).

Sufficiency of Evidence: A mere showing that the defendant's name is similar to the name of a person on a charge sheet showing an alleged prior offense is not sufficient to authorize an enhanced sentence. There must be competent proof that the defendant is the same person as the one named on the charge sheet. Failure to produce such proof does not invalidate the conviction, only the sentence. St. v. Cooper, 158 M 102, 489 P2d 99 (1971).

Cross-Examination of Defendant: Even though the prosecutor gave notice under this section, the defendant was not entitled to enjoin the prosecutor from cross-examining the defendant on prior convictions in the absence of a showing of prejudice from the cross-examination and the defendant was not prejudiced by his failure to testify after an injunction was denied. St. v. Lewis, 157 M 452, 486 P2d 863 (1971).

Constitutionality: Subsection (4) of this section does not unconstitutionally deprive the accused of the right to a jury trial. Newman v. Estelle, 156 M 502, 484 P2d 276 (1971), certiorari denied, 404 US 966, 30 L Ed 2d 285, 92 S Ct 341 (1971).

Collateral References

Admissibility of evidence: admissibility of evidence of subsequent criminal offenses as affected by proximity as to time and place. 92 ALR 3d 545.

National Motor Theft Act: conviction under Dyer Act (18 USCS §§2312, 2313) as ground for enhancement of penalty under state habitual criminal statutes. 65 ALR 3d 586.

46-13-109. Notice by prosecutor of other crimes, wrongs, or acts.

Compiler's Comments

1999 Amendment: Chapter 395 in (3) inserted "or nolo contendere". Amendment effective October 1, 1999.

Case Notes

Failure to Give Notice of Intent to Introduce Evidence of Prior Intervention Hearing and Sanctions — New Trial Granted: At Campa's drug trial, the state sought to introduce evidence of a prior intervention hearing and of sanctions that were imposed as a result of the hearing. However, the state neglected to give Campa notice of its intent to introduce the evidence as required by 46-13-109. Campa appealed the lack of notice, but the state argued that no notice was required because the evidence was part of the transaction of the charged offense and thus admissible under the transaction rule in 26-1-103. The Supreme Court disagreed. Evidence of the intervention hearing and sanctions constituted evidence of a wrong at a time other than the offense charged, and because the state failed to comply with the procedural notice requirement, the evidence was improperly admitted, prejudicing Campa. The case was reversed and remanded for a new trial. St. v. Campa, 2009 MT 251, 351 M 504, 213 P3d 1102 (2009).

46-13-110. Omnibus hearing.

Commission Comments

1991 Comment: Subsection (1) provides a time limit for the court to hold an omnibus hearing. Subsection (3) is designed to constitute a checklist of motions and notices otherwise provided in the statutes that should be considered, when applicable, at the omnibus hearing. Subsection (5) grants the court discretion to rule on the motion summarily or to establish a briefing schedule and subsequent hearing.

Compiler's Comments

2005 Amendment: Chapter 557 in (3) in first sentence inserted "unless ordered by the court". Amendment effective July 1, 2005.

1993 Amendment: Chapter 262 at end of (1)(g) substituted "persistent felony offender status, 46-13-108" for "enhanced punishment, 46-13-503"; and in (1)(h) substituted "46-13-109" for "46-13-503".

Case Notes

Factual Basis for Amended Charge Same as Factual Basis for Initial Charge — Second Omnibus Hearing Not Required: Adkins was originally arraigned on a charge of intent to distribute dangerous drugs, which was predicated on Adkins' possession of dangerous drugs, and an omnibus hearing was held on the charge. The state subsequently dropped the intent to distribute charge and amended the information to include only a straight possession charge. Adkins contended that a second omnibus hearing was required on the possession charge. The Supreme Court disagreed. The factual basis for the straight possession charge was identical to the factual basis underlying the intent to distribute charge for which an omnibus hearing had been held. Therefore, when the state amends an information to charge an alternate lesser included offense that is supported by an identical factual basis, a new omnibus hearing is not required. St. v. Adkins, 2009 MT 71, 349 M 444, 204 P3d 1 (2009).

Filing of Amended Information — New Omnibus Hearing or Persistent Felony Offender Notice Not Required: Potter asserted that because he was not notified anew that the state would seek a persistent felony offender designation following the filing of an amended information adding an additional felony charge, the trial court erred in sentencing him as a persistent felony offender. The Supreme Court disagreed. Nothing in statute requires either a new omnibus hearing or a new persistent felony offender notice upon the filing of an amended information. Potter knew for over a year that the state would seek a persistent felony offender designation, and nothing in the record indicated that he was prejudiced by the timing of the notice. The persistent felony offender designation was affirmed. St. v. Potter, 2008 MT 381, 347 M 38, 197 P3d 471 (2008).

Failure to Meet Statutory Duty to Bring Defense, Objection, or Request at or Before Omnibus Hearing Constituting Waiver: A party has a statutory duty to bring any defense, objection, or request that is capable of determination without trial of the general issue, including motions to suppress, at or before the omnibus hearing or by a later date if ordered by the court, and failure to do so constitutes a waiver. Here, defendant's motion to suppress was filed after both the date of the omnibus hearing and a later deadline for motions set by the District Court, but 6 months before the actual trial. Nevertheless, the motion was untimely as a matter of law, and the District Court did not err in denying relief from the waiver. St. v. VonBergen, 2003 MT 265, 317 M 445, 77 P3d 537 (2003), followed in St. v. Adkins, 2009 MT 71, 349 M 444, 204 P3d 1 (2009).

No Error in Denial of Untimely Midtrial Motion to Suppress Evidence: Motions to suppress are expressly among pretrial matters that must be raised at or before the omnibus hearing. Griffing indicated an intent to file motions to suppress his confession and physical evidence pursuant to 46-13-301 and 46-13-302, but the motions were not made until trial had commenced. Failure to raise the issues at or before the omnibus hearing constituted a waiver under 46-13-101. Thus, the trial court did not err in denying the midtrial motion to suppress as untimely. St. v. Griffing, 1998 MT 75, 288 M 213, 955 P2d 1388, 55 St. Rep. 309 (1998), following St. v. Greywater, 282 M 28, 939 P2d 975 (1997).

Lack of Omnibus Hearing Not Prejudicial — Adequate Notice and Presentation of Case: Defendant claimed error because no omnibus hearing was held in his criminal case, which prejudiced his opportunities for preparation of a timely defense and led to surprise when the state attempted to introduce certain physical evidence at trial. One of the purposes of the omnibus hearing is to discuss the use of evidence regarding other bad acts. In this case, the acts were other sexual assaults defendant had purportedly committed. Twenty days before trial, the state gave notice to defendant, pursuant to St. v. Just, 184 M 262, 602 P2d 957 (1979), of its intent to use the evidence of other bad acts, which constituted ample notice and opportunity for defendant to prepare for that evidence. Defendant's claim of lack of ability to confront the

witness failed because the Van Pelt exception to the rape shield law did not apply in this case because the defendant did not contend that the victim made accusations that had been adjudicated as false prior to trial. Defendant's argument of surprise also failed because even though he was not made aware at an omnibus hearing of the state's intent to introduce the rape victim's clothing as evidence, his objection to introduction of the evidence at trial was sustained and the evidence excluded. Defendant was not prejudiced by the lack of an omnibus hearing. St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994).

No Prejudice in Holding Omnibus Hearing Three Days Prior to Trial: Defendant argued that the holding of an omnibus hearing at least 30 days prior to trial as required by this section rather than 3 days before trial would have ensured timely consideration of pretrial motions and issues and would have avoided confusion and error. Noting that the purpose of the omnibus hearing is to expedite the procedures leading up to trial, the Supreme Court found that all pretrial motions were raised, argued, considered, and disposed of at the hearing and that nothing in the record demonstrated that defendant was prejudiced by the disposition of those matters 3 days rather than at least 30 days prior to trial. St. v. Sullivan, 266 M 313, 880 P2d 829, 51 St. Rep. 827 (1994).

Part 2
Specific Pretrial Motions

Part Commission Comments

1991 Part Comments: This part governs motions for a change of place of trial. While the Federal Rules of Criminal Procedure were considered, these statutes are largely modeled after the 1987 code. The statutes do not retain the general procedural requirements applicable to all pretrial motions. The statutes do establish a new provision for a return of the trial to the county in which the charge was originally filed. Established procedure, however, should not be affected by the adoption of these provisions.

Part Case Notes

Failure of Trial Court to Address Issues Raised in Defendant's Pro Se Petition — Reversible Error: After being charged with failure to register as a sexual offender, Samples was granted the opportunity to file a pretrial pro se petition addressing the ex post facto application of Title 46, ch. 23, part 5, as well as a variety of other constitutional challenges to the sexual offender registration law. The District Court substantively discussed and rejected Samples' ex post facto argument, refused to discuss the other constitutional concerns, and denied the petition. Following denial of the petition, Samples pleaded guilty, but reserved the right to appeal the ruling on the petition. On appeal, the Supreme Court held that, even though the District Court could have refused to allow the pro se motion, once the District Court expressly authorized Samples to file a pro se motion challenging the constitutionality of the sexual offender registration law, the court was obligated to address the constitutional issues raised in the petition. Failure of the District Court to consider all of the constitutional issues raised in the petition was reversible error, and the case was remanded for consideration of all issues raised by Samples in the petition. St. v. Samples, 2005 MT 210, 328 M 242, 119 P3d 1191 (2005).

Part Collateral References

Substitution of judge in state criminal trial. 45 ALR 5th 591.

Disqualification of prosecuting attorney in state criminal case on account of relationship with accused. 42 ALR 5th 581.

Disqualification from criminal proceeding of trial judge who earlier presided over disposition of case of coparticipant. 72 ALR 4th 651.

46-13-202. Motion for continuance.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 114-4; R.C.M. 1947, sections 94-9502 and 94-9503.

This section utilizes a general approach. It is comprehensive and at the same time should not harm either party by outlining pre-planned excuses that might be cause for continuance. If something has occurred that makes it difficult or impossible to meet established dates set for a case this "something" should be brought to the attention of the trial court and a ruling made. An example of the various kinds of reasons that might be grounds for a continuance are loss of a material witness, death or illness of the attorneys, or pre-trial publicity.

Compiler's Comments

1993 Amendment: Chapter 262 in first sentence of (1) substituted "prosecutor" for "state"; near end of (3) substituted "prosecution" for "state"; and made minor changes in style.

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GENERAL

Continuation of Trial Not Double Jeopardy Violation: Based on pretrial conversations with both counsel, a Justice's Court Judge anticipated an abbreviated bench trial designed to get Barron's DUI case through Justice's Court as quickly as possible so that Barron could then receive a trial de novo in District Court. However, defense counsel immediately began lodging objections, and the judge realized that the proceedings would not be quickly resolved. After concluding that neither party was ready for a more full-blown proceeding, the judge decided in the interests of justice to continue the trial to another date when the parties could be more fully prepared and more time could be allotted for trial. Defense counsel subsequently objected to the continuance on double jeopardy grounds, and following conviction and appeal to District Court, defense counsel again raised the issue, asserting that the trial following the continuation in Justice's Court constituted double jeopardy and warranted dismissal of the charges. The District Court declined to dismiss the charges, and Barron appealed. The Supreme Court considered whether Barron had been subjected to double jeopardy when the Justice's Court continued the initial bench trial and decided that no double jeopardy violation occurred. The trial following the lawful continuance did not constitute a new trial because the Justice's Court did not issue any findings or reach a verdict following the initial hearing, the state did not use the continuance to encourage the judge to reexamine evidence presented in the initial hearing, and Barron was not subjected to multiple punishments for the same offense. Double jeopardy did not apply because Barron was not subject to a second or successive trial on the underlying charges. St. v. Barron, 2008 MT 69, 342 M 100, 179 P3d 519 (2008).

No Assurance of Witness's Availability to Testify or Aid Defense — Motion for Continuance Properly Denied: After presenting his case at trial, Toulouse requested a continuance in order to allow his sister, who was sick with cancer, to testify the following day. The trial court granted a 15-minute recess to inquire whether the sister would be able to testify, but Toulouse could give no reasonable assurance that she would, so the continuance motion was denied. Following conviction, Toulouse appealed on grounds that he was denied a fair trial when the motion for continuance was denied, but the Supreme Court affirmed. A defendant moving for a continuance to secure an absent witness must demonstrate that a reasonable expectation or prospect of obtaining the presence of the witness exists, that the witness would testify, and that the witness's testimony would help the defense, and Toulouse did not meet this burden. Additionally, under 25-4-501, when a party moves to postpone a trial on the grounds of absence of evidence, such as an absent witness, the motion may be made only upon an affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to procure it. Toulouse failed to file an affidavit or to meet the other statutory criteria, so the District Court did not abuse its discretion in denying the motion for continuance. St. v. Toulouse, 2005 MT 166, 327 M 467, 115 P3d 197 (2005), following St. v. Fields, 2002 MT 84, 309 M 300, 46 P3d 612 (2002).

Failure of Defense Counsel to Diligently Obtain Requisite Witness Information — Motion for Continuance Properly Denied: Three days before Earl's trial for sexual assault, Earl learned of the existence of various witness statements that he did not have copies of. Earl moved for a continuance for additional time to review the statements. The motion was denied, and Earl appealed, arguing that the continuance should have been granted in the interests of justice. The Supreme Court disagreed. The District Court was required to consider not only the interests of justice, but also the diligence shown by the movant. The record showed that Earl's counsel did not make a diligent effort to obtain the requisite information, despite the state's recognized open file policy, nor did Earl present a compelling argument that the interests of justice mandated a continuance. Thus, denial of the continuance motion was affirmed. St. v. Earl, 2003 MT 158, 316 M 263, 71 P3d 1201 (2003).

Motion for Continuance Not Granted Absent Showing of Necessity: Three taped interviews were conducted with a sexual assault victim. The first two related to Baker's alleged assault of the victim, while the third related to separate allegations that the victim had also been abused by a family member, although Baker's name was also mentioned. Baker was not provided with a copy or transcript of the third interview prior to trial. When that information came out at trial, Baker moved for a continuance of the trial in order to review the transcript. The motion was denied, but Baker was provided a copy and viewed it during a 2-hour break. The court expressed

its willingness to reconsider the motion after the break if Baker determined more time was needed to prepare. Following the break and Baker's review of the transcript, Baker again moved for a continuance. The court reserved its ruling until after presentation of the state's case in chief, but never ruled on the motion, nor did Baker ever renew the motion or request the court to rule on the motion. On appeal, Baker contended that the court erred by failing to grant a continuance. The Supreme Court held that no error occurred because by not renewing the motion or requesting a ruling on the motion, Baker tacitly conceded that he did not need more time to prepare, thereby failing to establish the necessity for a continuance. St. v. Baker, 2000 MT 235, 301 M 323, 8 P3d 817, 57 St. Rep. 976 (2000).

Failure to Request Continuance of Trial Date — Issue Not Properly Raised or Preserved for Appeal: At a change of plea hearing 1 day before trial, Root requested that the public defender be removed and informed the court that he was seeking private counsel. The court postponed trial for 1 week, informing Root that if private counsel were retained, counsel must be ready for trial as scheduled. In the notice of substitution of counsel, Root's new counsel expressly stated an awareness of the trial date and the intention to be prepared to proceed that day. Root was convicted. On appeal, Root alleged error in the court's failure to grant a continuance of the trial. The Supreme Court noted that the trial court, either on its own motion or by granting what it considered a motion for continuance, did postpone the trial for an additional week upon learning that Root was seeking substitute counsel. Further, Root never requested a continuance, so the trial court could not be put in error on appeal regarding an issue that it had no opportunity to address. St. v. Root, 1999 MT 203, 296 M 1, 987 P2d 1140, 56 St. Rep. 792 (1999). See also St. v. Rodgers, 257 M 413, 849 P2d 1028, 50 St. Rep. 335 (1993).

Right to Speedy Trial Violated — Dismissal Correct: Defendant was charged with alternate counts of forgery or theft. After a 298-day delay, attributable solely to the state, defendant moved to dismiss for lack of speedy trial, and the District Court granted the motion. The state appealed, and the Supreme Court affirmed. When the delay resulted from the court's failure to arraign the defendant, from its failure to rule on the defendant's pretrial motions, and from the prosecution's lack of diligence, the District Court was correct in granting the defendant's speedy trial motion and in dismissing the charges with prejudice. The Barker v. Wingo factors applied. St. v. Matthews, 271 M 24, 894 P2d 285, 52 St. Rep. 305 (1995).

Videotaped Testimony — No Demonstration of Prejudice: Defendant claimed that he was prejudiced by the District Court's denial of his motion for continuance made on the day that videotaped testimony was to be made. When defendant failed to demonstrate prejudice on appeal, the Supreme Court ruled that the District Court did not err in denying the motion for continuance. St. v. Scott, 257 M 454, 850 P2d 286, 50 St. Rep. 353 (1993).

Continuance Sought to Allow Investigator More Time: The defendant contended that the trial court erred in not granting his request for a continuance to allow his special investigator more time. The Supreme Court affirmed the trial court on the basis of the lower court's findings that the motion was not timely, the defendant had not been diligent in his trial preparation, and the continuance would inconvenience many witnesses. St. v. LaPier, 242 M 335, 790 P2d 983, 47 St. Rep. 760 (1990).

Minimal Diligence of Movant — Motion for Continuance Denied: This section clearly allows the District Court to exercise discretion in granting or denying a motion for continuance after considering the diligence put forth by the movant. Where a trial date had already been rescheduled twice, the court properly denied a motion for continuance when defendant offered no evidence or argument that he exercised due diligence in pursuing a psychological evaluation and no formal affidavit was submitted as required by 25-4-501. St. v. French, 233 M 364, 760 P2d 86, 45 St. Rep. 1557 (1988), followed in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992).

Period of Delay Following Grant of Continuance Chargeable Against Defendant: Where trial would have occurred within 6 months of the filing of the charge had defendant not moved for continuance, the period of delay was chargeable to defendant and the state did not have the burden of explaining the delay or showing absence of prejudice to defendant. St. v. Moehr, 227 M 253, 738 P2d 499, 44 St. Rep. 1058 (1987).

Pro Se Defendant — No Prejudice to Deny Motion for Continuance: Pro se defendant requested continuance so he could file proposed jury instructions. The motion was supported with the reason that because of all his other pending lawsuits, he did not have time to prepare the proposed instructions. The Supreme Court held that the defendant was not prejudiced by denial of the motion when over 4 months elapsed between arrest and trial. St. v. Lance, 222 M 92, 721 P2d 1258, 43 St. Rep. 1086 (1986).

Delay Charged to Defendant Who Waived Speedy Trial Right: No denial of defendant's right to speedy trial occurred where defendant had previously filed multiple waivers of his right to speedy trial, pending a great number of motions and voluminous supporting briefs, and subsequently was granted an extension to allow substitution of counsel, which resulted in an additional 2-month delay. St. v. Harvey, 219 M 402, 713 P2d 517, 43 St. Rep. 46 (1986).

Judge, Jury, and Prosecutor Failing to Appear for Trial — Not Grounds for Dismissal — Continuance Without Notice: Defendant moved to dismiss because on the date originally set for trial the defendant, his attorney, and witnesses appeared, but for disputed reasons the judge, jury, and prosecution failed to appear. The District Court was correct in denying the motion because there was no delay prejudicing defendant's right to a speedy trial, and although it would be advisable, there is no rule that courts must give notice of continuances. St. v. Roll, 206 M 259, 670 P2d 566, 40 St. Rep. 1635 (1983).

Burden of Showing Prior Due Diligence: Before a motion for a continuance will be granted, the movant must show that he has employed due diligence to procure that which he requests additional time to procure. St. v. Klemann, 194 M 117, 634 P2d 632, 38 St. Rep. 1627 (1981), followed in St. v. Strandberg, 223 M 132, 724 P2d 710, 43 St. Rep. 1591 (1986), and in St. v. McPherson, 236 M 484, 771 P2d 120, 46 St. Rep. 525 (1989).

Circumstances of Each Case to Be Considered: Decision whether denial of a continuance was so arbitrary as to violate due process depends not on the application of a mechanical test but rather on the circumstances of the particular case, particularly the reasons presented to the trial judge at the time of the request. St. v. Klemann, 194 M 117, 634 P2d 632, 38 St. Rep. 1627 (1981).

Delay in Seeking to Obtain New Counsel: An information was filed on March 20, the case was set for an April 28 trial, was reset to June 9, then to June 16, and then to June 19, when the trial began. On the first morning of the trial, appellant moved for a continuance, mainly on the ground of dissatisfaction with his counsel and a desire to obtain new counsel. The motion for continuance was properly denied because appellant did not show prejudice to himself or arbitrariness on the part of the lower court and did not make the required showing of diligence on his part. St. v. Klemann, 194 M 117, 634 P2d 632, 38 St. Rep. 1627 (1981).

Discretion of Trial Court: A motion for a continuance is addressed to the discretion of the trial court and is not a matter of right. The trial court cannot be overturned on appeal in absence of a showing of prejudice to movant. St. v. Klemann, 194 M 117, 634 P2d 632, 38 St. Rep. 1627 (1981), followed in St. v. Strandberg, 223 M 132, 724 P2d 710, 43 St. Rep. 1591 (1986).

Trial Court Discretion — Showing of Prejudice Required: In a prosecution for attempted deliberate homicide, the court did not err in denying defendant's motion for a continuance, in which defendant argued he was deprived of his right to effective counsel, due process, and time to prepare his case. Motions for continuance are directed to the sound discretion of the trial court, and the trial court will not be reversed absent a showing of prejudice to the movant, citing St. v. Paulson, 167 M 310, 538 P2d 339 (1975). As more than 2 months elapsed between the entry of defendant's plea and his motion for continuance, and because he failed to show any prejudice, the motion was properly denied. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Denial Not Abuse of Discretion: In view of defendant's failure to comply with 25-4-501, it cannot be said that the court abused its discretion in denying a motion for continuance. St. v. Pascgo, 173 M 121, 566 P2d 802 (1977).

Good Cause for Continuance: If a defendant wishes to protect himself from alleged prejudice incurred by the use of an approximate date in charging an offense and the proof offered at trial, he can move for a continuance under this section. St. v. Hall, 171 M 33, 554 P2d 755 (1976).

Substitution of Counsel: The denial of a motion for a continuance based on substitution of counsel was not an abuse of discretion or a denial of the defendants' constitutional right to counsel. St. v. Spurlock, 161 M 388, 506 P2d 842 (1973).

Time to Prepare for Trial Sufficient: The trial judge did not abuse his discretion in denying the defendant's application for a continuance over the term when the trial was set for May 7, 1956, after the defendant had entered a plea of guilty on April 24, 1956. St. v. McLeod, 131 M 478, 311 P2d 400 (1957).

Prejudice of Potential Jurors: In the absence of a showing of abuse of discretion, an order refusing continuance of a criminal trial, asked for on the grounds that a large portion of the persons qualified for jury duty in the county were prejudiced, will be affirmed. St. v. Collins, 88 M 514, 294 P 957 (1930).

ABSENCE OF WITNESSES

Guidelines for Determining Whether Motion for Continuance Based on Absent Witness Proper: During Fields' criminal trial, his motion for a recess to allow a second psychiatric expert witness was denied. When a continuance motion is requested and is reasonable, viewing all relevant

factors, including the interests of justice and defendant's right to a fair trial, denial of the request is an abuse of discretion. In determining whether the District Court abused its discretion in denying the motion for continuance based on an absent witness, the Supreme Court set out guidelines, including whether: (1) there is a reasonable expectation or prospect of obtaining the presence of the absent witness; (2) the witness's testimony would help the defense; and (3) the witness would testify. Here, the charged offense was deliberate homicide; the requested delay was less than one-half day in a case originally estimated to require a week; the trial court had already ruled that Fields' second psychiatric expert's testimony was not cumulative and would go directly to the defense of mitigated deliberate homicide; Fields' counsel had told the jury that he would present two psychiatric experts; and in closing arguments, the state referred to the fact that Fields had presented only one psychiatric expert and that the expert had interviewed only Fields. Fields' motion was reasonable, and the trial court abused its discretion in refusing the motion for a continuance to allow the second psychiatrist to testify. St. v. Fields, 2002 MT 84, 309 M 300, 46 P3d 612 (2002), followed in St. v. Toulouse, 2005 MT 166, 327 M 467, 115 P3d 197 (2005).

Failure to Employ Due Diligence — Trial Court Discretion to Deny Continuance: The trial court did not abuse its discretion when it denied Elliott's motion for a continuance, noting that: (1) the trial had previously been continued at Elliott's request; (2) no reason was given why Elliott's expert was reluctant to appear and testify; (3) the matter had been pending for almost 1 year; and (4) Elliott had ample opportunity to arrange for witnesses. St. v. Elliott, 2002 MT 26, 308 M 227, 43 P3d 279 (2002), following St. v. Walker, 225 M 415, 733 P2d 352 (1987).

DUI Charge — No Objection to Rescheduled Trial — Vague Indication of Testimony — No Abuse of Discretion Found in Denial of Request for Continuance: Big Hair was arrested for DUI, and his trial was set 6 months in advance and was rescheduled once. On the day before trial, Big Hair moved for a continuance in order to procure the testimony of an exculpatory witness. The state objected on the grounds that the state's evidence would prove the basis for the arrest and that the arresting officer was moving to Oregon and would have to return if a continuance were granted. The Supreme Court upheld the denial of a continuance, noting that there was nothing in the record showing that Big Hair objected to the rescheduled trial date, that no basis was presented for Big Hair's belief that if a continuance was granted the witness could be located, and that Big Hair gave the District Court only vague indications as to what the witness's testimony might be. St. v. Big Hair, 1998 MT 61, 288 M 135, 955 P2d 1352, 55 St. Rep. 257 (1998).

Late Motion and Unidentified Witnesses in Unknown Place: Defendant moving for a continuance to obtain additional witnesses had to show reasonable cause for the continuance, that he employed due diligence to procure the witnesses, and that their testimony could help his defense. Defendant made the motion the day before trial, was not sure where the witnesses were or that they could be located in a reasonable time, refused to identify them, and stated they could only be located through intermediaries, whom he failed to identify. The District Court's denial of the motion was affirmed. St. v. Walker, 225 M 415, 733 P2d 352, 44 St. Rep. 363 (1987), and St. v. McPherson, 236 M 484, 771 P2d 120, 46 St. Rep. 525 (1989). See also St. v. Johnston, 271 M 385, 897 P2d 1073, 52 St. Rep. 490 (1995).

No Show of Abuse of Discretion — Refusal to Continue: The District Court did not abuse its discretion and thus did not err in refusing the defendant, who was accused of aggravated assault, a continuance to allow additional time to find a witness. The record showed that the District Court considered the defense's diligence in procuring the witness and that there were no assurances given to the court that the witness would be located in a reasonable time or that her testimony would be as the defense believed it would be. St. v. Harris, 209 M 511, 682 P2d 159, 41 St. Rep. 866 (1984).

Minimal Inconvenience to Locate Local Witness: The District Court abused its discretion in denying a continuance to allow defendant time to locate a local witness who, although subpoenaed, failed to appear for the trial. In applying the guidelines set forth in St. v. DiGiallonardo, 160 M 379, 503 P2d 43 (1972), the Supreme Court determined that the continuance should have been granted because: (1) there was no showing of lack of diligence; (2) the continuance would have caused minimal inconvenience; and (3) any question regarding the probative value of the missing witness's testimony should have been resolved in favor of the defendant's right to a fair trial. St. v. Fife, 187 M 65, 608 P2d 1069 (1980).

Continuance Denied: The trial court did not abuse its discretion in denying a continuance to allow the defendants time to locate two missing witnesses. St. v. DiGiallonardo, 160 M 379, 503 P2d 43 (1972).

Insufficient Supporting Affidavit: An affidavit in support of a motion for a continuance on the ground of the absence of witnesses, which was filed on the day set for trial and failed to disclose

the date upon which such witnesses left the state, was insufficient. Such an affidavit must disclose specifically the facts expected to be proved by the absent witnesses and set forth that, if such witnesses were present, they would testify to those facts. St. v. Showen, 60 M 474, 199 P 917 (1921).

LISTING OF WITNESSES

Listing of New Witnesses Ten Days Before Trial — Defense Acquiescence in Noncontinuance: The state gave notice 10 days prior to trial of intent to possibly call 12 additional witnesses. After defense objection, the state agreed not to call five of those witnesses, whereupon the defense appeared to acquiesce in the decision not to continue the trial date. The trial court did not abuse its discretion in allowing the new witnesses. St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987).

Withholding of Informants' Names — Harmless Error: Defendant moved for a continuance when, with a trial date set for August 2, the informants' names were not revealed to defendant's attorney until late July 30 and the County Attorney knew defendant's attorney would be out of town on August 1. The District Court denied defendant's motion, and the Supreme Court affirmed. The Supreme Court held that although the Sheriff and police acted improperly in refusing to comply with the District Court's order to disclose the informants' names, this was harmless error in this case and was not grounds for a continuance. The District Court did not abuse its discretion in denying the continuance because the informants could provide nothing that would refute the state's case. The Supreme Court stated that it did not condone the actions of the law enforcement agencies or the County Attorney. St. v. Warnick, 216 M 102, 699 P2d 1049, 42 St. Rep. 675 (1985).

Prosecution Witness Endorsed on Day of Trial — Failure to Request Continuance: Under the circumstances, the District Court did not abuse its discretion in allowing the prosecution to endorse a psychological counselor, an assistant to the doctor treating the victim, as a witness on the day of the trial. The counselor was previously interviewed by the defense, and the doctor had long been identified as a prosecution witness. The defense did not petition for a continuance, which should have been done if it was believed the endorsement left the defense inadequately prepared. St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984).

Late Notice of Evidence to Be Used — Waiver of Continuance: The night before trial the prosecutor phoned the defense and gave notice that he would use a piece of evidence of a prior criminal act. Judicially mandated notice was served the next morning. The judge granted a 2 ½-day continuance to the defense. Defense counsel waived his right to additional time when he told the judge after the continuance that he had had enough time to investigate the evidence and did not need time beyond the 2 ½ days. St. v. Azure, 208 M 233, 676 P2d 785, 41 St. Rep. 302 (1984).

Witness Added Five Days Before Trial — Three More Witnesses Added Morning of Trial — Not Error to Deny Continuance — Subject of Testimony Considered: It was not error for the District Court to deny a motion for continuance to a criminal defendant when the State added an extra witness 5 days before trial and then added three more witnesses on the morning of trial. The witness added 5 days before trial, an expert, was available for interviewing by the defense during those 5 days, and her testimony was basically corroborated by the defendant. The other three witnesses, local medical employees, testified (per stipulation) on chain of custody of the evidence and (not per stipulation, but de minimis) on preparation and shipping procedures of the evidence. St. v. Smith, 208 M 66, 676 P2d 185, 41 St. Rep. 176 (1984).

Witness List Amended — Continuance Denied: The trial court properly denied a defense motion for a continuance after permitting the State to amend its witness list on the morning of trial since the State informed the defendant's counsel of a change in the information within hours after the new witness negotiated a plea involving an agreement to testify. The defense counsel knew of the development on Friday but chose to keep other commitments, thus he was estopped from claiming surprise. St. v. McClean, 179 M 178, 587 P2d 20 (1978).

Endorsement of Additional Witness on First Day of Trial:

The defendant was not prejudiced when, on the first day of the trial, the District Court endorsed two more witnesses for the prosecution because the defendant's counsel and the County Attorney had already discussed the endorsement, the two names were set out in the information as victims, the County Attorney showed good cause for failing to list the names specifically as witnesses prior to the trial, and the defendant's counsel could have asked for a postponement or a continuance. St. v. Booke, 178 M 225, 583 P2d 405 (1978).

The lower court did not err in allowing the addition of the names of 58 new witnesses to the amended information on the day of trial when the defendant failed to ask for a continuance, the

witnesses were not prejudicial to the defendant, and the court was careful to provide the defendant with protection against surprise and to ensure that the defendant was able to prepare for the testimony. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Failure of State to List Witnesses: When the State failed to list witnesses on an information and continually failed to provide a list of witnesses even after a request by the defendant to do so and a promise by the Deputy County Attorney to the District Court that he would do so, the State did not make a sufficient showing of "good cause" to add witnesses on the day of trial. Therefore, the defendant had no burden to move for a continuance of the trial date. St. v. Haag, 176 M 395, 578 P2d 740 (1978).

Amendment of Witness List — Remedy When Surprise Claimed: The proper procedure when surprise is claimed from the addition of witnesses is to ask for a continuance so that the defendant may prepare. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Amendment of Witness List During Trial: Allowing the amendment of the witness list requested because of evidentiary matters developed during presentation of the State's case was not an abuse of discretion on the part of the trial judge when the court offered the accused a continuance and there was no objection to witnesses based on surprise by the defendant. St. v. Klein, 169 M 350, 547 P2d 75 (1976).

ATTORNEY-CLIENT RELATIONSHIP

Counsel Ready for Trial — Motion for Continuance Properly Denied: Molder asserted that a motion to continue trial should have been granted because his substitute counsel was unprepared for trial. The Supreme Court applied the factors in St. v. Sotelo, 209 M 86, 679 P2d 779 (1984), to determine whether the trial court abused its discretion in denying a continuance, including: (1) the length of the requested delay; (2) whether the state's case would be prejudiced; (3) reasons for the requested continuance; (4) whether defense counsel was diligent in preparing for trial; (5) whether defendant's right to a speedy trial would be violated; and (6) defendant's right to effective assistance of counsel. Despite Molder's assertion to the contrary, his counsel stated that a trial strategy was in place and that counsel was prepared for trial. The Supreme Court held that the trial strategy was reasonable, that Molder suffered no prejudice, and that Molder's substantial rights were not affected. Denial of the motion for continuance was affirmed. St. v. Molder, 2007 MT 41, 336 M 91, 152 P3d 722 (2007).

Deprivation of Right to Private Counsel Through Denial of Continuance Motion Warranting Reversal: About 18 days before Garcia's criminal trial, Garcia moved for a continuance so that his prospective private counsel could prepare for trial. Here, the District Court denied the continuance because: (1) retention of private counsel 2 weeks prior to trial was not a sufficient reason to grant a continuance; (2) Garcia's court-appointed counsel was competent; (3) if the motion was granted, Garcia would remain in jail for a lengthy period because of the inability to post bail; and (4) a new trial could not be scheduled for several months because of the court's congested docket. The case proceeded, and Garcia was convicted. On appeal, Garcia contended that denial of the continuance motion was error, and the Supreme Court agreed. The right to counsel contemplates the right to effective assistance of counsel, and the right to effective assistance in turn encompasses the right to retain counsel of one's choosing. Regardless of whether a defendant is entitled to appointed counsel, the right to be heard through the defendant's own counsel is unqualified. Pursuant to St. v. Craig, 274 M 140, 906 P2d 683 (1995), a defendant may not insist upon appointment of specific counsel or demand dismissal or substitution of appointed counsel as long as effective assistance is rendered. However, for individuals with the means to secure private representation, the right to decide who can best conduct the case must be respected whenever feasible. A District Court must consider a motion for continuance in a criminal trial in light of the diligence shown by the moving party and may grant the continuance if, in its discretion, the interests of justice so require. Here, Garcia exercised sufficient diligence in acquiring independent representation and in seeking a continuance, and the District Court abused its discretion in denying the continuance motion. Questions of the competency and effective assistance of court-appointed counsel were irrelevant and should not have been considered in addressing the continuance. Although the denial of a continuance motion cannot be reversed absent a showing of resultant prejudice to a defendant, in this case, despite the legitimacy of the subsequent proceedings, a deprivation of this magnitude warranted reversal in the interests of justice. St. v. Garcia, 2003 MT 211, 317 M 73, 75 P3d 313 (2003).

Denial of Continuance Unfair When Defendant Tried to Secure Counsel With Due Diligence: An information was filed December 2, 1983, charging the defendant with the offense of sexual intercourse without consent. After retaining an attorney, the defendant pleaded not guilty to the

charge on December 9, 1983. The attorney continued to represent the defendant until a disagreement arose between the two concerning the handling of a motion hearing. Two days later, on May 2, 1984, the defendant released the attorney. On May 3, 1984, the defendant tried to secure another attorney, who agreed to represent the defendant only if the trial court would grant a continuance. The court refused to do so, and trial was set to begin May 14. The defendant, after trying unsuccessfully a second time to secure counsel, appeared at trial without an attorney and again moved for a continuance. The motion was denied. Voir dire commenced, a jury was selected and sworn, and the defendant again moved for a continuance, waiving his right to a speedy trial. An attorney was appointed to defend the defendant, the trial proceeded immediately without allowing defendant's counsel an opportunity to prepare, and the defendant subsequently was convicted. The trial court abused its discretion in refusing to grant the defendant's motion for a continuance of the trial as he acted with due diligence to secure new counsel on learning he was not compatible with the attorney he initially retained. The mere right to an attorney is not sufficient if that attorney is not given sufficient time to prepare the client's case, including adequate pretrial preparation time. The defendant was denied a fair trial. St. v. Lundblade, 213 M 420, 691 P2d 831, 41 St. Rep. 2208 (1984).

Denial of Continuance When Attorney Informed of Appointment 25 Days Before Homicide Trial — Fair Trial and Effective Assistance Rights Denied: Attorney for defendant charged with deliberate homicide was relieved of his duty on December 14, and the new attorney learned of his appointment on December 30. On January 3, trial was set for January 24, and the new attorney was notified of the trial date on January 5. He spoke with the trial Judge on January 10 about a continuance, and on January 17 a motion for continuance was heard and denied. In the 7 days before trial, the attorney was able to interview only 8 of the state's 12 witnesses and could not locate possible defense witnesses or interview the state's pathologist. Refusal of the continuance was an abuse of discretion and reversible error requiring a new trial. The attorney's diligence was unquestioned, and though the state had a right to a speedy trial, the defendant's right to a fair trial must take precedence, particularly since defendant waived his speedy trial right. Defendant's rights to a fair trial and effective assistance of counsel were denied. St. v. Sotelo, 209 M 86, 679 P2d 779, 41 St. Rep. 568 (1984).

Failure to Cooperate With Counsel — Continuance Denied: Defendant was arrested and charged with felony theft, theft, and burglary on November 20, 1980. His trial was set for February 22, 1981. On February 20, 1981, defendant's counsel moved for a continuance because defendant had not been cooperating with counsel up until date of motion but had finally agreed to cooperate. The District Court denied the motion, saying defendant had not employed due diligence to cooperate with counsel. The Supreme Court found no abuse of discretion and would not overturn the District Court's ruling. St. v. Van Natta, 200 M 312, 651 P2d 57, 39 St. Rep. 1771 (1982).

Collateral References

Criminal Law *key* 578, 580, 583, 588.

22A C.J.S. Criminal Law §876.

17 Am. Jur. 2d Continuance §27, et seq.; 47 Am. Jur. 2d Justices of the Peace §33.

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case. 9 ALR 3d 1180.

Accused's right to communicate with his attorney, scope and extent, and remedy or sanctions for infringement of. 5 ALR 3d 1360.

46-13-203. Change of place of trial for prejudice.

Commission Comments

1991 Comment: This statute adopts the key provisions of the 1987 code that permitted a change of the place of trial for prejudice. Subsection (1) allows that either party may file such a motion but also requires that prejudice be significant enough to jeopardize the fair trial process. The subsection preserves established procedure. As the Montana Supreme Court stated, facts must be shown creating a reasonable apprehension that a fair trial cannot be had. Allegations alone will not support a change for prejudice. See St. v. Palmer, 223 Mont. 25 (1986). Subsection (2) preserves the court's options when faced with a case in which local prejudice may affect the fair trial. Nothing in this provision differs from the 1987 code.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 114-6.

This section is not intended to overrule the two Dryman decisions, 127 Mont. 579, 269 P.2d 796; 128 Mont. 402, 276 P.2d 969; but it is intended to preserve the fair trial rule allowing a change of venue when it appears impossible to draw an impartial jury.

Compiler's Comments

1993 Amendment: Chapter 262 in two places in (2), before "court", inserted "district".

1991 Amendment: In (1) deleted last sentence that read: "The motion must be made at least 15 days prior to trial except that, if good cause is shown, it may be made thereafter"; deleted former (2) that read: "(2) The motion must be in writing and supported by an affidavit which must state facts showing the nature of the prejudice alleged. The defendant or the state may file counteraffidavits. The court shall conduct a hearing and determine the merits of the motion"; in (2)(a), after "other", deleted "court of competent jurisdiction in any"; and made minor changes in style.

1981 Amendment: Inserted (3)(b) authorizing court to select a jury in another county; and inserted (3)(c) authorizing court to take any other action to insure a fair trial.

Case Notes

General 399
Motion Required 401
Motion Properly Denied 401
Motion Erroneously Denied 403
Motion Erroneously Granted 404

GENERAL

Pretrial Publicity Test for Change of Venue — Inflammatory Publicity Defined: Devlin moved for a change of venue for his bail-jumping trial on grounds of inflammatory publicity. The District Court denied the motion, and on appeal the Supreme Court considered what constitutes inflammatory publicity. The pertinent question is not simply whether media reports contain editorializing, whether the reports were calculated to achieve a sinister purpose, or whether the reports contained factual information. Although those are relevant factors, the focus must be on the publicity's likely effect on the jury pool. Therefore, inflammatory publicity is defined as publicity that, by its nature, has the tendency to stir up in the community pervasive and strong passions of anger, hatred, indignation, revulsion, and upset to such an extent that there are reasonable grounds to believe that jurors chosen from that community could not determine a defendant's guilt or innocence in a fair and unbiased manner based solely on the evidence at trial. This determination must be made based on extant circumstances, including but not limited to the size of the jury pool, the nature of the offense charged, the type and character of the media reports, readership of the publication, the relative size of the radio or television audience, the time lapse between the publicity and the trial, whether the reports contain extrajudicial statements by prosecutors or law enforcement personnel that are prejudicial to the defendant, and whether there is any ostensible adverse community reaction to the publicity. Considering the entire record, the Supreme Court concluded that the pretrial publicity was not inflammatory. Devlin failed to demonstrate, by surveys or affidavits or by individual voir dire, that the publicity actually inflamed the prejudice of the community to such an extent that a reasonable possibility existed that Devlin would not receive a fair and impartial trial. Thus, Devlin failed to meet the standard, and the District Court did not err in denying Devlin's motion for change of venue. St. v. Devlin, 2009 MT 18, 349 M 67, 201 P3d 791 (2009). See also St. v. Link, 194 M 556, 640 P2d 366 (1981), St. v. Moore, 268 M 20, 885 P2d 457 (1994), and St. v. Fuhrmann, 278 M 396, 925 P2d 1162 (1996).

Appeal of City Court Ruling — Trial De Novo in District Court Proper Remedy: Defendant was charged in Three Forks City Court with four counts of endangering the welfare of a minor. The City Court determined that a fair trial could not be had in Three Forks and, upon motion by the city for a change of venue, ordered the case and jurisdiction transferred to Madison County. A Madison County Justice's Court jury convicted defendant of one count and acquitted on three counts. Defendant appealed to Gallatin County District Court, requesting that the case be dismissed because the Three Forks City Court improperly granted the change of venue. The District Court denied the motion to dismiss, but concluded that the change of venue was an abuse of discretion and remanded to the Three Forks City Court for a new trial. The city appealed, and the Supreme Court reversed. The general rule is that, with few exceptions, District Courts must try appeals from Justices' Courts and City Courts de novo, rather than acting as courts of review. In this case, none of the statutory or case law exceptions to the general rule applied, so the District Court was limited to the remedy of conducting a de novo trial as required by 46-17-311, regardless whether the City Court's change of venue was erroneous. A trial de novo in District Court also cured any prejudice that might have been suffered by defendant occasioned by the change of venue. The case was remanded for a trial de novo in Gallatin County District Court. Three Forks v. Schillinger, 2007 MT 331, 340 M 211, 173 P3d 681

(2007), distinguishing Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800 (1998), and St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

No Prejudice in Change of Venue: The trial court granted Bar-Jonah's motion for a change of venue from Great Falls to Butte. Even though the venue change was requested by Bar-Jonah, following conviction, he asserted that pretrial publicity in Butte precluded a fair trial. The Supreme Court found that Bar-Jonah failed to demonstrate prejudice by the decision to hold the trial in Butte and declined to reverse the judgment absent a showing that any error in changing the venue was prejudicial. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Insufficient Probable Cause for Citizen Arrest — Suppression of Evidence Proper: At the visitor center at Malmstrom Air Force Base, security officers smelled alcohol on May's breath when May sought to enter the base. Because May was a civilian, the officers believed that May could be detained but not arrested, so they held May's driver's license, registration, and proof of insurance, and May was told to wait until a highway patrol officer arrived. May was subsequently arrested for DUI and at trial asked the District Court to suppress evidence from the arrest on grounds that the arrest was not based on probable cause and was thus illegal. Following denial of the suppression motions and conviction, May appealed, and the Supreme Court reversed. Applying the test in St. v. Widenhofer, 286 M 341, 950 P2d 1383 (1997), the court determined that May's detention constituted a citizen arrest. The test for probable cause for a citizen arrest is whether a reasonable person, under personally known facts and circumstances, is warranted in believing that someone is committing or has committed an offense. Here, the security officers' sole basis for detaining May was the smell of alcohol, but the odor of alcohol emanating from May's person, standing alone, was insufficient to establish probable cause for a citizen arrest. Thus, the arrest was illegal, and evidence related to the arrest should have been suppressed. St. v. May, 2004 MT 45, 320 M 116, 86 P3d 42 (2004).

Test for Change of Venue: A motion for a change of venue is addressed to the discretion of the trial court, and a denial is not error in the absence of an abuse of that discretion. Each case must be determined by the facts presented by it, and all indications of prejudice must be considered. The rule is that the accused is entitled to a change of venue when it appears that there are reasonable grounds to believe that the prejudice alleged actually exists and that by reason of the prejudice there is a reasonable apprehension that the accused cannot receive a fair and impartial trial. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982); State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982).

Venue Change Ordered Where Pervasive Publicity Among Small Population: Upon reversing mitigated deliberate homicide conviction had upon defendant's second trial for the offense charged, the Supreme Court ordered the District Court to grant a change of venue. The county (Mineral) in which the offense occurred had only about 993 residents, substantially increasing the probability that publicity could be pervasive and affect the opinions of potential jurors. There had already been two trials in the county, each hotly contested and attended by many residents of the county, so that the possibility that the results and content of the prior trials had been widely disseminated was much higher than if no prior trials had occurred. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982).

Pre-Voir Dire Determinations: Voir dire is not the solution to every venue case in which it must be determined whether prejudice still exists and whether by reason of it there is a reasonable apprehension that accused cannot receive a fair and impartial trial. Although that issue is usually determined by voir dire, each case must turn on its own merits, and a motion for a change of venue may be decided prior to voir dire if the circumstances of the case indicate inherent prejudice. Judicial economy and effective administration of justice are not served by the use of voir dire to decide the issue when it is apparent that it should be decided before voir dire, and there is the inherent problem of an atmosphere that may exert pressure on the jury selected. State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982).

Content and Effect of Pretrial Publicity — Review in Federal Habeas Corpus Proceeding: In assessing whether pretrial publicity precludes a fair trial, a court must consider the content of the publicity and its effect on the jury. A single misstatement of facts in a newspaper article 6 months prior to trial did not constitute inflammatory or impassioned press coverage. Where each person on the jury either had not read the newspaper article or could not recall the details of the article, the impact of the pretrial publicity was insufficient. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Prejudice of Judge:

In support of an application for a change of place of trial a denial of bail could not be claimed as showing prejudice by the trial judge, for such is a mere preliminary matter. St. v. London, 131 M 410, 310 P2d 571 (1957).

The action of a judge in refusing to set bond pending appeal from a manslaughter conviction is not an act which prejudices a defendant during a trial. St. v. Bischert, 131 M 152, 308 P2d 969 (1957).

"Place" Defined: In the expression "place of trial", the word "place" primarily means county and is synonymous with the word "venue". State ex rel. Sackett v. Thomas, 25 M 226, 64 P 503 (1901).

MOTION REQUIRED

Extensive Publicity — Failure to Move for Change of Venue: In a case that was the subject of extensive pretrial and trial publicity, the defendant was not denied his right to a trial by a fair and impartial jury when the record indicated that the defendant had attempted to use the media for his own advantage and had failed to move for a change of venue on the basis of the publicity. The defendant's argument that the court should have examined the jury as to their contact with the publicity and its prejudicial effect on them was not a proper subject for examination on appeal since no such motion was made during trial. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Application Necessary: The defendant in a criminal proceeding was not entitled to a change of venue when the files did not contain any application for a change of place of trial. In re Larocque's Petition, 139 M 405, 365 P2d 950 (1961).

MOTION PROPERLY DENIED

No Prejudicial Atmosphere in County Where State Prison Located: Defendant was charged with possession of a deadly weapon while an inmate at the state prison. He sought change of venue, contending that prejudice in the county where the prison was located was so great that a fair trial could not be had. The formation of a Citizen Protection Association and the fact that a large number of prison employees lived in the county did not constitute a prejudicial atmosphere. Also, upon review of the record of voir dire, the Supreme Court concluded an impartial jury had been empaneled, belying defendant's contention that all juries in the county were unalterably prejudiced. St. v. Palmer, 223 M 25, 723 P2d 956, 43 St. Rep. 1503 (1986).

Knowledge of Crime by Jurors Insufficient — Prejudice Required: Knowledge on the part of jurors cannot be equated with prejudice; thus, it was not an abuse of discretion by the trial court to deny a change of venue based upon appellant's claim of a denial of a fair trial because nearly all of the impaneled jury had heard of the case. Appellant must establish that a prejudicial atmosphere existed within the venue which created a reasonable apprehension that he could not get a fair trial. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986), followed in St. v. Brandon, 264 M 231, 870 P2d 734, 51 St. Rep. 244 (1994), and St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996).

Change of Venue to Adjacent County Proper: The trial court granted defendant's motion for change of venue, but over defendant's objection, placed venue in an adjacent county. The court agreed to reconsider the issue and change venue if the selection of jurors in the adjacent county indicated the defendant could not receive a fair trial. As the case came to trial, defendant did not renew his allegations of prejudice and thus waived his objection. The key to a venue inquiry is whether a fair trial may be had in a particular county, which is primarily a factual question. In this case, the action of the trial court was not arbitrary or capricious and therefore will not be overturned. The court acted reasonably in balancing the competing considerations of cost and inconvenience of holding a trial at a distant venue with the defendant's right to a fair trial. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985). See also St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988).

Venue of Second Retrial Returned to County Where Crime Committed — Order Upheld: Defendant argued that he had met a considerable burden in initially obtaining change of venue from Flathead County to Lake County, and that it was error for the District Court to order change of venue to Flathead County for a second retrial. The Supreme Court observed that the trial court was granted the discretion to determine place of trial and upheld the order changing venue, with cautionary instructions for the trial court and prosecution to use stringent controls to insulate the trial jury from any local prejudice. State ex rel. Forsyth v. District Court, 216 M 480, 701 P2d 1346, 42 St. Rep. 965 (1985).

Notorious and Controversial Defendant — Fairness Insured — No Change of Venue: The defendant was president of the Valley Industrial Park (V.I.P.). The defendant became a notorious and controversial figure when an attempt was made to house Cuban refugees at V.I.P. During the voir dire of the jury in defendant's trial on theft of V.I.P. property, every member of the jury panel stated that they knew of V.I.P. and the defendant. Defendant moved for a change of venue, but his motion was denied. On appeal, the court said the defendant failed to show prejudice and inflammation. The transcript indicates the District Court used many precautions

to ensure fairness and therefore properly denied defendant's motion for a change of venue. St. v. Holmes, 207 M 176, 674 P2d 1071, 40 St. Rep. 1973 (1983).

Community Upheaval — Subsided Before Trial: Where the defendant was convicted of two counts of negligent homicide after striking and killing a police officer and another person with his truck, the Supreme Court held that the District Court did not err in denying the defendant's motion for a change of venue. The defendant failed to satisfy the test for a change of venue established in St. v. Link, 194 M 556, 640 P2d 366 (1981), as the record showed that although there was community upheaval over the double deaths, that upheaval had significantly subsided within a few months after the incident. Moreover, the defendant was instructed by the court that the motion could be renewed, but it never was. St. v. Ballard, 202 M 81, 655 P2d 986, 39 St. Rep. 2342 (1982).

Jurors Challenged for Cause — Not Proof of Prejudice: An inmate at Montana State Prison, charged with the offense of possession of a deadly weapon by a prisoner, moved for a change of venue, claiming that a fair trial could not be had in the county because of prejudice. The fact that 4 jurors out of the total of 28 called were challenged for cause did not establish the existence of communitywide prejudice. The real question is whether the 12 jurors impaneled were sufficiently impartial. St. v. Ritchson, 199 M 51, 647 P2d 830, 39 St. Rep. 1201 (1982).

Prejudicial Pretrial Publicity Not Proved: An inmate at Montana State Prison, charged with the offense of possession of a deadly weapon by a prisoner, moved for a change of venue, claiming that a fair trial could not be had in the county because of prejudicial pretrial publicity. Because the newspaper articles complained of were factual reports, contained no editorializing, and did not refer to the inmate's offense, they were not inflammatory. Because the inmate did not inquire at voir dire if any prospective jurors had read the articles, he failed to prove that the community was actually inflamed by the articles. The motion for change of venue was properly denied. St. v. Ritchson, 199 M 51, 647 P2d 830, 39 St. Rep. 1201 (1982), followed in St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988), St. v. Bousquet, 248 M 53, 808 P2d 506, 48 St. Rep. 320 (1991), and St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996).

Prejudice to Be Exposed Through Voir Dire: Armstrong sought a change of venue and the appointment of an independent pollster to demonstrate the effect of prejudicial pretrial publicity. The District Court gave Armstrong, through his counsel, the opportunity to dig out and expose, through voir dire examination, any bias or prejudice that would have prevented a fair trial. The voir dire examination did not reveal any such prejudice. The District Court properly denied both the motion for an opinion survey at county expense and the motion for a change of venue. St. v. Armstrong, 189 M 407, 616 P2d 341 (1980).

Court's Discretion:

The defendant in a deliberate homicide case had moved for a change of venue based on allegedly inflammatory pretrial publicity and general bias against him in the county where the victim was killed. The Supreme Court held that a motion for a change of venue is addressed to the discretion of the trial court, and a denial is not reversible error in the absence of an abuse of discretion by the trial court. The Supreme Court also looked at the indicia of a denial of a fair trial resulting from prejudicial publicity (i.e., arousal of feelings of the community, threat to personal safety of the defendant, established opinion of members of the community as to the guilt of the accused, news articles beyond the objectivity of news printing and dissemination, and difficulty or failure in securing a fair and impartial jury from the community in which the news articles appeared). Having applied these indicators to the defendant's case and having considered the allegedly inflammatory news articles and broadcasts and the voir dire examination of prospective jurors, the Supreme Court found no abuse of discretion in the denial of the motion for a change of venue. St. v. Bashor, 188 M 397, 614 P2d 470 (1980). The denial was found proper in a federal habeas corpus proceeding. Bashor v. Risley, 730 F2d 1228 (9th Cir. 1984).

When the affidavits supporting the defendant's motion for a change of venue failed to show compelling evidence in support of the motion, it was not an abuse of discretion for the trial court to deny the motion. St. v. Barick, 143 M 273, 389 P2d 170 (1964).

An application for a change of place of trial is addressed to the sound discretion of the trial court, and a clear abuse of discretion must be shown or the ruling of the trial court will not be disturbed. In re Larocque's Petition, 139 M 405, 365 P2d 950 (1961); St. v. Bischert, 131 M 152, 308 P2d 969 (1957).

Due Process — Change of Venue for Prejudicial Publicity — Affidavit: The District Court's denial of defendant's motion for change of venue or a continuance for prejudicial publicity did not deprive him of due process since an affidavit supporting assertions of prejudice did not

accompany the motion as required. Additionally, the facts do not indicate he was denied a fair trial. St. v. Williams, 185 M 140, 604 P2d 1224 (1979).

Venue Unaffected by Publicity of Murder: Considering the nature of the crime involved, the Supreme Court found the reporting extremely objective and factual and not unreasonably voluminous. Therefore, there was no abuse of discretion in the District Court's refusal to grant defendant's motion for change of venue. St. v. Sandstrom, 176 M 492, 580 P2d 106 (1978).

Racial Bias Unproved: There was no evidentiary basis in the record to show the trial court abused its discretion in denying a change in venue based on the alleged anti-Black attitude at the trial site. St. v. Stewart, 175 M 286, 573 P2d 1138 (1977).

Refusal to Transfer Proper: Notwithstanding the pretrial publicity and the judge's comment that transfer of the case would cause expense to the county, if each juror seated could render an impartial verdict based upon the evidence, there was no error in not transferring the case. St. v. Buckley, 171 M 238, 557 P2d 283 (1976).

Juror's Impartiality: The trial court did not abuse its discretion in denying a motion for change of place of trial based on the mere existence of any preconceived notion as to the guilt or innocence of an accused as sufficient impartiality is established if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. St. v. Lewis, 169 M 290, 546 P2d 518 (1976), followed in St. v. Sullivan, 266 M 313, 880 P2d 829, 51 St. Rep. 827 (1994). See also St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

MOTION ERRONEOUSLY DENIED

Same Defendant — Similar Facts — Change of Venue Required: Paisley appealed to the District Court a conviction of a misdemeanor sexual assault. The case was to be tried de novo in the District Court. Earlier, in St. v. Paisley, 204 M 191, 663 P2d 322, 40 St. Rep. 763 (1983), the Supreme Court had approved an order granting a change of venue in companion cases on felony charges. In the interests of consistency, the Supreme Court issued a Writ of Supervisory Control ordering the District Court to grant a change of venue. State ex rel. Paisley v. District Court, 673 P2d 815, 40 St. Rep. 1852 (1983).

Prejudicial Pretrial Statements by Prosecution: In a well publicized and controversial case, defendant charged with rape had bail set at $100,000 by a Justice of the Peace and lowered to $15,000 by the District Court. The County Attorney and a Deputy County Attorney made statements to the press and various groups clearly indicating they believed defendant guilty and praising the description of defendant and his vehicle given by the 11-year-old victim. A disciplinary rule of Canons of Professional Ethics states that prosecutors shall not, in a pending case, make statements that a reasonable person would expect to be disseminated by means of public communication and that relate to the testimony or credibility of a prospective witness or to any opinion as to guilt or innocence of the accused or to the evidence or merits of the case. The failure of the County Attorney and a Deputy County Attorney to strictly adhere to the dictates of that rule jeopardized the impartial administration of justice to defendant by contributing to the establishment of prejudice against him, prejudice that the Supreme Court found to warrant a change of venue. State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982).

Publicity and Actions Arising From Rape and Bail: Defendant charged in Helena with rape of 11-year-old girl was entitled to a change of venue, as his exhibits and affidavits supplied reasonable grounds to believe that the prejudice alleged actually existed. After a Justice of the Peace set bail at $100,000, the District Court lowered it to $15,000. Angry citizens marched on the courthouse, public meetings were held and organizations were formed to address the matter, removal of the judge was sought, vandalism occurred, threats were made against defendant, the only local paper ran numerous front-page stories with photos and went beyond an objective dissemination of information and inflamed an already angry populace, and the Sheriff, County Attorney, and a Deputy County Attorney made comments prejudicial to defendant indicating they clearly believed him guilty. Law enforcement officials praised the victim's careful, excellent, and thorough description of her assailant and his vehicle. Numerous letters to the editor of the local paper indicating belief in defendant's guilt were printed. Defendant and his wife were forced to move to avoid reprisals and were prevented from moving into a place of their choice by complaints of nearby residents. State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982).

Intense Feeling Against Defendant in Community: The trial court was in error for refusing to grant a change of venue when the evidence disclosed that local newspapers had fanned the feeling of the community against the defendant and that county officials themselves felt that feeling against the defendant was so high that they moved him for safety to the state prison. St.

v. Dryman, 127 M 579, 269 P2d 796 (1954). See also State ex rel. Dryman v. District Court, 128 M 402, 276 P2d 969 (1954).

MOTION ERRONEOUSLY GRANTED

No Finding of Existing Prejudice: The findings of the District Judge do not indicate that he found existing prejudice. Rather, he found that "the publicity incident to these particular cases, without more, is sufficient to warrant a change of venue". Montana case law requires more than an allegation of publicity; the court must determine that the publicity has so affected the community and has so aroused prejudice in the community that a fair trial cannot be had. Without such a finding, the District Judge abused his discretion in ordering the change of venue. St. v. Link, 194 M 556, 640 P2d 366, 38 St. Rep. 982 (1981), followed in St. v. Bousquet, 248 M 53, 808 P2d 506, 48 St. Rep. 320 (1991). See also St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996), citing St. v. Moore, 268 M 20, 885 P2d 457 (1994), St. v. Hill, 2000 MT 308, 302 M 415, 14 P3d 1237, 57 St. Rep. 1301 (2000), St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004), and St. v. Pittman, 2005 MT 70, 326 M 324, 109 P3d 237 (2005).

Law Review Articles

Criminal Law: Extensive Publicity May Prevent a Fair Trial, (People v. Jacobsen, 46 Cal. Rptr. 515, 405 P2d 555), Peterson, 27 Mont. L. Rev. 205 (1966).

Collateral References

Criminal Law *key* 117, 123.

22 C.J.S. Criminal Law §239.

21 Am. Jur. 2d Criminal Law §§483 through 485; 77 Am. Jur. 2d Venue §§61 through 67, 88.

Change of venue by state in criminal case. 46 ALR 3d 295.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like. 34 ALR 3d 804.

46-13-204. Transfer of trial.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 114-1(f).

This segment of the pre-trial motions chapter is general in scope and is intended to outline the approach to be used by the defense in raising objections up to and including the time of arraignment. The remaining segment of pre-trial motions is primarily concerned with affirmative requests on the part of the defense for changes in the conduct of the future trial—such as (1) continuance, (2) change of venue, (3) change of judge.

46-13-205. Return to original place of trial.

Commission Comments

1991 Comment: This statute is a newly developed provision intended to provide for instances in which a retrial is required for a case in which a change of place of trial has been previously granted. This statute allows the case to return to the county in which it was originally and properly filed if a retrial is required. Once the case returns to the county in which it was originally filed, that court may again determine whether a change of place of trial is warranted.

Case Notes

Appeal of City Court Ruling — Trial De Novo in District Court Proper Remedy: Defendant was charged in Three Forks City Court with four counts of endangering the welfare of a minor. The City Court determined that a fair trial could not be had in Three Forks and, upon motion by the city for a change of venue, ordered the case and jurisdiction transferred to Madison County. A Madison County Justice's Court jury convicted defendant of one count and acquitted on three counts. Defendant appealed to Gallatin County District Court, requesting that the case be dismissed because the Three Forks City Court improperly granted the change of venue. The District Court denied the motion to dismiss, but concluded that the change of venue was an abuse of discretion and remanded to the Three Forks City Court for a new trial. The city appealed, and the Supreme Court reversed. The general rule is that, with few exceptions, District Courts must try appeals from Justices' Courts and City Courts de novo, rather than acting as courts of review. In this case, none of the statutory or case law exceptions to the general rule applied, so the District Court was limited to the remedy of conducting a de novo trial as required by 46-17-311, regardless whether the City Court's change of venue was erroneous. A trial de novo in District Court also cured any prejudice that might have been suffered by defendant occasioned by the change of venue. The case was remanded for a trial de novo in Gallatin County District Court. Three Forks v. Schillinger, 2007 MT 331, 340 M 211, 173 P3d 681

(2007), distinguishing Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800 (1998), and St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

Change of Place of Trial — Jurisdiction Retained by Original Court: When the location of a criminal trial is changed, the court in which the proceeding is commenced ordinarily retains jurisdiction. However, a City Court Judge may call in a substitute judge to act in the original judge's place. Three Forks v. Schillinger, 2007 MT 331, 340 M 211, 173 P3d 681 (2007).

46-13-210. Trial of indictments, informations, complaints, or defendants together.

Commission Comments

1991 Comment: This statute, using Rule 13 of the Federal Rules of Criminal Procedure as a model, provides for consolidation of charges or defendants in the interest of judicial economy when the charges or defendants could have been charged jointly in the first place.

Compiler's Comments

1993 Amendment: Chapter 262 at end substituted "46-11-404" for "46-12-213, 46-15-322, and 46-15-323".

46-13-211. Relief from prejudicial joinder.

Commission Comments

1991 Comment: Relying on Rule 14 of the Federal Rules of Criminal Procedure, subsection (1) provides that the court may order severance whenever either party is prejudiced by a joinder.

Subsection (2), based on the same federal rule, allows the court opportunity to review any extrajudicial statements of codefendants that are intended to be introduced at a joint trial. By doing so, the statute enables the court to determine whether the use of those statements would cause a prejudicial joinder.

Case Notes

Failure of Trial and Appellate Counsel to Adequately Assert Prejudice Element of Motion to Sever Constituting Ineffective Assistance of Counsel Warranting Reversal: Trial counsel failed to properly form a motion to sever sexual assault charges from pornography charges in a manner to demonstrate that failure to sever the criminal counts would result in prejudice to defendant. Following conviction on all counts, appellate counsel argued in St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004), that the trial court erred in failing to sever, but did not raise the issue of ineffective assistance of trial counsel, so the Supreme Court declined to consider the issue. On a petition for postconviction relief, new counsel argued the ineffective assistance of both trial and appellate counsel, and the District Court agreed. However, the petition was dismissed on grounds that counsels' conduct did not prejudice defendant in a manner that denied defendant a fair trial. Defendant appealed denial of the petition, and the Supreme Court reversed. Trial counsel's failure to allege the nature or type of prejudice that would occur absent a severance constituted ineffective assistance, and appellate counsel's failure to raise ineffective assistance of trial counsel could not be viewed as a legitimate appellate strategy. Defendant received inadequate assistance of both trial and appellate counsel and was entitled to a new trial on the sexual assault charges. Yecovenko v. St., 2007 MT 338, 340 M 251, 173 P3d 684 (2007).

Standard of Review for Severance of Counts: A criminal defendant seeking to sever counts into separate trials has the burden of proving that severing the counts is necessary to prevent unfair prejudice. It is not enough to prove that some prejudice will result from a joint trial or that a better chance of acquittal would be realized from separate trials; rather, defendant has the burden to prove that prejudice will prevent a fair trial. As enumerated in St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3 (1999), there are three types of prejudice that defendant may prove that must be considered by a trial court: (1) the accumulation of evidence may be such that a jury would find defendant to be a bad person and wish to convict defendant of something; (2) a jury might use evidence of guilt on one count to convict on another count, even though that evidence would be inadmissible at a separate trial on the latter count; and (3) defendant may suffer prejudice by wanting to testify on one count but not another. If the District Court fails to properly weight these types of prejudice against the judicial economy resulting from a new trial, an abuse of discretion occurs. In this case, Freshment conceded the third factor and failed to meet his burden to show prejudice under the other two factors, so although the case was reversed on other grounds, no abuse of discretion was ascribed to the denial of Freshment's motion to sever. St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002), followed in St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004), and St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006).

No Prejudice in Joinder of Logically Linked Offenses: Hocevar was charged with attempted deliberate homicide, two counts of deliberate homicide, criminal endangerment, and assault in connection with the deaths of her two sons. The District Court denied her pretrial motion to sever

the two counts associated with the death of one son from the three counts associated with the death of her other son, finding instead that joinder was proper because the counts were similar in nature and much of the proof, which included many out-of-state professional witnesses, would apply to all counts. Hocevar appealed on grounds that the counts should have been severed and separate trials held. In determining whether to grant a motion to sever, the trial court must balance the possibility of prejudice to defendant against the judicial economy that results from a joint trial and the burden is on defendant to show that prejudice was so great as to prevent a fair trial (see St. v. Richards, 274 M 180, 906 P2d 222 (1995)). Citing St. v. Martin, 279 M 185, 926 P2d 1380 (1996), the Supreme Court considered three types of prejudice that may result from the joinder of charges: (1) the jury considers a defendant facing multiple charges a "bad person" and accumulates evidence until it convicts the defendant of something; (2) the jury uses proof of guilt on one count to convict the defendant of a second count, even though the proof would be inadmissible in a separate trial on the second count; and (3) the defendant wishes to testify on one charge but not another. Hocevar alleged prejudice of the first two types, but after reviewing the record, the Supreme Court held that Hocevar failed to establish the existence of any of the three types of prejudice against her and affirmed the trial court's joinder of charges. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Joinder of Criminal Counts of Similar Character — Factors in Determining Similarity of Crimes: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern moved to sever the nine counts in the information into four separate trials, pursuant to this section, based on there being four different victims. Southern claimed a lack of similarity of the alleged crimes. The motion to sever was denied, and Southern was convicted on all nine counts and subsequently appealed. Although not determinative, some factors that are relevant to whether charges in an information are of the same or similar character include whether: (1) the charges are brought under the same statute; (2) the charges involve similar victims, locations, or modus operandi; (3) the conduct charged occurred in a narrow timeframe; and (4) the conduct charged occurred in a limited geographical area. Southern sought to differentiate the crimes by pointing out that the rapes occurred at different times of day, that some involved use of a knife while others did not, and that not all the rapes took place in the victims' homes. The Supreme Court held that despite these differences, the five counts of sexual intercourse without consent were properly joined because the crimes were of sufficiently similar character, being charged under the same statute. Counts may also be joined if the offenses constitute parts of a common scheme or plan. Thus, the kidnapping, burglary, and theft counts were also properly joined because, by definition, they were part of a common scheme linked by motive and because one charge precipitated the second charge, so overlapping proof would have been required regarding those counts and the accompanying counts of sexual intercourse without consent. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), following St. v. Richards, 274 M 180, 906 P2d 222, 52 St. Rep. 1176 (1995).

Joinder of Criminal Counts of Similar Character — No Prejudice: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. Southern moved to sever the nine counts in the information into four separate trials, pursuant to this section, based on there being four different victims. Southern asserted that joinder of the counts under 46-11-404 would result in unfair prejudice. However, it is not sufficient for a criminal defendant to prove that the defendant will face some prejudice as a result of a joint trial or that the defendant stands a better chance of acquittal in separate trials; rather, the defendant must prove that prejudice is so great as to prevent a fair trial. Applying the three basic kinds of prejudice outlined in St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), the Supreme Court found no unfair prejudice and affirmed, deferring to the trial court's discretion in balancing the possibility of prejudice against the judicial economy resulting from a joint trial. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), following St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996), and followed in St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005), and St. v. Harlson, 2006 MT 312, 335 M 25, 150 P3d 349 (2006).

Denial of Motion to Sever Upheld — Defendant Not Prejudiced by Admission of Evidence of Other Crimes: Martin was charged with several counts of sexual assault, sexual intercourse without consent, and deviate sexual conduct. Martin sought to have the counts severed in such a manner that five separate trials would have been required, but the District Court refused to sever. Martin argued that he was prejudiced on one count by the admission of evidence applicable to another count. Citing the rules on admissibility of evidence of other crimes established in St. v. Matt, 249 M 136, 814 P2d 52 (1991), the Supreme Court held that the

evidence that was admissible on some counts was admissible on others as well, so that Martin was not prejudiced by the use of inadmissible evidence. St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996), followed in St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Denial of Motion to Sever Economic Counts From Deliberate Homicide Count — No Error: Defendant was charged with 1 count of deliberate homicide, 51 counts of felony theft, 7 counts of felony forgery, and one count of felony deceptive practices. The Supreme Court held that the burden of showing prejudice by the joinder rests on the defendant and that the defendant must show that the prejudice was so great as to prevent a fair trial. The District Court did not err in denying defendant's motion to sever the economic counts from the deliberate homicide count. St. v. Richards, 274 M 180, 906 P2d 222, 52 St. Rep. 1176 (1995), followed in St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996), St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), and St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006).

Part 3
Suppression of Evidence

Part Commission Comments

1991 Part Comments: Two statutes modeled after the 1987 code have been amended to govern the suppression of certain evidence. The two statutes are divided in order to clearly separate the suppression of certain evidence from the suppression of confessions or admissions.

The Commission at all times remained cognizant of the difficulties arising from shifting the burden of proof. Under the 1987 code, the prosecution has the initial burden of showing that a confession or admission is admissible. See 1987 MCA 46-13-301(4). The defense has the burden of proving inadmissibility in other cases. See 1987 MCA 46-13-302(4). The statutes reflect the 1987 code but make no attempt to allocate the burden of proof. It is recognized, however, that the initial burden, however slight, of going forward with the evidence is on the defendant.

The statutes do not contain provisions concerning general motion practice. See 1987 MCA 46-13-301(3). The general statutes applicable to all pretrial motions are provided for in Title 46, ch. 13, part 1.

Part Case Notes

Improper Denial of State's Right to Appeal Justice's Court Suppression Motion: A Justice's Court granted Willis's motion to suppress that precluded the state from presenting statements made by Willis on the day of an accident on grounds that the state had unlawfully obtained the statements in violation of constitutional guarantees against self-incrimination. The state appealed the Justice's Court's ruling to the District Court, and the District Court granted Willis's motion to dismiss on grounds that the District Court lacked jurisdiction. On appeal, the Supreme Court reversed. Regardless of whether the Justice's Court order suppressed evidence or a confession or admission, the state had a statutory right under 46-20-103 to appeal the Justice's Court's ruling. Trial de novo in District Court was the proper proceeding for the state's appeal pursuant to St. v. Yarns, 252 M 45, 826 P2d 543, 49 St. Rep. 132 (1992), and St. v. Kesler, 228 M 242, 741 P2d 791, 44 St. Rep. 1490 (1987). St. v. Willis, 2008 MT 293, 345 M 402, 192 P3d 691 (2008). See also St. v. Strizich, 286 M 1, 952 P2d 1365, 54 St. Rep. 1241 (1997).

Trial De Novo of Criminal Case on Appeal From Justice's Court to District Court — No District Court Jurisdiction to Review Justice's Court Order Suppressing Evidence: A criminal case on appeal from Justice's Court to District Court must be tried anew in the District Court pursuant to 46-17-311, regardless of which party appeals. Accordingly, a District Court does not have appellate jurisdiction to review a Justice's Court order suppressing evidence. St. v. Kesler, 228 M 242, 741 P2d 791, 44 St. Rep. 1490 (1987), followed in St. v. Yarns, 252 M 45, 826 P2d 543, 49 St. Rep. 132 (1992).

Misrepresentation of Statute by Prosecutor — Not Prosecutorial Misconduct or Suppression of Evidence: Defendant claimed that the prosecution misrepresented the immunity statute to the court in an effort to prevent testimony by a witness, which amounted to a suppression of evidence. The Supreme Court found the prosecutor was incorrect in his interpretation, due to a statutory amendment, but that neither the court nor defense counsel was aware of the amendment either; therefore, the innocent misstatement of the law did not rise to the level of a knowing, bad faith scheme or action constituting misconduct. St. v. Dannels, 226 M 80, 734 P2d 188, 44 St. Rep. 472 (1987).

Motion to Suppress Statements and Related Evidence — Waiver and Voluntariness — Applicability to Custodial Interrogation: The District Court granted a motion to suppress all statements made by defendant and any evidence obtained as a result of the statements, citing

Smith v. Ill., 469 US 91, 83 L Ed 2d 488, 105 S Ct 490 (1984), as decisive of the suppression issue and supportive of the conclusion that defendant's request for counsel at his first interview barred further police interrogation. The Supreme Court reversed, holding that the Smith rule applied only to instances of custodial interrogation, while in this case defendant was not in custody or under formal arrest at the time he requested counsel. Further, the District Court never addressed the question of whether defendant's confession was voluntarily made; therefore, the case was remanded for hearing on the issues of waiver and voluntariness. St. v. Rorvik, 224 M 104, 728 P2d 419, 43 St. Rep. 2051 (1986).

Suppression Question — Psychological Evaluation — Standard of Review: Where two expert witnesses present conflicting evidence during a suppression hearing as to results of their psychological evaluations of the defendant and the District Court finds one expert's testimony to be more credible than the other's, such determination will be disturbed on appeal only if it is not supported by substantial credible evidence. In re R.P.S., 188 M 317, 613 P2d 999 (1980), following St. v. Grimestad, 183 M 29, 598 P2d 198 (1979).

Voluntariness of Confession — Factual Determination: The issue of voluntariness of a confession is mainly a factual determination for the District Court, and District Court's judgment will not be disturbed on appeal unless it is clearly against the weight of the evidence. In re R.P.S., 188 M 317, 613 P2d 999 (1980), following St. v. Blakney, 185 M 470, 605 P2d 1093 (1979). [Annotator's note: Certiorari was granted in Blakney v. Mont., 451 US 1013, 69 L Ed 2d 384, 101 S Ct 2999 (1981), and the judgment vacated and the case remanded for further consideration in light of Edwards v. Ariz., 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880 (1981). On remand the court affirmed its original decision in St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).]

Suppression of Evidence — Motion for New Trial: In a prosecution for attempted deliberate homicide, the defendant moved for a new trial, alleging that his counsel did not hear testimony offered by a State witness concerning an exculpatory item not admitted into evidence, claiming the prosecution had suppressed the evidence. The State did not take possession of the evidence during the trial or consider it evidence, and the defendant did not seek a continuance even when he gained knowledge of the evidence. There is no suppression of evidence if the defendant has knowledge of the facts and circumstances of the evidence. The court, therefore, did not err in denying the motion for a new trial. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979), followed in Harris v. St., 234 M 482, 765 P2d 706, 45 St. Rep. 2067 (1988), and in St. v. Henry, 241 M 524, 788 P2d 316, 47 St. Rep. 476 (1990).

Sexual Assault — Evidence of Previous Crimes: The District Court did not commit a reversible error by not excluding testimony relating to other incidents of sexual assault. The court had granted a motion to suppress testimony by the minors involved in the other incidents, but the judge specifically restricted his ruling to testimony by, as opposed to testimony relating to, the minors, and the defense attorney did not object. Further, he did not object at the trial when the testimony of the prosecutrix relating to statements made by the defendant about the previous incidents was introduced. The testimony was relevant not to prove the occurrence of the incidents but to prove the intent of the accused. The testimony was of sufficient probative value to outweigh any possible prejudicial effect of its introduction. St. v. Patton, 183 M 417, 600 P2d 194 (1979).

Use of Accused's Pretrial Testimony to Impeach: The pretrial testimony of the defendant at a suppression hearing may be used to impeach him, but not on the issue of guilt. St. v. Buckley, 171 M 238, 557 P2d 283 (1976).

46-13-301. Suppression of confession or admission.

Commission Comments

1991 Comment: This statute establishes two special provisions dealing specifically with the suppression of confessions or admissions. The statute is loosely modeled after 1987 MCA 46-13-301. The statute recognizes that it is incumbent upon the defendant to plead facts that the confession or admission was not voluntary. Also, the statute retains the 1987 code provision that allows the jury to hear the circumstances concerning the making of a confession or admission. Such evidence is only admissible to allow the jury to consider the weight of the evidence admitted.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 114-11.

This section provides for the suppression of an involuntary confession or admission. The determination of when a confession or admission is voluntary is to be made on a case by case method. A recent Montana decision now recognizes that the truth or falsity of a confession is not [to] be considered in determining its voluntariness. (State v. White, 146 Mont. 226, 405 P.2d

761.) The test set forth by the U.S. Supreme Court is whether the will of the accused is so overborne, that his statement is not the product of a rational intellect and a free will. (Rogers v. Richmond, 365 U.S. 534 (1961)[)]. This test is also recognized by recent Montana decisions. (See State v. Noble, 142 Mont. 284, 384 P.2d 504 and State v. White, supra.)

The procedure to be followed by state courts in determining the voluntariness of a confession has been set forth in the case of Jackson v. Denno, 378 U.S. 368. This case requires that the court must first hold a complete evidentiary hearing regarding the confession outside the presence of the jury. The court must then make a determination whether the purported confession was voluntary or involuntary. If the confession is found to be voluntary it may be admitted for consideration by the jury. This procedure must be followed whenever the voluntariness of a confession is put in issue, whether by motion prior to trial as provided for by this section or by objection during trial.

Compiler's Comments

1991 Amendment: Deleted former (2) and (3) that read: "(2) The motion shall be made before the trial unless for good cause shown the court shall otherwise direct.

(3) The defendant shall give at least 10 days' notice of such motion to the attorney prosecuting or such other time as the court may direct. The defendant shall serve a copy of the notice and motion upon the attorney prosecuting"; and made minor changes in style.

1981 Amendment: Substituted "The prosecution must prove by a preponderance of the evidence that the confession or admission was voluntary" for "The burden of proving that a confession or admission was involuntary shall be on the defendant" in (4).

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GENERAL

Youth's Right to Parental Notification — Suppression of Statements for Failure to Notify Parents: McKee, a youth charged with assault with a weapon, contended that police erred by failing to notify his parents prior to questioning or to inform him of the right to waive notification and that statements made prior to notification should have been suppressed. The trial court denied the suppression motion, reasoning that 41-5-331 provided the parents, not the youth, with the right to notification, so it was not a right that McKee could waive. The Supreme Court disagreed. The right of parental notification belongs to the youth, not to the parents. McKee did not waive the right, so statements made prior to parental notification should have been suppressed, and failure to do so was reversible error. St. v. McKee, 2006 MT 5, 330 M 249, 127 P3d 445 (2006).

Standard of Review of Motion to Suppress Statements: The Supreme Court reviews a District Court's ruling on a motion to suppress to determine whether the District Court's findings of fact are clearly erroneous and whether its interpretation and application of the law are correct. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the District Court misapprehended the effect of the evidence, or if the Supreme Court has a definite or firm conviction that the District Court has committed a mistake. St. v. Reavley, 2003 MT 298, 318 M 150, 79 P3d 270 (2003).

No Error in Denial of Untimely Midtrial Motion to Suppress Evidence: Motions to suppress are expressly among pretrial matters that must be raised at or before the omnibus hearing. Griffing indicated an intent to file motions to suppress his confession and physical evidence pursuant to 46-13-302 and this section, but the motions were not made until trial had commenced. Failure to raise the issues at or before the omnibus hearing constituted a waiver under 46-13-101. Thus, the trial court did not err in denying the midtrial motion to suppress as untimely. St. v. Griffing, 1998 MT 75, 288 M 213, 955 P2d 1388, 55 St. Rep. 309 (1998), following St. v. Greywater, 282 M 28, 939 P2d 975 (1997).

Untimeliness of Motion Waived by Failure to Object: A motion to suppress was filed the first day of trial, contrary to the 10-day notice requirement in 46-13-301. By failing to object to the timeliness of the motion at trial, any objection on appeal was waived under 46-20-104. In re J.W.K., 223 M 1, 724 P2d 164, 43 St. Rep. 1483 (1986).

Questions of Evidence — Law of Forum Controls: The defendant, while incarcerated in Louisiana on a misdemeanor charge, confessed to a murder committed in Montana several years

earlier. At his subsequent trial in Montana on a charge of deliberate homicide, he moved to suppress evidence of the confession on several grounds. As to an allegation of delay in initial appearance, the prosecution sought to have Louisiana law applied because the defendant was incarcerated there and was allegedly subject to Louisiana law at the time of his confession. The Supreme Court held that the general rule, as to questions of evidence, is that the law of the forum controls. The question involved an application of the exclusionary rule, which is a rule of evidence. Therefore, Montana law should control. Whenever possible, defendants should be entitled to the fullest protection of Montana law when appearing in its courts. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), followed in St. v. Lynch, 1998 MT 308, 292 M 144, 969 P2d 920, 55 St. Rep. 1278 (1998).

Jury to Weigh Credibility or Weight to Be Given Admission — Jury Instruction on Competence of Defendant Improper: Under 46-13-301(5), the jury is allowed to consider circumstances surrounding admission as bearing upon credibility or weight to be given admissions. Defendant's rejected instruction incorrectly addressed the question of defendant's competence rather than the weight or credibility of evidence. This inappropriately shifted the issue of admissibility to the jury. The Supreme Court held that the District Court did not err in refusing defendant's proposed instruction. St. v. Gould, 216 M 455, 704 P2d 20, 42 St. Rep. 946 (1985).

Motion In Limine a Motion to Suppress: On the first day of trial the defendant made a motion in limine regarding damaging statements made to police officers prior to arrest. The motion in limine was in fact a motion to suppress and was subject to the time and notice requirements of this section. St. v. Hart, 200 M 185, 650 P2d 768, 39 St. Rep. 1673 (1982), followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

Motion Made First Day of Trial Untimely: Immediately after his arrest the defendant attempted to retract damaging statements he had made prior to his arrest. Four months after he was charged with sexual assault, on the first day of trial, after the jury had been seated, the defendant orally motioned to suppress the damaging statements. The motion was untimely and properly denied by the trial court. St. v. Hart, 200 M 185, 650 P2d 768, 39 St. Rep. 1673 (1982).

"Good Cop/Bad Cop" Questioning Technique — Examination of Totality of Circumstances: In determining whether the impermissible "good cop/bad cop" questioning technique was used by police, the totality of the circumstances must be examined. The intent of the officers, whether or not they planned to use the technique, is irrelevant to that inquiry. Where the defendant confessed to a seemingly "nice" police officer after he had been questioned by officers who seemed to him to be angry was not, in this instance, triggered by the use of the technique but rather hinged on the defendant's listening to a codefendant's recorded confession at the end of the questioning session. The trial court's determination that the confession was freely given is supported by the comparatively short questioning period, the number of Miranda warnings given and defendant's understanding of them, and the defendant's age and education. St. v. Davison, 188 M 432, 614 P2d 489 (1980).

Failure to File Motion Within 10 Days — Motion Denied: Seven months prior to trial the defendant made statements and admissions. Eight days prior to trial the defendant filed a motion to suppress his statements and admissions. Section 46-13-301 requires at least 10 days' notice of such a motion. The Supreme Court found that the failure to comply with the statutory requirement is a proper ground upon which to deny the motion. St. v. Hall, 183 M 511, 600 P2d 1180 (1979), followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

Confession of Codefendant — Arrest Valid Under Idaho Law: The Supreme Court held that Idaho law recognizes the common-law rule that an arrest may be made without a warrant when the arresting officer has probable cause to believe the person arrested has committed a crime in another state. Thus, subsequent confessions of a codefendant were properly admitted. St. v. Coleman, 177 M 1, 579 P2d 732 (1978). See also St. v. Lynch, 1998 MT 308, 292 M 144, 969 P2d 920, 55 St. Rep. 1278 (1998).

Immunity From Use of Testimony Rejected: The court of appeals held that a state is not constitutionally required to grant a probationer immunity from use of testimony he gives at a combined probation revocation and deferred sentencing hearing when he is under criminal indictment for the same act that constitutes the alleged probation violation. Ryan v. St., 580 F2d 988 (9th Cir. 1978).

Statements Not Entered — Effect on Appeal: As the defendant's statements to the police following his arrest in a homicide were not used in his perjury trial, his specification of error based on denial of his motion to suppress the statements lacked relevance in the appeal. St. v. Thompson, 176 M 150, 576 P2d 1105 (1978).

Surprise Testimony Discounted: The Supreme Court rejected the defendant's contention that trial testimony constituted surprise and should have been excluded when a witness testifying as

to admissions made by the defendant quoted certain profane and vulgar language not previously mentioned in a statement provided to the defendant by the prosecution. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

Motion for Mistrial: The trial judge was correct in refusing to grant the defendant's motion for a mistrial because the admission made by the defendant to the arresting officer on another charge in another state and introduced in the instant case was not prejudicial or a denial of the right to a fair trial. St. v. LaVe, 174 M 401, 571 P2d 97 (1977).

Failure to List Witness Excused: In the absence of surprise, testimony concerning the defendant's oral admission of guilt was properly admitted even though the State had not supplied the names of witnesses to the admission. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

VOLUNTARINESS

Waiver of Rights and Confession Voluntary Despite Defendant's Emotional State — Motion to Suppress Testimonial Evidence Properly Denied When Defendant Advised of Miranda Rights: Lacey was advised of his Miranda rights prior to interrogation and subsequently confessed to felony sexual intercourse without consent and sexual assault. Lacey moved to suppress the testimonial evidence on grounds that he was under intense emotional distress when waiving his rights, so the confession was not voluntary, but the trial court denied the motion. On appeal, the Supreme Court examined the totality of the circumstances and affirmed. In this case, the interrogation was clearly custodial in nature, but when a custodial interrogation has occurred and a subject has been properly informed of the Miranda rights, those rights against self-incrimination may be waived by a waiver that is made voluntarily, knowingly, and intelligently. A defendant may move to suppress a confession on grounds that it was involuntary, which focuses on the factual inquiry of whether the confession was the product of free choice or compulsion. Lacey contended that the confession could not be voluntary because of the extreme emotional distress, but there was no indication that officers took advantage of that emotional state to manipulate Lacey and coerce the confession, so the confession was voluntary. Lacey was properly advised of his Miranda rights and knowingly and intelligently waived those rights, so the denial of the motion to suppress the confession was not error. St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009).

Use of Youth's Voluntary Confession of Drug Use in Subsequent Probation Violation Proceedings Not Error: A youth admitted that she had used methamphetamine, as part of an agreement with the County Attorney and in exchange for a recommendation that the youth be placed in a drug treatment program. When the youth violated the terms of her probation, the confession of prior drug use was admitted into evidence. The youth contended that the self-incriminating statement was inadmissible because the youth was not informed that the statement could later be used against her if she violated probation. The Supreme Court declined to reverse the Youth Court's disposition simply because the youth was not advised that the admission could be used later and instead noted that if the confession was voluntary and not coerced, it could properly be used at a later trial for drug possession. Further, under In re C.L., 2004 MT 71, 320 M 369, 87 P3d 462 (2004), the fact that an admission is voluntary is all that is required for a confession to be admissible in a Youth Court proceeding. In this case, the youth was not placed in a position in which she was coerced into waiving the right against self-incrimination by a threat of penalty, but rather voluntarily admitted drug use as a condition of sentencing to a drug treatment program in a manner similar to a plea bargain agreement. Thus, the Youth Court did not err in allowing the youth's admission into evidence and in taking judicial notice of the youth's waiver of the right against self-incrimination. In re R.L.H., 2005 MT 177, 327 M 520, 116 P3d 791 (2005).

Voluntary Confession During Noncustodial Interrogation — Motion to Suppress Properly Denied: Honey was interviewed once in a patrol car and once at the Sheriff's office regarding his involvement in certain thefts. At both interviews, Honey was read his Miranda rights, was advised of his right to counsel, which he waived, and was informed that he would not be arrested and was free to leave at any time. Honey later contended that his confession was involuntary and moved to suppress it. The District Court denied the motion, and the Supreme Court affirmed. Being able to leave, Honey was not subject to a custodial interrogation, and he was not denied the right to counsel. Under the totality of the circumstances, his confession was voluntary, and the motion to suppress was properly denied. St. v. Honey, 2005 MT 107, 327 M 49, 112 P3d 983 (2005). See also St. v. Grey, 274 M 206, 907 P2d 951 (1995), and St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003).

No Error in Failure to Suppress Incriminating Statements Made Following Knowing and Voluntary Waiver of Rights: After McCollom pleaded guilty to felony sexual assault against two

9-year-old girls, he argued on appeal that the trial court erred in failing to suppress incriminating statements made to law enforcement officers following his arrest. However, McCollom was fully advised of the right to counsel, signed a waiver of Miranda rights, admitted that he was advised of his rights and understood them, and then consented to the interrogation at which the statements were made. The trial court's conclusion that McCollom knowingly and voluntarily waived his rights was based on substantial evidence and was not clearly erroneous, and the Supreme Court affirmed denial of the suppression motion. St. v. McCollom, 2005 MT 61, 326 M 251, 109 P3d 215 (2005).

Youth's Waiver of Rights When Parent and Youth in Separate Places — No Specific Topic of Questioning — Admissibility of Confession: After a fire in a clandestine methamphetamine laboratory, police sought to question a youth who was reported to be involved. With the youth's mother present, the officers informed them of the youth's various rights, gave them a written statement of rights, and allowed them to discuss waiver of the rights. In the youth's presence, the mother signed a consent to waive the youth's rights. The youth was then taken to the station without his mother, who declined to go, was informed of his rights again and signed a waiver of rights, and was questioned about the fire and the laboratory. The youth subsequently confessed to involvement in the drug operation, and the District Court declared him delinquent and entered a dispositional order. On appeal, the youth contended that the confession should have been suppressed because he and his mother did not agree together to waive his rights and because his mother was led to believe that the questioning was about the fire and not the laboratory, so she could not effectively waive his rights without accurate knowledge of the basis of the questioning, citing Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455 (2000). The Supreme Court disagreed. Nothing in Evans or in 41-5-331 requires that a youth and parent agree as to the specific topic of questioning to which a waiver of rights applies in order to make the waiver effective, nor does 41-5-331 requires the agreement of the youth and parent in the same place at the same time. The youth also failed to show that the confession was involuntary through police deceit because he should have known that any interview regarding the fire could involve questions regarding the drug operation. In re C.L., 2004 MT 71, 320 M 369, 87 P3d 462 (2004).

Voluntariness of Statements Made to Officers Responding to Emergency Call — Admissibility of Statements Not Made During Custodial Interrogation: Officers responded to an emergency 9-1-1 domestic violence call at Saxton's home and discovered a marijuana growing operation in the home. Saxton contended that statements made to the officers should be suppressed because the statements were not voluntary and because no Miranda warning was given. The trial court disagreed, and the Supreme Court affirmed. Although the state may not use confessions or admissions obtained through custodial interrogations without proper Miranda warnings, in this case, the officer's conversation with Saxton was not considered a custodial interrogation within the context of Miranda because Saxton was not restrained in any way and was told repeatedly that she was free to leave and because Saxton's statements regarding ownership of the marijuana were offered voluntarily. St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003).

Voluntariness of Confession — Totality of Circumstances: When a defendant moves to suppress a confession or admission on grounds that it was given involuntarily, the prosecution must prove by a preponderance of the evidence that it was voluntary. On appeal, the Supreme Court will review denial of a suppression motion to determine whether findings of fact were clearly erroneous and correctly applied as a matter of law. A finding of fact is clearly erroneous if: (1) it is not supported by substantial evidence, which must be more than a scintilla of evidence but may be less than a preponderance of the evidence; (2) the trial court misapprehended the effect of the evidence; or (3) the Supreme Court has a definite or firm conviction that a mistake was made. When a determination of voluntariness depends on the credibility of witnesses, the Supreme Court will defer to the trial court. The emphasis in determining voluntariness is on whether the confession was the product of free choice or compulsion, which must take into account the totality of the circumstances, including the defendant's age and education, whether the defendant was advised of Miranda rights, the defendant's prior experience with the criminal justice system and police interrogation, the defendant's background, experience, demeanor, coherence, articulateness, and capacity to make full use of faculties, the length and method of interrogation, and whether the confession or admission was extracted through force, violence, or improper influence or by direct or implied promises. If the confession or admission was involuntary, its use violates self-incrimination and due process. Here, the Supreme Court considered the totality of the circumstances and found substantial credible evidence that Hoffman's confession was voluntary. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), followed in St. v. Jones, 2006 MT 209, 333 M 294, 142 P3d 851 (2006). The standard of review of

denial of a motion to suppress was also applied in St. v. Munson, 2007 MT 222, 339 M 68, 169 P3d 364 (2007), and St. v. Hurlbert, 2009 MT 221, 351 M 316, 211 P3d 869 (2009).

Admission of Murder by Schizophrenic Held Voluntarily Made — No Prejudice to Defense Case: Scarborough, a schizophrenic, was arrested for the murder of Willis and made incriminating statements in the back of a police car. He was taken to the police station where he was read his Miranda rights, waived those rights, and gave a recorded interview with a detective. The Supreme Court affirmed the District Court's decision not to suppress the statements made in the police car or the tape of the interview with the detective. After reviewing all of the evidence, the Supreme Court held that the single fact that raised doubts about the voluntariness of Scarborough's inculpatory statements is the fact that he is schizophrenic and was therefore subject to the suggestion by the arresting and interviewing officers that he had committed the crime rather than someone else. The Supreme Court reviewed the record of the circumstances of the confessions and held that they were not made because the police had suggested Scarborough's guilt to him. The Supreme Court also held that even if the confessions were involuntary, the admission of those confessions by the District Court did not prejudice Scarborough's defense because, as his defense, Scarborough admitted committing the murder but claimed that the murder was committed during an acute psychotic episode. St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Voluntariness of Confession Raised by Defendant — Burden of Proof Upon State: Hayworth was arrested by the police for attempted deliberate homicide and, in the course of his interrogation by the police, admitted his participation in the attempt. Hayworth filed a motion to suppress the confession, and the Supreme Court held, citing St. v. Mayes, 251 M 358, 825 P2d 1196 (1992), that when a defendant raises the issue of voluntariness of a confession, the state must prove by a preponderance of the evidence that the confession or admission was voluntarily obtained. St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Coercion of Testimony by Lengthy Interrogation, Threats, Bribes, Good Cop/Bad Cop Technique, and Misrepresentations Refuted by Record: Law enforcement officers did not coerce defendant's statements. A 5 ½-hour interview with a 2-hour break for dinner, a 2-hour interview on the next day, and a 1-hour interview on the third day did not amount to overly long or arduous interrogation. Defendant's move to a jail nearer his family was at his request, refuting his assertion that the officers threatened him with consequences to his family. The record contained similar evidence refuting allegations of use of good cop/bad cop technique, misrepresentations that defendant was not a suspect, offers of cigarettes, and feigned concern about defendant's family. St. v. Lawrence, 285 M 140, 948 P2d 186, 54 St. Rep. 1082 (1997).

Totality of Circumstances — Police Deception and Failure to Give Adequate Miranda Warning — Confession Not Voluntary: The defendant moved to suppress a videotaped statement on the grounds that the statement was obtained involuntarily. The Supreme Court stated that in a custodial interrogation at the station house, the failure of the police to preserve some tangible record of the giving of Miranda warnings and of the knowing, intelligent waiver by the detainee will be viewed with distrust in the judicial assessment of voluntariness under the totality of circumstances surrounding the confession or admission. Based on the totality of the circumstances of police deception and on the failure to give the defendant adequate warning, the confession was not voluntary and the District Court erred in denying the motion to suppress. St. v. Grey, 274 M 206, 907 P2d 951, 52 St. Rep. 1193 (1995), distinguished in St. v. Gittens, 2008 MT 55, 341 M 450, 178 P3d 91 (2008). The rules regarding preservation of a tangible record, set out in Grey, St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997), and St. v. Weaver, 1998 MT 167, 290 M 58, 964 P2d 713, 55 St. Rep. 668 (1998), were extended to statements of a witness or informant made at the station house or in a similarly controlled environment in St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Statement Taken From Inmate Following Prison Riot — Narrative Statement Not Extracted by Detailed Questioning: Defendant, a prison inmate, moved to suppress evidence concerning his statement made to a state investigator shortly after a prison riot, on grounds that the statement was involuntary because of the coercive nature of the situation. The motion was properly denied by the trial court because the totality of the circumstances revealed that defendant was informed of his rights and voluntarily waived them, that he was capable of understanding the meaning and consequences of his statements, and that the statement was narrative and was not extracted by detailed questioning. St. v. Wild, 266 M 331, 880 P2d 840, 51 St. Rep. 872 (1994).

Warrantless Search of Home — Voluntary Consent — Totality of Circumstances Test: Warrantless searches and seizures conducted inside a home are per se unreasonable, subject only to a few carefully drawn exceptions, including instances in which a citizen has

knowledgeably and voluntarily consented to a search. In order for consent to be voluntary, it must be uncontaminated by any duress or coercion, express or implied, as determined by the totality of the circumstances. In this case, defendant was told that he was not required to consent to the search, but that factor was not controlling. Other circumstances mitigating against voluntariness included: (1) the fact that defendant had made a highly incriminating admission that was extracted improperly without Miranda warnings after entry to the home was gained without a warrant; (2) coercion arising from the fact that defendant was promised that if consent was given for the search, he would not be arrested or incarcerated, which constituted an implication that if cooperation was not given, incarceration would result; and (3) a statement by the investigating officer that if consent was not given, officers would remain in the house for a number of hours until a search warrant was obtained. Based on the totality of the circumstances, defendant's consent was coerced rather than given freely and voluntarily and evidence obtained during the subsequent search was inadmissible. St. v. Rushton, 264 M 248, 870 P2d 1355, 51 St. Rep. 262 (1994), following Schneckloth v. Bustamonte, 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041 (1973), and followed in St. v. Doyle, 1998 MT 195, 290 M 287, 963 P2d 1255, 55 St. Rep. 819 (1998), St. v. Wetzel, 2005 MT 154, 327 M 413, 114 P3d 269 (2005), and St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

Involuntary Confession — Circumstances Mandating Suppression: The following circumstances surrounding a confession mandated suppression on the grounds of voluntariness. By the time defendant confessed to a crime committed 1 year previously, he had been: (1) awake for more than 30 hours; (2) questioned continuously without the presence of an attorney; (3) separated from his children, whom he was told were at the hospital being examined for possible health problems; and (4) lied to by the investigator, having been told that there was incriminating evidence against him when such evidence did not exist. St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992), followed in St. v. Hermes, 273 M 446, 904 P2d 587, 52 St. Rep. 1055 (1995), St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996), and St. v. Collard, 286 M 185, 951 P2d 56, 54 St. Rep. 1366 (1997). Hermes and Loh were followed in St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Statements to Parole Officer Voluntary: Shortly after his initial court appearance, defendant telephoned his parole officer and requested that the officer visit defendant in jail. During the parole officer's subsequent visit, defendant made incriminating statements to the officer that the officer testified to at trial. Defendant's statements and admissions to the parole officer were voluntary and thus came under the purview of this section that requires that the prosecution prove by a preponderance of evidence that the statements and admissions were voluntary. Therefore, a Miranda warning was not required. St. v. Pambrun, 240 M 62, 783 P2d 374, 46 St. Rep. 1944 (1989).

Motion to Suppress Statements and Related Evidence — Waiver and Voluntariness — Applicability to Custodial Interrogation: The District Court granted a motion to suppress all statements made by defendant and any evidence obtained as a result of the statements, citing Smith v. Ill., 469 US 91, 83 L Ed 2d 488, 105 S Ct 490 (1984), as decisive of the suppression issue and supportive of the conclusion that defendant's request for counsel at his first interview barred further police interrogation. The Supreme Court reversed, holding that the Smith rule applied only to instances of custodial interrogation, while in this case defendant was not in custody or under formal arrest at the time he requested counsel. Further, the District Court never addressed the question of whether defendant's confession was voluntarily made; therefore, the case was remanded for hearing on the issues of waiver and voluntariness. St. v. Rorvik, 224 M 104, 728 P2d 419, 43 St. Rep. 2051 (1986).

Confession of Juvenile — Voluntariness and Mental Deficiency: A 14-year-old boy with an I.Q. of 86 confessed to the sexual assault of a 6-year-old child. The Supreme Court noted that mental deficiency does not preclude admissibility of a confession if the defendant was capable of understanding the meaning and consequences of his statements, quoting St. v. Phelps, 215 M 217, 696 P2d 447, 42 St. Rep. 305 (1985). Looking to the totality of the circumstances, including the defendant's background, experience, and conduct, the court found substantial credible evidence to support the voluntariness of the confession. In re J.W.K., 223 M 1, 724 P2d 164, 43 St. Rep. 1483 (1986). See also St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Admission Made to Polygraph Examiner in Postexamination Interview — Voluntary: An admission was made after signing a rights and waiver form. The admission was made to a polygraph examiner in a postexamination interview in another room after disconnection from the device and in response to a note given the examiner while the postexamination interview was being conducted. The Supreme Court held that the District Court did not err in holding that the admission was a voluntary confession supported by sufficient credible evidence. The appellant

made no specific charges of coercion or unfair procedures but merely stated that he signed the waiver expecting exculpatory evidence, and since polygraph evidence is inadmissible, the waiver was not voluntary. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986).

Incarceration Unlawful — Subsequent Confession Voluntary: The defendant, while incarcerated illegally in Louisiana on a misdemeanor charge, confessed to a murder committed in Montana several years earlier. At his subsequent trial in Montana on a charge of deliberate homicide, the defendant moved to suppress evidence of his confession on several grounds, including that the State failed to establish the confession was voluntary. When, as in this case, a defendant shows his incarceration was initially illegal, the burden shifts to the State to show that his right against self-incrimination was not violated. The determination of voluntariness depends on the totality of the circumstances, with the burden of proof on the State to prove voluntariness by a preponderance of the evidence. In this case the defendant was issued numerous timely and complete Miranda advisements prior to making the incriminating statement. Also, he confessed in the presence of his attorney after opportunity to confer with him. The totality of the facts indicate the trial court did not err in finding the confession voluntary. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), followed in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996), and St. v. Campbell, 278 M 236, 924 P2d 1304, 53 St. Rep. 879 (1996). Loh was followed, as to totality of circumstances, in St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998). Hayworth was followed in St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Defendant Admitted Driving — Statement Voluntary Under Totality of Circumstances Corroborated by Circumstantial Evidence: Defendant was convicted of negligent homicide and DUI following a one-car accident in which his female companion died. Before trial defendant moved to suppress his admissions made at the scene of the crash, when he stated that he was driving. The District Court found by a preponderance of the evidence that defendant's statements were voluntary. The court took into account the totality of the circumstances, including the observations of highway patrol officers and emergency medical personnel. The court noted that defendant's statements that he was the driver were consistent throughout the period leading up to defendant's hospitalization. The Supreme Court's review of the suppression hearing transcript indicated conflicting evidence, but the trial court resolved the conflict in favor of admissibility of the statements. The Supreme Court held the transcript contained substantial evidence to support the findings and conclusions of the trial court. Defendant's admission was corroborated by sufficient independent evidence in the form of circumstantial evidence. St. v. Gould, 216 M 455, 704 P2d 20, 42 St. Rep. 946 (1985), followed in St. v. Campbell, 278 M 236, 924 P2d 1304, 53 St. Rep. 879 (1996). Campbell was followed, as to necessity for corroboration by independent evidence, in St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Confession Voluntary Under Totality of Circumstances — Questionable Police Conduct: A preponderance of the evidence supports the trial court's holding that, in the totality of the circumstances, defendant's confession was voluntary. The Supreme Court found: first, that although the investigating officer walked a thin line between constitutionally permissible police conduct and reversible error by giving defendant the impression that there would be the possibility of psychiatric treatment, it fell short of a promise of treatment in return for a confession; second, a detective potentially transgressed police conduct by stating during interrogation that ". . . we've even got a doctor's report on this . . . we've got all the evidence" when he possessed no medical report at the time—however, his partner had talked to the examining physician; and third, there was no impropriety in the display of women's clothing worn by defendant, use of leading questions, refusal to honor defendant's request to talk to his father, and prior denials of the accused. St. v. Phelps, 215 M 217, 696 P2d 447, 42 St. Rep. 305 (1985).

Voluntary Waiver of Miranda Rights — Mistake on Waiver Form — Police Trickery: After the police read and fully explained the defendant's Miranda rights, the defendant indicated he would talk with the police about a shooting incident. When signing the rights waiver form, the defendant initially wrote "no" in the blank that asked if he desired to talk with the police. After a police officer explained that "no" meant he did not want to talk to the police, the defendant changed his answer to "yes", initialed the change, and made a statement. The defendant then repeated his statement in greater detail on a tape recording. Miranda warnings were again given, explained, and waived. Because there was no evidence to suggest that defendant's statement was a result of police trickery, his Miranda rights were voluntarily and intelligently waived. St. v. Dupre, 200 M 165, 650 P2d 1381, 39 St. Rep. 1660 (1982).

Waiver of Right to Counsel by Defendant Claiming Mental Defect — When Confession Suppressed: Defendant, convicted of aggravated assault, appealed based on issues related to his confession. The Supreme Court on review said the real issue is whether the defendant knowingly and voluntarily waived the right to counsel. The question of waiver was inextricably interwoven with the question of the voluntariness of the accused's confession. That was especially true because the defendant alleged incapacity because of mental illness. Whether a confession should have been suppressed depends on its voluntariness, and that depends on the "totality of the circumstances". The Supreme Court found that the evidence showed that Miranda warnings were given before confession, that the defendant was capable of understanding the warnings, that the defendant waived his rights to counsel and against self-incrimination knowingly and voluntarily, and that the defendant was not improperly induced into confession. St. v. Mercer, 191 M 418, 625 P2d 44, 38 St. Rep. 312 (1981).

Voluntary Confession and Production of Murder Weapon by Intoxicated Defendant: Defendant's confessions to the police and the production by defendant of the murder weapon to the police were not involuntary and inadmissible at trial where although defendant was "kind of drunk", defendant read his Miranda rights, signed a waiver of his rights, no evidence was offered showing defendant did not understand his rights or that he was coerced, and where defendant's production of the murder weapon and initial inculpatory statements were spontaneous responses during his first contact with the police officers. St. v. Graves, 191 M 81, 622 P2d 203, 38 St. Rep. 9 (1981).

Voluntariness of Confession — Totality of Circumstances: Involuntariness in a confession, rendering it unusable against a defendant, may be caused either by physical or mental coercion. To be used against him, the confession must be a product of an essentially free and unconstrained choice by its maker. In determining whether a confession was voluntary, once the defendant contends that it is a product of coercion, the burden is placed upon the State to show that the defendant knowingly and intelligently waived his privilege against self-incrimination and right to counsel by a preponderance of the evidence. This issue is addressed to the trial court's discretion and depends upon the totality of the circumstances; if there is substantial evidence to support the trial court's finding, it must be affirmed. St. v. Davison, 188 M 432, 614 P2d 489 (1980).

Self-Incrimination — Voluntariness of Confession: The police read the defendant his Miranda rights before they originally interrogated him and again just before he confessed to the homicide. Between the original interrogation and the confession, the police kept the defendant incommunicado in a small room in a hostile police environment. They used the nice cop-mean cop method of interrogation and lied to the defendant while using the guilt assumption technique of interrogation. The defendant eventually confessed to the homicide after a truth serum was administered and he was told that his story was inconsistent and contradictory to his "serum" story. The Supreme Court, after considering the totality of the circumstances, found the confession to be inadmissible on the basis that it was not made voluntarily. St. v. Allies, 186 M 99, 606 P2d 1043 (1979), followed in St. v. Johnson, 274 M 124, 907 P2d 150, 52 St. Rep. 1186 (1995). Allies was distinguished in St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000), and St. v. Hill, 2000 MT 308, 302 M 415, 14 P3d 1237, 57 St. Rep. 1301 (2000). Hill was followed in St. v. Jones, 2006 MT 209, 333 M 294, 142 P3d 851 (2006).

Voluntariness of Confession — Burdens of Proof — Harmless Error: A trial judge can properly require a party moving for suppression of evidence (involuntary confession) to initiate suppression hearing proceedings. The rationale for such a procedure is the requirement that the movant establish a prima facie case that a constitutional infringement has occurred. Once this has been accomplished, the ultimate burden of proving the propriety of the state's action (obtaining a confession) shifts to the state, notwithstanding 46-13-301(4), which is unconstitutional in that it requires defendant to prove a confession or admission was involuntary. Thus, the District Court did not err in requiring appellant to present his evidence first at the suppression hearing but did err in putting the ultimate burden on the defendant at the hearing. The Montana Supreme Court, however, upheld the District Court's denial of the motion to suppress because its error was harmless beyond a reasonable doubt. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979). [Annotator's note: A 1981 amendment requires the state to prove by a preponderance of the evidence that the confession or admission was voluntary. Certiorari was granted in Blakney v. Mont., 451 US 1013, 69 L Ed 2d 384, 101 S Ct 2999 (1981), and the judgment vacated and the case remanded for further consideration in light of Edwards v. Ariz., 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880 (1981). On remand the court affirmed its original decision in St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).]

Testimony by Accused: The defendant, who voluntarily testified that he had shot the victim (but only in self-defense), could not argue on appeal that he had been compelled to testify in order to correct errors presented by the prosecution. St. v. Grady, 166 M 168, 531 P2d 681 (1975).

Test:

In the absence of evidence of physical or psychological coercion, the defendant's handwritten confession, made about 2 hours after the crime was reported and after the defendant had been informed of his rights, was voluntarily given and admissible at trial. St. v. Smith, 164 M 334, 523 P2d 1395 (1974).

The truth or falsity of a confession is not to be considered in determining its voluntariness; before a confession may be admitted into evidence, the State must show to the satisfaction of the trial court that it was voluntary. St. v. White, 146 M 226, 405 P2d 761 (1965).

Before admitting a confession into evidence, it is necessary to determine whether it was made voluntarily and of defendant's free will. The fact that a sedative was administered to the defendant within an hour before his first confession did not, ipso facto, make it inadmissible. St. v. Noble, 142 M 284, 384 P2d 504 (1963).

MIRANDA REQUIREMENTS

Sufficient Proof of Miranda Warning Despite Failure of Recording Equipment — Denial of Motion to Suppress Statements Proper: Following Gittens' arrest, officers attempted to memorialize the reading of Gittens' Miranda rights, but the camera equipment failed to record any audio. At trial, Gittens moved to suppress all statements that he made after the arrest on grounds that, absent recorded proof, he had not been properly informed of his Miranda rights. The trial court denied the motion, and Gittens appealed, but the Supreme Court affirmed. Pursuant to St. v. Grey, 274 M 206, 907 P2d 951 (1995), officers should preserve a tangible record of the giving and waiver of Miranda rights when the means to do so are readily available, but the lack of a tangible record does not mandate suppression of a detainee's statements. Rather, this is simply one factor that weighs against the state in proving its burden. The proper inquiry is whether, based on all available evidence, the state met its burden of proving that the officer read the detainee the Miranda rights and whether those rights were waived. In this case, two officers testified that they had made a good faith effort to preserve a record of the reading and waiver, that one officer read the Miranda rights off of a card while the other officer observed, that Gittens verbally waived the rights and never indicated that he wished to avail himself of those rights, and that if the officers had known that the audio equipment was nonfunctional, they would have had Gittens sign a written acknowledgment and waiver. The trial court weighed the testimony of Gittens and the officers and found the officers more credible. The Supreme Court declined to disturb the trial court's decision that the state met its burden of proving that Gittens was properly advised of his rights despite the lack of a tangible record. St. v. Gittens, 2008 MT 55, 341 M 450, 178 P3d 91 (2008).

Confession a Result of Exploitation of Unlawful Arrest — Miranda Warning Insufficient to Negate Cumulative Effect of Circumstances Leading to Confession: Officers had insufficient probable cause to arrest Van Dort, resulting in an unlawful arrest, and the Supreme Court then considered whether Van Dort's subsequent confession was legitimate. The state maintained that because Van Dort was given Miranda warnings, the confession should be admissible. Van Dort averred that the Miranda warnings alone were insufficient to sever the causal connection between the confession and the arrest. The court noted that as set out in St. v. Beach, 217 M 132, 705 P2d 94 (1985), which adopted the federal rule set out in Brown v. Ill., 422 US 590 (1975), the general principle is that a confession obtained as a result of an unlawful arrest is inadmissible; however, there must be a causal connection between the arrest and the confession. In determining whether a causal connection exists, the court considers: (1) the presence or absence of timely Miranda warnings; (2) whether there was an intervening independent act by the defendant or some third party; (3) the temporal proximity of the arrest and confession; and (4) the degree of the alleged constitutional violation. Miranda warnings will not, in all cases, attenuate the corruptive effect of a prior constitutional violation or remove the taint of a prior constitutional violation. In this case, the Miranda warnings did not sever the chain of causality between Van Dort's unlawful arrest and the confession and were insufficient to negate the cumulative effect of all the relevant circumstances leading to Van Dort's confession. The court distinguished Beach, holding that despite the issuance of Miranda warnings, Van Dort's confession was the result of the exploitation of the unlawful arrest and inadmissible as fruit of the poisonous tree, and the Supreme Court reversed the District Court's denial of Van Dort's motion to suppress. St. v. Van Dort, 2003 MT 104, 315 M 303, 68 P3d 728 (2003).

Miranda Warning Not Required When Suspect Not in Custody: Officers were lawfully searching Roehr's motel room when Dawson knocked on the door. An officer opened the door, and Dawson entered, asking for Roehr. The officer told Dawson that he was going to conduct a pat-down search for weapons and asked Dawson if he possessed any weapons, drugs, or needles. Dawson said that he had no weapons. The officer repeated the question. Dawson motioned toward his coat pocket and said that he had some "smoke" in there. The "smoke" turned out to be methamphetamine and drug paraphernalia. Dawson sought to suppress the evidence on grounds that he was not given a Miranda warning before being subjected to a custodial interrogation and to suppress the statement regarding "smoke", contending that he was referring to his cigarettes. Two requirements must be met before Miranda is applicable: (1) the suspect must be in custody; and (2) the questioning must meet the legal definition of "interrogation". However, the questioning of Dawson took only 2 or 3 minutes, and there were several other people present. The investigative stop did not ripen into a custodial interrogation because the questions were routine, Dawson's detention was brief, and the protective frisk occurred within the view of others in the room. The only detention occurred when Dawson put his hands on the wall during the pat-down search. He was not under arrest or handcuffed at the time, so he was not in custody and the officer was not required to advise Dawson of his Miranda rights prior to asking if Dawson possessed any weapons, drugs, or needles. Dismissal of Dawson's motion to suppress the statement regarding the "smoke" in his pocket was not error. St. v. Dawson, 1999 MT 171, 295 M 212, 983 P2d 916, 56 St. Rep. 668 (1999), following U.S. v. Ritchie, 35 F3d 1477 (10th Cir. 1994).

Officer Testimony, Tapes, and Notes Showing Advice and Waiver of Rights: The state met its burden of showing by a preponderance of the evidence that defendant was advised of his rights, voluntarily waived them, and talked to the police. The officers who interviewed him testified that he was advised of his rights at the beginning of each of three interviews. The tape that was recorded at the end of each interview started with defendant's stating that he had been advised of his rights and had waived them. The notes of one of the officers referred to advices and waivers of rights. Defendant signed a waiver form. The statements would not be found inadmissible for failure to make a tape recording or other record of the advice and waiver at the time that they were given. Grey, in which the court stated a preference for such a record, does not require such a record. How the officers preserve a record of the advice and waiver is up to them. However, a tangible record should be preserved when the means to do so are readily available, and failure to do so will result in extreme disfavor with the court in later determining the voluntariness of a waiver. St. v. Lawrence, 285 M 140, 948 P2d 186, 54 St. Rep. 1082 (1997).

Admissions by Boot Camp Inmate to Other Inmates and Program Staff Held Admissible Without Miranda Warnings: Woods, an inmate at the Swan River Correctional Training Center, or "boot camp", made admissions that he killed two people to a trustee counselor and to other boot camp inmates in an anger management workshop. Woods later made the same admission to the boot camp superintendent. After being charged with the homicides, Woods sought to suppress the admissions, arguing that the admissions were not voluntarily made and that they were made while he was in custodial interrogation. From the review of the record, the Supreme Court found: (1) that Woods voluntarily chose to participate in the boot camp program knowing that under the program guidelines, he had to make full disclosure concerning his past; (2) that he made the disclosure to the members of the anger management workshop voluntarily; (3) that Woods's disclosures were made to the trustee and superintendent after they inquired whether he, Woods, wished to further discuss the subject; (4) that prior to Woods's admissions, the boot camp staff did not suspect Woods in the homicides; (5) that Woods was held in a room with the trustee out of concern for his safety rather than to coerce a statement from him; and (6) that there was no evidence of pressure or coercion by the other inmates, the trustee, or the superintendent. Based upon these findings and in reliance on case law from the State of Washington, the Supreme Court held that there was no "interrogation" and no "custody" within the meaning of Miranda, that Miranda warnings did not have to be given to Woods before his admissions, and that therefore the District Court did not err in refusing to suppress the admissions made by Woods without Miranda warnings. The Supreme Court did not address Woods's argument that he was placed in a "classic penalty situation", as discussed in Minn. v. Murphy, 465 US 420 (1984), and St. v. Fuller, 276 M 155, 915 P2d 809 (1996), because Woods raised the issue for the first time on appeal. St. v. Woods, 283 M 359, 942 P2d 88, 54 St. Rep. 617 (1997).

Suppression of References to First Illegal Interview From Second Legal Interview — Poisoned Tree: Defendant's fifth amendment Miranda rights were violated by interrogating officers during a November interview, but a subsequent December interview was conducted properly. Conceding that the November interview was clearly inadmissible, the state nevertheless argued

that all of the December interview was admissible, including references to the November interview, as fruit of the poisoned tree that had been purged of the primary taint of the November Miranda violations by the presence of several factors outlined in In re R.P.S., 191 M 275, 623 P2d 964 (1981). However, references to the November interview were not "fruit" of the poisoned tree; they were the poisoned tree itself by the violation of defendant's constitutional rights. It was unacceptable to suppress the November interview and then admit that evidence by allowing reference to it in discussion of the December interview. The exclusionary rule dictated that the product of the constitutional violations was inadmissible, and therefore the trial court properly suppressed all reference to the November interview from the December interview. St. v. Moore, 250 M 254, 818 P2d 835, 48 St. Rep. 913 (1991).

Person Not in Custody as Focus of Investigation — Miranda Warning Unnecessary: Citing Beckwith v. U.S., 425 US 341, 48 L Ed 2d 1, 96 S Ct 1612 (1976), the Supreme Court held that Miranda warnings are not required when police officers question a person not in custody, even though that person is the "focus" of the investigation. St. v. Dannels, 226 M 80, 734 P2d 188, 44 St. Rep. 472 (1987), followed in St. v. Dawson, 1999 MT 171, 295 M 212, 983 P2d 916, 56 St. Rep. 668 (1999).

Weapon Seized in Home Without Warrant — Statement by Defendant Without Miranda Warnings — Evidence Suppressed: Defendant charged with aggravated assault moved to suppress evidence. The trial court granted defendant's motion on grounds that defendant felt compelled to give officers access to his home without warrant, and thus seizure of weapon in plain view was not justified; statements by defendant in response to officers' questions were not admissible since defendant was considered to be in custody at the time and did not receive Miranda warnings. The Supreme Court upheld the trial court's order suppressing the evidence, noting factors that required the officers to obtain a search warrant. St. v. Osteen, 216 M 258, 700 P2d 188, 42 St. Rep. 789 (1985), followed in St. v. Rushton, 264 M 248, 870 P2d 1355, 51 St. Rep. 262 (1994).

Later Voluntary Amplification of Confession — No Second Miranda Warning — Not Error: Approximately a month after his arrest for homicide, followed by a Miranda warning and confession, the defendant asked to see the Sheriff. When the Sheriff arrived at the cell, no Miranda warning was given, but the defendant began clarifying his confession and reenacting transactions that occurred the day of the homicide. The Supreme Court held it was not error for the District Court to admit the Sheriff's testimony regarding the incident because the defendant had been given a Miranda warning at the time of his first confession and he had asked to talk to the Sheriff and voluntarily offered information in an atmosphere free from coercion. The court also held that because there was no direct infringement of the defendant's fourth or fifth amendment rights under the federal constitution, the Sheriff's testimony could not be excluded as the fruit of a suppressed statement. In a further holding, the court provided that the Sheriff's statements were not inadmissible under Rule 701, Montana Rules of Evidence, on the grounds that the Sheriff's testimony was nonexpert opinion testimony and that even if error had occurred, there was no reversible error because no prejudice was demonstrated. St. v. Kutnyak, 211 M 155, 685 P2d 901, 41 St. Rep. 1277 (1984).

Miranda Warnings Given After Defendant Admitted Knowledge of Shooting: While the defendant was at police headquarters to identify his lost jewelry, police officers investigating a shooting incident asked the defendant if he knew of the shooting. The defendant replied "yes", at which point the officers read his Miranda rights. That defendant answered "yes" before Miranda warnings were given did not amount to an admission against interest or confession pursuant to an unconstitutional interrogation. Defendant had not been deprived of his freedom in any significant manner at the point when he answered "yes", nor had he stated an independent fact from which guilt could be inferred. St. v. Dupre, 200 M 165, 650 P2d 1381, 39 St. Rep. 1660 (1982).

Waiver of Miranda Rights With No Knowledge of Victim's Injuries: A shooting incident resulted in the death of one victim and serious bodily injury to another victim. The defendant's contention that his Miranda rights could not be voluntarily or intelligently waived if he was not aware of the injuries that resulted from the incident was without merit. St. v. Dupre, 200 M 165, 650 P2d 1381, 39 St. Rep. 1660 (1982).

Admission of Pre-Miranda Statement Not Prejudicial — Untimely Motion to Suppress: The defendant made the same damaging statements to the police before and after Miranda warnings were given. A motion to suppress the prior damaging statements was denied because of the motion's untimeliness under this section. Although the Supreme Court has the power under 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987) to overturn a conviction if the substantial rights of the defendant have been prejudiced, the slight cumulative effect of

admitting the prior statements and the untimeliness of the motion to suppress do not warrant a consideration of the constitutionality of admission of the prior statements. St. v. Hart, 200 M 185, 650 P2d 768, 39 St. Rep. 1673 (1982).

Admission for Purposes Other Than as Direct Evidence: Evidence inadmissible in the prosecution's case in chief due to Miranda violations is not barred for all other purposes and may be used for impeachment of accused. If the police willfully violate Miranda, thinking that the evidence can still be used for impeachment, the case, like those involving coercion or duress, may be handled by the application of the traditional standards for evaluating voluntariness and trustworthiness. St. v. Cartwright, 200 M 91, 650 P2d 758, 39 St. Rep. 1598 (1982), following St. v. Smith, 168 M 93, 541 P2d 351 (1975); St. v. Buckley, 171 M 238, 557 P2d 283 (1976).

Refusal to Suppress Second Admission Held Proper — Connection With First Admission Held Controlling: Where a police investigation subsequent to the suppression of a first confession by the defendant to a charge of homicide revealed that the defendant had made a second confession over the telephone to a friend, the court did not err in refusing to suppress the evidence of the second confession and transferring the case from Youth Court to District Court for trial. The facts surrounding the second confession showed that it was derived from an independent source and not so connected with the first confession as to be considered "fruit of the poisonous tree", under the principles announced in Silverthorne Lumber Co. v. U.S., 251 US 385, 64 L Ed 319, 40 S Ct 182 (1920), or inadmissible under "the cat out of the bag" doctrine pertaining to second confessions announced in St. v. Allies, 190 M 475, 621 P2d 1080, 37 St. Rep. 2089 (1980). In re R.P.S., 191 M 275, 623 P2d 964, 38 St. Rep. 231 (1981), followed in St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996).

Miranda Warnings When Defendant Stopped on Street: Police officers were not required to give Miranda warnings prior to asking investigatory questions of the defendant where the defendant was stopped by armed officers in uniform on the street for the purpose of identifying the defendant as a witness or a suspect. Following Oreg. v. Mathiason, 429 US 492, 50 L Ed 2d 714, 97 S Ct 711 (1977), the Supreme Court held that any deprivation of freedom occurring under these circumstances was merely the result of the "coercive aspect" incidental to any conversation between an armed police officer and a suspect. St. v. Graves, 191 M 81, 622 P2d 203, 38 St. Rep. 9 (1981).

Admissibility of Defendant's Statement When Attorney Advisability Mentioned — Miranda Warnings — Tape Recordings: A defendant who said it probably was advisable that he have an attorney but who nonetheless went ahead and fully consented to being interrogated and tape-recorded was held to have made a voluntary statement, having been advised of his rights. A statement made voluntarily after the speaker has been made fully aware of and understands his rights is not objectionable because the statement is made without the advice or assistance of counsel. Electronically recorded or preserved evidence is subject to the same admissibility tests as direct evidence of eyewitnesses or earwitnesses. With proper advice to a prospective defendant who then voluntarily consents to the tape recording of his statements, the constitutional defenses of self-incrimination, unlawful search, invasion of privacy, and right to counsel disappear. Then the tape-recorded statement may be regarded as independent direct evidence or as corroborative evidence. In either case, the tests for admissibility are the same. Since the interviewing detective would have testified directly to the recorded statements, the recorded statements are themselves admissible. St. v. Brubaker, 184 M 294, 602 P2d 974 (1979).

Admission of Confession — Harmless or Prejudicial Error: When error is federal constitutional error, as with the improper admission of a confession, the error cannot be considered harmless unless the court finds it harmless beyond a reasonable doubt. Admission of a confession taken without adequate Miranda warnings constituted prejudicial error, resulting in overturn of convictions on two charges. Nonetheless, because admission of that portion of the same confession that related to another charge (criminal trespass) against the defendant was held harmless error, conviction on that other charge was sustained. St. v. Dess, 184 M 116, 602 P2d 142 (1979).

Suppression of Defendant's Confession — When Miranda Warning Inadequate — Voluntariness: Appellant's statement was admitted into evidence erroneously for two reasons. First, the State failed to prove the voluntariness of appellant's confession at the suppression hearing by a preponderance of the evidence. When the State fails to show that the appellant was advised of his Miranda rights or that the appellant made the statement attributed to him or to introduce any evidence other than evidence showing that the appellant had the mental capacity to make a voluntary statement, a finding that the State has carried its burden of proving voluntariness by a preponderance of the evidence is clearly against the weight of the evidence and must be overturned. Second, the Miranda warning allegedly given appellant was

inadequate. The language "we have no way of giving you a lawyer, but one will be appointed for you, if and when you go to court" was held confusing. Because the confession "undoubtedly weighed heavily in the minds of the jurors in finding [the] appellant guilty", conviction was reversed. St. v. Dess, 184 M 116, 602 P2d 142 (1979).

No Coercion or Interrogation — Miranda Inapplicable: When an entire situation was free from any coercion or deprivation of freedom of action by law enforcement officers and the statements made by the defendant were not the result of interrogation, the requirements of Miranda were not applicable. St. v. Ryan, 182 M 130, 595 P2d 1146 (1979).

Admission Without Proof of Miranda Warning: Absent proof that the defendant was given the Miranda warning or otherwise effectively advised of his rights, the testimony of the County Attorney about an alleged admission by the defendant while in custody was inadmissible. St. v. Johnson, 177 M 182, 580 P2d 1387 (1978).

Incriminating Statements at Prison Disciplinary Hearing: When the defendant uttered incriminating statements at a disciplinary hearing involving allegations of possession of a weapon by a prisoner, without benefit of Miranda cautionary statements, the subsequent admission of the statements into evidence at the defendant's trial was a violation of the privilege against self-incrimination. St. v. Harris, 176 M 70, 576 P2d 257 (1978).

WAIVER OR LACK OF COUNSEL

Ambiguous and Equivocal Request for Counsel — Motion to Suppress Properly Denied When Admissions Voluntary: Immediately after demanding an attorney, and without interruption, Maestas told an investigator to question another witness. The investigator immediately instructed Maestas to stop talking and asked at least six times whether Maestas wanted counsel present before proceeding, but Maestas repeatedly stated that he did not want an attorney. As stated in St. v. Simmons, 2000 MT 329, 303 M 60, 15 P3d 408 (2000), a suspect must articulate the desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. Maestas's ambiguous and equivocal requests for a lawyer, followed by repeated statements refusing the provision for counsel, did not rise to the level of clarity that mandated that the investigator stop all questioning, especially questions seeking to clarify what Maestas really wanted. Thus, Maestas's right to counsel was not violated. In addition, the incriminating statements made by Maestas were not made until the following day after Maestas again waived the right to counsel. Under the totality of the circumstances, Maestas's motion to suppress the statements was properly denied. St. v. Maestas, 2006 MT 101, 332 M 140, 136 P3d 514 (2006).

Use of Police Informant to Obtain Taped Conversation Not Violative of Right to Counsel or Attorney-Client Privilege — When Right to Counsel Attaches: Police used Reavley's girlfriend to obtain a taped conversation that included statements that could be viewed as incriminating. The District Court granted Reavley's motion to suppress the statements, based on Escobedo v. Ill., 378 US 478 (1964), on grounds that the right to counsel extends to all stages preceding trial, beginning when an accused first becomes the focus of a police investigation. The District Court also concluded that Reavley's attorney-client privilege was violated when the girlfriend probed into conversations that Reavley had with his counsel. The Supreme Court disagreed and reversed. Under Moran v. Burbine, 475 US 412 (1986), the right to counsel does not attach until after the initiation of formal charges. Reavley was not formally charged, and adversarial proceedings had not begun, so the right to counsel had not attached. Further, the record did not reflect that law enforcement directed the girlfriend to deliberately seek privileged information, nor did she purposely intrude into the attorney-client relationship or ask questions aimed at eliciting privileged information regarding Reavley's conversations with counsel. Rather, Reavley voluntarily disclosed the privileged communications without prompting from the girlfriend, which was sufficient to waive the right to their privileged nature. St. v. Reavley, 2003 MT 298, 318 M 150, 79 P3d 270 (2003).

Motion to Suppress Statements and Related Evidence — Waiver and Voluntariness — Applicability to Custodial Interrogation: The District Court granted a motion to suppress all statements made by defendant and any evidence obtained as a result of the statements, citing Smith v. Ill., 469 US 91, 83 L Ed 2d 488, 105 S Ct 490 (1984), as decisive of the suppression issue and supportive of the conclusion that defendant's request for counsel at his first interview barred further police interrogation. The Supreme Court reversed, holding that the Smith rule applied only to instances of custodial interrogation, while in this case defendant was not in custody or under formal arrest at the time he requested counsel. Further, the District Court never addressed the question of whether defendant's confession was voluntarily made; therefore, the

case was remanded for hearing on the issues of waiver and voluntariness. St. v. Rorvik, 224 M 104, 728 P2d 419, 43 St. Rep. 2051 (1986).

Central Question on Motion to Suppress Confession: The central question on a motion to suppress a confession for being involuntary is whether the State has proved by a preponderance of the evidence that the person was advised of his constitutional rights and knowingly and voluntarily waived them. St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982), on remand from U.S. Supreme Court.

Knowing and Intelligent Waiver Necessary — Test: In judging a waiver of the fifth amendment right to counsel, a conclusion that the right was waived necessarily entails a finding of a knowing and intelligent relinquishment of a known right, and some of the factors to be considered in making the finding are: (1) the background, experience, and conduct of the person; (2) his age, education, and intelligence; and (3) his capacity to understand the Miranda warnings given him, the nature of his fifth amendment rights, and the consequences of waiving those rights. St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982), on remand from U.S. Supreme Court.

Waiver Following Indication of Interest in Counsel: Arrested person asked police interviewing him if they thought he should get an attorney, and police stated it was up to him. He resumed talking. At a later interview with police he stated, "Maybe I should have an attorney". The police stopped talking to him and began to leave the room, and before they left he resumed talking to them, at which point they reminded him that he had just indicated he wanted an attorney. He stated that he did not want an attorney. The interview continued. He made a knowing and intelligent waiver of his right to counsel, and subsequent confession was voluntary and admissible. St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982), on remand from U.S. Supreme Court.

Suppression of Confession — Voluntariness — Waiver of Right to Counsel After Making Request: To determine whether a confession should have been suppressed, it had to be determined whether the confession was voluntary and whether there was an unconstitutional denial of the right to counsel. In so doing, the following questions had to be answered: What was the totality of the circumstances? Was there effective assertion of the right to counsel, and if so, was there an effective waiver later? Since the evidence answered a large number of the requisite questions about the circumstances, the decision of the trial court was held not to have clearly contravened the weight of the evidence and its holding of voluntariness was upheld. Since any indication by a defendant in any manner that he wishes to consult with an attorney suffices, and evidence showed the defendant had met this requirement, the trial court erred in concluding that there was ineffective assertion of the right to counsel. After adopting the rule that a defendant can validly waive the right to counsel after making a request for counsel, the Supreme Court found the trial court properly found that the State had carried its "heavy burden" of showing waiver of counsel. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979); certiorari granted, Blakney v. Mont., 451 US 1013, 69 L Ed 2d 384, 101 S Ct 2999 (1981), and judgment vacated and case remanded for further consideration in light of Edwards v. Ariz., 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880 (1981); affirmed on remand in St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Juveniles — Suppression of Statements and Evidence: In the trial of a juvenile for shooting a police officer, a motion for suppression of evidence, obtained under authority of a lawful inspection and statements voluntarily made, was erroneously granted. However, statements made after a waiver of counsel, which were void because of lack of counsel for the underaged defendant, were properly suppressed. St. v. District Court, 176 M 257, 577 P2d 849 (1978).

Voluntary Confession in Absence of Counsel: A confession made after 3 hours' interrogation of the accused, who was advised of his right to counsel and his right to remain silent, was not rendered inadmissible by the absence of counsel when the accused never requested assistance of counsel and the confession was voluntarily given. St. v. White, 146 M 226, 405 P2d 761 (1965).

NONCUSTODIAL CONFESSION

Noncustodial Statements to Law Enforcement — Motion to Suppress Improperly Granted: The District Court granted Reavley's motion to suppress a statement made to law enforcement at the police station on grounds that the police: (1) gave mere lip service to Miranda warnings; (2) did not respond to Reavley's inquiry about a need for counsel; (3) used psychological coercion by implying that Reavley would receive leniency if he confessed to the crime; (4) made repeated religious references; (5) falsely told Reavley that a hypnotist was on the way; and (6) lied about DNA evidence that did not exist. The Supreme Court's review of the record did not support the findings. In examining whether the statement was voluntary, the Supreme Court applied the

factors in St. v. Olson, 2003 MT 61, 314 M 402, 66 P3d 297 (2003), to determine whether Reavley was subjected to a custodial interrogation, and all the factors weighed in favor of the state. Reavley was not in custody when he was questioned by the police, so a Miranda warning was not required when questioning began. Officers did not use threats or violence or otherwise act improperly during the interview. At no time did Reavley make a clear, unambiguous, and unequivocal request for counsel, and he was free to leave the station at any time. Based on these facts, the motion to suppress the statement was improperly granted, and the District Court was reversed. St. v. Reavley, 2003 MT 298, 318 M 150, 79 P3d 270 (2003), distinguishing St. v. Grey, 274 M 206, 907 P2d 951 (1995).

Admissions by Boot Camp Inmate to Other Inmates and Program Staff Held Admissible Without Miranda Warnings: Woods, an inmate at the Swan River Correctional Training Center, or "boot camp", made admissions that he killed two people to a trustee counselor and to other boot camp inmates in an anger management workshop. Woods later made the same admission to the boot camp superintendent. After being charged with the homicides, Woods sought to suppress the admissions, arguing that the admissions were not voluntarily made and that they were made while he was in custodial interrogation. From the review of the record, the Supreme Court found: (1) that Woods voluntarily chose to participate in the boot camp program knowing that under the program guidelines, he had to make full disclosure concerning his past; (2) that he made the disclosure to the members of the anger management workshop voluntarily; (3) that Woods's disclosures were made to the trustee and superintendent after they inquired whether he, Woods, wished to further discuss the subject; (4) that prior to Woods's admissions, the boot camp staff did not suspect Woods in the homicides; (5) that Woods was held in a room with the trustee out of concern for his safety rather than to coerce a statement from him; and (6) that there was no evidence of pressure or coercion by the other inmates, the trustee, or the superintendent. Based upon these findings and in reliance on case law from the State of Washington, the Supreme Court held that there was no "interrogation" and no "custody" within the meaning of Miranda, that Miranda warnings did not have to be given to Woods before his admissions, and that therefore the District Court did not err in refusing to suppress the admissions made by Woods without Miranda warnings. The Supreme Court did not address Woods's argument that he was placed in a "classic penalty situation", as discussed in Minn. v. Murphy, 465 US 420 (1984), and St. v. Fuller, 276 M 155, 915 P2d 809 (1996), because Woods raised the issue for the first time on appeal. St. v. Woods, 283 M 359, 942 P2d 88, 54 St. Rep. 617 (1997).

Confession Prior to Arrest: The Supreme Court rejected defendant's contention that his confession was the product of an illegal arrest. Defendant himself admitted that he was not arrested first and that the confession was not taken against his will. St. v. Hodgson, 184 M 394, 603 P2d 246 (1979).

Statements Made to Civilians Prior to Police Custody: On two occasions, while the defendant and his stepchild were alone, the stepchild received serious injuries. On both occasions the defendant gave explanations of how the injuries occurred to his wife and to several doctors. The defendant was charged with aggravated assault and filed a motion to suppress his statements concerning the cause of the child's injuries. The trial court properly denied the motion. The statements were voluntarily given. The Miranda warnings do not apply to statements given by a person before he is a criminal suspect in police custody. The statements made here were not made to law enforcement agents or their alter egos. St. v. Hall, 183 M 511, 600 P2d 1180 (1979).

Evidentiary Hearing Not Required: The District Court did not err by not holding an evidentiary hearing to determine whether an admission by the defendant met constitutional requirements because the voluntariness of the statement was not an issue and Miranda warnings were not required for a noncustodial confession to a civilian. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

DELAY IN ARRAIGNMENT

Delay in Bringing Before Magistrate: The officers' failure to present the defendant before a magistrate before interrogation did not render the confession inadmissible when the defendant failed to show that it was an "unnecessary delay". St. v. Lenon, 174 M 264, 570 P2d 901 (1977).

Delay in Initial Appearance — Statements Excluded: Failure to provide the defendant with a prompt initial appearance necessitated exclusion of evidence obtained and statements allegedly made after the defendant's arrest when he established that the delay was unnecessary and the prosecution failed to meet the burden of showing that such evidence and statements were not reasonably related to the delay. St. v. Benbo, 174 M 252, 570 P2d 894 (1977). See also St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999).

Law Review Articles

In Determining Whether a Confession Was Voluntary and Therefore Admissible in Evidence the Use of a Standard That Takes Into Account the Circumstances of Probable Truth or Falsity Violates the Due Process Clause of the Fourteenth Amendment, Andriolo, 23 Mont. L. Rev. 233 (1962).

A Guide for More Efficient Law Enforcement: This note explores the requirements for admissibility of confessions as evidence. Kalbfleisch, 18 Mont. L. Rev. 198 (1957).

46-13-302. Suppression of evidence.

Commission Comments

1991 Comment: This statute, modeled after the 1987 code, is the statute designed to govern the suppression of evidence. The suppression of certain evidence is a defense practice, and the moving party must establish initial support for the motion.

Subsection (2) requires that once facts are established to support the motion, the court must conduct a suppression hearing. That hearing may be held in conjunction with the hearings of other motions at the omnibus hearing or at a later time as the court directs.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 114-12.

This section provides the machinery for enforcing the constitutional protection against illegal searches and seizures as found in [1889] Montana Constitution Article III, section 7 [now Art. II, sec. 11, 1972 Mont. Const.], and the 14th Amendment to U.S. Constitution. In accordance with Mapp, the 14th Amendment denies the admission of illegally seized evidence. This section continues the requirement that the motion be made before trial but subsection [(3)] provides that if the grounds for the motion were unknown to the defendant he may make it later. (See State v. Gotta, 71 Mont. 288, 229 P. 405 (1924) which required a timely motion to suppress illegally gained evidence.)

The procedure for an appeal from a motion to suppress is provided for in Chapter [20]. [Chapter 18, part 9,] does not allow a defendant to appeal from a ruling on a motion to suppress until after final judgment.

Compiler's Comments

1991 Amendment: In (1), after "obtained", inserted "by the unlawful search and seizure" and deleted second sentence that read: "The motion shall be in writing and state facts showing wherein the search and seizure were unlawful"; deleted former (2) and (3) that read: "(2) The motion shall be made before trial unless for good cause shown the court shall otherwise direct.

(3) The defendant shall give at least 10 days' notice of such motion to the attorney prosecuting or such other time as the court may direct. The defendant shall serve a copy of the notice and motion upon the attorney prosecuting"; in (2), before "motion", deleted "allegations of the", after "show that the" substituted "evidence should be suppressed" for "search and seizure were unlawful", at end inserted "at the omnibus hearing or at a later date if the court orders", and deleted former sentence that read: "The burden of proving that the search and seizure were unlawful shall be on the defendant"; and made minor changes in style.

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GENERAL

Warrantless Entry Justified Under Exigent Circumstances Exception — Evidence Admissible Under Plain View Doctrine: Officer Cameron investigated a report that Kenfield was on the way to a remote small town to purchase alcohol for minors. The officer arrived at Kenfield's residence and heard loud music and smelled marijuana. Cameron was out of radio range. No one answered when Cameron knocked at the door and announced himself, but Cameron heard running feet. Concerned with the minors' well-being, Cameron entered the residence and saw drug

paraphernalia and residue on the kitchen sink. Cameron then called dispatch from the residence and requested backup, and officers subsequently seized drugs and other contraband. Kenfield was arrested for drug production or manufacture, distribution of drugs to minors, and sexual abuse of children. Kenfield moved to suppress the fruits of the warrantless search, but the motion was denied, and Kenfield appealed, but the Supreme Court affirmed. The odor of marijuana, coupled with the facts that the occupants attempted to avoid contact with Cameron and that Kenfield was believed to have been on the way to purchasing alcohol for minors, was sufficient for Cameron to form a reasonable belief that Kenfield had committed or was committing an offense. Additionally, the remoteness of the area, the time of the incident, the failure of Cameron's radio communication, Cameron's concern for the minors, the lack of response to the knock and announce, and the possibility that relevant evidence would be destroyed constituted exigent circumstances warranting immediate entry into the residence. Therefore, warrantless entry into Kenfield's home was justified, as was the seizure of drug evidence in plain view. St. v. Kenfield, 2009 MT 242, 351 M 409, 213 P3d 461 (2009), following St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065 (1998), distinguishing St. v. McBride, 1999 MT 127, 294 M 461, 982 P2d 453 (1999).

Admissible Evidence in Drug Case Obtained Through Informant — Actual Informant Testimony Allowed: A confidential informant wearing a wire purchased drugs from Schwartz, but no search warrant was issued for the electronic monitoring. The state indicated that it would call the informant to testify but would not introduce the results of the electronic monitoring. Schwartz moved to suppress all evidence seized as the result of a search conducted by the informant. The motion was denied, and on appeal, the Supreme Court affirmed. The evidence derived through the informant and not through contemporaneous electric monitoring was admissible. Thus, the District Court was correct in declining to suppress actual testimony by the confidential informant, including identification of Schwartz as the seller and identification of the actual drugs purchased. St. v. Schwartz, 2009 MT 234, 351 M 384, 212 P3d 1060 (2009). See also St. v. Hanley, 186 M 410, 608 P2d 104 (1980), and St. v. Bassett, 189 M 28, 614 P2d 1054 (1980).

Evidence That Statements Freely Given, Not Compelled — Defendant's Right to Remain Silent Not Infringed — Mosley Standard: Morrisey was detained when officers served search warrants. The officers read Morrisey his Miranda rights prior to interrogation. When informed that he had the right to remain silent, Morrisey stated, "Yeah, I will." When told that anything he said could and would be used against him, Morrisey replied, "I ain't saying nothing." When informed that he had the right to an attorney and whether he understood that if he chose to answer questions he had the right to stop answering questions at any time, Morrisey answered, "Yes, got it." The officers then conversed with and questioned Morrisey for the next 3 to 4 hours, during which time Morrisey made incriminating statements. At trial for deliberate homicide, Morrisey moved to suppress the statements and evidence recovered as a result of the statements, but the motion was denied. On appeal, Morrisey maintained that his right to remain silent was violated during the interrogation and that the motion to suppress should have been granted. The Supreme Court recognized Morrisey's right against self-incrimination protected by due process and the totality of the circumstances test, as well as the Miranda doctrine. The court noted that under Oregon v. Elstad, 470 US 298 (1985), failure to give the prescribed warnings prior to questioning does not constitute actual coercion, but rather creates a bright-line legal presumption of coercion that is irrebuttable for purposes of the prosecution's case-in-chief. In this case, Morrisey did not contend that he did not receive Miranda warnings prior to questioning, but rather that officers failed to honor his assertion of the right to remain silent. The court, however, cited the standard in Michigan v. Mosley, 423 US 96 (1975), that the admissibility of statements obtained after a person in custody has decided to remain silent depends under Miranda on whether the person's right to cut off questioning was scrupulously honored. Morrisey was clearly in custody and also clearly invoked the right to silence but then willingly engaged in a running conversation with the officers, giving statements freely, voluntarily, and without compulsion, yet without invoking the right to cut off questioning. Therefore, under the Miranda-Mosley theory, Morrisey's right to remain silent was not infringed, and he was not entitled to suppression of the incriminating statements. The District Court was affirmed. St. v. Morrisey, 2009 MT 201, 351 M 144, 214 P3d 708 (2009).

Failure of Counsel to File Unmerited Motion Not Prejudicial — No Ineffective Assistance of Counsel: Adkins contended that he received ineffective assistance of counsel because his attorney failed to move to suppress drug evidence based on an officer's failure to administer Miranda warnings to Adkins. However, Adkins was on probation at the time the search was conducted and was therefore subject to search of his person and residence. The imminent probation search was an independent legal means by which the evidence would have been

inevitably discovered in any case. Counsel's motion to suppress would thus have been without merit, and failure to file for suppression therefore did not prejudice Adkins, so the ineffective counsel argument failed. St. v. Adkins, 2009 MT 71, 349 M 444, 204 P3d 1 (2009).

Inevitable Discovery of Laptop Computer Evidence — Motion to Suppress Properly Denied: Lacey shared a residence with Dozier, although the property was owned by Dozier. Dozier discovered incriminating evidence on Lacey's laptop computer, which was in the common area of the residence and which Dozier was allowed to access. Officers came to the residence and Dozier allowed them to seize the computer. Lacey later asserted that the officers lacked probable cause to seize Lacey's personal property without Lacey's consent. Because Lacey had a possessory interest in the property, Dozier did not have the right or authority to consent to seizure of the computer. However, because the computer was searched pursuant to a federal search warrant rather than on Dozier's consent, Dozier's consent was immaterial. Rather, even if probable cause did not exist for seizure of the laptop, the evidence later discovered pursuant to the federal warrant was admissible under the inevitable discovery exception to the fruit of the poisonous tree doctrine, and Lacey's motion to suppress was properly denied. St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009). See also St. v. Notti, 2003 MT 296, 318 M 146, 79 P3d 289 (2003), and St. v. Dasen, 2007 MT 87, 337 M 74, 155 P3d 1282 (2007).

Seized Evidence Not Considered "Other Evidence of a Crime" Not Subject to Suppression: Cotterell moved to suppress evidence of illegal hunting activity that was seized under a search warrant that allowed seizure of numerous hunting-related items, but also allowed seizure of "any other evidence of a crime", on grounds that the warrant was overbroad. The motion was denied. On appeal, the state conceded that the phrase "any other evidence of a crime" was overbroad (see St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180 (1999), and Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001)) but asserted that journals and calendars found in searching Cotterell's property were directly related to the crimes being investigated and thus were not subject to suppression. The Supreme Court agreed with the state. Although the journals and calendars were not specifically mentioned in the warrant, they were found during execution of a validly executed warrant in places that could lawfully be searched, were found in the course of a search for items that were specifically set out in the warrant, and were related to hunting and fishing activities. Even if the overbroad phrase was excised from the warrant, the journals and calendars were within the scope of the warrant, so denial of the motion to suppress was affirmed. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008).

No Hearing on Suppression Motion Required Absent Showing of False Statement in Warrant Application: Tucker argued that the District Court erred by failing to hold a hearing on Tucker's motion to suppress. The Supreme Court disagreed. Tucker failed to make any preliminary showing of a false statement or to challenge any factual statement in the application and instead challenged whether probable cause was established within the four corners of the application, so no hearing was required under this section. Rather, a hearing was within the discretion of the District Court. St. v. Tucker, 2008 MT 273, 345 M 237, 190 P3d 1080 (2008).

No Ineffective Assistance of Counsel Who Failed to Request Hearing That Was Not Required: Tucker contended that he received ineffective assistance of counsel when his attorney failed to request a hearing on Tucker's motion to suppress evidence from a search pursuant to 46-13-302. The Supreme Court disagreed. Tucker failed the first prong of the Strickland test because he could not demonstrate that counsel was deficient for failing to request a hearing when counsel had no basis to request a hearing absent Tucker's challenge to the truthfulness of any statements in the warrant application. St. v. Tucker, 2008 MT 273, 345 M 237, 190 P3d 1080 (2008).

Inevitable Discovery Doctrine Exception to Exclusionary Rule on Inadmissibility of Evidence Obtained as Result of Unlawful Search — Sua Sponte Application by Supreme Court: Dickinson asserted that certain evidence discovered during a warrantless search of his motel room should be suppressed under the exclusionary rule as fruit of the poisonous tree because the discovery was not made during a search incident to arrest and because the search was not a justified protective sweep. The state contended that the search was conducted on grounds of safety and exigent circumstances. Although neither party raised the argument, the Supreme Court decided sua sponte to address the issue under the inevitable discovery doctrine exception to the exclusionary rule, which holds that fruit of the poisonous tree evidence is admissible if it is inevitable that the evidence would have been discovered apart from a defendant's confession. In this case, the officers were legally in the motel room, and there was more than sufficient evidence in plain sight to justify issuance of a warrant. Once the warrant was executed, the remainder of the evidence would have inevitably been discovered and was thus admissible under the inevitable discovery doctrine. St. v. Dickinson, 2008 MT 159, 343 M 301, 184 P3d 305 (2008). The

Dickinson inevitable discovery doctrine was also applied in St. v. Hilgendorf, 2009 MT 158, 350 M 412, 208 P3d 401 (2009). See also St. v. Pearson, 217 M 363, 704 P2d 1056 (1985).

Clarification of Plain View Warrant Exception — Applicable to Seizures, Not Searches: The plain view doctrine allows peace officers to seize evidence in plain view without a warrant under certain circumstances. If an officer discovers evidence in plain view while lawfully present on an individual's property and the incriminating nature of the evidence is immediately apparent, the evidence may be seized and used against a defendant at trial. However, unlike exigent circumstances, valid consent, and lawful arrest, the doctrine does not allow the officer to proceed or intrude to the location of the evidence without a warrant. Rather, the applicability of the doctrine depends on the officer's lawful presence and right of access to the evidence and should not be construed as a stand-in for a search warrant. As an exception to the warrant requirement, the plain view doctrine applies to seizures, not searches. St. v. Lewis, 2007 MT 295, 340 M 10, 171 P3d 731 (2007). See also Horton v. Calif., 496 US 128 (1990).

Standard of Review of Denial of Suppression Motion: A trial court's denial of a suppression motion based on a finding of particularized suspicion is reviewed to determine whether that finding is clearly erroneous and whether the trial court's conclusions of law are correct. Billings v. Costa, 2006 MT 181, 333 M 84, 140 P3d 1070 (2006). See also St. v. Schulke, 2005 MT 77, 326 M 390, 109 P3d 744 (2005).

Motion to Suppress DUI Blood Test Evidence Obtained by Investigative Subpoena Properly Denied: Following a motorcycle accident, Fregien admitted to a responding firefighter that he had consumed some beer, and the firefighter and a highway patrol officer noticed the odor of alcohol on Fregien's breath. The firefighter's affidavit supported an investigative subpoena for Fregien's blood test results obtained at the hospital. Fregien contended that the evidence did not rise to the level of probable cause and that the blood test results should have been suppressed, but the suppression motion was denied. On appeal, the Supreme Court affirmed. Under St. v. Nelson, 283 M 231, 941 P2d 441 (1997), the facts warranted an honest belief in the mind of a reasonable and prudent person that Fregien had committed the offense of DUI, thereby establishing probable cause for the investigative subpoena for Fregien's blood test results, and the motion to suppress was properly denied. St. v. Fregien, 2006 MT 18, 331 M 18, 127 P3d 1048 (2006).

Voluntary Confession During Noncustodial Interrogation — Motion to Suppress Properly Denied: Honey was interviewed once in a patrol car and once at the Sheriff's office regarding his involvement in certain thefts. At both interviews, Honey was read his Miranda rights, was advised of his right to counsel, which he waived, and was informed that he would not be arrested and was free to leave at any time. Honey later contended that his confession was involuntary and moved to suppress it. The District Court denied the motion, and the Supreme Court affirmed. Being able to leave, Honey was not subject to a custodial interrogation, and he was not denied the right to counsel. Under the totality of the circumstances, his confession was voluntary, and the motion to suppress was properly denied. St. v. Honey, 2005 MT 107, 327 M 49, 112 P3d 983 (2005). See also St. v. Grey, 274 M 206, 907 P2d 951 (1995), and St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003).

Standard of Review of Grant or Denial of Motion to Suppress Evidence: The Supreme Court reviews a District Court's grant or denial of a motion to suppress evidence to determine whether the District Court's findings of fact were clearly erroneous and whether those findings were correctly applied as a matter of law. A trial court's findings are clearly erroneous if they are not supported by substantial evidence, if the court has misapprehended the effect of the evidence, or if review of the record leaves the Supreme Court with a definite and firm conviction that a mistake has been made. St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005). See also St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974 (1999), St. v. Lanegan, 2004 MT 134, 321 M 349, 91 P3d 578 (2004), and St. v. Vaughn, 2007 MT 164, 338 M 97, 164 P3d 873 (2007).

Hearing on Suppression Motion Unnecessary When Facts Uncontested: In Justice's Court, Schulke moved to suppress evidence, but the motion was denied. Schulke stated that an evidentiary hearing on the motion would be superfluous and thus did not request a hearing. On appeal, the District Court declined to hold a hearing on the suppression motion and Schulke asserted error, but the Supreme Court affirmed. Schulke did not contest the facts in the investigating officer's report in Justice's Court and argued that a hearing was necessary only when the Justice's Court and the District Court ruled against him. An evidentiary hearing is unnecessary when facts are uncontested and the court is asked to make a decision as a matter of law. The District Court did not abuse its discretion in denying a hearing on the suppression motion when a hearing was not requested in Justice's Court. St. v. Schulke, 2005 MT 77, 326 M 390, 109 P3d 744 (2005). See also St. v. Shook, 2002 MT 347, 313 M 347, 61 P3d 863 (2002).

Breath Test Administered Before Reading of Implied Consent Advisory — Motion to Suppress Properly Denied: Kintli was stopped for suspicion of DUI. She was administered field sobriety tests and was read the preliminary alcohol screen test advisory. At the detention center, she refused to repeat the field sobriety tests and indicated that she wanted to take the breath test. The test was administered and resulted in a BAC of 0.262. Following the test, the officer read Kintli the consent advisory and offered to void the test and administer a new one. Kintli indicated that she did not want to retake the test. Kintli was found guilty of DUI per se in City Court and appealed to District Court for a trial de novo. She moved to suppress the results of the breath test, which was denied. Kintli then pleaded guilty, reserving the right to appeal the suppression denial. The Supreme Court upheld the District Court. Because the right to independent blood testing remains constant regardless of whether the suspect refuses or submits to testing, Kintli's argument that the officer's failure to advise her of this right before she consented invalidates her consent is nonsensical. She was timely advised of her right to obtain independent blood testing, and this was sufficient to safeguard her due process rights. Section 61-8-409 requires an officer to advise a person submitting to a preliminary breath test ("PBT") of the right of refusal and the consequences of refusal. The Supreme Court has held that in order for that statutory section to have meaning, the notice of the right of refusal and the consequences of refusal necessarily must precede the testing. No similar statutory requirement is found as to other BAC tests conducted after arrest. St. v. Kintli, 2004 MT 373, 325 M 53, 103 P3d 1056 (2004).

Sufficient Corroboration of Tip in Application for Warrant to Demonstrate Probable Cause — Suppression Motion Improperly Granted: Based on a tip, Palmer was arrested for drugs following a search of his bus. The District Court subsequently granted Palmer's motion to suppress after concluding that: (1) the informant lacked reliability; (2) timeframes surrounding the information were unclear; (3) the informant's tip was not sufficiently corroborated; (4) associations between Palmer and drug activity were tenuous; and (5) evidence found in Palmer's trash could not be directly linked to Palmer. The state appealed the suppression, and the Supreme Court reversed. Applying St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), the court found it unnecessary to determine whether the informant should be treated as a confidential informant, requiring corroboration, or as an informant who made an unequivocal admission against interest in the course of providing the tip because the search warrant application itself sufficiently corroborated the tip and demonstrated probable cause. The fact that corroborative evidence in the form of video surveillance revealed no actual criminal activity did not necessarily lead to the conclusion that probable cause did not exist. St. v. Palmer, 2003 MT 129, 316 M 46, 68 P3d 809 (2003).

Exigent Circumstances and Probable Cause Justifying Warrantless Entry Into Private Home — Motion to Suppress Evidence of Warrantless Search Properly Denied: In response to an urgent domestic violence 9-1-1 call from Saxton, officers arrived at Saxton's mobile home, but because they received no response to their calls and knocking, the officers entered the home to protect the lives of possible victims inside. Once inside, the officers discovered a marijuana growing operation and subsequently arrested Saxton on drug charges. Saxton moved to suppress the evidence on grounds that the warrantless entry was unlawful, but the motion was denied, and Saxton appealed. The Supreme Court recognized the general rule that warrantless searches conducted inside a person's home are per se unreasonable, with few exceptions. Pursuant to St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065 (1998), one exception occurs when an officer concludes that there are exigent circumstances and probable cause to conduct the search, and in this case, exigent circumstances and probable cause justified entry into the home. It was reasonable for the responding officers to conclude that it was necessary to enter the home to discover and protect Saxton or other potentially incapacitated victims. Because entry was justified, the District Court did not err in denying Saxton's motion to suppress evidence obtained as a result of the search. St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003).

Sufficient Probable Cause for Search of Vehicle for Suspected Drug Lab: Officers received a tip from Olson's estranged husband that a methamphetamine lab was being operated in Olson's garage. The officers placed the garage under surveillance and saw equipment being loaded into Olson's car that same day. The officers stopped the car for an investigative stop, and an officer informed Olson that he knew that lab equipment was in the trunk. Olson initially denied it, but when the officer expressed concern for Olson and her son, she made incriminating statements and confessed that the lab was in the car. The officers then obtained a search warrant and searched the vehicle and Olson's garage. Olson contended that the warrant application was not supported by probable cause. The Supreme Court applied the standards in Ill. v. Gates, 462 US 213 (1983), and St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), and concluded that

Olson's husband was acting as a good citizen and was a reliable informant. The officers had sufficient probable cause to believe that a drug lab was relocated from Olson's garage to the vehicle to support the issuance of the search warrant. St. v. Olson, 2003 MT 61, 314 M 402, 66 P3d 297 (2003).

Defendant Informed of Right to Independent Blood Test After Administration of Portable Breath Test — No Violation of Due Process Rights: After Feldbrugge was stopped for speeding, the investigating officer noticed that Feldbrugge seemed confused, had difficulty removing his driver's license from his wallet and producing proof of registration and insurance, had bloodshot and glassy eyes and slurred speech, and was unsteady on his feet. Upon questioning, Feldbrugge admitted having had a couple of drinks. The officer did not perform field sobriety tests, but did ask Feldbrugge to take a portable breath test (PBT). The officer read a short advisory that did not contain information regarding Feldbrugge's right to obtain an independent blood test to challenge the PBT results and told Feldbrugge that if he passed the PBT, he would not be arrested, but if he failed the PBT, he would be arrested for DUI. Feldbrugge consented to the PBT, which he failed, and was arrested and taken to the county jail. Before being administered an Intoxilyzer breath test at the jail, Feldbrugge was read the informed consent advisory form, which included a statement regarding Feldbrugge's right to obtain an independent blood test. At trial, Feldbrugge moved to suppress the evidence on grounds that his due process rights were violated because he was not informed of the right to an independent blood test until after the PBT was administered, citing St. v. Strand, 286 M 122, 951 P2d 552 (1997), which establishes an officer's affirmative duty to inform a defendant of the right to an independent blood test at the time of arrest while the blood can still be analyzed. The motion was denied, and Feldbrugge appealed. The state maintained that the officer in this case complied with Strand by informing Feldbrugge of the right to an independent blood test after arrest and at a time when the right could be meaningfully exercised, noting that Strand involves a defendant's right to attempt to obtain exculpatory evidence and does not implicate the separate right to refuse to submit to a breath test that has been requested under the implied consent statute. Feldbrugge argued that had he been informed of the right to an independent blood test, he might have refused to consent to the PBT. However, the notion that Feldbrugge had a choice between taking a PBT or obtaining an independent blood test, without penalty, was misguided. Under the implied consent statute, every person who operates a motor vehicle in this state impliedly consents to a blood or breath test, and if the test is refused, the person's driver's license is subject to immediate seizure and suspension. A person may obtain an independent blood test in addition to the test administered at the direction of an officer, but the right to an independent blood test, as discussed in Strand, is separate from the obligation to submit to an officer-designated test under the implied consent law. Here, it was unnecessary for the officer to inform Feldbrugge of the right to an independent blood test prior to requesting the PBT because even if Feldbrugge had been so informed, his options remained the same: consent to the PBT or refuse and have his driver's license seized. Rather, under Strand, the officer was required to timely inform Feldbrugge that he could obtain an independent blood test in addition to the PBT and Intoxilyzer breath test so that Feldbrugge could gather exculpatory evidence. Informing Feldbrugge after the PBT was timely, so Feldbrugge's due process rights were not violated. Because the PBT results were admissible, Feldbrugge's arrest was supported by probable cause, and the DUI conviction was affirmed. St. v. Feldbrugge, 2002 MT 154, 310 M 368, 50 P3d 1067 (2002).

Elements of Community Caretaker Doctrine — Particularized Suspicion Not Required in Case of Safety Stop: About 3:05 a.m., an officer on routine patrol stopped to investigate a vehicle parked beside a highway with its lights out but with its motor running. Lovegren was in the driver's seat and appeared to be asleep, but he did not respond when the officer knocked on the window. When the officer opened the door, Lovegren awoke and stated, "I was drinking." The officer noticed that Lovegren's eyes were bloodshot and smelled alcohol. The officer had Lovegren perform field sobriety tests, which Lovegren failed, and arrested Lovegren for DUI. Lovegren moved to suppress all evidence, claiming that the search was illegal because the officer had no particularized suspicion of any wrongdoing. The District Court denied the motion on grounds that a particularized suspicion was not necessary because the officer had a duty to investigate for Lovegren's own safety. Lovegren appealed, but the Supreme Court affirmed pursuant to the community caretaker doctrine. The court applied the following test to determine whether an officer's actions fall under the doctrine: (1) as long as there are objective, specific, and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, the officer has a right to stop and investigate; (2) if the citizen is in need of aid, the officer may take appropriate action to render assistance or mitigate the peril; and (3) once the officer is assured that the citizen is not in peril and is not in need of assistance or that the peril has been

mitigated, any actions beyond that constitute a seizure implicating constitutional protections afforded by the right of privacy and the right against illegal search and seizure. In this case, when the officer opened the door to check on Lovegren's well-being and Lovegren awoke and voluntarily stated that he had been drinking, the officer then noticed other signs of intoxication that constituted a particularized suspicion to make a further investigative stop that eventually developed into probable cause for an arrest. It would have been a dereliction of the officer's duty if, after knocking on the window and receiving no response, the officer had walked away and continued on patrol. Thus, the escalation of events leading to Lovegren's arrest was proper, and denial of the motion to suppress the evidence of the investigation was not erroneous. St. v. Lovegren, 2002 MT 153, 310 M 358, 51 P3d 471 (2002), following Grinde v. St., 249 M 77, 813 P2d 473 (1991), and Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998), and followed in St. v. Reiner, 2003 MT 243, 317 M 304, 77 P3d 210 (2003), St. v. Nelson, 2004 MT 13, 319 M 250, 84 P3d 25 (2004), St. v. Litschauer, 2005 MT 331, 330 M 22, 126 P3d 456 (2005), St. v. Wheeler, 2006 MT 38, 331 M 179, 134 P3d 38 (2006), and St. v. Vaughn, 2007 MT 164, 338 M 97, 164 P3d 873 (2007). The Lovegren community caretaker doctrine was also applied in St. v. Seaman, 2005 MT 307, 329 M 429, 124 P3d 1137 (2005). See also Henry v. U.S., 361 US 98 (1959), Terry v. Ohio, 392 US 1 (1968), and Cady v. Dombrowski, 413 US 433 (1973).

Standard of Review of Denial of Motion to Suppress Evidence of Investigatory Stop: The Supreme Court reviews the denial of a motion to suppress evidence from an investigatory stop to determine whether the trial court's finding that the officer involved had a particularized suspicion to justify the investigatory stop was clearly erroneous. The trial court's conclusions of law are reviewed to determine whether the court's interpretation of the law was correct. St. v. Lovegren, 2002 MT 153, 310 M 358, 51 P3d 471 (2002).

Catchall Phrase in Warrant — Particularity Requirement — Suppression of Only Articles Seized Pursuant to Invalid Portions of Search Warrant: A lawful search warrant authorized officers to search Hauge's mobile home and seize drugs, drug paraphernalia, records of drug transactions, weapons, and the proceeds of drug transactions, including "anything else of value furnished or intended to be furnished in the exchange of controlled substances". Hauge argued that the catchall phrase "anything else of value" rendered the warrant overbroad and invalid and that any evidence seized pursuant to the warrant must be suppressed. After initially citing the requirement that a search warrant must particularly describe who or what is to be seized, the Supreme Court noted that in St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180 (1999), warrant language authorizing seizure of anything else of value was a catchall phrase encompassing everything conceivable, giving officers unbridled discretion to engage in a general exploratory rummaging without any guidance in distinguishing between items that could and could not be seized and that the language rendered the warrant facially overbroad and all fruits of the search inadmissible. However, the court also noted the adoption of the doctrine of severance, explained in U.S. v. Gomez-Soto, 723 F2d 649 (9th Cir. 1984), which provides that invalid portions of a search warrant may be stricken and valid portions preserved and that only articles seized pursuant to the invalid portions of the warrant need be suppressed. In Hauge's case, officers acting pursuant to a lawfully issued and otherwise sufficiently particularized warrant did not seize any property related to the catchall phrase and no criminal charges resulted from the presence of the catchall language in the warrant. The overbroad catchall clause was thus severable, and because no evidence was seized pursuant to the clause, no evidence was subject to suppression. Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001). See also St. v. Kuneff, 1998 MT 287, 291 M 474, 970 P2d 556 (1998).

Sufficient Probable Cause for Search Warrant Based on Tip From Confidential Informant — Corroboration Required — Defendant's Burden to Show False Information in Warrant Application: A confidential informant told police that Gray was conducting a marijuana growing operation in his home. Based on the allegations, officers surveyed the exterior of the home and discovered a newly installed chimney and vents consistent with such an operation. Known drug offenders were observed frequenting the residence. An investigative subpoena of Gray's utility records showed an increase in power consumption consistent with a growing operation. Based on this information, officers obtained a search warrant and discovered 77 marijuana plants and associated growing paraphernalia. Gray moved unsuccessfully to suppress the evidence on grounds of insufficient probable cause to support the warrant, arguing that the warrant application contained unreliable hearsay, insufficient detail, and unsupported conclusory statements. The Supreme Court affirmed. In St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), the court reiterated that corroboration of an informant's tip through other sources is necessary when the information is hearsay or the informant is anonymous. In this case, even though the informant was not anonymous, the informant lacked personal knowledge of the

operation, so the information was hearsay and required corroboration. Nevertheless, the information could still be considered with other factors in determining probable cause under the totality of the circumstances test. The officers made several attempts to corroborate the information, including verification of the physical description of Gray and the residence, although that innocuous information alone provided no indicia of suspicious human conduct to substantiate the allegations, as required in St. v. Griggs, 2001 MT 211, 306 M 366, 34 P3d 101 (2001). However, the officers' other observations did provide sufficient corroboration to support probable cause, despite Gray's attempt to offer seemingly innocent explanations for the suspicious conduct. When a defendant challenges the veracity of information in a warrant application, the defendant must make a substantial preliminary showing that the application or affidavit in support of the application contained false information. If that showing is made, a hearing must be held and the defendant must prove by a preponderance of the evidence that the information is untrue, and if proved untrue, that information must be excised from the application and a determination made as to whether sufficient probable cause exists without the excised information (see St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968 (1999)). Here, Gray did challenge the veracity of some, but not all, of the information, but the Supreme Court declined to disturb the trial court's findings regarding the reasonableness and prudence of the investigation or its judgment regarding the credibility of the witnesses. The court found that at some point, credence must be lent to the judgment of law enforcement whose training and experience invoke common sense conclusions about human behavior, and as long as officers provide reasonable justifications for their conclusions, the court will not disturb a finding of probable cause for issuance of a search warrant. The information here was sufficiently corroborated, and in light of the totality of the circumstances, the conclusion that probable cause existed was affirmed. St. v. Gray, 2001 MT 250, 307 M 124, 38 P3d 775 (2001). See also St. v. Rinehart, 262 M 204, 864 P2d 1219 (1993).

Investigative Subpoena for Medical Records Not Issued for Overly Broad Time Period: The District Court issued an investigative subpoena related to an accident on January 3, 2000, to compel production of Bilant's medical records back to 1996. The affidavit for subpoena was issued May 10, 2000. The health care provider supplied records back to 1991. Bilant moved to suppress the information on grounds that the subpoena was overly broad in supplying any information after the date of the accident and prior to the date specified in the subpoena. The Supreme Court affirmed the validity of the investigative subpoena. The inclusion of time between January 3 and May 10 did not render the subpoena defective because there was a legitimate nexus between prescriptions issued before January 3 and prescription refills issued during subsequent months. Further, if a health care provider discloses medical information beyond what is allowed by law, the remedy lies with the health care provider and not with law enforcement through a motion to suppress. The question of the production of medical records beyond those required by the subpoena was a matter beyond the scope of Supreme Court review, and receipt by the state of records that contained information outside the scope and time period requested did not justify suppression of those portions of the records sought by and yielded pursuant to an otherwise legally sufficient investigative subpoena. St. v. Bilant, 2001 MT 249, 307 M 113, 36 P3d 883 (2001).

Revealing Limited Medical Information During Police Interview Not Considered Waiver of Constitutional Right to Confidentiality in Medical Records — Voluntary Medical Information Outside Scope of Fruit of Poisonous Tree Doctrine — Adequate Probable Cause for Investigative Subpoena of Medical Records: Bilant was involved in a three-car accident and was subsequently arrested for DUI and a seat belt violation. During an interview following the arrest, Bilant revealed to an officer that he had taken pain medication on the day of the accident. The officer called Bilant's health care provider for confirmation, and the provider confirmed that Bilant had a prescription for a drug similar to the pain medication that he mentioned. The officer then procured an investigative subpoena regarding documentation on all prescriptions issued to Bilant, including any advisory warnings, and the provider sent Bilant's entire medical file. Bilant contended that the state violated both his constitutional right to privacy and the statutory protections of 50-16-535. The state maintained that Bilant waived his claim of confidentiality in his medical information when he voluntarily revealed his use of pain medication to the officer. The Supreme Court agreed with Bilant. Medical records are quintessentially private and deserve the utmost constitutional protection. None of the statutory prerequisites for disclosure of the medical records were met. In deciding to reveal limited medical information in a police interview, Bilant did not forfeit his constitutional right to subsequently claim confidentiality in his medical records. The officer conducted an illegal search in seeking the constitutionally protected private medical information without probable cause and the benefit of an investigative

subpoena under 46-4-301, and the information gleaned from the telephone call should have been suppressed. Bilant then contended that the use of the illegally obtained information formed an improper basis for the investigative subpoena and that the results of the subpoena should also have been suppressed pursuant to the fruit of the poisonous tree doctrine, which forbids the use of evidence that comes to light as the result of an initially illegal act. However, on this point, the Supreme Court disagreed with Bilant. One exception to the doctrine is that the derivative evidence is admissible if it is obtained from an independent source. Here, Bilant himself provided the source by giving voluntary medical information from other than the illegal telephone inquiry. The Supreme Court recognized that an investigative subpoena seeking constitutionally protected medical information requires greater justification for state access than the administration of justice rationale used to obtain public information under 46-4-301, so in reviewing the probable cause basis for constitutionally protected material, the court excised the illegal evidence from the application and reviewed the remaining information de novo to determine whether probable cause existed for issuing the subpoena. In this case, even when the information subject to suppression was excised, the remaining evidence established probable cause that a DUI was committed and underscored a compelling state interest in medical records related to prescription medicines in order to confirm Bilant's initial admission to the officer. Thus, the subpoena was issued in accordance with the statutory requirements for constitutionally protected medical records, and Bilant's conviction was affirmed. St. v. Bilant, 2001 MT 249, 307 M 113, 36 P3d 883 (2001). See also St. v. New, 276 M 529, 917 P2d 919 (1996), and St. v. Nelson, 283 M 231, 941 P2d 441 (1997).

Suppression Hearing — Court to Consider Totality of Circumstances: In a suppression hearing, a court must consider the totality of the circumstances, and in evaluating the totality of the circumstances, a court should consider the quantity or content and quality or degree of reliability of the information available to the officer. St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001). See also St. v. Gilder, 1999 MT 207, 295 M 483, 985 P2d 147 (1999).

Sufficiency of Law Enforcement Officer's Independent Corroboration of Anonymous Tip — Failure to Corroborate Probability of Criminal Activity — Evidence of Search Properly Suppressed: Bozeman police received an anonymous tip that Griggs was conducting a mushroom-growing operation in his home. The informant also included a physical description of Griggs, his address, a description of his vehicle, the fact that Griggs had recently improved the wood trim on his residence, and the facts that he was a member of the armed forces, was a sharpshooter, and possessed several weapons. Detectives were able to corroborate all the personal information and incorporated it into a search warrant application, but did not corroborate that alleged criminal activity was occurring. Nevertheless, a warrant was issued by a District Court Judge and executed the following day, resulting in the seizure of contraband and Griggs's arrest. Griggs moved to suppress, arguing that the warrant was issued without sufficient probable cause, and a different District Court Judge granted the motion on grounds that because there was no independent police investigation that corroborated the caller's statements about the drug activity, sufficient probable cause for the warrant did not exist. The state appealed, contending that the further law enforcement investigation required under the standards in Ill. v. Gates, 462 US 213 (1983), and St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), do not necessarily require corroboration of any criminal activity at all and need not extend to any incriminating information regarding alleged criminal activity supplied by an informant. The Supreme Court disagreed. A defendant may challenge whether independent corroboration or investigation was sufficient within the context of a court's totality of the circumstances analysis. Upon review, an appellate court must look solely to the information given to the impartial magistrate and to the four corners of the entire warrant application, rather than examining the application sentence by sentence. An anonymous informant's information regarding criminal activity always requires law enforcement corroboration in order to supply a sufficient substantial basis for a probable cause determination, although information supplied by a "concerned citizen" whose identity is known, who personally observes the alleged criminal activity, and who openly risks liability by accusing another person of criminal activity may not need further law enforcement corroboration. What is critical in the corroboration of an informant's information, when corroboration is in fact required, is that innocent noncriminal activity or evidence subjected to further investigation by officers ripens into suspicious behavior in light of the tip concerning criminal activity. A warrant application must state facts sufficient to support probable cause to believe that a criminal offense has been committed, as well as facts supporting probable cause to believe that evidence, contraband, or persons connected with the offense may be found. The necessary indicia of suspicion that results from police corroboration of otherwise innocent information must reveal a pattern of human behavior associated with the

alleged criminal activity or activity necessary to carry out the activity that, when viewed as a whole, is consistent with the criminal activity. It is possible that in order to reveal this indicia of suspicious conduct, officers may investigate and corroborate otherwise innocent, noncriminal activity with further observations of otherwise innocent, noncriminal activity, but in Griggs's case, none of the subsequent investigations served to supply the magistrate with any indicia of conduct even remotely associated with the criminal activity alleged by the informant. Thus, probable cause did not exist, and the fruits of the search were properly suppressed. St. v. Griggs, 2001 MT 211, 306 M 366, 34 P3d 101 (2001), distinguishing St. v. Deskins, 245 M 158, 799 P2d 1070 (1990), and St. v. Hook, 255 M 2, 839 P2d 1274 (1992), and followed in Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001). See also U.S. v. Mendonsa, 989 F2d 366 (9th Cir. 1993).

Failure of District Court to Properly Consider Prior Supreme Court Decision Regarding Suppression of Evidence as Law of Case — Grant of Request for Further Evidentiary Hearing Reversible Error: In St. v. Gilder, 1999 MT 207, 295 M 483, 985 P2d 147 (1999) (Gilder I), the Supreme Court concluded that the District Court erred when it denied Gilder's motion to suppress evidence obtained during the stop of Gilder's vehicle because the investigating officer did not have a particularized suspicion to justify the stop; however, the Supreme Court did not remand for further proceedings. Following the issuance of remittitur in Gilder I, the state requested an evidentiary hearing to present additional evidence to meet its burden of establishing particularized suspicion, arguing that a hearing was appropriate because Gilder I had referenced the District Court's failure to conduct an evidentiary hearing prior to its original denial of the motion to suppress. The request for an evidentiary hearing was granted over Gilder's objection, and the arresting officer was allowed to testify and supplement the evidence offered by the state in Gilder I. The District Court then issued an order again denying Gilder's motion to suppress, and Gilder appealed. The state's interpretation of Gilder I as an invitation for further proceedings on the suppression issue was incorrect. Although the District Court could have properly revisited factual determinations in regard to other issues, the suppression issue in Gilder I was foreclosed from further consideration. Gilder I constituted the law of the case regarding the lack of particularized suspicion for the investigative stop and the suppression of evidence obtained from the stop, and the District Court abused its discretion by not properly treating Gilder I as the law of the case and by conducting further evidentiary hearings on a matter that was conclusively decided by the Supreme Court in the previous proceedings. St. v. Gilder, 2001 MT 121, 305 M 362, 28 P3d 488 (2001), following Zavarelli v. Might, 239 M 120, 779 P2d 489 (1989).

Search Warrant Based in Part on Illegal Information — Motion to Suppress Denied — Reviewing Court to Conduct De Novo Review of Search Warrant Application: Police officers went to defendants' trailer home to check out a tip about marijuana being grown in the home. Defendants were arrested after the officers saw a marijuana pipe on a shelf. An officer went down the hall and saw and seized marijuana plants growing in a bedroom. The officers then got a search warrant and seized additional drug evidence. Defendants moved to suppress the plants seized without a warrant and the additional evidence seized pursuant to the warrant on the basis that it was tainted. The District Court granted the motion to suppress the plants on the basis that no exception to a warrantless search excused the illegal search and denied the motion to suppress the evidence seized with a search warrant. The Supreme Court held that when the issuance of a search warrant is based in part on illegally obtained information, the reviewing court shall excise the illegally obtained information from the application for search warrant and review the remaining information de novo to determine whether probable cause supported the issuance of a search warrant, overruling the use of the "great deference" standard of review in such cases. The Supreme Court held that the marijuana pipe and the citizen tip established probable cause for the issuance of the search warrant. The test is not to determine whether each individual fact presented in the application for search warrant establishes probable cause, but to determine from the totality of the circumstances whether there is probable cause. St. v. Kuneff, 1998 MT 287, 291 M 474, 970 P2d 556, 55 St. Rep. 1173 (1998).

Presence of Arresting Officer Needed to Prove Particularized Suspicion: A highway patrol officer stopped Angeline on suspicion of violating the basic rule and subsequently arrested him for driving under the influence. Angeline moved to suppress any evidence obtained after the stop on the basis that the arresting officer had no grounds to make the initial stop. At the suppression hearing, the state presented no witnesses, not even the arresting officer. Angeline presented evidence as to why he believed that his actions in passing two cars at 80 miles an hour on a two-way road did not violate the basic rule. The lower court held that Angeline's testimony was sufficient to demonstrate the facts that the arresting officer relied upon to achieve a

particularized suspicion that Angeline had violated the basic rule. The Supreme Court reversed, holding that without the arresting officer's testimony, the lower court could only speculate as to the objective data that the officer may have observed before the investigatory stop and further that no evidence was introduced regarding the officer's experience and training that would allow the court to evaluate his observations, inferences, and resulting suspicions that led to the stop. St. v. Angeline, 1998 MT 139, 289 M 222, 961 P2d 1251, 55 St. Rep. 556 (1998), followed in St. v. Gilder, 1999 MT 207, 295 M 483, 985 P2d 147, 56 St. Rep. 808 (1999).

Seizure of Items Not Described in Search Warrant: Based on an informant's tip, a search warrant was issued for respondent's home, and marijuana plants and materials used to cultivate marijuana were seized. The District Court granted respondent's motion to suppress, and the Supreme Court reversed, holding that there was probable cause to support the warrant. Items or things other than those described in the warrant may be seized so long as a reasonable relationship is demonstrated between the search authorized by the warrant and the seizure of the thing not described. St. v. Sundberg, 235 M 115, 765 P2d 736, 45 St. Rep. 2235 (1988).

Motion to Suppress Results of Breathalyzer Test Denied — Affirmed on Appeal — No Transcript Forwarded: Charged with driving under the influence of alcohol, defendant moved to suppress results of Breathalyzer test. The Justice of the Peace denied the motion. In a bench trial the Justice Court found defendant guilty. On appeal to the District Court, defendant renewed his suppression motion on a set of stipulated facts. Motion was denied and defendant was convicted by a jury of violating 61-8-406, but was acquitted of charges under 61-8-401. On appeal to the Supreme Court, defendant stated that no trial transcript was being forwarded since the appeal of the denial of the suppression motion could be reviewed upon the face of the stipulated facts. The state included excerpts of the trial transcript that buttressed the lower court's decision on the suppression motion. The Supreme Court approved the state's approach since the suppression motion denial was not final and could be reversed at any time. St. v. Sharp, 217 M 40, 702 P2d 959, 42 St. Rep. 1009 (1985).

Weapon Seized in Home Without Warrant — Statement by Defendant Without Miranda Warnings — Evidence Suppressed: Defendant charged with aggravated assault moved to suppress evidence. The trial court granted defendant's motion on grounds that defendant felt compelled to give officers access to his home without warrant, and thus seizure of weapon in plain view was not justified; statements by defendant in response to officers' questions were not admissible since defendant was considered to be in custody at the time and did not receive Miranda warnings. The Supreme Court upheld the trial court's order suppressing the evidence, noting factors that required the officers to obtain a search warrant. St. v. Osteen, 216 M 258, 700 P2d 188, 42 St. Rep. 789 (1985), followed in St. v. Rushton, 264 M 248, 870 P2d 1355, 51 St. Rep. 262 (1994).

Standing by Overnight Guest to Contest Search of Dwelling: The defendant appealed his denial of standing to contest a search of a dwelling that resulted in evidence against him. The defendant was an overnight guest in the dwelling searched, and that fact coupled with his lack of ownership interest in the dwelling is a factor to consider in determining standing, but it is not the controlling factor. Another factor to consider is whether the defendant had a reasonable expectation of freedom from government intrusion. Here, the dominion over the dwelling exercised by the defendant as the sole occupant at the time of search and the fact that evidence was seized in areas where he slept and stored his belongings were sufficient to grant standing to the defendant. St. v. Isom, 196 M 330, 641 P2d 417, 39 St. Rep. 137 (1982).

Electronic Monitoring: Carrier, an undercover drug investigator, was outfitted with a concealed microphone and a body monitor during six meetings with the defendant. Court orders permitting the monitoring were obtained for the last three meetings but not for the first three. The transcripts of the last three meetings were admitted into evidence over the defendant's objection. On appeal, the Supreme Court said that the application for electronic monitoring authorization was based on Carrier's own personal observations which supplied adequate independent information. The application made no reference to the fact that the earlier conversations were monitored or recorded, and the later recordings were not tainted by the earlier unauthorized recordings. St. v. Bassett, 189 M 28, 614 P2d 1054 (1980).

Undercover Investigators — No Need to Meet Requirement to Be Deputy: Carrier worked as an undercover drug investigator in Billings for Yellowstone County. Carrier was a Deputy Sheriff even though he may not have met all the technical statutory qualifications. To require all law enforcement officials to be fully clothed with all statutory requirements in all instances would seriously jeopardize the success of law enforcement in circumstances such as those presented in this case. St. v. Bassett, 189 M 28, 614 P2d 1054 (1980).

Standing to Suppress Evidence — Person Living in Searched Apartment Rented by Another: The defendant had a legitimate expectation of privacy in the apartment searched. He shared it with his girlfriend and except with respect to her had complete dominion and control over the apartment and could exclude others from it. The defendant had standing to contest the legality of a search and seizure within the apartment. St. v. Allen, 188 M 135, 612 P2d 199 (1980).

Constitutionality: Defendant cited no authority for his position that this subsection is unconstitutional and therefore failed to overcome the presumption of constitutionality. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Hearing — Requirements: "Hearing", as contemplated by this section, is a full judicial hearing with a record made. No "hearing" was held when the only record was the clerk's docket entry, notwithstanding the court's later statement that both parties had agreed to proceed without a court reporter. St. v. Fetters, 162 M 204, 510 P2d 1 (1973).

EVIDENCE OBTAINED PRIOR TO ARREST

Motion to Suppress Statements and Related Evidence — Waiver and Voluntariness — Applicability to Custodial Interrogation: The District Court granted a motion to suppress all statements made by defendant and any evidence obtained as a result of the statements, citing Smith v. Ill., 469 US 91, 83 L Ed 2d 488, 105 S Ct 490 (1984), as decisive of the suppression issue and supportive of the conclusion that defendant's request for counsel at his first interview barred further police interrogation. The Supreme Court reversed, holding that the Smith rule applied only to instances of custodial interrogation, while in this case defendant was not in custody or under formal arrest at the time he requested counsel. Further, the District Court never addressed the question of whether defendant's confession was voluntarily made; therefore, the case was remanded for hearing on the issues of waiver and voluntariness. St. v. Rorvik, 224 M 104, 728 P2d 419, 43 St. Rep. 2051 (1986).

No Warrantless Search Where Defendant Hands Over Murder Weapon: Where defendant was asked by police officers if a knife was involved in an altercation in which police officers were informed that defendant participated, and defendant answered "yes" and handed the knife to the police, no search by the police was involved and thus no warrantless search and seizure without consent was involved which would justify suppression of the knife. St. v. Graves, 191 M 81, 622 P2d 203, 38 St. Rep. 9 (1981).

MOTION DENIED — LAWFUL SEARCH

Signed Arrest Warrant Listing Wrong Offense Considered Inconsequential and Ministerial — Arrest Pursuant to Valid Warrant — Motion to Suppress Properly Denied: Law enforcement executed a search warrant on Torgeson's residence in Mineral County and found a meth lab. Torgeson was charged in Mineral County with operating a clandestine drug laboratory and the District Court issued a warrant for Torgeson's arrest, but the warrant incorrectly named the charged offense as a violation of bail conditions. Torgeson was subsequently located in Missoula County. Missoula County officers verified the Mineral County charges and confirmed that a warrant was outstanding, and went to Torgeson's residence to arrest him. Torgeson was arrested based on the Mineral County warrant and was read his Miranda rights. A search of the residence revealed another meth lab. Torgeson moved to dismiss or suppress statements he made after being given the Miranda warnings because the arrest was based on an invalid arrest warrant from Mineral County. The motion was denied, and on appeal the Supreme Court affirmed. Section 46-6-210 provides that a peace officer may arrest a person when the officer reasonably believes that a warrant for the person has been issued, and 46-6-204 provides that a warrant may not be dismissed because of technical irregularities that do not affect the person's substantial rights. Torgeson described no substantial right that was prejudiced by the erroneous charge stated in the Mineral County warrant. The warrant was in writing, was signed by a District Court judge, and was based on an existing felony charge of operating a clandestine drug laboratory. The name of the person to be arrested, the date of the charge, and the amount of bail were all correctly stated in writing, and a complete record of the proceedings leading to issuance of the warrant existed. The irregularity in the warrant did not affect Torgeson's substantial rights, and under these circumstances Torgeson was arrested pursuant to a valid warrant, so the motion to dismiss or suppress was properly denied. St. v. Torgeson, 2008 MT 295, 345 M 415, 191 P3d 448 (2008), distinguishing St. v. McKee, 1998 MT 110, 288 M 454, 958 P2d 700 (1998).

Sufficient Probabilities Supporting Particularized Suspicion to Justify Investigative Stop — Motion to Suppress Properly Denied: McMaster was stopped for investigation after an officer observed apparent traffic violations and erratic driving. The officer was called to make the stop following a police officer's observations of McMaster's possible drug trafficking activities at the Conrad Town Pump. McMaster moved to suppress the fruits of the search on grounds that the

officer lacked particularized suspicion to make the investigative stop. The motion was denied, and on appeal the Supreme Court affirmed. The determination whether particularized suspicion supports an investigative stop does not deal with hard certainties, but rather with probabilities. In this case, McMaster was known by officers to be involved in drug deals, and his furtive conduct at the Town Pump led officers to believe that a possible drug deal was in progress. McMaster was identified as the probable driver of the vehicle through a personalized license plate and by physical description. This evidence, coupled with McMaster's apparent traffic violations and erratic driving, constituted sufficient particularized suspicion that McMaster was involved in criminal activity to justify the investigative stop. St. v. McMaster, 2008 MT 294, 345 M 408, 191 P3d 443 (2008). See also St. v. Gopher, 193 M 189, 631 P2d 293 (1981).

Exigent Circumstances in Safety Sweep — Confession Related to Evidence Lawfully Seized Not Subject to Suppression: Officers arrested a suspect at Whisler's motel room, then entered the room in a safety sweep, where drugs were observed in plain view. Whisler was arrested and while at the detention center admitted possessing methamphetamine. Whisler contended that because the drugs were unlawfully seized at the motel room, the methamphetamine evidence should be suppressed as fruits of an unlawful search. However, exigent circumstances existed to warrant the safety sweep of the motel room, so the search was not unlawful, and because Whisler's admission did not stem from an unlawful search, the motion to suppress the methamphetamine evidence was properly denied. St. v. Whisler, 2008 MT 276, 345 M 292, 190 P3d 1098 (2008).

Sufficient Probable Cause for Search Warrant — Motion to Suppress on Grounds of Unreliable Sources Properly Denied: Tucker asserted that fruits of a search of his residence should be suppressed because the warrant application was insufficient to establish probable cause because police failed to corroborate information provided by two informants. The Supreme Court examined the information in light of St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), and St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006), to determine the reliability of the informants. The first test is whether corroboration was required because the informants were anonymous, and in this case both informants were known to officers. The second test is whether the informants' information was based on hearsay, which requires corroboration, or on personal information. Here both informants had personal information of Tucker's activities. The third test is whether the informants were reliable. Neither informant was a confidential informant, but rather acted as concerned citizens, and the warrant application contained the necessary information to establish the reason for the informants' personal exposure to the evidence as well as their motivation for going to the police. Both informants were thus considered reliable, and any necessity for corroboration was satisfied. Therefore, the warrant application demonstrated the necessary probable cause, and Tucker's motion to suppress was properly denied. St. v. Tucker, 2008 MT 273, 345 M 237, 190 P3d 1080 (2008).

Sufficient Objective Data to Justify Particularized Suspicion Warranting Investigative Stop on Remote Mountain Road Following Burglary: Deputies investigated a break-in and burglary at a cabin in a remote mountain area in winter. There were several cabins in the area, none of which were occupied, but the deputies discovered that another cabin had also been burglarized. The deputies confirmed that all access roads but one in the area were closed by snow. Items left outside the cabin indicated that the burglar would likely return to retrieve the items, so the deputies surmised that the burglar was probably still in the area. When Flemings was observed driving the only vehicle on the only accessible road later that night, a deputy stopped Flemings' vehicle. Flemings was arrested on an outstanding warrant in another county and subsequently made incriminating statements regarding the burglaries. With a warrant, officers searched Flemings' vehicle and residence and seized evidence related to the burglaries, and Flemings was charged with 10 counts of felony burglary, 7 counts of felony theft, 4 counts of misdemeanor theft, and 2 counts of misdemeanor mischief. At trial, Flemings moved to suppress all evidence and statements on grounds that the deputy lacked a particularized suspicion to make the investigative stop. The trial court denied the motion, and Flemings was convicted and appealed. The Supreme Court considered the totality of the circumstances and affirmed. Based on their experience and training, the deputies reasonably inferred that the burglary suspect was still in the area and would return to complete the theft. The deputies observed no other vehicles on the only accessible road. There were no businesses or occupied homes in the area, and there was no reason for persons to be in the area at night at that time of year. Thus, a deputy had sufficient objective data from which to infer that the driver coming down the road at 2 a.m. was or had been engaged in wrongdoing, resulting in a particularized suspicion justifying the investigative stop of Flemings' vehicle. St. v. Flemings, 2008 MT 229, 344 M 360, 188 P3d 1020 (2008),

distinguishing St. v. Jarman, 1998 MT 277, 291 M 391, 967 P2d 1099 (1998), and St. v. Fisher, 2002 MT 335, 313 M 274, 60 P3d 1004 (2002).

Warrant Sufficient to Show Probable Cause That Crime Occurring Under Totality of Circumstances — Motion to Suppress Properly Denied: Wing asserted that evidence seized during a search should be suppressed because the search warrant was not supported by sufficient facts for a finding of probable cause. The trial court denied a motion to suppress the evidence, and Wing appealed. The Supreme Court applied the totality of circumstances test and affirmed. The warrant application contained a narrative account of a confidential informant's alleged controlled purchase of drugs from Wing and of Wing's subsequent arrest. Wing did not argue that the drug purchase was illegal or that it was improperly controlled by law enforcement officials. The warrant application provided facts sufficient to show that a crime was occurring and thus supported the issuance of the warrant, so the trial court did not err in denying Wing's motion to suppress. St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008).

Particularized Suspicion to Confirm Identity of Vehicle Owner Based on Information From License Plate Search on Probationer's Vehicle: A Deputy Sheriff noticed a woman sitting in a vehicle parked in front of the residence of a known drug dealer who was on probation for drug violations. When the woman acted suspiciously, the deputy ran the vehicle's license plate through dispatch. Dispatch confirmed that the vehicle belonged to Thomas, who was also on probation. After 5 minutes, the deputy drove past the vehicle again, and the woman acted furtively. The deputy tried unsuccessfully to contact Thomas's probation officer to inquire about Thomas's status and then approached the vehicle to question the woman. The woman confirmed that she was Thomas and that she was on probation. The deputy returned to his car and successfully reached Thomas's probation officer, who informed the deputy that Thomas was not to have contact with any other person on probation and had recently failed a urinalysis test. The probation officer requested that the deputy search Thomas's vehicle, and the deputy found a drug pipe that later tested positive for methamphetamine. Thomas was charged with felony drug possession but moved to suppress the evidence on grounds that the search was illegal because the deputy lacked particularized suspicion. The motion was denied, Thomas was convicted and appealed, and the Supreme Court affirmed. As an experienced officer, the deputy could reasonably infer that Thomas was engaged in some sort of criminal activity based on the fact that the deputy knew Thomas was on probation and that Thomas was observed parked in front of the residence of another probationer whom the deputy knew to be a drug dealer. This information, coupled with the deputy's knowledge of the drug history of the resident, comprised the totality of the circumstances and supported the determination that particularized suspicion existed for the deputy's initial investigatory stop of Thomas. Denial of the motion to suppress was affirmedSt. v. Thomas, 2008 MT 206, 344 M 150, 186 P3d 864 (2008), followed in St. v. Neil, 2009 MT 128, 350 M 268, 207 P3d 296 (2009).

Exigent Circumstances Sufficient to Justify Warrantless Search to Avoid Possible Destruction of Drug Evidence: Law enforcement officers were tipped off that defendant was transporting one-half pound of methamphetamine into the state and tracked defendant to another person's apartment in Corvallis. Officers began surveillance of the apartment and observed two individuals who appeared to be watching the officers. Within a minute, two persons left the apartment, and the officers concluded that their presence was known to persons in the apartment. Shortly thereafter, the officers received a call from an officer in Butte informing them that defendant had called an informant in Butte and told the informant that defendant knew he was being watched and asked the informant to come to Corvallis to help get rid of the drugs. The officers then discussed the possibility that defendant could destroy the drugs before a valid search warrant could be issued in 4 to 7 hours and decided to call for backup and enter the apartment. Upon entering, the officers found defendant and a woman present. Defendant had no drugs on his person, but had $1,500 in his wallet and appeared to be under the influence of methamphetamine. When the warrant eventually arrived, officers found 3½ grams of methamphetamine packaged for sale. Defendant was charged with felony conspiracy to commit criminal distribution of dangerous drugs, felony criminal possession with intent to distribute, felony criminal endangerment, and misdemeanor criminal possession of drug paraphernalia. Defendant pleaded not guilty to all charges and moved to suppress the fruits of the warrantless search. The motion was denied, and defendant was convicted on one confessed count of intent to distribute. On appeal, defendant contended that the warrantless search was unlawful, but the Supreme Court affirmed. The facts that the officers had already witnessed one suspect flee the scene, knew that defendant was aware of the officers' presence, and knew that a third party had been contacted to help defendant get rid of the drugs, combined with the knowledge that procurement of a search warrant would take 4 to 7 hours, established the presence of exigent

circumstances sufficient to justify warrantless entry into the apartment to avoid destruction of the alleged one-half pound of methamphetamine. St. v. Ruggirello, 2008 MT 8, 341 M 88, 176 P3d 252 (2008), applying the exigent circumstances test set out in St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004).

Reasonable Cause for Warrantless Probationary Search — Motion to Suppress Properly Denied: Smith's live-in girlfriend was arrested on a probation violation for failing to report her change in residence and subsequently tested positive for drugs, which provided reasonable cause for her probation officer to conduct a warrantless search of her new residence—Smith's trailer. The search revealed weapons, drug paraphernalia, items used to manufacture and distribute drugs, and some of the girlfriend's personal items. The officer then decided to search a bus parked near the trailer, and while waiting for a warrant, Smith arrived. Based on the items found in the trailer and an officer's knowledge that Smith's driver's license was suspended, Smith was arrested and found to be in possession of a large amount of cash, drugs, and paraphernalia. More drugs and chemical precursors of methamphetamine were subsequently found in Smith's vehicle and in the bus. Smith moved to suppress all evidence obtained in the searches on grounds that the initial search was unlawful because it was not justified as a probation search or by any other exception to the warrant requirements, but the motion was denied. On appeal, the Supreme Court affirmed. Because the initial search was a probationary search of the residence of the woman living with Smith and was justified by reasonable cause and because Smith did not challenge the legality of the searches of his person and vehicles, the District Court did not err in determining that the searches were lawful and in denying Smith's motion to suppress the evidence. St. v. Smith, 2008 MT 7, 341 M 82, 176 P3d 258 (2008).

Investigation of Disorderly Conduct — No Expectation of Privacy in Backyard — Fruits of Warrantless Search Properly Admitted: Officers investigated a disorderly conduct complaint at Dunn's residence and found Dunn and six others partying in Dunn's backyard with loud music blaring. Dispatch indicated an outstanding warrant for Dunn, he was searched, officers found drugs and paraphernalia on Dunn's person, and Dunn was arrested. Dunn moved to suppress the evidence on grounds that the search was an unlawful invasion of privacy. The District Court denied the motion, and on appeal, the Supreme Court affirmed. Pursuant to Whitefish v. Large, 2003 MT 322, 318 M 310, 80 P3d 427 (2003), two factors are considered when determining whether a search was unlawful: (1) whether the person had an actual expectation of privacy that society is willing to recognize as objectively reasonable; and (2) the nature of the state's intrusion. Given the unique circumstances of this case, Dunn did not have a reasonable expectation of privacy. The ongoing disorderly conduct invited officers to investigate the complaint. Blasting loud music at 4 a.m. was not conduct that society would be willing to recognize as objectively reasonable. The unobtrusive investigation by officers accessing the backyard by an open and unobstructed path that would be used by any casual visitor was reasonable. Dunn's motion to suppress was properly denied. St. v. Dunn, 2007 MT 296, 340 M 31, 172 P3d 110 (2007).

Admissibility of Arson Evidence in Plain View Seized Under Exigent Circumstances — Warrant Required for Search for Other Evidence: A Deputy Sheriff responded to a fire call at Lewis's house and entered the building as part of fire suppression efforts. While inside, the Deputy Sheriff noticed evidence of possible arson. The Deputy Sheriff went back to his vehicle for a camera, reentered the building, photographed the evidence, and removed it, placing it in his vehicle. After the fire department arrived and suppressed the fire, the Deputy Sheriff reentered the building a third and fourth time to look for additional arson evidence. At trial, Lewis contended that all the evidence should be suppressed as fruits of unlawful warrantless searches. The trial court allowed introduction of evidence from the first entry because exigent circumstances existed to justify the Deputy Sheriff's entry, but the court denied admission of evidence gathered during the second and subsequent entries because exigent circumstances did not exist, holding that the Deputy Sheriff should have acquired a warrant for further investigative searches. The Supreme Court agreed that exigent circumstances surrounding the fire justified the first entry, but also held that the second entry was a continuation of the first and that evidence in plain view during the first entry could be lawfully seized and was admissible. However, a separate entry to search for or gather evidence pursuant to a criminal investigation requires a separate justification, such as a warrant, consent, or an exigency, and none of those justifications applied to the third and subsequent entries, so the motion to suppress evidence gathered during those searches was properly granted. St. v. Lewis, 2007 MT 295, 340 M 10, 171 P3d 731 (2007).

Companion's Activity at Defendant's Residence Sufficient to Justify Search of Defendant's Property: Officers obtained a warrant to search Barnaby's residence based in large part on

informants' tips that Barnaby's companion, Sheridan, was operating a clandestine drug laboratory at the residence. Barnaby moved to suppress the evidence on grounds that the search warrant was insufficient because evidence of Sheridan's involvement in methamphetamine production did not establish probable cause to search Barnaby's residence. The Supreme Court cited Zurcher v. Stanford Daily, 436 US 547 (1978), St. v. Gray 2001 MT 250, 307 M 124, 38 P3d 775 (2001), and St. v. St. Marks, 2002 MT 285, 312 M 468, 59 P3d 1113 (2002), for the proposition that the critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought. Thus, corroboration of criminal conduct by Barnaby's companion, Sheridan, could be imputed to Barnaby, even though Sheridan's mere presence at the residence did not amount to probable cause to search Barnaby's residence. However, Sheridan's involvement in the production of methamphetamine and continued presence at Barnaby's house, coupled with two independent reports that Sheridan operated a drug lab at the house and a report of suspicious activity at the house since Sheridan's arrival, amounted to a substantial basis for determining whether probable cause supported the issuance of a warrant under the totality of the circumstances. The fact that the warrant application did not include a specific account of the circumstances under which some informants viewed the events or whether two citizens based their reports on personal observations did not preclude a court from finding probable cause. Sufficiency of the warrant was affirmed, and Barnaby's motion to suppress was properly denied. St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006).

Voluntariness of Consent to Search — Totality of Circumstances: In determining whether consent to search was made voluntarily and was uncontaminated by coercion or duress, the Supreme Court considers the totality of the circumstances. In this case, Copelton was sitting in a car driven by Garcia, and when asked by officers if they could search the vehicle, Garcia shrugged his shoulders and gestured with his hands in an affirmative manner. The search revealed drugs, and Copelton was arrested for felony possession with intent to distribute. On appeal, Copelton asserted that his motion to suppress the fruits of the search should have been granted because Garcia did not knowingly and voluntarily consent to the warrantless search. A native of Mexico, Garcia had limited education with no instruction regarding the American legal system and a limited understanding of English. Copelton also noted that the officers did not inform Garcia of the right to refuse consent to the search and questioned whether a mere shrug of the shoulders was enough to indicate consent. Nevertheless, the Supreme Court affirmed. Garcia testified that he had prior experiences with law enforcement officers, including prior vehicle searches, that he clearly understood what the officer was asking when the officer requested to search the vehicle, and that he consented to the search because he had nothing to hide. Thus, Garcia's limited foreign education and limited ability to speak and understand English did not impede his ability to knowingly and voluntarily consent to the search. Further, lack of knowledge of the right to refuse consent is not determinative that consent was not voluntary in and of itself, and nonverbal consent can be effective when conduct indicates unequivocal consent. Under the totality of the circumstances, Copelton's motion to suppress was properly denied. St. v. Copelton, 2006 MT 182, 333 M 91, 140 P3d 1074 (2006), following St. v. Snell, 2004 MT 269, 323 M 157, 99 P3d 191 (2004).

Admissibility of Liquor Bottle in Plain View During Officer's Attempt to Secure Vehicle When Suspect in Custody for DUI: After receiving a report of a suspected drunk driver, the investigating officer stopped Delao and placed him in custody in the patrol car. Upon securing the vehicle, the officer saw a clear bottle partially covered beneath the center armrest, which the officer recognized as a liquor bottle. The bottle contained vodka, which the officer confiscated and which was entered as evidence in Delao's DUI case. Delao moved to suppress the evidence as the fruit of an unlawful search, but the motion was denied. Following conviction, Delao appealed, but the Supreme Court affirmed. The officer's attempt to secure the vehicle fell within the ambit of the slight duty of care owed to Delao under St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), and neither the observation nor seizure of the bottle involved any privacy violation because the bottle was in plain view. The officer was lawfully present in the vehicle, and the incriminating nature of the bottle was immediately apparent. St. v. Delao, 2006 MT 179, 333 M 68, 140 P3d 1065 (2006).

Totality of Circumstances, Including Odor of Marijuana, Sufficient Probable Cause to Support Search Warrant: The Department of Public Health and Human Services received a call alleging that Morse was selling drugs in the presence of her juvenile daughter, and the local drug task force received two additional calls alleging that Morse was distributing drugs from her apartment. When police visited Morse's apartment, there were four other people there, all of

whom had prior drug-related arrests, including Morse. The officers smelled marijuana and observed an empty electric digital scale in the living room. Morse refused a search of the apartment, so officers obtained a search warrant. In executing the warrant, the officers found drugs and paraphernalia. At trial, Morse moved to suppress the evidence based on lack of probable cause for the warrant. The motion was denied, and on appeal, the Supreme Court reviewed the totality of the circumstances and affirmed. The smell of marijuana did not in itself establish probable cause, nor did the telephone calls. However, when considered with Morse's drug history, the criminal backgrounds of the other four people, and the presence of the scale, the search warrant application established probable cause, and the motion to suppress was properly denied. St. v. Morse, 2006 MT 54, 331 M 300, 132 P3d 528 (2006).

Probable Cause for Warrantless Seizure of Vehicle — Odor of Marijuana Coupled With Defendant's Admission That Marijuana Had Been Smoked in Vehicle: Following a single-vehicle accident, the investigating officer discovered that Pierce had over $8,000 in outstanding warrants. Pierce was arrested and placed in the patrol car and then requested that the officer retrieve a telephone book from Pierce's vehicle. When the officer entered the vehicle, he noticed the strong odor of burnt marijuana. Pierce subsequently admitted that someone had smoked marijuana in the vehicle. The officer impounded the vehicle, sealing it with evidence tape. Following an alert by a canine officer 2 days later, the officer obtained a search warrant, discovered drugs and paraphernalia, and arrested Pierce on drug charges. Pierce contended that the state lacked probable cause to impound the vehicle and search it and moved to suppress the evidence. The Supreme Court disagreed. The officer used the marijuana odor in conjunction with Pierce's admission that someone had unlawfully smoked marijuana in the vehicle to establish probable cause to seize the truck, and the affidavit for a warrant to search the vehicle contained sufficient information to support a reasonable belief that the offense of possession of dangerous drugs had been committed and that evidence or contraband might be found in the vehicle. Pierce's motion to suppress the evidence was properly denied. St. v. Pierce, 2005 MT 182, 328 M 33, 116 P3d 817 (2005), following St. v. Broell, 249 M 117, 814 P2d 44 (1991), and distinguishing St. v. Schoendaller, 176 M 376, 578 P2d 730 (1978), and St. v. Olson, 180 M 151, 589 P2d 663 (1979).

No Reasonable Expectation of Privacy in Garbage Placed for Collection — Warrantless Search of Garbage Affirmed: Following an investigation of Pelvit and based on information that Pelvit was operating a methamphetamine lab, agents conducted a warrantless search of garbage cans in a public alley behind Pelvit's house and discovered discarded materials consistent with the manufacture of the drug. The items formed the basis for a search warrant of Pelvit's residence, pickup, and boat, where additional evidence was found. The state instituted forfeiture proceedings against the pickup, boat, and boat trailer. Pelvit moved to exclude the evidence, arguing that the warrant was not valid because it was based on an unlawful search of the garbage cans. The District Court held that Pelvit had no reasonable expectation of privacy in the garbage and denied the motion to suppress. On appeal, the Supreme Court affirmed. The court held that Pelvit did not have a reasonable expectation of privacy in his trash because he voluntarily relinquished his interest and control over his garbage when he abandoned the property with no express intent to exclude others. In abandoning the trash, Pelvit also abandoned any expectation of privacy in the property, and absent an expectation of privacy, there was neither a search nor a seizure in violation of a constitutionally protected interest. However, the Supreme Court did place certain constraints on the searching of garbage placed for collection, as set out in Litchfield v. St., 824 NE 2d 356 (Ind. 2005): (1) for such a seizure to be reasonable, the garbage must be quickly retrieved by officers in substantially the same manner as the trash collector would take it; and (2) in order to prevent wholesale or random searches, officers must have an articulable individualized suspicion that a crime is being committed in order to justify the garbage seizure. The circumstances in this case met the Litchfield constraints. The state met its burden of proving that Pelvit abandoned the trash, the seizure was conducted in a reasonable and unobtrusive manner, and police had a particularized suspicion that Pelvit was involved in criminal activity to justify the warrantless search. Denial of Pelvit's motion to suppress was not error. St. v. A Blue 1993 Chevrolet Pickup, 2005 MT 180, 328 M 10, 116 P3d 800 (2005), followed in St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008).

Analysis of Federal Knock and Announce Statute — Involvement of Federal Postal Inspector: A postal inspector suspected that a package addressed to Ochadleus contained drugs. The inspector took the package to the Billings DEA office, and a drug-sniffing dog alerted to the package. The inspector obtained a search warrant, and the package was found to contain marijuana. The inspector then obtained a warrant to search the intended destination of the package. The package was delivered by the inspector later that day, and shortly thereafter, state

officers executed the search warrant and arrested Ochadleus for possession with intent to distribute. Ochadleus contended that the state officers violated the federal knock and announce statute, 18 U.S.C. 3109, noting that the officers failed to knock. The Supreme Court disagreed. The statute does not directly apply to state law enforcement officers, but rather applies when federal officers are a significant part of a search conducted pursuant to a state warrant, as in this case involving a federal postal inspector and the federal Drug Enforcement Administration. Additionally, the statute does not contain an express requirement that officers actually knock on the door, but rather requires that officers give notice of their authority and purpose. Here, Ochadleus's roommate saw the officers through the window in the door and then backed away. It was reasonable for the officers to assume that the action of backing away was a refusal to admit them, and it would have been futile for the officers to knock before entering. Thus, the federal statute was not violated, the forced entry was lawful, and Ochadleus's conviction was affirmed. St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005).

No Expectation of Privacy for Trespasser — Entry Lawful and Warrantless Search Reasonable: Gilmore kept some belongings in a locked bedroom in Kathie Gilmore's house, and Kathie had no key to the room. Based on a tip from a confidential informant that marijuana plants had been observed in the window of the residence, officers requested and were given permission by Kathie to search the house without a warrant. Although she gave conflicting statements, Kathie stated that some of Gilmore's belongings were in the locked bedroom but he paid no rent, that Gilmore had previously assaulted her and that she was afraid of him, that she did not want him living in the house and had asked him to leave, and that she had no key to the room and advised the officers to kick down the door. Upon entering, the officers observed Gilmore asleep on the couch and drug paraphernalia in plain view. The officers then obtained a warrant and seized drugs and paraphernalia. Gilmore moved to suppress the evidence on grounds that the search was unlawful because Kathie did not have authority to authorize entry into the locked bedroom and that Gilmore had an expectation of privacy in the bedroom. The District Court found that in this case, the officers were acting under the appropriate authority of Kathie to consent to the search and denied the motion to suppress. The Supreme Court held that as a trespasser, Gilmore had no expectation of privacy in the bedroom. The District Court was affirmed. St. v. Gilmore, 2004 MT 363, 324 M 488, 104 P3d 1051 (2004). See also St. v. McLees, 2000 MT 6, 298 M 15, 994 P2d 683 (2000).

Investigatory Stop Based on Suspicion of Impersonation of Police Officer: Police stopped Bar-Jonah in the early hours of the morning near a school wearing a police-style jacket and stocking cap. The officer had prior knowledge of Bar-Jonah's history of crimes against children. Bar-Jonah asserted that he was simply walking a few blocks from his home, minding his own business, that the officer lacked a particularized suspicion of criminal activity to warrant the investigatory stop in violation of Bar-Jonah's right against unreasonable search and seizure, and that any evidence should thus be suppressed. The District Court denied the motion to suppress, and the Supreme Court affirmed. Relying on Fla. v. Bostick, 501 US 429 (1991), the District Court found that the initial stop was not an investigatory stop but merely a police-citizen encounter, but the Supreme Court held that the stop was not a mere police-citizen encounter because Bar-Jonah had no reason to believe that he could leave. Nevertheless, the officer reasonably suspected that Bar-Jonah had impersonated or was about to impersonate a police officer, and coupled with the officer's knowledge of Bar-Jonah's criminal history, the officer had a particularized suspicion of criminal activity warranting the investigative stop. Once Bar-Jonah was lawfully detained, a search of Bar-Jonah's person was justified based on Bar-Jonah's statement that he was carrying a stun gun. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Consent Justification for Warrantless Entry Into House — Motion to Suppress Properly Denied: Officers in pursuit of DeWitt following an aggravated burglary knew that DeWitt was staying with Bill Robinson. After arriving at Robinson's house, Robinson said that he has just arrived and did not know if DeWitt was there but granted the officers permission to search the house. The officers found DeWitt sitting in the dimly lit basement drinking a beer. DeWitt argued that the search was unlawful and that evidence obtained from the search should be suppressed because Robinson did not have the right to consent to a search of the part of the house that DeWitt was renting. The Supreme Court disagreed. The officers' entry into the house was consensual, and warrantless entry was justified, so denial of the motion to suppress was proper. St. v. DeWitt, 2004 MT 317, 324 M 39, 101 P3d 277 (2004).

Evidence of Motorcycle in Plain View Admissible: Officers in pursuit of DeWitt following an aggravated burglary found DeWitt's truck in another person's driveway, noticed a light on in the garage, and knocked on the door, which opened on impact. As soon as the door opened, officers

noticed the smoke and odor of a two-stroke engine recently being started and surmised that DeWitt had been at the home and left on a motorcycle shortly before their arrival. DeWitt contended that the search of the garage was unlawful and that evidence obtained from the search should be suppressed. The Supreme Court disagreed. Evidence regarding the motorcycle was in plain view and fell within the plain view exception to the right against unreasonable search and seizure. St. v. DeWitt, 2004 MT 317, 324 M 39, 101 P3d 277 (2004).

Objective Manifestation to Support Investigation Following Traffic Stop — Time of Stop Extended: Following a traffic stop and observation of Nelson's behavior, officers conducted a DUI investigation, performed field sobriety tests and arrested Nelson for DUI, and then searched Nelson's car and discovered drugs and paraphernalia. Nelson contended that the fruits of the search should be suppressed because the officers did not give the stop advisory required in former 46-5-402 (repealed 2003) or a Miranda advisory and because the DUI investigation at the scene exceeded the scope of the investigative stop. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. The stop advisory issue was not contested, and the Supreme Court declined to address it. Nelson was not entitled to a Miranda warning because the Miranda protections are afforded during a custodial interrogation but do not apply to an investigative stop. In addition, as in St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), the initial investigatory stop took on the quality of an escalating situation in which additional information gave rise to further suspicions and enlarged the scope of the investigation to that of a possible DUI. The officers had a particularized suspicion to conduct the DUI investigation, properly extending the time of the stop. Although the Supreme Court has not established specific time parameters to which an officer must adhere when conducting an investigative stop, the 24 minutes taken to conduct the investigative stop in this case was reasonable and not excessive. St. v. Nelson, 2004 MT 310, 323 M 510, 101 P3d 261 (2004).

Authority of Properly Appointed Substitute Justice of the Peace to Issue Search Warrant: A search warrant was issued by a substitute Justice of the Peace, and Beaupre contended that the fruits of the search should be suppressed because no attempt was made to call in another Justice of the Peace or City Judge and because the substitute was not properly appointed. The Supreme Court dismissed the claims. The regular Justice of the Peace had letters from judges in nearby cities indicating that they were not available should the Justice of the Peace be absent, and the letters were updated every 6 months in accordance with the Attorney General's recommendations in 48 A.G. Op. 11 (2000). Further, the substitute was timely designated during the second term of the regular Justice of the Peace, and incorrect wording on the waiver of training form was inconsequential and did not affect the authority of the substitute to act. St. v. Beaupre, 2004 MT 300, 323 M 413, 102 P3d 504 (2004). See also Potter v. District Court, 266 M 384, 880 P2d 1319 (1994), and St. v. Vickers, 1998 MT 201, 290 M 356, 964 P2d 756 (1998).

Information Provided by Citizen Informant — Sufficient Warrant Application: Beaupre contended that the fruits of a search should be suppressed because the warrant application was based on uncorroborated information provided by a confidential informant unknown to the officer who applied for the warrant and that the application was based on impermissible hearsay. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. The informant was part of a cleaning crew hired by Beaupre to clean up damage after a fire at Beaupre's residence. During the cleanup, the informant observed drug paraphernalia and suspected drug lab materials, photographed the items, and gave the photographs to police. The informant remained confidential, but was not anonymous, and was acting as a concerned citizen. Questions regarding the informant's involvement and motivation were answered by the application and thus provided probable cause without further corroboration. The informant's information was not considered hearsay because the observations of fellow officers were a reliable basis for a warrant applied for by another officer. St. v. Beaupre, 2004 MT 300, 323 M 413, 102 P3d 504 (2004). See also St. v. Seaman, 236 M 466, 771 P2d 950 (1989), and St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000).

Admission of Unrelated Criminal Activity by Informant — Independent Corroboration Unnecessary: An informant who was known to police told the authorities that Meyer was in possession of illegal explosives after witnessing the explosives being delivered to Meyer. The informant admitted several instances of criminal activity, including use and possession of methamphetamine and being present when the explosives were delivered. Meyer sought to suppress evidence of the explosives because the informant's statements were not corroborated, the informant was not charged with transporting illegal explosives, and the drug charges were unrelated to the explosives investigation. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. Independent corroboration is not required for a reliable informant whose identity is known to law enforcement and whose information is not based on hearsay, and

an informant who gives an unequivocal admission against interest is considered reliable without further corroboration. Because corroboration was not necessary, the court declined to address whether admissions unrelated to the underlying offense may be classified as an admission against interest. St. v. Meyer, 2004 MT 272, 323 M 173, 99 P3d 185 (2004), following St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000).

Suspect's Conduct and Officer's Knowledge of Suspect's Criminal History Sufficient Probable Cause for Warrant to Search Vehicle for Drugs: When officers arrested Frasure on an outstanding warrant, Frasure acted jittery and nervous, spoke with choppy, accelerated speech, and was sweating. Based on their training, the officers knew Frasure's actions were consistent with a person under the influence of methamphetamine. The officers also knew from previous contact that Frasure was a methamphetamine addict who had previously been arrested for methamphetamine offenses. A pat-down search incident to the arrest revealed a marijuana pipe in Frasure's pocket. Frasure denied consent to search the vehicle that he was in when arrested, but the vehicle was impounded and a warrant was obtained to search the vehicle. The search revealed drugs and paraphernalia, and Frasure moved to suppress the evidence on grounds that there was insufficient probable cause for the search warrant. The motion was denied, and on appeal, the Supreme Court affirmed. The officers' knowledge and Frasure's conduct constituted sufficient evidence to support the officers' belief that Frasure had committed an offense, so sufficient probable cause existed to support the vehicle search, and denial of Frasure's motion to suppress was not erroneous. St. v. Frasure, 2004 MT 242, 323 M 1, 97 P3d 1101 (2004).

No Privacy Interest in Rental Car by Unauthorized Driver Who Disavows Ownership of Contents: Hill was stopped for speeding and ticketed. After the stop was completed, the officer engaged Hill in small talk, inquiring where Hill was going and where his traveling clothes were. Hill replied that it was a quick trip, so no extra clothes were needed. Although no bags or clothes were in sight, the officer asked if Hill was carrying anything illegal. Hill said no, and the officer asked if Hill would consent to a search of the vehicle, to which Hill initially consented. In going over the terms of the consent form, Hill related that the car had been rented by a friend and that a search of the trunk was probably not a good idea because Hill did not know what the friend might have placed there. The officer then checked on the origin of the car and discovered that it had been acquired through a rental agency, but that the car was 2 days late in being returned, and that Hill was not an authorized driver. The agency asked that the car be impounded and gave permission for a search. The officers found two bags in the trunk, but Hill disclaimed ownership of the bags. A search of the bags revealed drugs and Hill's cell phone charger. Hill was then charged with drug crimes and later moved to suppress the evidence, but the motion was denied. On appeal, the Supreme Court affirmed. Hill had no reasonable expectation of privacy in the car's contents because he was not an authorized driver, had no relation to the car's owner or renter, and voluntarily disclaimed knowledge and ownership of anything in the car. Hill could not expect privacy in a car he illegally possessed, and once Hill waived control over the bags, he implicitly granted permission for the bags to be accessed. The search of the trunk was reasonable because permission was granted by the car owner, and the trunk contents were effectively surrendered by Hill, making the car owner's permission to search the vehicle sufficient to permit a full search of items found in the car. St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004), distinguishing St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), and St. v. Tackitt, 2003 MT 81, 315 M 59, 67 P3d 295 (2003).

Search Incident to Conversation After Traffic Stop Concluded Considered Voluntary — Motion to Suppress Properly Denied: Officers stopped Merrill for investigation following an improper lane change. A license plate check showed that Merrill was not the vehicle owner. However, the vehicle was owned by a person suspected by one of the officers to be involved with dangerous drugs. The officer told Merrill that he was just giving her a verbal warning and that she was free to go. Stepping away from the vehicle, the officer noticed that Merrill seemed unusually nervous. Suspicious about the report regarding the vehicle owner, the officer again approached the vehicle and asked Merrill if he could talk to her. Merrill answered affirmatively. The officer then asked if he could search the vehicle. Merrill again answered affirmatively. Merrill stepped out of the car, and the officer asked if he could search her person, including her pockets. Merrill again answered affirmatively, and the officer discovered drugs in her pocket. Merrill contended that she had been unlawfully detained subsequent to an investigatory stop and that the evidence should be suppressed. The trial court concluded that the search was voluntary and denied the suppression motion. On appeal, the Supreme Court affirmed. Once the officer completed the investigation of the improper lane change, the investigatory stop was concluded and Merrill was free to leave. What followed was neither a subsequent investigatory stop nor an extension of the first stop, but rather a voluntary exchange, and nothing prevents an

officer from engaging a citizen in a voluntary conversation. A purely voluntary conversation intrudes on no constitutionally protected interest, so Merrill was accorded no constitutional protection related to the search and seizure, and denial of the motion to suppress was appropriate. St. v. Merrill, 2004 MT 169, 322 M 47, 93 P3d 1227 (2004), followed in St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004).

Threat of Cruelty to Animals Sufficient Exigent Circumstance to Justify Warrantless Entry of Probationer's Home — Entry Authorized by Probation Officer: Stone ran an animal zoo at his home. A neighborhood boy who assisted in feeding animals and cleaning cages notified authorities that some animals had died and that numerous others appeared to be without food or water. When officers arrived on Stone's posted property, they confirmed that numerous animals were dead and others had no food or water. Stone was not home, but the boy informed the officers that there were other animals in the house. The officers also learned that Stone was on probation and notified Stone's probation officer, who authorized entry into the house so that the animals inside could be cared for. Stone was convicted of animal cruelty and appealed on grounds that he had an expectation of privacy and that, although probable cause existed, the entry was unlawful because of the absence of exigent circumstances, so the evidence should have been suppressed. In a case of first impression, the Supreme Court concluded that the unrefuted imminent threat to the lives and well-being of the animals and the prevention of needless suffering and death of the animals were adequate exigent circumstances to justify warrantless entry into the house so as not to frustrate legitimate law enforcement efforts in preventing animal cruelty. Having reasonable cause to suspect that Stone was violating probation by committing cruelty to animals inside the house, the warrantless entry was also considered a justifiable probation search, and denial of the motion to suppress was proper. St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004). See also Tuck v. U.S., 477 A2d 1115 (1984), St. v. Bauer, 379 NW 2d 895 (1985), Pine v. St., 889 SW 2d 625 (1994), and People v. Thornton, 676 NE 2d 1024 (1997).

Sufficient Particularized Suspicion for DUI Stop Based on Anonymous Tip and Officer's Observations: An officer received an anonymous tip that Brander was driving while intoxicated. The tipster named Brander, described the vehicle, including a license number and model, and gave Brander's direction of travel and suspected destination. The officer encountered a vehicle that mostly matched the description and followed, observing that the vehicle was moving slowly, meandering in its lane, crossing the fog line, partially crossing into the left lane without signaling, and then moving back into the right lane. The officer initiated a stop and noticed a number of cases of beer in the back of the truck that were both opened and unopened. Brander failed field sobriety tests and was arrested. Brander contended that the officer did not have reasonable grounds for making the stop based on the anonymous tip and moved to suppress the DUI evidence. The suppression motion was denied, and on appeal, the Supreme Court affirmed. Brander's argument failed because the stop was not based solely on the tip with no independent observation of suspicious activity. In fact, the officer was not even initially sure if the vehicle that he was stopping was the one described in the tip, but based on the officer's training and experience, the erratic driving supported a particularized suspicion that the driver was under the influence sufficient to warrant the stop and the administration of field sobriety tests. St. v. Brander, 2004 MT 150, 321 M 484, 92 P3d 1173 (2004), followed in St. v. Schulke, 2005 MT 77, 326 M 390, 109 P3d 744 (2005). See also Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998).

Sufficient Objective Police Data to Warrant Investigative Stop of Burglary Suspect — Motion to Suppress Evidence Properly Denied: Following a tip from a former parole officer and a background check, Eixenberger became a potential suspect in a string of burglaries in Kalispell area casinos. Eixenberger had received two citations while driving a red Thunderbird in the area and became a primary suspect when the car was seen about 200 yards from a casino about 9 minutes before the casino was burglarized. The car was subsequently spotted several times, with either Eixenberger or a friend driving, during early morning hours when the burglaries occurred. One early morning, a casino was burglarized. Police checked Eixenberger's friend's residence and found neither Eixenberger nor the car and then stopped Eixenberger in the car a short distance from and within minutes of another casino burglary. Police found rocks and tools consistent with the burglaries. Eixenberger moved to suppress the evidence on grounds that the police lacked a particularized suspicion to make the investigative stop, but the motion was denied. On appeal, the Supreme Court affirmed. Under the totality of circumstances in this case, the police had sufficient objective data to support a suspicion that Eixenberger was or had engaged in wrongdoing, so the investigative stop was appropriate. St. v. Eixenberger, 2004 MT 127, 321 M 298, 90 P3d 453 (2004), distinguishing St. v. Lafferty, 1998 MT 247, 291 M 157, 967 P2d 363 (1998).

No Expectation of Privacy in Animal Cape Taken to Taxidermist: Bowman took an elk cape to a taxidermist for mounting, but the cape was seized without a warrant when wildlife officials received a tip that Bowman had taken the elk out of season. Bowman contended that the evidence should be suppressed because the search was unlawful. On appeal, the Supreme Court noted that a determination of whether a search is lawful depends in part on whether a person has an actual expectation of privacy that society is willing to recognize as reasonable and that one factor in determining a legitimate expectation of privacy is the extent to which the person took measures to shield the property from public view. Here, any expectation of privacy that Bowman had in the cape was relinquished when, without taking any measures to preserve a claim of privacy, the cape was taken to a public business and placed in possession of a third party, even if the transfer was only temporary. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

Warrants Based on Anonymous Tip Sufficiently Corroborated by Inculpatory Information — Motion to Suppress Evidence Properly Denied: Wildlife officials received an anonymous tip that Bowman had taken an elk out of season and seized evidence at a taxidermy shop and at Bowman's home pursuant to two warrants. Bowman moved to suppress the evidence, contending that the warrant applications did not state probable cause. The motion was denied, and on appeal, the Supreme Court affirmed. After receiving the anonymous tip, the wildlife officials obtained independent data that revealed inculpatory information corroborating the criminal conduct disclosed by the tip, which provided a substantial basis to determine that probable cause existed to issue the warrants. Bowman's motion to suppress was properly denied. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

Reasonable Cause for Investigative Stop and Pat-Down Search — Motion to Suppress Evidence Properly Denied: An officer discovered a youth behind a car about 11 p.m., apparently working on the vehicle's license plate. The officer suspected that the youth was removing the plate, but when asked, the youth claimed to be installing it. The officer recognized the youth from prior law enforcement contacts and knew that the youth did not live at the residence or own a car. Based on these circumstances, the officer conducted a pat-down search and discovered a marijuana pipe. At about that time, the youth's girlfriend came out of the residence and told the officer that she had requested that the youth put the license plate on the vehicle. The youth later moved to suppress the drug paraphernalia on grounds that the officer did not have a particularized suspicion to make the investigative stop, exceeded the scope of the investigative stop, and did not have probable cause to conduct a frisk. The Supreme Court affirmed denial of the motion to suppress. Applying the two-part test from St. v. Gopher, 193 M 189, 631 P2d 293 (1981), the court held that the officer had sufficient objective data to form a particularized suspicion that the youth was engaged in wrongdoing to justify the investigative stop. Then, once the officer recognized the youth, suspicions were heightened, so the pat-down search remained within the context of the initial stop, and the officer did not exceed the scope of the stop. Finally, because of the officer's prior dealings with the youth and knowing that the youth did not live at the residence or own a car, the officer had reasonable cause: (1) to believe that the youth was committing an offense and might be armed; (2) for concern for the officer's safety; and (3) to conduct a frisk. The officer did not have to accept the youth's seemingly innocent explanation of why he was working behind the car late at night. In re D.R.B., 2004 MT 90, 320 M 516, 88 P3d 808 (2004). See also St. v. Collard, 286 M 185, 951 P2d 56 (1997), and St. v. Dawson, 1999 MT 171, 295 M 212, 983 P2d 916 (1999).

Use of DNA Sample From Unrelated Investigation Not Violative of Right to Privacy — Waiver of Privacy Upon Consent to Particular Search: Notti contended that the use of a DNA profile from an unrelated sexual assault case, in which he was convicted, violated the right to privacy on a subsequent charge of deliberate homicide. The argument failed because Notti had consented to the withdrawal of a blood sample to be used for DNA testing, and a defendant's voluntary consent to a search constitutes waiver of any reasonable expectation of privacy with respect to the place searched (or blood or DNA), and the permitted search is lawful. St. v. Notti, 2003 MT 170, 316 M 345, 71 P3d 1233 (2003). See also St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993).

Erratic Driving at Night in Proximity to Bars — Totality of Circumstances Justifying Traffic Stop: Shortly after midnight, an officer observed Loiselle's vehicle drifting across the right traffic lane, crossing the white fog line, making several turns without signaling, and weaving. The officer pulled Loiselle over for an investigative stop, which resulted in a DUI charge. At trial, Loiselle moved to suppress evidence obtained during the stop, but the motion was denied, and Loiselle appealed. To make an investigatory stop, an officer must have a particularized and objective basis for suspecting criminal activity, and whether particularized suspicion exists is a question of fact determined by considering the totality of the circumstances. In this case, the

totality of the circumstances justified the stop. Loiselle did not merely touch the fog line, but actually drove over it and proceeded on the shoulder of the road for at least 3 seconds. The behavior was preceded by erratic driving that caught the officer's attention and that occurred late at night in the proximity of several nearby bars. Irrespective of Loiselle's failure to use turn signals, to a 5-year veteran of the Sheriff's office, there was sufficient objective data from which the officer could suspect that the occupant of the vehicle had engaged in wrongdoing and commence an investigatory stop. St. v. Loiselle, 2001 MT 174, 306 M 166, 30 P3d 1097 (2001).

Lack of Evidence That Investigating Officers Went Above High-Water Mark to Obtain Photograph of Marijuana Plant on Private Property — Motion to Suppress Properly Denied: An anonymous caller informed the Rosebud County Sheriff's office that Mogen was growing marijuana on Mogen's private land abutting the Yellowstone River. A Sheriff's officer and a game warden traveled by boat down the river to begin surveillance operations. The officers did not have a search warrant or permission to be on Mogen's property, nor was the property posted along the river. The Sheriff testified that the game warden came along to identify and prevent trespass above the ordinary high-water mark, below which public access is allowed pursuant to Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). The officers used binoculars to view the suspected marijuana plant and took photographs of the plant from a point that they testified was below the ordinary high-water mark. Mogen moved to suppress the evidence, asserting that the officers must have crossed above the ordinary high-water mark, without an invitation or warrant, to observe and take the photographs in a portion of his property where he had an expectation of privacy and that the evidence was thus illegally seized. The District Court denied the motion to suppress. The Supreme Court affirmed, finding nothing in the record to indicate that the District Court's finding of fact was clearly erroneous or incorrectly applied. St. v. Mogen, 2000 MT 14, 298 M 87, 993 P2d 699, 57 St. Rep. 82 (2000), following St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997).

Application for Search Warrant Signed by Deputy County Attorney of Another County — Search and Seizure Not Illegal if Any Irregularity Has Not Affected Substantial Rights of Accused — Exclusionary Rule Not Automatically Applied: The Deputy County Attorney of Lake County signed an application for a search warrant to be executed in Sanders County. The defendant moved to suppress all evidence seized as a result of the warrant. The District Court denied the motion. On appeal, the Supreme Court did not address the question of the authority of a Deputy County Attorney from one county to apply for a search warrant to be executed in another county. Because the warrant was sufficient under the constitution, the fact that the application for the warrant was signed by the Deputy County Attorney of another county did not affect the defendant's substantial rights under the constitution, the search and seizure was not illegal, and the evidence should not have been suppressed. The exclusionary rule should not be automatically applied when there is a technical violation of a statutory requirement. St. v. West, 1998 MT 282, 291 M 435, 968 P2d 289, 55 St. Rep. 1155 (1998).

Facts Provided by Nonconfidential Informant Self-Authenticating — Omissions and Misstatements Raised by Defendant Held Immaterial for Purposes of Determining Necessity for Franks Hearing — Issues Not Raised on Appeal Held Nonreviewable: Dotts was arrested for assault and disorderly conduct and, in the course of an interview with a detective, offered information on a marijuana-growing operation that was being run by Adams, in exchange for leniency on the charges. Dotts subsequently disclosed, without any commitments from the police, that Adams ran the marijuana-growing operation at a certain location, which Dotts himself helped establish, and that Adams and his son drove certain vehicles described by Dotts. The house and the vehicles were subsequently confirmed by detectives, a search warrant was obtained, a marijuana-growing operation was discovered, and Adams was arrested. Adams sought to suppress the evidence, arguing that a detective's statement in the warrant application that "Mr. Dotts asked for nothing . . . and I have offered him nothing . . ." in the way of leniency was untrue and that certain facts contained statements that were made by Dotts and that turned out to be incorrect. The Supreme Court distinguished St. v. Valley, 252 M 489, 830 P2d 1255 (1992), and St. v. Kaluza, 272 M 404, 901 P2d 107 (1995), explaining that, unlike those cases, the case before it involved a nonconfidential informant whose identification was known to the police. Declining to follow a procedure urged by defendant Adams that would establish a policy of "zero tolerance" for intentional misstatements or omissions in applications for search warrants because the argument was raised for the first time on appeal, the Supreme Court followed the procedure outlined in Franks v. Del., 438 US 154 (1978), and applied in Montana in St. v. Sykes, 194 M 14, 663 P2d 691 (1983), which requires a defendant to make a substantial showing that false statements were knowingly or intentionally made, requires the reviewing court to disregard any such statements, and then requires the court to determine if the remaining facts

demonstrate probable cause. Following St. v. Garberding, 245 M 356, 801 P2d 583 (1990), and other cases, the Supreme Court found that the misstatements and omissions in the warrant application raised by Adams did not, in light of Dotts' admission against interest that he helped set up the marijuana-growing operation, cast doubt on the credibility of the other information given by Dotts. For these reasons, the Supreme Court held that the misstatements and omissions were immaterial in determining Dotts' credibility and that, even if Dotts had been a confidential informant, the information that he gave was sufficiently corroborated to establish probable cause. Adams also raised the issue that the search warrant was overbroad, but relying upon St. v. Henderson, 265 M 454, 877 P2d 1013 (1994), the Supreme Court held that because the issue had been raised by Adams for the first time on appeal, the Supreme Court would not consider the issue. St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997), followed in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), and St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Totality of Circumstances — Search Sustained on Legally Obtained Evidence Supporting Search Warrant — Evidence Gathered by Ruse Irrelevant: Detectives were informed by a previously reliable confidential informant that Holstine conducted a marijuana growing operation in his house in the Big Sky area. The information provided by the informant about the location and description of Holstine's home was independently verified by detectives. Posing as a skier, one detective then gained entrance to Holstine's home, and smelled marijuana smoke inside the home. The same detective also smelled growing marijuana near an outside corner of Holstine's home and observed a boarded window near the place where the informant had said the growing operation was located inside Holstine's home. A search warrant was obtained based upon all of the information gathered by the detectives. Marijuana plants were confiscated from Holstine's home, and Holstine was convicted of felony possession of marijuana. The Supreme Court held that under the "totality of the circumstances" test adopted by St. v. Campbell, 254 M 425, 838 P2d 427 (1992), and St. v. Valley, 252 M 489, 830 P2d 1255 (1992), the information gained from the confidential informant, together with the testimony of the detective concerning the window and smell of marijuana from outside the residence, was sufficient information constituting probable cause to support the application for the search warrant. The information gained by the detectives by use of the skier ruse was of no value. St. v. Holstine, 260 M 310, 860 P2d 110, 50 St. Rep. 1063 (1993).

Informant's Tip and Record of Electricity Consumption — Probable Cause Readily Ascertainable: Electricity consumption records consistent with a marijuana growing operation that were presented to the reviewing judge in conjunction with an application for a search warrant, coupled with a statement of personal observation of the operation by a reliable informant, constituted a substantial basis for the District Court's conclusion that probable cause for issuing the warrant was readily ascertainable. St. v. Deskins, 245 M 158, 799 P2d 1070, 47 St. Rep. 1951 (1990), distinguished in St. v. Griggs, 2001 MT 211, 306 M 366, 34 P3d 101 (2001).

Electricity Consumption as Probable Cause: The defendant argued that the officer obtaining the search warrant had failed to set forth the average electricity consumption by marijuana growers and that therefore no probable cause existed to issue the warrant. The Supreme Court affirmed the lower court's issuance of the warrant on the basis that three separate locations on the defendant's property consumed more power individually than a family of four would consume. St. v. Baldwin, 242 M 176, 789 P2d 1215, 47 St. Rep. 614 (1990).

Exclusionary Rule Not Extended to Investigative Subpoenas: The defendant argued that the officer obtaining the investigative subpoena had misread a warranty deed and alleged that the defendant had paid the sellers of his residence $10,000 in addition to his downpayment, when in reality the document stated that consideration of only $10 had been paid. The Supreme Court stated that the erroneous conclusions contained within the application did not invalidate the remaining information and declined to extend the exclusionary rule to investigative subpoenas. St. v. Baldwin, 242 M 176, 789 P2d 1215, 47 St. Rep. 614 (1990).

Informant's Tip — Admissions Against Interest: An investigating officer obtained a search warrant based on information from a self-admitted marijuana user. Before obtaining the warrant, the officer corroborated all the information through public records. A search of the respondent's residence resulted in the seizure of marijuana plants and materials used to cultivate marijuana. The District Court granted respondent's motion to suppress the evidence. The Supreme Court reversed and held that there was probable cause to support the warrant. The affidavit supporting the warrant was sufficient not only under the "totality of the circumstances" test, but also because the informant admitted his marijuana use. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at

least to support a finding of probable cause to search. St. v. Sundberg, 235 M 115, 765 P2d 736, 45 St. Rep. 2235 (1988), followed in St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997).

Probable Cause — Informant's Tip — "Totality of Circumstances" Test — "Four Corners of the Warrant Application": An investigating officer obtained a search warrant based on information from a self-admitted marijuana user. Before obtaining the warrant, the officer corroborated all the information through public records. A search of the respondent's residence resulted in the seizure of marijuana plants and materials used to cultivate marijuana. The District Court granted respondent's motion to suppress the evidence. The Supreme Court reversed and held that there was probable cause to support the warrant. To determine whether there is probable cause to issue a search warrant, one must look only at information contained in the four corners of the application. The test for determining probable cause for issuance of a search warrant is the "totality of the circumstances" test set forth in Ill. v. Gates, 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317. Legally unimpeachable findings of probable cause may rest upon evidence that is not legally admissible at the criminal trial itself. After-the-fact scrutiny by the reviewing court should not take the form of de novo review. St. v. Sundberg, 235 M 115, 765 P2d 736, 45 St. Rep. 2235 (1988), followed in St. v. Van Voast, 247 M 194, 805 P2d 1380, 48 St. Rep. 160 (1991).

Informant's Tip — Aquilar-Spinelli and Gates Tests: A search warrant was based upon a tip from an informant (who was reliable in three previous tips), and part of the tip resulted in the seizure of marijuana from a car specifically described in the tip and that had apparently originated from the defendant's residence. There was sufficient probable cause to issue a search warrant for the search of the defendant's residence under the Aquilar-Spinelli test because there was sufficient "self-verifying" detail in the tip to inform the issuing magistrate of the circumstances underlying the informant's basis of knowledge and the informant's specific information, corroborated by the details concerning the automobile, was sufficient evidence of the informant's veracity. Since the stringent requirements of the Aquilar-Spinelli test were met, probable cause also existed under the "totality of the circumstances" test set forth in Ill. v. Gates, 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317, 51 U.S.L.W. 4709 (1983). St. v. Erler, 207 M 88, 672 P2d 624, 40 St. Rep. 1915 (1983).

No Expectation of Privacy in Forest Service Campground: Defendant sought to suppress evidence seized from a Forest Service campground. The primary test for determining standing to challenge the legality of a search and seizure is "a legitimate expectation of privacy", although factors such as disclaimer of ownership and whether one is on the premises searched legitimately and the permanence of such presence are also factors. In this case, the defendant did not have an expectation of privacy and therefore had no standing to challenge the legality of the search. St. v. Dess, 201 M 456, 655 P2d 149, 39 St. Rep. 2231 (1982).

Blood Alcohol Test Found Voluntary: The admissibility of the results of the blood alcohol test in this case is not based on implied consent to the withdrawal of the defendant's blood under 61-8-402. Instead, it is based on the actual consent of the defendant, which he admits. The issue turns on whether the defendant's consent was voluntary or was coerced by psychological means. The court held that there was substantial evidence that the defendant's consent was free and voluntary and that the lower court committed no error in denying the defendant's motion to suppress the results of the blood alcohol test. St. v. Kirkaldie, 179 M 283, 587 P2d 1298 (1978).

Constitutionality of Burden of Proof: The Supreme Court held that the language "The burden of proving that the search and seizure were unlawful shall be on the defendant." from 46-13-302(4) is not unconstitutional. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Probationer Search Clause: Execution of a probationer search clause by law enforcement personnel, being instrumental in achieving the objectives of probation, is a proper condition of probation. St. v. Means, 177 M 193, 581 P2d 406 (1978).

Standing to Challenge Constitutional Violations: The rule in Montana is that a defendant does not have standing to challenge violations of the constitutional rights of a codefendant or third party by law enforcement authorities. Furthermore, codefendant's consent to a search made it a lawful search. St. v. Coleman, 177 M 1, 579 P2d 732 (1978).

Juveniles — Suppression of Statements and Evidence: In the trial of a juvenile for shooting a police officer, a motion for suppression of evidence, obtained under authority of a lawful inspection and statements voluntarily made, was erroneously granted. However, statements made after a waiver of counsel, which were void because of lack of counsel for the underaged defendant, were properly suppressed. St. v. District Court, 176 M 257, 577 P2d 849 (1978).

"Open Fields" Doctrine: Marijuana plants discovered in an old corral on unrestricted property were in an area not constitutionally protected from unreasonable search and seizure because of Montana's recognition of the "open fields" doctrine. St. v. Charvat, 175 M 267, 573 P2d 660 (1978).

Affidavit for Warrant — Informant's Oral Testimony to Establish Reliability: When an affidavit for a search warrant is wholly sufficient to establish probable cause but is based on hearsay from an untested informant, the reliability of that informant may be checked by a magistrate and the informant's oral testimony to the magistrate is not considered as supplementing probable cause to support the affidavit but merely as providing a direct test of the informant's reliability as to the hearsay contained in the affidavit. St. v. Thompson, 169 M 158, 545 P2d 1070 (1976).

Consent Valid When Defendant Arrested Previously: The defendant's consent to the search of his car was voluntary even though he had spent the night in jail and was still in custody because the defendant had previously been arrested and knew his rights. State ex rel. Kotwicki v. District Court, 166 M 335, 532 P2d 694 (1975).

Test of Voluntariness: Voluntariness is to be determined from the totality of the circumstances, and consent was voluntary under the circumstances of this case. State ex rel. Kotwicki v. District Court, 166 M 335, 532 P2d 694 (1975).

Search Without Warrant Based on Probable Cause: Police officers who had been given a description of an automobile and its occupants, who were suspected of having recently robbed a pharmacy, had probable cause to believe the vehicle was carrying stolen property, and evidence obtained in a search of the automobile without a warrant was admissible. St. v. Spielmann, 163 M 199, 516 P2d 617 (1973), distinguished in St. v. Amor, 164 M 182, 520 P2d 773 (1974), followed in St. v. Evjen, 234 M 516, 765 P2d 708, 45 St. Rep. 2096 (1988) (distinguishing U.S. v. Parr, 843 F2d 1228 (9th Cir. 1988)), and in St. v. McCarthy, 258 M 51, 852 P2d 111, 50 St. Rep. 420 (1993).

Lawful Inspection — Plain View: The Sheriff, who was called to search for a prowler, was justified under this section in seizing items in plain view during such search. St. v. Gallagher, 162 M 155, 509 P2d 852 (1973), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Disclaimer — Evidence Admitted: Evidence discovered during a search of the house occupied by the defendant's mother was properly admitted on a charge of burglary since the defendant disclaimed any interest in the property recovered from the search and had no possessory interest in his mother's home. St. v. Dess, 154 M 231, 462 P2d 186 (1969).

Consent Following Miranda Warnings: When the appellant, convicted of robbery, had been given three Miranda warnings during the course of the investigation, evidence obtained from the appellant's apartment after he gave consent to the police to go there was not the product of an unlawful search and seizure. St. v. Braden, 154 M 90, 460 P2d 85 (1969).

Waiver of Right to Object:

When the defendant had taken the Sheriff to his house and turned over the alleged murder weapon to the Sheriff, there was no illegal search and seizure since the defendant voluntarily consented to turning over the rifle. St. v. Williams, 153 M 262, 455 P2d 634 (1969).

Any right which the defendant may have had to complain of a seizure at the time of his arrest was waived when he voluntarily surrendered the evidence to police officers upon request. St. v. Nelson, 130 M 466, 304 P2d 1110 (1956).

One consenting to a search of his premises without a warrant cannot complain that it was illegal. State ex rel. Muzzy v. Uotila, 71 M 351, 229 P 724 (1924).

UNLAWFUL SEARCH

Search of Residence on Permission of Minor Child Violative of Parent's Right to Privacy — Evidence Properly Suppressed — Exception: Police were dispatched to a residence in response to a report of a sexual assault on a young woman, who was discovered to be a minor. Following questioning in the living room, the girl led the police to her bedroom, where an alleged assault by her father had occurred. Because police believed that the minor had lawfully granted permission to search the residence, they seized items from the bedroom, including the sheets, comforter, and blanket from the bed and the victim's pajamas. They also had the victim change clothes so they could take possession of the underwear that the victim was wearing at the time of the alleged assault. The girl later signed a form granting permission to search the residence. The father's DNA was found on the bedding and he was charged with felony sexual assault. The father argued that the search and seizure were unconstitutional because they were conducted without his consent or a search warrant. The state contended that in a case such as this where the child granting entrance to the home was the possible victim of a sexual assault, a warrant was unnecessary. The District Court, citing St. v. Schwarz, 2006 MT 120, 332 M 243, 136 P3d 989 (2006), held that because the minor did not have actual authority to consent to a search, police were obligated to obtain consent from the parent or a search warrant prior to seizing items from the bedroom. Because neither consent nor warrant was obtained, the court suppressed all

evidence seized from the house. The state appealed. The Supreme Court cited St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), for the factors used to determine whether a state action constitutes an unreasonable or unlawful search or seizure: (1) whether the person challenging the state's action has an actual subjective expectation of privacy; (2) whether society is willing to recognize that subjective expectation as objectively reasonable; and (3) the nature of the state's intrusion. The court also noted that warrantless searches conducted inside a home are per se unreasonable, subject only to a few specifically established and well-delineated exceptions, none of which were present here. The court affirmed the holding in Schwarz, holding that the child did not have authority to consent to the search of her parent's home. The focus was on the violation of the privacy rights of the parent in control of the home, not the general privacy rights of the child, except where, as with the underwear the victim was wearing during the alleged assault, society would recognize as reasonable a person's privacy interest in the intimate apparel that she was wearing at the time. Therefore, the evidence seized from the residence must be suppressed because it was the product of an illegal search and seizure, with the exception of the daughter's underwear, because the father did not have an actual subjective expectation of privacy in the underwear that his daughter was wearing at the time the alleged assault occurred that society would find objectively reasonable. The District Court did not err in granting the motion to suppress all the evidence, with the exception of the underwear. The case was remanded for further proceedings. St. v. Ellis, 2009 MT 192, 351 M 95, 210 P3d 144 (2009).

Admissibility of Evidence From Independent Source Following Illegal Warrantless Search: Deputies conducted an illegal warrantless search that resulted in defendant receiving a minor in possession charge. Immediately after the illegal entry, defendant began defiantly chugging alcohol in the deputies' presence. Nevertheless, defendant contended that evidence of the alcohol possession should have been suppressed because the search was illegal. The District Court denied the suppression motion, and on appeal the Supreme Court affirmed. Evidence is admissible notwithstanding a search violation when the evidence is obtained from an independent source. By continuing to consume alcohol after the warrantless entry, defendant provided deputies with an independent source for evidence that was excluded from the fruit of the poisonous tree doctrine, and the evidence was properly admitted. In re B.A.M., 2008 MT 311, 346 M 49, 192 P3d 1161 (2008). See also St. v. Ottwell, 239 M 150, 779 P2d 500 (1989), St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002), and St. v. Rookhuizen, 2007 MT 312, 340 M 148, 172 P3d 1257 (2007).

Admissibility of Arson Evidence in Plain View Seized Under Exigent Circumstances — Warrant Required for Search for Other Evidence: A Deputy Sheriff responded to a fire call at Lewis's house and entered the building as part of fire suppression efforts. While inside, the Deputy Sheriff noticed evidence of possible arson. The Deputy Sheriff went back to his vehicle for a camera, reentered the building, photographed the evidence, and removed it, placing it in his vehicle. After the fire department arrived and suppressed the fire, the Deputy Sheriff reentered the building a third and fourth time to look for additional arson evidence. At trial, Lewis contended that all the evidence should be suppressed as fruits of unlawful warrantless searches. The trial court allowed introduction of evidence from the first entry because exigent circumstances existed to justify the Deputy Sheriff's entry, but the court denied admission of evidence gathered during the second and subsequent entries because exigent circumstances did not exist, holding that the Deputy Sheriff should have acquired a warrant for further investigative searches. The Supreme Court agreed that exigent circumstances surrounding the fire justified the first entry, but also held that the second entry was a continuation of the first and that evidence in plain view during the first entry could be lawfully seized and was admissible. However, a separate entry to search for or gather evidence pursuant to a criminal investigation requires a separate justification, such as a warrant, consent, or an exigency, and none of those justifications applied to the third and subsequent entries, so the motion to suppress evidence gathered during those searches was properly granted. St. v. Lewis, 2007 MT 295, 340 M 10, 171 P3d 731 (2007).

Suspect Interrogated in Home Without Miranda Warning — Motion to Suppress Improperly Denied: Following a lead of methamphetamine use at Munson's home, detectives went to the home and, without giving Munson a Miranda warning, questioned Munson for 1 ¾ hours before Munson confessed to possessing methamphetamine paraphernalia. Munson was arrested for criminal possession of dangerous drugs and paraphernalia, and at trial, Munson moved to suppress the evidence and statements made to the officers, but the motion was denied. On appeal, the Supreme Court reversed. The officers created a custodial atmosphere, and Munson's freedom of action was significantly restricted. Under the totality of the circumstances, a reasonable person in Munson's position would not have felt free to terminate the interview and

leave or to ask the officers to leave, so for purposes of Miranda, Munson was in custody and subjected to an interrogation. Therefore, failure of the officers to give Munson a Miranda warning rendered Munson's statements inadmissible. Because Munson's consent to a search was not given freely and without duress or coercion, all evidence seized under the guise of consent was also inadmissible. St. v. Munson, 2007 MT 222, 339 M 68, 169 P3d 364 (2007), following St. v. Osteen, 216 M 258, 700 P2d 188 (1985), and St. v. Rushton, 264 M 248, 870 P2d 1355 (1994).

Knock and Announce Rule — Exigent Circumstances Exception — Futility Exception — Warrant Requirements: Without knocking and announcing its presence, a SWAT team broke down the doors of a rental home, discovered a methamphetamine lab, and arrested the occupants, including Anyan. Anyan contended that the entry was illegal and that evidence seized should be suppressed. Following a guilty plea, Anyan appealed on grounds of the illegality of the no-knock entry. Absent state statutory or case law, the Supreme Court examined extensive federal precedent, concluding that pursuant to the right of privacy and the right to be free from illegal search and seizure, an officer serving a search warrant must comply with the knock and announce requirement unless there are exigent circumstances that would present a threat of physical violence or the likelihood that evidence would be destroyed. Mere suspicion or evidence that firearms are present in the residence or that a particular resident is armed is not sufficient to create an exigency; rather, there must be specific information to lead the officer to a reasonable conclusion that the presence of firearms raises a concern for officer safety. Another exception to the knock and announce requirement, known as the futility exception, arises when police have a reasonable suspicion that the occupants know of the police presence and purpose prior to entry and that knocking and announcing would be futile. In addition, the decision to make a no-knock entry should ordinarily be made by a neutral and detached magistrate as part of the application for a search warrant, along with any foreknown exigent circumstances justifying a no-knock entry, but an investigating officer may make the decision if unexpected exigent circumstances arise at the scene. The knock and announce rule is flexible, and courts must determine whether an unannounced entry was reasonable under the particular circumstances of each case, including the time that an officer must wait prior to forced entry. However, unless exigent circumstances exist, the failure of officers to knock and announce their presence renders evidence procured during execution of the search warrant inadmissible. Thus, the officers' no-knock entry into Anyan's house violated federal and state constitutional rights to be free from unreasonable search and seizure, and failure of the District Court to suppress the evidence seized during the search was reversible error. St. v. Anyan, 2004 MT 395, 325 M 245, 104 P3d 511 (2004), followed in St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005), in which the Supreme Court reiterated that no-knock entry into a residence is the exception and not the rule. The Anyan futility exception was also applied in St. v. Hill, 2008 MT 260, 345 M 95, 189 P3d 1201 (2008), where officers responding to a domestic disturbance call did not knock but announced their presence through the open door of a trailer and observed defendant moving aggressively toward the back of the trailer, but defendant ignored their order to stop. The officers had a reasonable suspicion that the trailer occupants knew of their presence and purpose prior to entry. A woman screaming in the trailer indicated an ongoing domestic disturbance, and continuing to wait at the open door after defendant failed to respond would have been superfluous, futile, and dangerous.

Transient Party Guest's Reasonable Expectation of Privacy in Host's Bathroom During Warrantless Search — Community Caretaker Doctrine Inapplicable: When officers executed a warrantless search of Tash's apartment based on a complaint of a loud party, Smith, an 18-year-old transient party guest, was in the bathroom vomiting. An officer opened the closed bathroom door, smelled what was believed to be an intoxicating substance, concluded that Smith was intoxicated, and charged Smith with being a minor in (former?) possession of alcohol. Smith moved to suppress the evidence on grounds that the search was illegal and that the officer violated Smith's expectation of privacy in Tash's bathroom. The state contended that Smith lacked the requisite standing to challenge the officers' initial entry into the apartment because Smith was a guest and had no reasonable expectation of privacy in the common rooms of the apartment. Applying the factors in St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004), the Supreme Court agreed with the state. The state also argued that an officer's intrusion into the closed bathroom was justified under the community caretaker doctrine. On this point, the Supreme Court reversed. The community caretaker doctrine stands for the proposition that officers have a duty to investigate uncertain situations in order to ensure public safety, but the facts in this case did not warrant the officer's intrusion absent objective, specific, articulable facts supporting a conclusion that Smith was in need of officer assistance. Smith had a legitimate

expectation of privacy in Tash's bathroom and was entitled to constitutional privacy protections. St. v. Smith, 2004 MT 234, 322 M 466, 97 P3d 567 (2004), followed, with regard to a guest's lack of standing to challenge a search of common areas of another person's apartment, in St. v. Redlich, 2004 MT 235, 322 M 476, 97 P3d 1090 (2004), and St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008).

Lack of Exigent Circumstances Justifying Warrantless Search of Fanny Pack — Motion to Suppress Evidence Properly Granted: After Lanegan was arrested for obstructing a peace officer and handcuffed, the officer proceeded to conduct a warrantless search of Lanegan's fanny pack and discovered drugs and drug paraphernalia. Lanegan was then charged with drug crimes. Lanegan moved to suppress the evidence, and the motion was granted. The state appealed, but the Supreme Court affirmed. A search incident to arrest may be conducted under the conditions in 46-5-102, but in this case, none of the conditions were present. The search would not have protected the officer or prevented Lanegan's escape because Lanegan was already handcuffed, nor would the search have resulted in discovery of anything that could have been used in or fruits of the crime of obstructing a peace officer. Warrantless searches are per se unreasonable, but one exception is when there are exigent circumstances that would cause a reasonable person to believe that prompt action is necessary to prevent physical harm, destruction of relevant evidence, escape, or some other consequence improperly frustrating legitimate law enforcement efforts. However, the search in this case did not rise to the level of exigent circumstances to allow a warrantless search, and the motion to suppress was properly granted. St. v. Lanegan, 2004 MT 134, 321 M 349, 91 P3d 578 (2004).

Reasonable Expectation of Privacy in Lost Wallet — Evidence Obtained From Search of Lost Wallet Subject to Suppression: Hamilton's lost wallet was turned into the Bozeman police, who opened it to determine ownership. In doing so, the police discovered prescription drugs. Hamilton confessed that the drugs were not prescribed for her, and she was arrested and convicted. On appeal, Hamilton asserted that she retained an expectation of privacy in the lost wallet and that the fruits of the search of the wallet should be suppressed. The Supreme Court agreed. In determining whether an unlawful search of the wallet occurred, the court applied St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), looking at whether Hamilton had an actual expectation of privacy that society was willing to recognize as objectively reasonable and at the nature of the state's intrusion. When a person intentionally abandons property, the expectation of privacy is abandoned as well. However, when property is not intentionally or voluntarily abandoned, the expectation of privacy remains substantially intact. Thus, Hamilton's expectation of privacy was diminished only to the extent necessary for the police to determine ownership. The police search exceeded what was necessary to determine ownership of the wallet and was not justified by any exception to the warrant requirements. Therefore, the warrantless search was illegal, and the evidence obtained as a result of the search should have been suppressed. Hamilton's conviction was reversed. St. v. Hamilton, 2003 MT 71, 314 M 507, 67 P3d 871 (2003).

Justifiable Stop for Daytime Check of Temporary Window Sticker Warranted — Further Police Intrusion Not Warranted Once Limited Purpose of Stop Accomplished: Following weeks of surveillance instigated by a confidential tip intimating drug activities, the Billings police observed no suspicious drug-related activities conducted by defendants, but after receiving a tip that defendants would be driving from Billings to Bozeman to sell marijuana, officers stopped defendants' vehicle because there were no license plates displayed, although a temporary sticker could be seen but not read in the tinted rear window. When the officers approached the vehicle, they noticed that the temporary sticker properly displayed in the window was current. Nevertheless, in a short time, additional officers arrived with a drug-sniffing dog. The dog indicated the presence of drugs, the vehicle was searched, marijuana was found, and defendants were arrested. Defendants contended that the evidence should be suppressed because there was no particularized suspicion to make the stop. The Supreme Court agreed that the investigative stop was warranted because the officers' inability to read the expiration date on the temporary sticker provided an objective basis to infer that the sticker was not valid. However, a quick check of the properly displayed sticker in bright daylight confirmed the sticker's validity. Defendants had committed no traffic offense or violated any other criminal law of which the officers were aware. An investigative stop is a temporary detention that may not last longer than necessary to effectuate the purpose of the stop. Once the limited purpose of the investigative stop was accomplished, no further police intrusion was warranted, and the investigative stop related to drug possession was not justified. The District Court committed reversible error in refusing to suppress the evidence of the subsequent vehicle search. St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003), following St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998). See also St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Absence of Exigent Circumstances — Warrantless Search Unjustified: Logan was one of two passengers in a vehicle that was stopped for failure to have the rear license plate illuminated. The officer recognized the driver, who had a history of carrying weapons and of violence toward police officers, and called for backup. The officer then approached the vehicle but did not smell or observe any illegal drugs or drug paraphernalia or observe any behavior that led the officer to believe that anyone in the vehicle was under the influence of drugs. After obtaining identification from the driver and passengers, the officer ran a check for outstanding warrants on all the parties and learned that all three persons had past drug arrests and that an extreme officer caution alert was in effect for the driver. The officer then called for another officer who had a drug-sniffing dog. The dog alerted to the passenger-side door of the car, and the officer removed a purse from the back seat containing drug paraphernalia and a paper bindle. The dog entered the vehicle and indicated additional drugs. Logan was subsequently arrested for possession of dangerous drugs but moved to suppress the evidence on grounds that the officer did not have a particularized suspicion of the presence of drugs to support a canine sniff search of the vehicle. The Supreme Court agreed. In St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), the Supreme Court held that there is no automobile exception to constitutional search warrant requirements and that the mobility of a vehicle, without more, is not sufficient to justify a warrantless search. In addition to particularized suspicion, a warrantless search of a vehicle requires probable cause and a generally applicable exception to the warrant requirement, such as plain view search, a search incident to arrest, or exigent circumstances, which was the only applicable exception at issue here. The District Court held that the exigent circumstance in this case was that allowing Logan to reenter the vehicle to retrieve the purse would have provided the opportunity to destroy the evidence. However, the officer testified that there was nothing that prevented obtaining a search warrant, and that testimony itself belied the fact that exigent circumstances existed. Because the state failed to meet the heavy burden of proving exigent circumstances, the District Court erred in denying Logan's motion to suppress, so the case was reversed. St. v. Logan, 2002 MT 206, 311 M 239, 53 P3d 1285 (2002).

Invalid Third-Party Consent to Warrantless Search of Private Residence — Consenting Party to Have Actual Authority to Consent to Search: A warrantless search conducted inside a home is per se unreasonable, subject to only a few exceptions, one of which is when the search is conducted pursuant to consent that is freely and voluntarily given. The state may justify a warrantless search by showing that permission was obtained from defendant or from a third party who possessed common authority over or other sufficient relationship to the premises or effect sought to be inspected, but the state has the burden of showing that consent was voluntary. However, for third-party consent to be valid, the consenting party must have actual authority to consent, as opposed to apparent authority. In the present case, McLees lived with his father, Scott, in an apartment owned by his grandfather, Earl, and investigating officers obtained Earl's voluntary consent before searching the residence. The District Court held that Earl had common authority to consent to the search and denied McLees' motion to suppress incriminating evidence found in the search. The Supreme Court disagreed. Under U.S. v. Matlock, 415 US 164, 39 L Ed 2d 249, 94 S Ct 988 (1974), common authority may not be implied from the mere property interest of a third party in the property to be searched. Rather, the authority that justifies third-party consent rests on the mutual use of the property by persons having joint access or control for most purposes. Here, the record was insufficient to show that Earl had common authority over McLees' apartment. Earl never went to the apartment unless Scott was there. Earl did not have free access to and was not a cohabitant of the apartment and did not share in its use. The fact that Earl owned the property was not dispositive when McLees had a reasonable expectation of privacy by living there. Earl therefore did not have a sufficient relationship with the apartment that would give him actual authority to consent to a warrantless search. While declining to address whether the seized evidence was admissible under the independent source rule or the inevitable discovery rule, the Supreme Court held that it was inadmissible under the third-party consent rule and reversed for further proceedings. St. v. McLees, 2000 MT 6, 298 M 15, 994 P2d 683, 57 St. Rep. 25 (2000), following St. v. Sorenson, 180 M 269, 590 P2d 136 (1979), St. v. Lopez, 896 P2d 889 (Hawaii 1995), and St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997), distinguishing Ill. v. Rodriguez, 497 US 177, 111 L Ed 2d 148, 110 S Ct 2793 (1990), and followed, with regard to third-party authority to consent to search, in St. v. Gilmore, 2004 MT 363, 324 M 488, 104 P3d 1051 (2004), and St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009).

No Particularized Suspicion — Stop Illegal — Evidence Suppressed: At 3:30 a.m. on a cold morning in a high-crime area, a police officer who was searching for a participant in a domestic disturbance observed defendant talking on a pay phone. When the police officer drove back by

the phone, the phone was off the hook and defendant was gone. When he spotted defendant leaving a parking lot in the area, the police officer made a traffic stop and discovered a knife in plain view on the front seat of the car and illegal drugs and a gun on defendant's person. Defendant moved to suppress all the evidence. The District Court denied the motion. The Supreme Court reversed. A person's presence in a high-crime area does not alone give the police a particularized suspicion to stop the person. The facts did not rise to the level of a reasonable and articulable suspicion that defendant was, had been, or was about to engage in criminal activity. Because the stop was illegal, all evidence must be suppressed. St. v. Jarman, 1998 MT 277, 291 M 391, 967 P2d 1099, 55 St. Rep. 1133 (1998), distinguished in St. v. Flemings, 2008 MT 229, 344 M 360, 188 P3d 1020 (2008).

Warrantless Search of Home — Voluntary Consent — Totality of Circumstances Test: Warrantless searches and seizures conducted inside a home are per se unreasonable, subject only to a few carefully drawn exceptions, including instances in which a citizen has knowledgeably and voluntarily consented to a search. In order for consent to be voluntary, it must be uncontaminated by any duress or coercion, express or implied, as determined by the totality of the circumstances. In this case, defendant was told that he was not required to consent to the search, but that factor was not controlling. Other circumstances mitigating against voluntariness included: (1) the fact that defendant had made a highly incriminating admission that was extracted improperly without Miranda warnings after entry to the home was gained without a warrant; (2) coercion arising from the fact that defendant was promised that if consent was given for the search, he would not be arrested or incarcerated, which constituted an implication that if cooperation was not given, incarceration would result; and (3) a statement by the investigating officer that if consent was not given, officers would remain in the house for a number of hours until a search warrant was obtained. Based on the totality of the circumstances, defendant's consent was coerced rather than given freely and voluntarily and evidence obtained during the subsequent search was inadmissible. St. v. Rushton, 264 M 248, 870 P2d 1355, 51 St. Rep. 262 (1994), following Schneckloth v. Bustamonte, 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041 (1973), and followed in St. v. Doyle, 1998 MT 195, 290 M 287, 963 P2d 1255, 55 St. Rep. 819 (1998), St. v. Wetzel, 2005 MT 154, 327 M 413, 114 P3d 269 (2005), and St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

Elements of Intimidation Present in Threat to Third Party — Probable Cause for Search: Defendant intimidated victims by pointing a gun at them in his car. Defendant also indicated the presence of another weapon in the trunk of the car and indicated his intention to use it to harm a third party. Victims viewed a second gun in the trunk but were not directly threatened with it. The District Court suppressed evidence found in the trunk after finding a sufficient nexus did not exist for probable cause because defendant gave no indication he intended to use the gun in the trunk to intimidate victims and because the second gun was not alleged to be contraband. The Supreme Court reversed, holding that defendant produced a fear in the victims that he intended and had the ability to harm the third party, constituting intimidation, and that viewing of the gun in the trunk established sufficient probability to authorize a search of the trunk. St. v. Hembd, 235 M 361, 767 P2d 864, 46 St. Rep. 55 (1989).

Evidence Not Suppressed as "Fruit of the Poisonous Tree": A Deputy Sheriff illegally seized a bag of marijuana from the passenger compartment of defendant's vehicle after his arrest on DUI charges. The court held that this illegal search did not taint the subsequent legal seizure of cocaine in the vehicle or the seizure of marijuana found under the chair occupied by defendant in the Sheriff's office. There was knowledge independent of the illegal search that supported probable cause, thus the "fruit of the poisonous tree" doctrine did not bar admission of the seized evidence. St. v. Pearson, 217 M 363, 704 P2d 1056, 42 St. Rep. 1253 (1985).

Unauthorized Recording of Telephone Call — Third Person's Right to Privacy Invaded: Recording of telephone conversation by police undercover officer of a call received from an acquaintance of defendant setting up a drug sale did not taint all evidence against defendant even though the recording was not authorized by court order. The undercover officer personally contacted police regarding the setting up of the drug buy which resulted in defendant's conviction. Furthermore, a defendant cannot invoke a breach of right of privacy of his acquaintance; he must assert his own privacy rights. The recording was not introduced into evidence, but the undercover officer testified concerning it. St. v. Hanley, 186 M 410, 608 P2d 104 (1980).

Fruits of Involuntary Confession: The defendant's confession was obtained involuntarily. Under the "fruit of the poisonous tree" doctrine, evidence obtained as a result of an involuntary confession must be suppressed unless: (1) the evidence is attenuated from the constitutional violation so as to remove its primary taint; (2) the evidence is obtained from a source independent

of the defendant's confession; or (3) it is inevitable that the evidence would have been discovered apart from the defendant's confession. The Supreme Court found that none of the exceptions applied and that the evidence should have been suppressed. St. v. Allies, 186 M 99, 606 P2d 1043 (1979).

Requirements for Electronic Surveillance: Under Title III of the Federal Omnibus Crime Control and Safe Streets Act, states are required to have a specific statutory scheme for electronic surveillance before public officials can lawfully monitor oral and wire communications in the state. If a state chooses to allow electronic surveillance by adopting a statutory scheme, the scheme must be at least as or more restrictive than the regulations of Title III. Montana statutes 45-8-213, defining the offense of violating privacy in communications, and 46-5-202 (renumbered 46-5-221), setting forth the grounds for issuance of a search warrant, fail to meet the minimum requirements of Title III or the standard enumerated by the U.S. Supreme Court in the Berger and Katz decisions. Among other things, Montana's statutes fail: (1) to require a showing of exigent circumstances to overcome the defect of not giving prior notice; (2) to state what items of information should be included in the application for a warrant; and (3) to outline the general procedures by which law enforcement officials obtain warrants for electronic surveillance. In St. v. Brackman (since overruled in St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988)), the court held that in view of Montana's constitutional right of privacy, law enforcement officials must first obtain a warrant before intercepting any communication. This will no longer suffice, since the requirements of Title III are not met. Any evidence seized by electronic surveillance must be suppressed since Montana's statutory scheme for allowing such surveillance does not meet the federal requirements. St. v. Hanley, 185 M 459, 605 P2d 1087 (1979), followed in St. v. Lynch, 1998 MT 308, 292 M 144, 969 P2d 920, 55 St. Rep. 1278 (1998). Lynch was followed in St. v. Pizzichiello, 1999 MT 123, 294 M 436, 983 P2d 888, 56 St. Rep. 499 (1999).

Suspicion of Officer Insufficient for Probable Cause: Evidence obtained when officers stopped a vehicle on the pretext of a traffic violation and arrested the defendant without probable cause was properly suppressed. Suspicion of an officer alone, unsubstantiated by some evidence upon which to base a belief that a crime is or has been committed, is not enough to establish probable cause, no matter what the subsequent search discloses. St. v. Rader, 177 M 252, 581 P2d 437 (1978).

Parking Meter Violation — Unlawful Search — Ordinance Unconstitutional: The search of the defendant's person under a warrant of arrest issued by a police magistrate for a parking meter violation was an unreasonable search since evidence at a suppression hearing did not disclose any basis for a mandatory custodial arrest. Furthermore, the city ordinance involved was unconstitutional to the extent that it precluded the defense that the defendant was not driving the vehicle when the parking violation occurred, depriving him of due process. St. v. Jetty, 176 M 519, 579 P2d 1228 (1978).

Odor of Marijuana — Not Probable Cause: A police officer's detection of the odor of marijuana emanating from inside an automobile, absent evidence of visible content, was insufficient probable cause for a warrantless search and subsequent arrest of the occupants on the basis of evidence seized in the search. St. v. Schoendaller, 176 M 376, 578 P2d 730 (1978).

No Probable Cause — Unreliability of Tip: Police detectives did not have probable cause to enter an upstairs room of an inn, arrest defendants for participating in a card game on unlicensed premises, and search the room because of the inability of the informant's tip to satisfy the two-pronged Aguilar test. St. v. Robey, 176 M 298, 577 P2d 1226 (1978).

"Plain View" Doctrine — Elements: A warrantless seizure of evidence under the "plain view" doctrine is justified only if the police officer had a prior justification for an intrusion in the course of which he inadvertently viewed contraband and exigent circumstances existed to render immediate seizure imperative. In this case the officer's valid visual observation merely furnished probable cause for issuance of a warrant; thus, the trial court was correct in granting a motion to suppress evidence. St. v. Lane, 175 M 225, 573 P2d 198 (1977), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Inventory Search — Not Justified: Contraband found under a seat during an inventory of an automobile held in police custody was not in plain view, thus it was seized in violation of individual privacy and freedom from unreasonable searches. The inventory search was not justified by protection of the contents for the owner's benefit or protection of the police from claims for lost property beyond articles in plain view from outside the vehicle. St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), distinguished in St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994).

Inadmissible Evidence in Alleged Bomb Threat: The trial court properly declared inadmissible that evidence which was seized in a warrantless search of the defendant's curtilage

and secured by a wiretap of the defendant's phone and all testimony relating thereto. The State's reliance on the "plain view" doctrine and the theory that the telephone company personnel were authorized to secure the evidence was unsuccessful. St. v. Lewis, 173 M 1, 565 P2d 642 (1977).

Search Without Voluntary Consent or Warrant: When the defendant was held incommunicado until he consented to a search and probable cause did not exist, a search of a car trunk was unlawful and marijuana seized was properly suppressed. St. v. Brough, 171 M 182, 556 P2d 1239 (1976).

Invalid Consent: When the Sheriff confiscated the defendant's truck without his knowledge after arrest and later obtained the defendant's signature on a consent form which did not purport to be retroactive, while the defendant was held in jail in the absence of counsel, material taken from the truck was illegally obtained and inadmissible. St. v. Keller, 170 M 372, 553 P2d 1013 (1976).

Consent Search — Requirements — Burden of Proof:

Equivocal conduct by a defendant is not a sufficient basis for an inference that he consents to a search because the consent to a search must be freely given, and unequivocal and specific consent must be shown by clear positive evidence. St. v. LaFlamme, 170 M 202, 551 P2d 1011 (1976).

A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, express or implied. The State has the burden of proving that such consent was given. St. v. Tomich, 332 F2d 987 (9th Cir. 1964).

No Prior Justification: Marijuana and hashish found in a search of the defendant's purse were excluded since there was no valid reason for the officer to inspect the contents of defendant's purse and the "plain view" doctrine was not applicable. St. v. Hough, 163 M 47, 516 P2d 613 (1973).

Disclaimer — Evidence Suppressed: Suppression of evidence found in the car in which the defendant was riding at the time of arrest was not error when the vehicle belonged to the defendant's companion and the defendant disclaimed any ownership or right to possession of it or any of the property taken from it. St. v. Nelson, 130 M 466, 304 P2d 1110 (1956).

CITIZEN SEARCHES

Looking Through Crack in Door of Defendant's Locked Shed: Kloberdanz told the Sheriff that he believed that Henderson was storing a stolen red Peterbilt truck in a shed on his property. Kloberdanz told the Sheriff that he had received a letter from his friend Herrick reporting the theft of his truck from Colorado over Memorial Day weekend. The letter contained a detailed description and sketch of the truck. Two of Kloberdanz's coworkers had mentioned that they had seen a new red Peterbilt in Henderson's shed while picking up some equipment at Henderson's property. Kloberdanz took advantage of an opportunity to go to the Henderson property to pick up equipment for his employer and while there looked through a crack in the door of the locked shed. He told the Sheriff that he had seen a truck that matched the description and sketch of the truck stolen from Herrick. The information Kloberdanz obtained by looking through the crack in the door of the locked shed was obtained in violation of Montana law. U.S. v. Henderson, 721 F2d 662 (9th Cir. 1983).

Exclusionary Rule and Judicial Integrity: The Montana Constitution provides that "the right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest". The judicial system must not become an accomplice to constitutional violations by admitting illegally obtained evidence. Therefore, evidence obtained by a private citizen in violation of the state constitutional right to privacy is subject to the exclusionary rule and may not be admitted into evidence in a criminal trial in Montana. St. v. Van Haele, 199 M 522, 649 P2d 1311, 39 St. Rep. 1586 (1982).

Search of Unit by Manager of Rental Storage Unit Business: After renter of storage unit entered his unit, manager of the storage unit rental business wanted to know how much longer he would be on the premises and wondered what renter was doing, as the unit's door was closed and there were no windows or lights in the unit. She opened the door after a knock and calling out to renter produced no result. Renter was sitting on the floor pointing a gun at the manager and had two suitcases behind him in the dim interior of the unit. Manager left. Pursuant to a suggestion of the business' home office, the manager removed the hinge pins on the door, cut off the padlock, entered, opened a suitcase, found a number of bottles of pills, and called the police. Based on the manager's information the police obtained a search warrant, found over 100 bottles of pills in the suitcases and a purse, and renter was arrested, charged, and convicted of criminal possession of dangerous drugs with intent to sell them. On appeal it was found that the evidence

was obtained in violation of renter's state constitutional right to privacy and should have been excluded. The conviction was reversed because it was not supported by the remaining evidence or the law. St. v. Van Haele, 199 M 522, 649 P2d 1311, 39 St. Rep. 1586 (1982).

Entry to Defendant's Porch — No Private Search Conducted: There was testimony that two men entered the defendant's porch while the defendant was not at home. The same two men returned and talked to the defendant. The two men returned for a third time with a Deputy Sheriff. After obtaining a search warrant, the Deputy Sheriff searched the defendant's premises. After certain stolen items were found, the defendant was arrested and later convicted of theft. The court rejected the defendant's argument that the two men conducted an unlawful search the first time they entered his porch in violation of the defendant's right of privacy. St. v. Brown, 199 M 472, 649 P2d 1306, 39 St. Rep. 1531 (1982).

Landlord Search of Apartment: The defendant, who had signed a lease allowing his landlord the right to enter the defendant's apartment, borrowed a vacuum cleaner from the landlord, who, upon entering the defendant's room to retrieve the vacuum, saw light coming from a closet and inadvertently discovered marijuana and drug paraphernalia. The District Court did not err in denying the defendant's motion to suppress the evidence taken after a search warrant was obtained. The landlord was justified in entering the room to show it to prospective lessees or to retrieve the vacuum. Once the landlord was in the apartment, he was justified in inspecting the closet to see if the cause of the light constituted a fire hazard. The landlord could, under the circumstances, permit the police officer to observe the items in the closet, and the officer's observation could be used as a basis for the warrant. St. v. Sayers, 199 M 228, 648 P2d 291, 39 St. Rep. 1309 (1982).

Citizen Search Without Probable Cause Unlawful Warrantless Search: In appeal by the state from a motion suppressing all evidence resulting from an unreasonable search and seizure, the Supreme Court affirmed. A warrantless search is per se unreasonable unless it falls within one of the defined exceptions. Before the warrantless search, neither private citizen searcher could have obtained a valid search warrant because he was not possessed, through his own knowledge or through demonstrably reliable informants, of facts sufficient to establish probable cause, an essential ground for the issuance of a warrant. Since the warrantless search here was per se unreasonable, it was unconstitutional under our federal and state constitutions and therefore unlawful. St. v. Hyem, 193 M 51, 630 P2d 202, 38 St. Rep. 891 (1981).

Warrantless Citizen Search of House — Defendants' Right of Privacy Violated: A warrantless citizen search of house violated defendants' right of privacy without the showing of a compelling state interest. Since the citizens were acting in their individual capacities and not for the state, state action was not involved, and the searchers could never be in a position of showing a compelling state interest, which is the only exception to the restriction against the invasion of individual privacy. Citizens gained entry by pretending to be interested in purchasing the house. Although defendants were aware that their rented house was for sale and being shown to prospective buyers in their absence, defendants did not consent to the search under their bed which turned up stolen skis and thereby waive their right of privacy. St. v. Hyem, 193 M 51, 630 P2d 202, 38 St. Rep. 891 (1981).

Search Warrant and Search Based on Marijuana Obtained by Trespassing Neighbor Illegal: The issuance of a search warrant and the subsequent search based solely on a sample of marijuana obtained by the defendant's curious neighbor by means of an illegal trespass were improper and illegal. The evidence obtained by the search was properly suppressed by the District Court. St. v. Helfrich, 183 M 484, 600 P2d 816 (1979).

Search by Private Citizens — Exclusionary Rule:

The exclusionary rule for suppression of evidence must also apply to searches by private citizens such as security guards, private detectives, political investigators, or any citizen who conducts an unreasonable search or illegal intrusion into the privacy of another. St. v. Coburn, 165 M 488, 530 P2d 442 (1974).

The motion to suppress evidence was properly granted when the employer removed marijuana from the defendant's coat in a search without a warrant. St. v. Coburn, 165 M 488, 530 P2d 442 (1974).

INSUFFICIENT SEARCH WARRANT

Failure to Prove Falsity of Warrant Application — Motion to Suppress Properly Denied: Shelton moved to suppress evidence from a drug search based on the assertion that the warrant application mischaracterized statements upon which the application was based. The Supreme Court found that the alleged mischaracterization was merely a difference in semantics, not proof of a false statement in the application. The trial court gave Shelton the opportunity to challenge

the veracity of the application but denied the motion to suppress, and the Supreme Court affirmed. St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008). Following conviction on drug charges in a different county but stemming from the same incident, Shelton raised an identical claim of the insufficiency of the search warrant based on false information. Having considered and dismissed the argument in Shelton, id., the Supreme Court denied review of the claim under res judicata. Further, there was no indication that the District Court in the subsequent case considered information not contained in the warrant application, so Shelton's second conviction was also affirmed in St. v. Shelton, 2008 MT 321, 346 M 114, 193 P3d 943 (2008).

Clarification of Corroboration Necessary to Verify Information Provided by Anonymous or Confidential Informant — Confidential Informant's Information Corroborated by Anonymous Tip Considered Insubstantial Basis for Determination of Probable Cause: A confidential informant provided police with firsthand information on alleged drug-related activities at a trailer home in Big Sky occupied by a person named Hoge, but there was no mention that Reesman lived at the trailer or was involved in any way. There was no indication that the informant had provided reliable information in the past. Police also received information from an anonymous citizen, who had reportedly provided reliable information in the past, regarding similar activity at the trailer home. However, there was no indication that the citizen's information came from personal observation or in what context prior reliable information had been received. Police took no further steps to corroborate the information supplied by either informant. Nevertheless, a warrant was issued for the entire trailer home and executed 2 days later. Police found Reesman and three other persons there and, upon searching Reesman's bedroom without his valid consent, discovered more than 100 doses of LSD. Reesman was charged with criminal possession of dangerous drugs with intent to sell, but he pleaded not guilty and moved to suppress the evidence on grounds that the warrant lacked probable cause and was overbroad. The District Court determined that corroboration of the confidential informant's firsthand, detailed information by an anonymous tip weighed heavily in favor of the informant's reliability and provided a substantial basis for a finding of probable cause; therefore, the court refused to suppress the evidence. On appeal, the Supreme Court applied the totality of circumstances test set out in Ill. v. Gates, 462 US 213 (1983), to determine the sufficiency of the warrant application based on information supplied by anonymous or confidential informants, examining extensive case law. In obtaining a search warrant based on a tip from an anonymous informant or one based on hearsay, independent corroboration of the information is necessary. If an informant is not anonymous, but the information is not based on personal observation of the described criminal activity, independent corroboration is also required. In the case of a confidential informant with information based on personal observation, that person must have provided reliable and accurate information in the past in order for the information to serve as a basis for determining probable cause without further corroboration. If an informant makes an unequivocal admission against interest, further corroboration is unnecessary for warrant purposes. If an informant is motivated by good citizenship and the information demonstrates a sufficient degree of the nature of the circumstances under which the information became known, the informant's disclosures are considered a reliable basis for determining probable cause. A citizen informant is generally presumed reliable, and that reliability is shown by the very nature of the circumstances under which the incriminating evidence became known. Under the circumstances in Reesman's case, the confidential informant's information, which required further corroboration, could not serve as a source of independent corroboration or investigation that transformed the other informant's information into a basis for establishing probable cause. Thus, without further independent corroboration or investigation, the confidential informant's information in the search warrant application failed to supply the magistrate with the substantial basis for probable cause. The District Court erred in denying Reesman's motion to suppress the evidence, and the Supreme Court reversed. St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83, 57 St. Rep. 1017 (2000), distinguishing St. v. Rydberg, 239 M 70, 778 P2d 902 (1989), St. v. Deskins, 245 M 158, 799 P2d 1070 (1990), and St. v. Oleson, 1998 MT 130, 289 M 139, 959 P2d 503 (1998), and followed in St. v. Palmer, 2003 MT 129, 316 M 46, 68 P3d 809 (2003). See also St. v. Walston, 236 M 218, 768 P2d 1387 (1989), and St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003).

Stale Information, Lack of Informant Veracity, and Failure to Investigate as Insufficient Basis for Probable Cause — Motion to Suppress Proper: An application for a search warrant was based on five tips, including three that were stale, ranging in time and age from 11 months to over 7 years, and two that were anonymous and confidential Crimestoppers tips that did not allow for proper assessment of the credibility of the informant or his sources. None of the tips

were subjected to prompt or adequate law enforcement investigation. The application did not contain sufficient facts and circumstances to meet the Gates test for probable cause, and a motion to suppress evidence seized as a result of the warrant should have been granted. St. v. Valley, 252 M 489, 830 P2d 1255, 49 St. Rep. 30 (1992), distinguished in St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997).

Search Warrant Based on Informant's Statement: The court properly granted the defendant's motion to suppress evidence seized in the search of his home when the application for a search warrant before the Justice of the Peace failed to set forth the underlying circumstances necessary to enable him to independently judge the validity of the informant's conclusion that the defendant was in possession of dangerous drugs unlawfully and with intent to sell. St. v. Leistiko, 176 M 434, 578 P2d 1161 (1978).

Warrant Issued by Tribal Court: The Supreme Court declined to address the applicability of Montana law versus that of the Blackfeet Tribal Law and Order Code to the admissibility in a state prosecution of a non-Indian of evidence seized on the Blackfeet Indian Reservation by Blackfeet tribal police acting under authority of a search warrant issued by the Blackfeet Tribal Court because both the State and the defendant agreed that under either law the search warrant and affidavit were defective and the evidence must be suppressed. St. v. Stenson, 175 M 523, 575 P2d 72 (1978).

Defective Warrant Addressed to Any Peace Officer: Having previously disapproved the practice of directing search warrants "to any peace officer of this state", the court ordered the suppression of evidence seized under such a warrant in the present case. State ex rel. Sanford v. District Court, 170 M 196, 551 P2d 1005 (1976). See also St. v. Meidinger, 160 M 310, 502 P2d 58 (1972); St. v. Snider, 168 M 220, 541 P2d 1204 (1975).

Sufficiency of Affidavit for Warrant: Contemporaneous oral declarations to a magistrate cannot be used to bolster an insufficient affidavit in the attempt to establish probable cause, unless such declarations are sworn, signed, reduced to writing, and made a part of the affidavit for the issuance of the search warrant. An affidavit which omits reference to the time of the criminal event cannot establish probable cause and is therefore deficient. State ex rel. Townsend v. District Court, 168 M 357, 543 P2d 193 (1975).

Issuance of Warrant by City Judge: A City Court Judge does not have the statutory authority to issue search warrants, and the trial court correctly suppressed evidence obtained under color of a search warrant executed by a City Court Judge. St. v. Tropf, 166 M 79, 530 P2d 1158 (1975), applied, with regard to substitute judges, in Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

MOTION DENIED — LAWFUL ARREST

Reasonable Mistake in Arrest of Misidentified Person and Subsequent Seizure of Incriminating Evidence — Admissibility of Evidence: The landlady of a rental apartment asked police to come and talk to her about her tenant, whom she identified as Thomas Bateman, and gave the officers Bateman's physical description, approximate age, and a description of Bateman's suspicious activity. The officer radioed in for an outstanding warrant check on Thomas Bateman and discovered that Thomas Bateman had an outstanding warrant for misdemeanor possession of dangerous drugs. The warrant information matched the description provided by the landlady. When officers knocked on Bateman's door and asked if he was Thomas Bateman, Bateman replied affirmatively. The officers said they had a warrant for his arrest and attempted to handcuff Bateman, and Bateman dropped a bag of Gummy Bears and what appeared to be a marijuana pipe. Bateman then told the officers that there was another Thomas Bateman and that there had been police confusion regarding them in the past. Officers checked Bateman's identification, radioed to dispatch for further information, and determined that although their ages and physical descriptions were similar, the arrestee was indeed not the Thomas Bateman with the outstanding warrant. Because the officers saw Bateman drop the marijuana pipe and noticed the odor of smoke and other drug paraphernalia in the living room, they had probable cause at that point to arrest him. Also in the apartment was another man who did have an outstanding warrant. Officers then obtained a warrant to search the apartment and discovered a methamphetamine lab in the crawl space. Bateman moved to dismiss the charges because the evidence resulted from an illegal arrest. The motion was denied, and Bateman appealed. Citing Hill v. Calif., 401 US 797 (1971), the Supreme Court affirmed. The officers acted reasonably, albeit mistakenly, in arresting Bateman. Because the arrest was reasonable, the subsequent discovery of incriminating evidence was legal and admissible. St. v. Bateman, 2004 MT 281, 323 M 280, 99 P3d 656 (2004).

Passenger Not Unlawfully Detained During Lawful Stop of Driver — Motion to Suppress Evidence Found in Search of Passenger Properly Denied: Roberts was a passenger in a vehicle that was lawfully stopped. When he tried to exit the vehicle, Roberts was told to remain inside. After volunteering his name, the officer ran a warrant check and found that Roberts was wanted on an outstanding warrant. Roberts was arrested and searched, and a quantity of controlled substances was found on his person. Roberts moved to suppress the evidence of the search on the grounds that he was unlawfully detained when he was directed to remain in the vehicle, but the motion was denied. The Supreme Court applied U.S. v. Vaughan, 718 F2d 332 (9th Cir. 1983), in holding that it is not a constitutional violation to detain a passenger when a vehicle has been lawfully stopped because a warrant is outstanding for the driver. Even though officers had no reason to believe that the passenger had engaged in any criminal activity, they were permitted to detain the passenger while a search was conducted of his companions. Based on Roberts' own version of the events, the detention, arrest, and search of his person were justified and lawful, and the motion to suppress was therefore properly denied. St. v. Roberts, 284 M 54, 943 P2d 1249, 54 St. Rep. 745 (1997).

Parolee's Wallet at Scene of Homicide — Probable Cause for Arrest: There was probable cause or reasonable grounds to believe accused committed acts constituting a violation of his parole conditions where his wallet was found at the scene of a criminal homicide. Accused could not successfully contend on appeal following deliberate homicide conviction that statements made to police should be suppressed for being the result of an arrest without probable cause. St. v. Plouffe, 198 M 379, 646 P2d 533, 39 St. Rep. 1064 (1982).

Warrantless Arrest — Evidence Obtained Pursuant to Arrest — Collective Police Information Considered — Exceptional Circumstances: On appeal from a conviction for conspiracy to sell dangerous drugs, the defendant attacked his arrest as being without probable cause and unlawfully warrantless. The Supreme Court found the arrest was based on probable cause and lawful. Therefore, the evidence seized after the arrest was admissible at trial. An officer could make an arrest without a warrant when he believed on reasonable grounds that the person had committed an offense and the existing circumstances required immediate arrest. "Reasonable grounds" to arrest is synonymous with "probable cause" to arrest. Probable cause may be found in a case such as this by evaluating the collective information of the police, not just that of the arresting officer. Here the court found more than the defendant's mere presence at the scene of the crime, and it found probable cause had existed. On the issue of the necessity of immediate arrest, the court compared the situation to the "exceptional circumstances" that allow police to enter a residence without a warrant to search and arrest. Considering the possibilities of the defendant's fleeing and the likelihood that the evidence of the buy, which easily could have been destroyed or disposed of, might be found on the defendant because he was present at delivery, the court held that the officers were reasonable in their belief that an immediate arrest was necessary. St. v. Davis, 190 M 285, 620 P2d 1209, 37 St. Rep. 1958 (1980).

Search Incident to Arrest — Admissible Evidence: The facts and circumstances within the officers' personal knowledge at the time of the defendant's arrest would justify a man of reasonable caution to believe that an offense had been or was being committed, and there was sufficient probable cause to arrest the defendant. Thus, the seizure of a grocery sack in his possession and in plain view was made pursuant to a valid lawful arrest, justifying denial of a motion to suppress this evidence. St. v. Petko, 177 M 229, 581 P2d 425 (1978).

Marijuana Odor — Probable Cause for Warrantless Arrest and Search: Law enforcement officers had probable cause to believe an offense was being committed in the defendants' residence and, because of the presence of exigent circumstances, were justified in entering and arresting the defendants and searching the defendants and the premises immediately under their control. Thus, the constitutionality of the warrantless search and seizure condition of parole and probation status was irrelevant. St. v. Means, 177 M 193, 581 P2d 406 (1978).

Complaint Not Defective: When a complaint was issued in one county but the offense was committed in another, it was not defective since the purpose of the complaint was not to charge the offense but to establish the basis for an arrest warrant. St. v. Benbo, 174 M 252, 570 P2d 894 (1977).

MOTION DENIED — NO ARREST

Identification Testimony — Transport of Accused Prior to Arrest: Identification testimony derived from the transportation of defendant for the purpose of exhibiting him to a witness was not suppressible as a fourth amendment violation. The record supports the District Court's conclusion that defendant agreed to accompany the officers and had not been "arrested" prior to his formal arrest upon identification by a witness. On the issue of an identification of defendant

in the back seat of a police car, the Supreme Court stated that it could not conclude that the identification was so unreliable as to constitute a violation of due process. Considering the totality of the circumstances, the Supreme Court held that while the identification procedure was suggestive, it did not create a situation in which there was a substantial likelihood of misidentification. St. v. Jenkins, 192 M 539, 629 P2d 761, 38 St. Rep. 922 (1981).

MOTION DENIED — NO PREJUDICE

Voluntariness of Confession — Totality of Circumstances: When a defendant moves to suppress a confession or admission on grounds that it was given involuntarily, the prosecution must prove by a preponderance of the evidence that it was voluntary. On appeal, the Supreme Court will review denial of a suppression motion to determine whether findings of fact were clearly erroneous and correctly applied as a matter of law. A finding of fact is clearly erroneous if: (1) it is not supported by substantial evidence, which must be more than a scintilla of evidence but may be less than a preponderance of the evidence; (2) the trial court misapprehended the effect of the evidence; or (3) the Supreme Court has a definite or firm conviction that a mistake was made. When a determination of voluntariness depends on the credibility of witnesses, the Supreme Court will defer to the trial court. The emphasis in determining voluntariness is on whether the confession was the product of free choice or compulsion, which must take into account the totality of the circumstances, including the defendant's age and education, whether the defendant was advised of Miranda rights, the defendant's prior experience with the criminal justice system and police interrogation, the defendant's background, experience, demeanor, coherence, articulateness, and capacity to make full use of faculties, the length and method of interrogation, and whether the confession or admission was extracted through force, violence, or improper influence or by direct or implied promises. If the confession or admission was involuntary, its use violates self-incrimination and due process. Here, the Supreme Court considered the totality of the circumstances and found substantial credible evidence that Hoffman's confession was voluntary. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003). The standard of review of denial of a motion to suppress was also applied in St. v. Munson, 2007 MT 222, 339 M 68, 169 P3d 364 (2007), and St. v. Hurlbert, 2009 MT 221, 351 M 316, 211 P3d 869 (2009).

Defendant Present in Apartment Where Methamphetamine Lab Found — Totality of Circumstances Justifying Warrantless Arrest: Officers raided Savage's apartment, identified by an anonymous tip as a suspected methamphetamine laboratory. Nalder was also present, and although officers had no previous suspicions regarding Nalder, they arrested her after hearing a toilet running and observing her standing in the kitchen, which was adjacent to the bathroom, near what appeared to be a jar filled with a substance in the first stage of the methamphetamine-producing process. During an interview, Nalder admitted to flushing substances used to make methamphetamine down the toilet when she heard the officers announce themselves. Nalder was charged with tampering with physical evidence, but Nalder moved to suppress the statements and the charge on grounds that probable cause did not exist for her warrantless arrest. The motion was denied, and Nalder was convicted and appealed, contending error in denial of the motion to suppress based on certain findings that were allegedly incorrect. The Supreme Court affirmed. The trial court's finding that the officers announced their presence twice before entering the apartment, contrary to Nalder's claim that she did not hear any knocking, was supported by the evidence and not clearly erroneous because failure to hear did not constitute evidence contradicting the officers' testimony that they announced themselves. The trial court's finding that the officers broke down the door was not supported by substantial evidence and was thus erroneous, but the error was not prejudicial in light of the totality of the circumstances. Nalder correctly asserted that her mere presence at the scene did not justify arrest and that there must be some connection with criminal activity before her warrantless arrest was justified. However, considered in light of the totality of the circumstances and the trained officers' knowledge, there was sufficient probable cause for Nalder's arrest. The officers received extensive training in what to reasonably expect while raiding a methamphetamine laboratory, and evaluated in accordance with the officers' perceptions, they could reasonably believe that Nalder was committing, and had just committed, a crime. St. v. Nalder, 2001 MT 270, 307 M 280, 37 P3d 661 (2001).

Failure to Make Return — Effect: The defendant failed to demonstrate any prejudice to his substantial rights by an officer's failure to make a return of an item of evidence; therefore, it was not rendered inadmissible. St. v. Lenon, 174 M 264, 570 P2d 901 (1977).

DELAY IN APPEARANCE

Evidence Excluded: Failure to provide the defendant with a prompt initial appearance necessitated exclusion of evidence obtained and statements allegedly made after the defendant's arrest when he established that the delay was unnecessary and the prosecution failed to meet the burden of showing that such evidence and statements were not reasonably related to the delay. St. v. Benbo, 174 M 252, 570 P2d 894 (1977). See also St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999).

MOTION DENIED — UNTIMELINESS

Failure to Meet Statutory Duty to Bring Defense, Objection, or Request at or Before Omnibus Hearing Constituting Waiver: A party has a statutory duty to bring any defense, objection, or request that is capable of determination without trial of the general issue, including motions to suppress, at or before the omnibus hearing or by a later date if ordered by the court, and failure to do so constitutes a waiver. Here, defendant's motion to suppress was filed after both the date of the omnibus hearing and a later deadline for motions set by the District Court, but 6 months before the actual trial. Nevertheless, the motion was untimely as a matter of law, and the District Court did not err in denying relief from the waiver. St. v. VonBergen, 2003 MT 265, 317 M 445, 77 P3d 537 (2003), followed in St. v. Adkins, 2009 MT 71, 349 M 444, 204 P3d 1 (2009).

No Error in Denial of Untimely Midtrial Motion to Suppress Evidence: Motions to suppress are expressly among pretrial matters that must be raised at or before the omnibus hearing. Griffing indicated an intent to file motions to suppress his confession and physical evidence pursuant to 46-13-301 and this section, but the motions were not made until trial had commenced. Failure to raise the issues at or before the omnibus hearing constituted a waiver under 46-13-101. Thus, the trial court did not err in denying the midtrial motion to suppress as untimely. St. v. Griffing, 1998 MT 75, 288 M 213, 955 P2d 1388, 55 St. Rep. 309 (1998), following St. v. Greywater, 282 M 28, 939 P2d 975 (1997).

Timeliness of Objection to Evidence: If evidence was obtained by unlawful search and seizure, it was necessary for the accused, who desired to exclude such evidence from his trial, to make a timely objection to its introduction and not wait until the first day of trial after voir dire of the jury. St. v. Briner, 173 M 185, 567 P2d 35 (1977), followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997).

Waiver for Appeal: The defendant's failure to make a timely motion to suppress evidence waived the search and seizure issue for appeal, notwithstanding his objection to the introduction of the evidence seized. St. v. Gallagher, 162 M 155, 509 P2d 852 (1973).

Waiver of Right to Object: If accused has had opportunity to suppress illegally obtained evidence before trial and fails to do so, objection to the evidence at trial will not avail him. St. v. Gotta, 71 M 288, 229 P 405 (1924).

TIMELY MOTION

Excusable Delay: When confusion between the parties and the District Court over the State's intention to drop or continue prosecution after the defendant's conviction on an assault charge caused delay in the defendant's filing a motion to suppress illegally seized evidence, the motion was neither improper nor untimely. St. v. Bentley, 156 M 129, 477 P2d 345 (1970).

Law Review Articles

The Exclusionary Rule—The Illusion Vs. The Reality, Ranney, 46 Mont. L. Rev. 289 (1985).

State v. Brecht: Evolution or Offshoot of the Fourth Amendment Exclusionary Rule?, Johnson, 34 Mont. L. Rev. 187 (1973).

Procedures for Suppressing Illegally Seized Evidence—The Exclusionary Rule, Acher, 20 Mont. L. Rev. 225 (1959).

Extension of the Federal Exclusionary Rule: This summarizes some principles of evidence and injunctions as affected by the federal exclusionary rule in Rea v. U.S., 350 US 214 (1956). Bookey, 18 Mont. L. Rev. 228 (1957).

Collateral References

Propriety of governmental eavesdropping on communications between accused and his attorney. 44 ALR 4th 841.

Admissibility, in criminal case, of physical evidence obtained without consent by surgical removal from person's body. 41 ALR 4th 60.

Propriety in state prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant. 32 ALR 4th 378.

Part 4
Motion for Dismissal

Part Commission Comments

1991 Part Comments: This part establishes two provisions intended to govern the practice of a motion for dismissal. These statutes are modeled after and are chiefly a restatement of the 1987 code. None of the provisions are intended to alter established procedure.

46-13-401. Dismissal at instance of court or prosecution.

Commission Comments

1991 Comment: This statute is primarily a restatement of 1987 MCA 46-13-201. Subsection (1) allows either the prosecutor or the court to move for the dismissal of a criminal charge. The 1985 amendment to the section, requiring that the reasons for the dismissal of a felony charge be stated on the record, is retained. Minor changes not significantly affecting established procedure have been adopted. Compare subsection (1) and 1987 MCA 46-13-201(1).

Subsection (2) combines the provisions found in the remainder of 1987 MCA 46-13-201. The resulting statute affirmatively states that misdemeanor charges not brought to trial within 6 months may be dismissed with prejudice. The statute remains discretionary in order that a delay caused by the defendant or for other good reasons can prevent dismissal. The statute accurately reflects those two code provisions without substantive change.

Source: R.C.M. 1947, section 94-9505.

No substantive change. [Note subsequent amendments.]

Compiler's Comments

1991 Amendment: At beginning of (2) inserted "After the entry of a plea upon a misdemeanor charge", after "dismissed" inserted "with prejudice", and after "6 months" deleted "after entry of plea upon a complaint, information, or indictment charging a misdemeanor"; and deleted (3) that read: "(3) An order for the dismissal of an action as provided in this chapter is a bar to any other prosecution for the same offense if it is a misdemeanor, but it is not a bar if the offense is a felony"; and made minor changes in style.

1985 Amendment: In (1), near beginning after "order", deleted "an action", after "dismissed", inserted "however, the court may not order a dismissal of a complaint, information, or indictment, or a count contained therein, charging a felony, unless good cause for dismissal is shown", and made minor wording changes in remainder of subsection.

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GENERALLY

No Triple Jeopardy in Prosecution of Misdemeanor Absent Prosecutorial Intent to Provoke Mistrial: At Mouat's misdemeanor DUI trial, the city prosecutor presented a videotape of Mouat's arrest, which showed the arresting officer asking Mouat about previous DUI arrests. Mouat moved for and was granted a mistrial. The trial court found that admission of the offending statement was an inadvertent oversight by both parties and ordered the city to redact the statement from the tape. Nevertheless, despite the city's efforts, at the next trial, the statement was still slightly audible, and Mouat again moved for and was granted a mistrial. Mouat then asserted that, based on double jeopardy and fundamental fairness grounds, the prosecution should not be granted a third trial in a misdemeanor case when the cause was negligence on the part of the government. The Supreme Court disagreed, citing St. v. Mallak, 2005 MT 49, 326 M 165, 109 P3d 209 (2005), for the proposition that when a mistrial is declared on a defendant's motion, double jeopardy does not bar a subsequent trial unless the governmental conduct in question was intended to goad defendant into moving for a mistrial. Billings v. Mouat, 2008 MT 66, 342 M 79, 180 P3d 1121 (2008).

Probability of Mootness — Writ of Supervisory Control Appropriate When Issue Likely to Arise Again — Appeal Inadequate Remedy: Defendant Courville was charged in Justice's Court with speeding, DUI, and possession of an open container. Courville requested a waiver of a jury trial, and the state objected. The Justice's Court granted the waiver, finding that the statute violated Art. II, sec. 24, Mont. Const. The state filed an application for a writ of supervisory control and a motion for stay of proceedings pending the Supreme Court's review of the application. Courville argued that the case was likely to be dismissed under subsection (2) of this section, which requires dismissal of misdemeanor prosecutions if not brought to trial within a certain time period, thus making the issue of waiver of a jury trial moot. The Supreme Court found that there

was a justiciable controversy because the issue would very likely arise in future proceedings. The court further concluded that the case was appropriate for the exercise of supervisory control, an extraordinary remedy exercised when a court is proceeding under a mistake of law that, if uncorrected, would cause significant injustice and the remedy of appeal is inadequate. The appeal process in this matter would have provided an inadequate remedy for the state because, upon appeal, the state would have already lost its right to consent or object to waiver of a jury trial. The Supreme Court vacated the waiver of a jury trial, holding that Art. II, sec. 26, Mont. Const., provides a right of a jury trial to the state and that both parties in a criminal trial must consent to waiver. State ex rel. Long v. Justice's Court, 2007 MT 3, 335 M 219, 156 P3d 5 (2007).

Violation of Motion In Limine in First Trial Not Grounds for Double Jeopardy Dismissal in Second Trial: Mallak contended that the state goaded him into moving for a mistrial by purposely violating a motion in limine prohibiting testimony of Mallak's prior violent conduct and that under Oreg. v. Kennedy, 456 US 667 (1982), and St. v. Laster, 223 M 152, 724 P2d 721 (1986), a second trial was a violation of double jeopardy. The Supreme Court disagreed. The part of the testimony that Mallak objected to was a product of the prosecutor's inadvertence, not intention, and did not inevitably lead to a violation of the motion in limine, unlike the inherently violative questioning in Laster. Thus, double jeopardy did not apply, and the trial court did not err in denying Mallak's motion to dismiss the charges. St. v. Mallak, 2005 MT 49, 326 M 165, 109 P3d 209 (2005), followed in Billings v. Mouat, 2008 MT 66, 342 M 79, 180 P3d 1121 (2008), regarding the principle that when a mistrial is declared on a defendant's motion, double jeopardy does not bar a subsequent trial unless the governmental conduct in question was intended to goad defendant into moving for a mistrial, and followed in Helena v. Whittinghill, 2009 MT 343, 353 M 131, 219 P3d 1244 (2009), to the extent that it is insufficient to bar a retrial absent intent on the part of the prosecutor to subvert the protections afforded by the double jeopardy clause, even when the prosecutor's conduct prompting the mistrial motion constitutes harassment or overreaching.

Reasonable Mistake in Arrest of Misidentified Person and Subsequent Seizure of Incriminating Evidence — Admissibility of Evidence: The landlady of a rental apartment asked police to come and talk to her about her tenant, whom she identified as Thomas Bateman, and gave the officers Bateman's physical description, approximate age, and a description of Bateman's suspicious activity. The officer radioed in for an outstanding warrant check on Thomas Bateman and discovered that Thomas Bateman had an outstanding warrant for misdemeanor possession of dangerous drugs. The warrant information matched the description provided by the landlady. When officers knocked on Bateman's door and asked if he was Thomas Bateman, Bateman replied affirmatively. The officers said they had a warrant for his arrest and attempted to handcuff Bateman, and Bateman dropped a bag of Gummy Bears and what appeared to be a marijuana pipe. Bateman then told the officers that there was another Thomas Bateman and that there had been police confusion regarding them in the past. Officers checked Bateman's identification, radioed to dispatch for further information, and determined that although their ages and physical descriptions were similar, the arrestee was indeed not the Thomas Bateman with the outstanding warrant. Because the officers saw Bateman drop the marijuana pipe and noticed the odor of smoke and other drug paraphernalia in the living room, they had probable cause at that point to arrest him. Also in the apartment was another man who did have an outstanding warrant. Officers then obtained a warrant to search the apartment and discovered a methamphetamine lab in the crawl space. Bateman moved to dismiss the charges because the evidence resulted from an illegal arrest. The motion was denied, and Bateman appealed. Citing Hill v. Calif., 401 US 797 (1971), the Supreme Court affirmed. The officers acted reasonably, albeit mistakenly, in arresting Bateman. Because the arrest was reasonable, the subsequent discovery of incriminating evidence was legal and admissible. St. v. Bateman, 2004 MT 281, 323 M 280, 99 P3d 656 (2004).

No Error in Failure to Consider Pro Se Motion for Dismissal When Defendant Represented by Counsel: It is not error for a District Court to refuse pro se motions for dismissal from a defendant who is represented by counsel. St. v. Weaver, 2001 MT 115, 305 M 315, 28 P3d 451 (2001), following St. v. Harvey, 219 M 402, 713 P2d 517 (1986).

Conditions for Dismissal of Misdemeanor: A misdemeanor may be dismissed pursuant to this section only if: (1) defendant has not asked for a postponement; and (2) the state has not shown good cause for delay. St. v. Pollack, 1998 MT 105, 288 M 436, 958 P2d 75, 55 St. Rep. 403 (1998), following St. v. Fitzgerald, 283 M 162, 940 P2d 108 (1997).

Premature Dismissal of Felony Assault (Now Assault With a Weapon) Charge — Case Reversed: Pinkerton was charged with felony assault (now assault with a weapon) and misdemeanor domestic abuse (now partner or family member assault). He moved to dismiss on

grounds of insufficient evidence to convict on felony assault (now assault with a weapon), based on apparently conflicting testimony of his wife, and also moved to dismiss the accompanying misdemeanor charge because the case had not been brought to trial within 6 months. The District Court agreed and dismissed the felony charge, and because without the adjoining felony charge the misdemeanor charge must stand on its own, the lesser charge was also dismissed for failure to prosecute. Upon review, the Supreme Court held that the trial court abused its discretion in dismissing the information prior to trial because there was no way to know what wife's actual testimony would be at trial. There was no independent examination of wife's prior statements made to law enforcement, thus the court relied solely on the parties' interpretation of the statements. It was unclear whether the potential prior inconsistent statement would be the state's sole basis for seeking a conviction or whether the statement could be corroborated by other evidence. Without allowing the state to present its case in chief, dismissal of the felony charge was premature, and the dismissal of the charge, along with the related misdemeanor charge, was reversed and remanded. St. v. Pinkerton, 270 M 287, 891 P2d 532, 52 St. Rep. 186 (1995).

Dismissal Not in Furtherance of Justice: The District Court judge dismissed a criminal proceeding after he had ordered a legal intern from the courtroom because the judge considered the intern to be inappropriately attired and when the judge could not locate the appropriate criminal charge in the court file. The Supreme Court held that the dismissal was not in the furtherance of justice and was an abuse of discretion. In balancing the interests of the court to enforce its own rules against the interests of society in proceeding with a case in which a plea bargain had been arranged, the balance weighs in favor of the interests of society. St. v. Schwictenberg, 237 M 213, 772 P2d 853, 46 St. Rep. 746 (1989).

Reinstatement of Dismissed Information Impermissible: Defendant filed a brief in support of dismissal based on a lack of District Court jurisdiction. Absent any reply brief or request for extension, the court found the challenge to jurisdiction well-taken and dismissed the information and the charges. The order of dismissal was filed, but through oversight the order was not served on the attorneys. Counsel subsequently filed briefs, including a motion to set aside dismissal, but not until after the time for appealing the dismissal had expired. The court nevertheless held a hearing on the motion and reinstated the information, upon which defendant was then convicted. The Supreme Court reversed, noting that 46-13-106 (renumbered 46-13-402) does not provide for reinstatement of a dismissed information. The reinstatement was a reversal of the District Court's decision on the motion to dismiss and was impermissible. Because a valid information did not exist, defendant's trial, conviction, and sentence under the reinstated information were invalid. St. v. Onstad, 234 M 487, 764 P2d 473, 45 St. Rep. 2071 (1988), followed, with regard to dismissal "with prejudice" in a criminal case, in St. v. District Court, 265 M 445, 877 P2d 1008, 51 St. Rep. 599 (1994), in which it was held that an order of dismissal in a criminal case, while not technically a judgment as that term is defined in the code of criminal procedure, is nevertheless a final adjudication of the case, is conclusive of the rights of the parties as is a final judgment, and is not subject to continuing jurisdiction by the trial court.

Authority to Dismiss: A judge had no authority under 46-13-101 to grant the defendant's motion to dismiss based on a defense that went to the general issue to be determined at trial or under 46-13-201 (renumbered 46-13-401) because he did not set forth the reasons for dismissal in an order entered on the minutes. St. v. Cole, 174 M 380, 571 P2d 87 (1977).

"In Furtherance of Justice": Since the Legislature did not define the phrase "in furtherance of justice", as used in the predecessor to this section, it is left for the court's judicial discretion, exercised in view of a defendant's constitutional rights and the interests of society, to determine what particular grounds warrant dismissal of a pending criminal action, and mandamus will not issue to control the court's discretion. State ex rel. Anderson v. Gile, 119 M 182, 172 P2d 583 (1946).

Procedure After Indictment Dismissed: After dismissal of an indictment because of substantial defects therein, the District Court may, but is not required to, submit the case to another grand jury or permit or order the County Attorney to file an information charging the defendant with the same offense ineffectually sought to be charged against him by the indictment. St. v. Vinn, 50 M 27, 144 P 773 (1914).

DISMISSAL ON APPLICATION OF PROSECUTION

Failure to Grant Praecipe to Dismiss Misdemeanor Charge to Allow Pursuit of Felony Charge — Reversible Error: The state filed a praecipe in Justice's Court to dismiss a misdemeanor domestic abuse (now partner or family member assault) charge on the basis that a felony sexual assault charge was being prosecuted in District Court. The Justice of the Peace did not rule on

the praecipe at the time that it was filed, instead proceeding to sentence defendant on the lesser offense. In moving for dismissal of a misdemeanor charge, the state need only show that dismissal would be in the furtherance of justice, and having met that standard, the court may not deny the motion to dismiss. Failure to grant the state's praecipe to dismiss constituted reversible error. St. v. Schneiderhan, 261 M 161, 862 P2d 37, 50 St. Rep. 1242 (1993).

Responsibility for Dismissal: Absent fraud or misrepresentation, a County Attorney is not criminally responsible for the dismissal of a criminal matter when the District Court has given its approval and accomplishes the dismissal through its order. State ex rel. Forsythe v. Coate, 171 M 377, 558 P2d 647 (1976).

Constitutes Amendment of First Information: Where defendant did not move to dismiss or demur to second information which was filed after defendant had pleaded to first information, and thus was improperly filed under this section as it read at that time, but rather entered plea to second information and moved to dismiss first information, and where defendant entered no objection to second information at subsequent trial and did not question the information on appeal, defendant waived any right he may have had to object to second information as improper amendment to first information. Gransberry v. St., 149 M 158, 423 P2d 853 (1967).

SPEEDY TRIAL

Trial Delay of 432 Days Without Showing of Compelling Reason — Case Dismissed: Hardaway was arrested for criminal possession of dangerous drugs with intent to distribute. After more than 200 days without trial, Hardaway moved to dismiss for lack of a speedy trial. The majority of delay was attributed to the state as institutional delay, and because Hardaway was not prejudiced, dismissal was denied. Subsequently, after 432 days had elapsed without trial, Hardaway again moved to dismiss on speedy trial grounds. This time the District Court analyzed the delay pursuant to St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), and concluded that the state failed to meet its burden to provide compelling justification for the delay, so Hardaway's motion to dismiss was granted. The state appealed, but the Supreme Court affirmed. The District Court weighed the length of delay, the state's failure to provide a compelling reason for the delay, Hardaway's two timely speedy trial complaints, and the presumption of prejudice and correctly concluded that Hardaway was deprived of a speedy trial, and on appeal the state failed to demonstrate that the District Court's conclusions were wrong. St. v. Hardaway, 2009 MT 249, 351 M 488, 213 P3d 776 (2009).

Delay of 507 Days From Accusation to Trial — Greater Delay Caused by Defendant — No Speedy Trial Violation: Following a 507-day delay between accusation and trial, Rose contended that his right to a speedy trial was violated. Applying the speedy trial analysis set out in St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), the Supreme Court examined the well-developed record and found no violation. Of the 507 days, 199 days were attributable to the state, but all of that delay was institutional delay, and it was Rose that caused the greater portion of the delay while the state was concerned with protecting Rose's right to a speedy trial, so the length of delay did not in itself violate the speedy trial right. Although Rose suffered some discomfort while in jail, that discomfort was not oppressive, nor was Rose's ability to defend himself impaired by the delay between arrest and trial. Pursuant to the Ariegwe criteria, the District Court did not abuse its discretion by dismissing Rose's speedy trial argument. St. v. Rose, 2009 MT 4, 348 M 291, 202 P3d 749 (2009).

Applicability of Speedy Trial Statute to Potential Misdemeanor Partner or Family Member Assault Charge: Martz was convicted of partner or family member assault in 2002. In January 2006, Martz was charged with misdemeanor second offense and felony third offense partner or family member assault, and in May 2006 Martz was charged with felony fourth offense partner or family member assault. The second and third offense charges were dismissed in August 2006 and were subsequently refiled in September 2006. The refiling had the effect of Martz being tried for the felony fourth offense before trial for the misdemeanor second and felony third offenses. Martz contended that the order in which the charges came to trial meant that the fourth offense charge was in fact the second offense tried and that because second offense partner or family member assault is a misdemeanor, the speedy trial provisions of 46-13-401 should apply. The state argued that because Martz was charged with felony partner or family member assault, the speedy trial statute did not apply. The District Court held that if Martz was convicted on the fourth charge but not on the second and third charges, the fourth offense would be treated as a misdemeanor for sentencing purposes, and denied the speedy trial motion. Martz was subsequently convicted on the fourth charge and, the following day, on the second charge. On appeal, the Supreme Court noted that although Martz was first found guilty of the fourth offense, he was not convicted of that charge and sentenced until March of the following year,

after sentence for the second offense was imposed, which made the charged fourth offense a felony conviction, so the speedy trial provisions did not apply. However, the state's argument that the speedy trial provisions could never apply was clarified by the Supreme Court. The speedy trial statute could have applied because the fourth offense had the potential of being reduced to a misdemeanor depending on the outcome of the trial on the second and third offenses. Because that contingency did not occur, dismissal of the speedy trial motion was affirmed. St. v. Martz, 2008 MT 382, 347 M 47, 196 P3d 1239 (2008).

Length of Speedy Trial Interval When Dismissal Granted: The date that a court grants a speedy trial dismissal motion becomes the date of the case's disposition and the end date of the speedy trial interval for purposes of appeal. St. v. Billman, 2008 MT 326, 346 M 118, 194 P3d 58 (2008).

Prejudice From 278-Day Delay Warranting Speedy Trial Dismissal: Billman was incarcerated 278 days awaiting trial for felony DUI and misdemeanor driving charges. His motion for dismissal on speedy trial grounds was granted and the state appealed. The Supreme Court applied the Ariegwe speedy trial analysis and affirmed on the following grounds: (1) the entire 278-day delay was attributable to the state; (2) Billman never waived the right to a speedy trial and sincerely wanted a speedy trial; (3) lengthy incarceration coupled with relatively simple charges against Billman established prejudice from the pretrial delay; (4) pretrial incarceration unduly prolonged the disruption to Billman's life and aggravated Billman's anxiety and concern; (5) Billman's memory faded during incarceration, impeding his ability to accurately recall past events and to prepare a defense. Because all the speedy trial factors weighed in Billman's favor and the state failed to persuasively show that the pretrial delay did not prejudice Billman, the District Court's conclusion that Billman was denied a speedy trial was correct. St. v. Billman, 2008 MT 326, 346 M 118, 194 P3d 58 (2008).

Speedy Trial Decision Remanded for Ariegwe Analysis: The District Court held that a delay of 894 days, without the state disproving prejudice, violated Madplume's right to a speedy trial. The state appealed, but before Madplume responded to the state's opening appeal brief and the state replied, the Supreme Court announced a new speedy trial analysis in St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007). In Madplume's case, the parties had applied the test in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), which was partially overruled in Ariegwe. In order to allow the District Court to apply the new Ariegwe test, the case was remanded without prejudice for further speedy trial analysis. St. v. Madplume, 2008 MT 37, 341 M 321, 176 P3d 1071 (2008).

Revised Speedy Trial Balancing Test: Although acknowledging the general approach for analyzing speedy trial claims articulated in Barker v. Wingo, 407 US 514 (1972), and the subsequent clarification of the Barker framework in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the Supreme Court noted that Bruce does not actually involve a balancing test, but rather that the first three factors, i.e., length of delay, reason for the delay, and defendant's timely assertion of the right to a speedy trial, act to channel the focus of the analysis to the issue of the fourth factor of prejudice, rendering the second and third factors relatively inconsequential. Because an actual balancing test of the four factors is more likely to produce an accurate assessment of a speedy trial claim, the court revisited the process and revised the analytical framework. None of the factors deserves greater consideration in the balancing. Rather, each factor's significance varies from case to case, and because of the case-specific nature of speedy trial claims, a given factor may outweigh all the others in one case but be of little consequence in another. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), followed in St. v. Howard, 2008 MT 173, 343 M 378, 184 P3d 344 (2008). The Ariegwe speedy trial balancing test was applied in St. v. Hendershot, 2009 MT 292, 352 M 271, 216 P3d 754 (2009).

Revised Speedy Trial Balancing Test — Factor One: Factor one of a speedy trial analysis is the length of the delay, which requires two inquiries, and until there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other three factors. The first inquiry, a threshold matter, is whether the interval between accusation and trial is sufficient to trigger a speedy trial analysis, which is measured without regard to the fault for the delay and is necessarily dependent on the particular circumstances of the case. A speedy trial claim lacks merit if the interval is less than 200 days, and the interval runs not to the date on which the accused's motion is considered by the court, but rather to the scheduled trial date or the date on which a guilty plea is entered, whichever date represents the date of the disposition of the case. If the interval is 200 days or more, the second inquiry is the extent to which the delay stretches beyond the trigger date. In Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the court adopted a bright-line 275-day rule of presumptive prejudice beyond which the state was required to provide evidence that the delay was not prejudicial, and if shown, the accused was

then required to show evidence of prejudice. However, the Supreme Court decided not to retain the Bruce 275-day rule and instead concluded that the presumption of prejudice exists as of the 200-day trigger date, at which point prejudice is minimal, and escalates over time. Both parties should come forward with evidence regarding prejudice or the lack thereof, and the trial court must weigh each party's evidence. The state's burden to justify the delay increases with the length of the delay. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), following Doggett v. U.S., 505 US 647 (1992).

Revised Speedy Trial Balancing Test — Factor Two: Under the second factor of the speedy trial test, the court first identifies each period of delay in bringing the accused to trial, without considering any actions by the accused or the state that did not result in a postponement of the trial date, and then attributes each period of delay to the appropriate party. The state bears the burden of explaining pretrial delays. Any delay not demonstrated to have been caused by the accused or affirmatively waived by the accused is attributed to the state by default. After identifying and attributing each period of delay in bringing the accused to trial, the court assigns weight to each period based on the specific cause and motive for the delay, depending on the party's culpability in causing it. Thus, the function of factor two in the overall balancing is no longer to conclusively establish a burden shift for the determination of prejudice, but rather the significance is in the specific cause and culpability for each delay. Because the primary burden to ensure that cases are brought to trial is on the courts and prosecutors, the further the delay stretches beyond the 200-day trigger date, the more compelling the state's justification for the delay must be. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), following McNeely v. Blanas, 336 F3d 822 (9th Cir. 2003).

Revised Speedy Trial Balancing Test — Factor Three: The third factor in the speedy trial balancing test is the accused's assertion of the right to a speedy trial. In Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the Supreme Court established a bright-line rule that no further analysis of this factor was necessary as long as the accused asserted the right to a speedy trial at any time prior to the commencement of trial. However, the court determined here that the overall accuracy of the balancing test is enhanced when the totality of the accused's responses to pretrial delays is considered, thus departing from the nonweighted Bruce approach and restating the factor as the accused's responses to the delay. Whether the accused actually wanted to be brought to trial promptly is an important consideration in ascertaining whether the right to a speedy trial has been violated. Useful indicators of whether and how the accused asserted the speedy trial right are the frequency and force of the accused's objections to pretrial delays and the reasons for any acquiescence by the accused in pretrial delays. Factor three will no longer be considered a procedural formality, but rather will serve as an indicator of whether the accused actually wanted a speedy trial, which in turn informs the inquiry into whether there has been a deprivation of the right. Therefore, under factor three, a trial court must evaluate an accused's responses to the delay, and the totality of the various responses to delays in trial should then be considered together with the other three balancing factors, including the timeliness and persistence of an accused's objections to pretrial delays in determining whether prejudice occurred. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007).

Revised Speedy Trial Test — Factor Four: The fourth factor in a speedy trial analysis is prejudice to the accused, which should be assessed in light of the interests of defendants that the speedy trial right was designed to protect. In Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the Supreme Court expressed those interests as: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired by dimming memories and loss of exculpatory evidence. Here, the Supreme Court reaffirmed those considerations as pertinent when evaluating prejudicial delay to an accused and reaffirmed that prejudice may be established based on "any or all" of those considerations. In assessing whether pretrial incarceration is oppressive, the court must consider all circumstances of incarceration. The longer the pretrial incarceration, the more likely it is oppressive and prejudicial, but the complexity of the charged offense is also relevant, and the length of pretrial incarceration that is oppressive is less for a relatively simple offense than for a more complex charge. However, there is no bright-line date on which pretrial incarceration becomes oppressive because that determination varies from case to case based on the specific circumstances of the incarceration. Minimizing anxiety and concern is more subjective and difficult to demonstrate but is nevertheless an interest protected by the speedy trial right and is a pertinent consideration under factor four. The crucial question is whether the delay in bringing the accused to trial has unduly prolonged the disruption of the accused's life or aggravated the anxiety and concern inherent in being accused of a crime. Last, impairment of one's defense is the most difficult form of speedy trial prejudice to prove, so in the absence of affirmative proof

that a delay has impaired the accused's ability to present an effective defense, impairment must be assessed based on other analytical factors, such as length of delay, the accused's responses to the delay, and the duration of pretrial incarceration. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007).

No Prejudice Shown by 338-Day Delay — Speedy Trial Motion Properly Denied: A 426-day delay triggered review of LaGree's speedy trial claim, even though only 338 days were properly attributed to the state. LaGree properly asserted the right to a speedy trial, and the burden was on the state to demonstrate that LaGree was not prejudiced by the delay. In this case, the state met its burden. LaGree did not demonstrate that his pretrial incarceration was extraordinarily prejudicial, that his anxiety was more than marginal, or that defense was prejudiced by the delay. The District Court's denial of LaGree's motion to dismiss for lack of a speedy trial was affirmed. St. v. LaGree, 2007 MT 65, 336 M 375, 154 P3d 615 (2007), following Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998).

No Impairment of Defense Following Pretrial Delay of 802 Days: Bowser contended that his defense to drug charges was impaired after a pretrial delay of 802 days and moved to dismiss. The District Court denied the motion, and Bowser appealed. In this case, the state preserved all physical evidence, all of Bowser's witnesses were available to testify at trial, and the state memorialized its evidence through written reports, videotape, and photographs. Bowser offered no evidence and cited no instances in which the pretrial delay impaired his defense, other than a general allegation that witness memory is impaired and a claim of increasing paranoia. The Supreme Court affirmed. St. v. Bowser, 2005 MT 279, 329 M 218, 123 P3d 230 (2005).

Trial Delay of 273 Days Attributable to State — Speedy Trial Claim Dismissed Absent Showing of Prejudice by Defendant: Blair was arrested on September 10, 2002, and his trial was eventually held August 18 and 19, 2003. Following conviction, Blair argued that more than 275 days of delay between arrest and trial were attributable to the state, requiring the state to prove that Blair was not prejudiced by the delay, and that the state's failure to carry that burden of proof violated Blair's right to a speedy trial. The Supreme Court applied the test in Barker v. Wingo, 407 US 514 (1972), to analyze the speedy trial claim. The second Barker factor is the reason for the delay, which attributes delay to either the state or the defendant on a case-by-case basis and determines which party carries the burden to prove prejudice. In this case, the state was responsible for 273 days of delay. The bright line rule established in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), is 275 days, and although the difference was nominal, the burden to show prejudice nevertheless rested with Blair. Blair was unable to prove that he was prejudiced by the pretrial incarceration, that his anxiety and concern were prejudicial, or that the delay impaired his defense, so his speedy trial claim failed. St. v. Blair, 2004 MT 356, 324 M 444, 103 P3d 538 (2004), followed in St. v. Bowser, 2005 MT 279, 329 M 218, 123 P3d 230 (2005).

Failure of State to Demonstrate Good Cause for Trial Delay in Misdemeanor Case — Reversible Error: Defendant was charged with misdemeanor DUI and pleaded not guilty. At the omnibus hearing, a trial date was set, and the Justice's Court set a date for production of evidence and a deadline for defendant to file a jury waiver. Defendant filed nothing in response to the deadlines. Ten days before the trial date, the state moved to vacate and reset the trial date because the County Attorney would be out of town. Efforts to contact defense counsel were unsuccessful, so the court sent a letter to counsel advising of the state's motion and extending the deadline for waiver of a jury trial. More than 7 months after defendant was charged, the case came to trial. Defendant gave no opening statement and presented no evidence or testimony in defense, but instead moved for dismissal for failure to prosecute within 6 months as required in this section. The motion was denied on grounds that any delay was caused by defendant and defense counsel. On appeal to District Court, the motion was again denied. On appeal to the Supreme Court, defendant contended that denial of the dismissal motion was in error because defendant never asked for a trial postponement and because the state did not show good cause for the delay. The state argued that good cause was shown in defendant's lack of compliance with court orders, including the failure to file a waiver of a jury trial and to comply with discovery requests. However, the record revealed no connection between defendant's failure to comply with the court's orders and the failure to prosecute the case within 6 months. The state's request for continuance did not reference defendant's failure to comply with court orders or that the failure to do so necessitated a continuance beyond the 6-month deadline. Thus, because the state failed to show good cause for the delay, the motion to dismiss should have been granted, so the Supreme Court reversed the District Court and dismissed the charge. St. v. Bertolino, 2003 MT 266, 317 M 453, 77 P3d 543 (2003).

Original Misdemeanor Charges Dismissed and Refiled With Felony Charge — Joinder of Charges Establishing New Case: Following an automobile accident, Topp was charged in Justice's Court with two misdemeanors to which he pleaded not guilty. The charges were subsequently dismissed, and the state filed a new information in District Court recharging Topp with the misdemeanors plus felony criminal endangerment. Topp argued that the misdemeanor charges should be dismissed because they were not prosecuted within 6 months, as required by this section. The Supreme Court held that this section did not apply in this case. When the original misdemeanor charges were dismissed, there were no longer charges pending against Topp, so there was no requirement for prosecution. As set out in St. v. Bullock, 272 M 361, 901 P2d 61 (1995), as long as Justice's Court jurisdiction is exhausted within 6 months by some action that authorizes appeal de novo to the District Court, this section is satisfied. Thus, when the charges were joined in District Court, the action became a case de novo, so the District Court did not err in denying Topp's motion to dismiss the misdemeanor charges on speedy trial grounds. St. v. Topp, 2003 MT 209, 317 M 59, 75 P3d 330 (2003).

Burden of Proof Erroneously Applied to Speedy Trial Analysis — Remand: The District Court improperly attributed less than 275 days of trial delay to the state and then erroneously held that the burden was on defendant to prove that the delay was prejudicial. On appeal, both parties conceded that the state was responsible for more than 275 days, thus the burden should have shifted to the state to show that defendant was not prejudiced by the delay. The Supreme Court was unable to conduct a meaningful review of the evidence when the burden was erroneously applied by the trial court, so the case was remanded so that the trial court could reconsider its speedy trial analysis after properly acknowledging that the burden of proof was with the state rather than with defendant. St. v. Ray, 2003 MT 171, 316 M 354, 71 P3d 1247 (2003), following Barker v. Wingo, 407 US 514 (1972).

Trial Delay of 342 Days — No Speedy Trial Violation Given Sufficient Rebuttal of Presumption of Prejudice: Following a delay of at least 342 days, Stiffarm moved to dismiss assault charges on grounds that his right to a speedy trial was violated. Applying Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the Supreme Court analyzed the four factors used in determining whether a defendant is denied the constitutional right to a speedy trial. The first three factors were conceded or undisputed, so the court considered the fourth factor—whether the defense was prejudiced by the delay. Regarding pretrial incarceration, the court agreed that most of any prejudice Stiffarm suffered was due to the natural consequences of Stiffarm's prior and alleged conduct. Stiffarm had to remain in jail because of the inability to meet the $150,000 bail, which was set at that amount because of the severity of the charged offense, because Stiffarm was on probation for a prior felony when the alleged offense occurred, and because of Stiffarm's extensive prior criminal record. Any presumption of prejudice from pretrial anxiety was adequately rebutted by testimony that Stiffarm had been depressed prior to incarceration and that with medication and counseling received in jail, the depression had actually improved. Finally, with respect to impairment of defense based on the alleged unavailability of witnesses, the state presented affidavit testimony of witnesses who indicated that their memories of the alleged incident were intact and that all evidence held by the state was preserved. Thus, the state adequately rebutted the presumption of prejudice, and absent any demonstration of further prejudice by Stiffarm, denial of the motion to dismiss on speedy trial grounds was affirmed. St. v. Stiffarm, 2003 MT 70, 314 M 499, 67 P3d 249 (2003).

Defendant Out of State for Six Years — Speedy Trial Right Preserved by Diligent Good Faith Prosecution: Longhorn was charged with felony sexual assault, and a warrant was issued for his arrest. However, Longhorn was in Oklahoma, and the warrant was not served until 6 years later. At trial, Longhorn moved to dismiss on speedy trial grounds, but the motion was denied, and Longhorn was convicted. On appeal, the Supreme Court applied the test in Barker v. Wingo, 407 US 514 (1972), and Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), to determine if Longhorn's speedy trial rights were violated. The court noted that the right to a speedy trial commences when a defendant becomes an accused, and if an accused is out of state, the state must act diligently and in good faith to acquire jurisdiction. The District Court found that the state acted diligently, and the Supreme Court concurred. The prearrest time was properly attributed to Longhorn, and he bore the burden of showing that he was prejudiced by the delay. The Supreme Court applied St. v. Boese, 2001 MT 175, 306 M 169, 30 P3d 1092 (2001), in evaluating the potential prejudice based on the three interests that speedy trials are designed to protect: (1) prevention of oppressive pretrial incarceration; (2) minimization of the defendant's anxiety and concern; and (3) avoidance of impairment of the defense. The court concluded that Longhorn did not prove prejudice, so the speedy trial motion was properly denied. St. v. Longhorn, 2002 MT 135, 310 M 172, 49 P3d 48 (2002).

Delay of 391 Days Attributable to State — Speedy Trial Analysis Triggered — Remand for Determination of Whether State Can Prove Lack of Prejudice: A.G., a juvenile charged with felony vehicle theft, being a runaway, and curfew violation, moved to dismiss the charges for lack of a speedy trial 2 months before a scheduled hearing. The District Court subsequently attributed 229 of 392 days of delay to the state, concluded that the right to a speedy trial was not violated, and placed the burden on A.G. to show that the delay was prejudicial. Applying the criteria in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the Supreme Court found that the District Court incorrectly calculated the length of delay, which was actually 455 days. As established in Billings v. Bruce, any delay over 200 days triggers further speedy trial analysis. Because of a miscommunication between the juvenile probation office and the County Attorney, the state neglected to diligently move the case toward prosecution, and A.G. was under no obligation to ensure diligent prosecution of the case or to help the state avoid dismissal for failure to timely prosecute. Further, the District Court mistakenly placed the burden of proving prejudice on A.G., when in actuality, the burden was on the state to prove a lack of prejudice. The Supreme Court remanded for a hearing to determine whether A.G. was prejudiced by the 455-day delay. In re A.G., 2002 MT 111, 309 M 491, 47 P3d 831 (2002).

Sufficient Proof of Lack of Prejudice to Defendant Caused by 362-Day Trial Delay — Claim of Lack of Speedy Trial Properly Denied: Good satisfied three of the four speedy trial factors in Barker v. Wingo, 407 US 514 (1972), and Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998): (1) more than 200 days of delay were attributable to the state, triggering speedy trial analysis; (2) the delay was caused by the state's failure to locate Good's motions, trial court institutional delay, and failure of the state to diligently prosecute; and (3) Good properly asserted his speedy trial right 7 days before trial. However, the fourth factor, a showing that Good was prejudiced by the delay, was not met. Good suffered no pretrial incarceration and conceded that the defense was not impaired by the delay. Good's pretrial anxiety and concern stemmed from the nature of the charges, rather than the delay. Thus, the District Court did not err in holding that Good was not denied a speedy trial. St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002).

Burden of Showing Lack of Prejudice in Trial Delay Met by State — Dismissal of Speedy Trial Motion Affirmed: Price was convicted in City Court in July 1994 for DUI and resisting arrest and appealed to District Court. The District Court ruled that the notice of appeal was untimely and dismissed the appeal. Price appealed that dismissal to the Supreme Court, which ruled in 1995 that the appeal was timely and remanded to District Court for trial (see St. v. Price, 271 M 409, 897 P2d 1084 (1995)). Following remand, trial was delayed until April 1997. Five days before trial, Price moved to dismiss for lack of a speedy trial. On the day of trial, the District Court considered the motion, denied it, and proceeded to trial, and Price was convicted of DUI. Price subsequently appealed denial of the speedy trial issue. The Supreme Court applied the revised Barker test set out in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), to determine whether Price was prejudiced by the delay. Because of the length of delay attributable to the state, the burden shifted to the state to show that Price was not prejudiced by the delay. Applying the Bruce standard, the Supreme Court evaluated prejudice based on the presence of oppressive pretrial incarceration, Price's level of anxiety and concern, and impairment of the defense. In this case, the state met its burden of showing that Price was not prejudiced by the delay. Price was not incarcerated prior to trial, so pretrial incarceration was not a factor. Price's original City Court sentence was stayed pending the de novo appeal to District Court, which prevented the DUI conviction from appearing on Price's driving record and adversely affecting Price's driving privileges or ability to obtain insurance. Thus, Price's life affairs were protected from the impact of the pending charge and conviction, so Price did not suffer more than the normal anxiety and concern associated with the charge. Last, the state reinterviewed the witnesses several times over the course of the proceeding, so witness memories were not diminished, and Price conducted much of the case pro se, so it was obvious that his memory was not diminished either. This constituted sufficient evidence that Price's defense was not impaired by the delay, so the District Court did not err in dismissing the speedy trial claim. St. v. Price, 2001 MT 212, 306 M 381, 34 P3d 112 (2001).

Failure to Show Prejudice in Delayed DUI Trial Based on Pretrial Anxiety: Stuart was arrested for DUI, and after a delay of more than 200 days, moved for dismissal on grounds of denial of a speedy trial. The motion was denied, and Stuart ultimately was convicted, but timely asserted the right to a speedy trial on appeal. The Supreme Court applied the analysis set out in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), to determine if prejudice occurred. No single factor is determinative, and each must be weighed in light of the facts of the case. The only disputed factor was the possible anxiety caused by the pretrial delay that might

have placed Stuart's employment as a commercial driver in limbo; however, Stuart conceded that he had received full-time employment as a commercial truck driver about 6 months after the DUI charge. Affidavits from Stuart and his wife addressed the anxiety factor, but did not transcend the generic anxiety inherent in being accused of a crime. Stuart failed to establish prejudice once the state met its burden of showing a lack of prejudice, and the District Court did not err in denying the motion to dismiss for lack of a speedy trial. St. v. Stuart, 2001 MT 178, 306 M 189, 31 P3d 353 (2001).

Trial Delay of 761 Days on Bad Check Charges — Facts Discharging State's Burden of Disproving Prejudice: Boese's trial for issuing bad checks was delayed 761 days, sufficient to bring about a speedy trial analysis. A total of 176 days was attributable to the state because the arresting officer failed to return the served arrest warrant, and 289 days were institutional delay, also attributable to the state. Boese asserted the right to a speedy trial in a timely manner, so the burden shifted to the state to show that the delay was not prejudicial. Boese contended that the burden was not properly shifted, but the order regarding Boese's motion to dismiss demonstrated otherwise. Thus, the Supreme Court applied the analysis set out in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), to determine if prejudice occurred, examining pretrial incarceration, anxiety caused by the pretrial delay, and whether Boese's defense was damaged by the delay. Because Boese was incarcerated on other charges for most of the time prior to trial, the pretrial incarceration was not oppressive based on the charges in this case. The likelihood of anxiety from delay was contraindicated by the frequency with which Boese changed his plea, adding to the delay, and any increased anxiety was more likely caused by the other, more serious unrelated charges facing Boese. Finally, the nature of the bad check case was not fact-sensitive and depended primarily on documentary evidence and interpretation of that evidence, which was not evanescent and not likely to change because of the trial delay. These facts were sufficient to discharge the state's burden of disproving prejudice, and the District Court did not err in denying Boese's motion to dismiss for lack of a speedy trial. St. v. Boese, 2001 MT 175, 306 M 169, 30 P3d 1092 (2001).

Failure to Show That Pretrial Delay Impaired Defense Based on Unavailability or Loss of Exculpatory Evidence — No Prejudice: Ellenburg asserted that his defense was impaired as a result of the delay caused by his incarceration from arrest until trial, which prevented his access to business documents that would have been exculpatory, and that the delay prejudiced him as a result of the state's loss or destruction of the documents seized from his office. However, Ellenburg failed to describe the documents that he could not access or to explain how they could help in his defense, nor did he ask his attorney or anyone else to procure the documents for him, thus also failing to meet the burden of proving that the documents, if they existed, were material and exculpatory. Any delay in bringing the case to trial based on a loss or unavailability of exculpatory evidence was not a prejudicial impairment of the defense. St. v. Ellenburg, 2000 MT 232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000).

Failure to Show Prejudice From 230-Day Pretrial Delay Caused by State's Institutional and Unintentional Delays: A pretrial delay of 230 days having triggered a speedy trial analysis, the Supreme Court examined the delay for prejudice to Johnson and found that all 230 days were attributable to the state: 190 days of unintentional delay because of two continuance motions necessary to secure the appearance at trial of prosecution witnesses and 40 days of institutional delay because of the District Court's sua sponte continuance because of calendar conflicts. Docket delays weigh less heavily against the state than purposeful delays, of which there was no evidence. The delay was not the result of intentional or purposeful foot-dragging on the part of the state, nor was there any indication that the state harbored any motive for delaying Johnson's trial; therefore, the degree of fault of the state was minimal. Johnson was thus not unduly prejudiced by the pretrial delay in and of itself, so the state did not bear the burden of rebutting presumptive prejudice, proof of which fell on Johnson. After weighing the four prongs of the Barker test (407 US 514), the Supreme Court affirmed denial of Johnson's motion to dismiss on speedy trial grounds, holding that Johnson failed to show adequate proof of prejudice because of pretrial incarceration, economic hardships, or impairment of defense. St. v. Johnson, 2000 MT 180, 300 M 367, 4 P3d 654, 57 St. Rep. 727 (2000), following Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), and distinguishing St. v. Bailey, 201 M 473, 655 P2d 494 (1982).

Anxiety During Preindictment Period Insufficient to Trigger Prejudice Establishing Due Process or Speedy Trial Violation: In January 1996, Burt's former employer filed suit to recover more than $250,000 that Burt allegedly stole while employed as office manager and bookkeeper for the business. In January 1997, the state filed an information charging Burt with five counts of felony theft. In October 1998, Burt was convicted on all counts and later appealed, alleging that the preindictment delay between the time when the state could have filed charges and the

time when the information was actually filed violated her due process rights and that she suffered actual prejudice in the effect of the delay on her health and emotions. Applying the two-step analysis in St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773 (1998), the Supreme Court held that, without more, Burt was not prejudiced by the preindictment delay simply because of her anxiety. Anxiety, no matter how real, does not in itself impair the accused in defending against a charge and thus does not qualify as prejudice in the due process context. The delay did not cause a loss of witnesses or evidence, nor did requiring Burt to stand trial violate the fundamental conceptions of justice that lie at the base of our civil and political institutions and that define the community's sense of fair play and decency. Burt was not incarcerated. Her stress was not excessive. Her economic hardship, the stigma of being charged with a crime for the first time, and her recourse to a psychiatrist could not be considered consequences of the pretrial delay. Although a total of 208 days of institutional delay was chargeable to the state, the remainder was chargeable to Burt. Absent a showing of prejudice, the convictions were affirmed. St. v. Burt, 2000 MT 115, 299 M 412, 3 P3d 597, 57 St. Rep. 482 (2000), following Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998). See also St. v. Mouser, 806 P2d 330 (Alaska Ct. App. 1991).

Reasonable Delay Because of Complex "Eve of Trial" Motion Attributable to Defendant — Court Delay Attributable to State — 433-Day Delay Prejudicial: When a defendant files an "eve of trial" motion that raises a complex legal issue or requires an evidentiary hearing, making the original trial date impracticable, the reasonable period of delay caused thereby is attributable to the defendant. Here, Kipp's motion to quash was heard 19 days before the original trial date. At that time, the District Court vacated the trial date and stated that another date would be set after the motion to quash was considered. The court set a briefing schedule, but no new trial date. When a trial court, for its own reasons, vacates a trial date and does not set a new date, the delay is attributable to the state; therefore, the delay from the motion to quash until the court issued its decision was institutional delay attributable to the state. Further, the 5-month delay between the court's decision and the state's request for a new trial date was also attributable to the state. With a total of 433 days of institutional delay, the burden shifted to the state to prove that Kipp was not prejudiced. The state offered no evidence to rebut Kipp's contention that she was prejudiced by anxiety and concern because: (1) she was the custodial parent of two minor children; (2) she was faced with potential incarceration; (3) she was denied employment because of the charges; and (4) her defense was impaired because of the loss of a main witness as a result of delay attributable to the state. Kipp's right to a speedy trial was thus violated, so the Supreme Court reversed the conviction and dismissed the charges. St. v. Kipp, 1999 MT 197, 295 M 399, 984 P2d 733, 56 St. Rep. 762 (1999), following Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866, 55 St. Rep. 750 (1998). Kipp was distinguished, as to impairment of defense, in St. v. Highpine, 2000 MT 368, 303 M 422, 15 P3d 938, 57 St. Rep. 1573 (2000).

Six-Month Speedy Trial Limit Inapplicable by Its Terms to Trials De Novo in District Court on Appeal: Stanko was convicted in Justice's Court of reckless driving and appealed to the District Court. Before the Supreme Court, Stanko argued that his case should have been dismissed by the District Court because more than 6 months had elapsed between the time that he filed his appeal to District Court and the time of his trial. The Supreme Court pointed out that the limitation in this section applies only "after the entry of a plea" and that because there is no plea entered in an appeal to District Court, the statute and its 6-month limit was not intended to be applied to those appeals held as a trial de novo. The Supreme Court also held that Stanko's argument that application of the 6-month limit is outmoded because of the requirement for one jury trial contained in 46-17-201 was not persuasive because the method of disposition of the case in Justice's Court is immaterial to the application of the 6-month speedy trial limitation. (Annotator's note: The requirement contained in 46-17-201 for one jury trial was held unconstitutional in Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep 1298 (1998).) For these reasons, the Supreme Court said that it would continue to adhere to the rule of St. v. Mantz, 269 M 135, 887 P2d 251 (1994), that the 6-month speedy trial limitation does not apply to trials de novo on appeal from Justice's Court to District Court. St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998).

Revised Speedy Trial Analysis — Barker Test Clarified: In an attempt to harmonize numerous disparate rulings on the right to a speedy trial, the Supreme Court held that the general guidelines for review of claims of denial of a speedy trial contained in Barker v. Wingo, 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182 (1972), are to be applied on a case-by-case basis to the unique circumstances of each claim. The factors to be considered do not have talismanic qualities, and courts must still engage in a difficult and sensitive balancing process. There is not some magical time for assertion of the right to a speedy trial that should be weighed more

favorably to the defendant than some other time. As long as the defendant files a motion to dismiss prior to trial, the right to a speedy trial is properly asserted. To initially calculate the length of delay, the period from the time that charges are filed until the trial date is determined without assignment of fault to either party for the various delays. If the delay is 200 days or more, further speedy trial analysis is triggered. In determining the reasons for the delay, time of delay is assigned to either the state or the defendant. Then the determination is made as to whether the delay attributable to the state is 275 days or more, at which point the burden shifts to the state to demonstrate that the delay has not prejudiced the defendant. The state's proof should take into consideration but need not include the three traditional bases for determining prejudice: (1) pretrial incarceration; (2) anxiety and its attendant considerations; and (3) impairment of the defense. In determining whether the state has met its burden, the court should consider the fact that direct proof of a defendant's state of mind may not always be possible and that the state's ability to anticipate the nature of the defense varies from case to case. The third consideration is whether the right to a speedy trial is properly invoked before trial, either by demand of a speedy trial or by motion to dismiss for failure to provide a speedy trial. Once that motion is made, the District Court must rule on it prior to trial; however, any delay directly attributable to a motion to dismiss that is filed less than 10 days before trial is assignable to the defendant. The fourth consideration, whether the defense was prejudiced, includes the three traditional bases for determining prejudice stated above. In the present case, the city of Billings was responsible for prosecuting the defendant, and a 447-day delay attributable to the state sufficiently prejudiced the defense to warrant reversal of defendant's conviction on speedy trial grounds. The defendant was under no obligation to ensure diligent prosecution of the case against him or to help the city avoid dismissal for failure to timely prosecute. Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866, 55 St. Rep. 750 (1998), followed in St. v. Hardaway, 1998 MT 224, 290 M 516, 966 P2d 125, 55 St. Rep. 936 (1998), in which the Supreme Court clarified the second speedy trial factor set out in Billings v. Bruce in holding that if the state can show lack of prejudice on only one of the three traditional bases of prejudice, it must, at a minimum, address the question of whether there has been an impairment of the defense. Hardaway was followed in St. v. Highpine, 2000 MT 368, 303 M 422, 15 P3d 938, 57 St. Rep. 1573 (2000). If the state satisfies its burden of demonstrating that defendant has not been prejudiced by the delay, the burden shifts to defendant to show prejudice. Billings v. Bruce was also followed in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998), St. v. Kipp, 1999 MT 197, 295 M 399, 984 P2d 733, 56 St. Rep. 762 (1999), St. v. Johnson, 2000 MT 180, 300 M 367, 4 P3d 654, 57 St. Rep. 727 (2000), St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019, 57 St. Rep. 794 (2000), St. v. Ellenburg, 2000 MT 232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000), St. v. Highpine, 2000 MT 368, 303 M 422, 15 P3d 938, 57 St. Rep. 1573 (2000), St. v. Boese, 2001 MT 175, 306 M 169, 30 P3d 1092 (2001), St. v. Stuart, 2001 MT 178, 306 M 189, 31 P3d 353 (2001), St. v. Price, 2001 MT 212, 306 M 381, 34 P3d 112 (2001), St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002), and In re A.G., 2002 MT 111, 309 M 491, 47 P3d 831 (2002). See also St. v. Tweedy, 277 M 313, 922 P2d 1134 (1996). The 10-day rule in Billings v. Bruce, providing that any delay directly attributable to a motion to dismiss based on denial of a speedy trial that is filed less than 10 days prior to trial will be assigned to the defendant, was modified in St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), to provide that any delay directly attributable to the filing of a speedy trial motion less than 30 days prior to a scheduled trial date is chargeable to the accused. The requirement that a motion to dismiss on speedy trial grounds must be ruled on prior to trial was reaffirmed in Ariegwe, and an additional requirement added that the trial court must enter findings of fact and conclusions of law with respect to each of the four speedy trial balancing factors and how the factors were balanced against each other.

Defendant's Motion for Continuance Negating Speedy Trial Provision: The 6-month period for trial of a misdemeanor charge is the general rule. When, as here, defendant moves for a continuance, the expiration of the 6-month period no longer requires dismissal. St. v. Chesarek, 1998 MT 15, 287 M 215, 953 P2d 698, 55 St. Rep. 53 (1998). See also St. v. Ronningen, 213 M 358, 691 P2d 1348 (1984), and St. v. Crane, 240 M 235, 784 P2d 901 (1989).

"Months" Defined as Calendar Months: Under this section, a misdemeanor charge must be dismissed if not brought to trial within 6 months after entry of a plea. The language referring to "6 months" means 6 calendar months, not 180 days. St. v. Hayes, 1998 MT 14, 287 M 210, 953 P2d 700, 55 St. Rep. 51 (1998).

Admissibility of Preliminary Alcohol Screening Test Results for Probable Cause Purposes Only — Clarification and Effect of Orders Suppressing Evidence — Grant of Motion to Exclude Inadmissible Evidence Not Considered Order Suppressing Evidence: The state sought to have

the results of a preliminary alcohol screening test admitted into evidence in a DUI case. The City Court denied the motion, and the state immediately appealed to District Court, contending that in denying the motion, the City Court had suppressed evidence and that the statutory 6-month limit on trial of misdemeanors in this section was thus exhausted. The Supreme Court noted that the results of a preliminary alcohol screening test pursuant to 61-8-409 are not substantive evidence of the amount of alcohol present in a person's body but instead are an estimate of alcohol concentration only for the purpose of establishing probable cause to believe that a person is under the influence of alcohol prior to making an arrest. An order that suppresses evidence is an order that excludes evidence on the grounds that the evidence was illegally obtained and does not include a pretrial order that excludes evidence based on rules of evidence, such as relevancy, probative value, or statutory inadmissibility. Thus, the City Court order excluding preliminary alcohol screening test results was not an order suppressing evidence but rather an order determining that the results were not substantive evidence at all; therefore, there was no statutory basis under 46-20-103(2)(e) for appeal to District Court. Because City Court jurisdiction was not exhausted by some action authorizing appeal to the District Court, subsection (2) of this section was not satisfied and defendant, who made no move to postpone, was entitled to dismissal of the DUI charge with prejudice pursuant to subsection (2) of this section on grounds that he had not received a timely trial. St. v. Strizich, 286 M 1, 952 P2d 1365, 54 St. Rep. 1241 (1997), following St. v. Carney, 219 M 412, 714 P2d 532 (1986), and St. v. Bullock, 272 M 361, 901 P2d 61 (1995), overruling inconsistent holdings in St. v. T.W., 220 M 280, 715 P2d 428 (1986), and St. v. Yarns, 252 M 45, 826 P2d 543 (1992), and followed, with regard to limited admissibility of preliminary breath test evidence, in St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003). See also St. v. Crawford, 2003 MT 118, 315 M 480, 68 P3d 848 (2003), and St. v. Snell, 2004 MT 334, 324 M 173, 103 P3d 503 (2004).

Two-Month Delay in Holding Omnibus Hearing Caused by Defendant — Trial Six and One-Half Months After Charge: Defendant was charged with a misdemeanor on August 23 and on March 7 moved for dismissal for failure to try him within 6 months. The trial date had been set for March 26. Approximately 1 month of the 6 ½-month delay was caused by defendant's failure to appear at an omnibus hearing. Defendant's request for a postponement of the hearing after the originally scheduled hearing was rescheduled caused another 1-month delay. The District Court did not err in denying the motion to dismiss for lack of a speedy trial. Any pretrial motion for a continuance by defendant that has the incidental effect of delaying the trial beyond the 6-month time limit can be said to postpone the trial for purposes of application of that limit. St. v. Fitzgerald, 283 M 162, 940 P2d 108, 54 St. Rep. 545 (1997).

Delay of 363 Days, With 217 Attributable to Defendant Who Suffered Minor Prejudice From Delay: If denial of a speedy trial is claimed in a case appealed by the state from Justice's Court to the District Court, the time for calculating the length of the delay commences on the date on which the state files its notice of appeal. The state filed its appeal on November 30, 1993, trial was scheduled for May 2, 1994, and the motion to dismiss for lack of a speedy trial was denied on April 25, 1994, 153 days after the state's appeal was filed. Trial was held 363 days after the state's appeal was filed. Defendant was responsible for the last 217 days of the delay because of his motion to dismiss. Moreover, he failed to object to the order vacating the trial date and continuing the evidentiary hearing. However, his motion to dismiss was timely filed. He was not subjected to pretrial incarceration, and the record did not show that he suffered undue anxiety or concern over the delay or that his defense was impaired. The District Court correctly denied the motion to dismiss for lack of a speedy trial. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996).

Six-Month Rule Not Applicable When Defendant Tried in Justice's Court and Case Appealed to District Court: The 6-month rule in this section does not apply when defendant is tried in Justice's Court and the case is appealed for trial de novo in the District Court. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996), followed in St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998).

Right to Speedy Trial Violated — Dismissal Correct: Defendant was charged with alternate counts of forgery or theft. After a 298-day delay, attributable solely to the state, defendant moved to dismiss for lack of speedy trial, and the District Court granted the motion. The state appealed, and the Supreme Court affirmed. When the delay resulted from the court's failure to arraign the defendant, from its failure to rule on the defendant's pretrial motions, and from the prosecution's lack of diligence, the District Court was correct in granting the defendant's speedy trial motion and in dismissing the charges with prejudice. The Barker v. Wingo factors applied. St. v. Matthews, 271 M 24, 894 P2d 285, 52 St. Rep. 305 (1995), followed in St. v. Keating, 285 M 463, 949 P2d 251, 54 St. Rep. 1250 (1997).

Six-Month Rule Applicable Only to Initial Trial in Justice's Court: Mantz was found guilty of misdemeanor assault in Justice's Court and appealed to the District Court for a trial de novo on January 22, 1993. On December 7, 1993, Mantz filed a motion to dismiss for lack of a speedy trial, maintaining that under this section, a defendant cannot be brought to trial on a misdemeanor charge after 6 months. As set out in St. v. Sunford, 244 M 411, 796 P2d 1084 (1990), this section is inapplicable to situations in which a case comes from Justice's Court to a trial de novo in District Court. Because the District Court in this case properly applied the Barker v. Wingo test for determining speedy trial in finding that this section applies only to the initial trial in Justice's Court, the motion to dismiss was properly denied. St. v. Mantz, 269 M 135, 887 P2d 251, 51 St. Rep. 1527 (1994). Sunford and Mantz were followed in St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998).

Remand Not Authorized: This section allows a District Court to dismiss a complaint, information, or indictment, but remand is not authorized. Rickett v. Billings, 262 M 339, 864 P2d 762, 50 St. Rep. 1586 (1993), affirming Hardin v. Myers, 194 M 248, 633 P2d 677 (1981).

Failure to Grant Praecipe to Dismiss Misdemeanor Charge to Allow Pursuit of Felony Charge — Reversible Error: The state filed a praecipe in Justice's Court to dismiss a misdemeanor domestic abuse (now partner or family member assault) charge on the basis that a felony sexual assault charge was being prosecuted in District Court. The Justice of the Peace did not rule on the praecipe at the time that it was filed, instead proceeding to sentence defendant on the lesser offense. In moving for dismissal of a misdemeanor charge, the state need only show that dismissal would be in the furtherance of justice, and having met that standard, the court may not deny the motion to dismiss. Failure to grant the state's praecipe to dismiss constituted reversible error. St. v. Schneiderhan, 261 M 161, 862 P2d 37, 50 St. Rep. 1242 (1993).

Failure of District Court to Grant Motions to Dismiss as Directed by Attorney General for Government Misconduct — Violation of Separation of Powers: The Attorney General directed the Lincoln County Attorney to file motions to dismiss charges against certain criminal defendants for the reason that outrageous government misconduct had occurred in the course of the prosecution. The Lincoln County Attorney filed the motions, but they were denied by the District Court. In a proceeding for supervisory control, the Supreme Court held that the Attorney General was within his authority to direct the County Attorney to move to dismiss the charges and held that the Attorney General's conclusion that there had been outrageous government misconduct in the cases served as a basis under subsection (1) of this section for the District Court to dismiss the charges. The refusal of the District Court to dismiss the charges was an abuse of discretion and a violation of the doctrine of separation of powers. By refusing to grant the motions to dismiss, the District Court intruded upon the lawful functions of the County Attorney and the Attorney General, who belong to the Executive Branch of government. State ex rel. Fletcher v. District Court, 260 M 410, 859 P2d 992, 50 St. Rep. 992 (1993). See also St. v. Schneiderhan, 261 M 161, 862 P2d 37, 50 St. Rep. 1242 (1993).

Reset of Speedy Trial Clock Following Mistrial: When a mistrial is declared, the speedy trial clock is reset and begins to run from the date the mistrial was declared. It was error for the District Court to include the period of time prior to mistrial in its calculation of total elapsed time. St. v. Strong, 258 M 48, 851 P2d 415, 50 St. Rep. 418 (1993). See also St. v. Sanders, 163 M 209, 516 P2d 372 (1973), adopting in part Section 2.2 of the American Bar Association Project on Minimum Standards for Criminal Justice.

Arrest Two Years and Five Months From Date of Offense — No Denial of Due Process: There was no violation of the statute of limitations or denial of defendant's due process rights when an arrest warrant was executed 1 year and 9 months from the date it was issued (2 years and 5 months from the date of the offense). St. v. Cummins, 257 M 491, 850 P2d 952, 50 St. Rep. 377 (1993).

Client Bound by Attorney's Waiver of Right to Speedy Trial — Purpose of Statute: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that he, the defendant, was not bound by his attorney's waiver. Defendant asserted that 37-61-401 makes the waiver binding only if it was entered with the defendant's knowledge or upon the record in open court. Citing Bush v. Baker, 46 M 535, 129 P 550 (1913), the Supreme Court ruled that 37-61-401 has been applied only as to agreements between attorneys and that the purpose of that section is to relieve the presiding judge of the burden of determining disputes between attorneys concerning their unexecuted agreements. The Supreme Court stated that it would not apply 37-61-401 literally as to agreements between an attorney and the court because to do so would lead to absurd consequences and greatly retard the business of the courts. The Supreme Court held that the

defendant was thus bound by his counsel's waiver. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Speedy Trial Clock to Start With Date of De Novo Appeal From Justice's Court to District Court: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that his right to a speedy trial was violated because the clock should have started with the date of his arrest, not the date of appeal to District Court. Citing St. v. Sanders, 163 M 209, 516 P2d 372 (1973), the Supreme Court noted that it had adopted Standard 12-2.2(c) of the American Bar Association Standards for Criminal Justice. The standard provides that in cases of appeal or an order for a new trial, the time for trial should begin running with the order granting the new trial or, in this case, the date of appeal to District Court. The Supreme Court determined not to abandon that standard and therefore held that defendant's trial was within the 6-month limitation of this section. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Speedy Trial Not Denied by Application of Six-Month Speedy Trial Limitation to De Novo Appeal From Justice's Court to District Court: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that his right to a speedy trial was violated because it is prejudicial to apply the speedy trial standards of this section to an appeal from Justice's Court to District Court. The Supreme Court held that the argument was without merit because the 6-month limit was met in this case, both in the time for trial in Justice's Court and in the time for trial de novo in District Court. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Uncertain Testimony of Defense Counsel Insufficient to Disprove Oral Waiver of Right to Speedy Trial: At the time scheduled for defendant's trial in Justice's Court on a DUI charge, the Justice of the Peace called defense counsel into his chambers and informed him that a different date for trial was necessary because of another trial then in progress. The Justice of the Peace then issued a written order reciting the fact that an oral motion for a continuance was made by defense counsel, along with an oral waiver of defendant's right to a speedy trial. Trial was then set for a date beyond the 6-month limitation provided for in this section. In a de novo appeal to District Court, defendant raised the issue of his right to a speedy trial, and defense counsel testified he could not remember whether he made an oral motion for continuance and a waiver. The Supreme Court found that the Justice's Court's order was presumed correct under 26-1-602(17) and that the testimony of defense counsel did not demonstrate that the order was in error in reciting the waiver. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Prosecution's Failure to Seek Dismissal of Defendant's Appeal Not Denial of Right to Speedy Trial: The defendant filed a notice of appeal with the City Court after being convicted of his fourth DUI. The defendant's attorney failed to complete and return a praecipe to transmit the record to District Court within the 30-day time limit. The request for transmittal was not submitted until a year and a half later. The defendant argued that the prosecution, in failing to bring him to trial or to move to have the appeal dismissed, violated his right to a speedy trial. The Supreme Court held that the delay was a result of the defendant's attorney's actions and that therefore the state had not violated the defendant's rights. St. v. Speith, 244 M 392, 797 P2d 221, 47 St. Rep. 1630 (1990).

Six-Month Time Limit for Misdemeanor Trial Not Violated When Defendant Requested Delay: The defendant in a DUI case asked for a continuance to enter a guilty plea so that the 5-year period would run on a prior DUI conviction before his guilty plea on the second violation. Subsequently, the defendant pleaded not guilty and moved for dismissal on the basis that the statutory 6-month period to try a misdemeanor had elapsed. The Supreme Court held that the 6-month period did not run when it was the defendant rather than the state who was responsible for the delay. St. v. Crane, 240 M 235, 784 P2d 901, 46 St. Rep. 2082 (1989).

Time Necessary to Adjudicate Pretrial Motions — Delay Justified: Defendant contended that a delay caused by the state mandated dismissal because his speedy trial rights were violated. Part of the delays associated with pretrial controversies regarding appointment of counsel, request for transcript, motion to dismiss, and change of venue motion was properly attributable to the state; however, the delay caused by the pretrial motions and appeals was justified by the complexity and need for evidence in the counsel issue and by the lack of a showing that the prosecution acted intentionally to delay. St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988), distinguishing St. v. Bailey, 201 M 473, 655 P2d 494 (1982).

Defendant Liable for 83 of 189 Days — Motion on Day of Trial — No Unfair Prejudice Shown From Denial: The time between arrest and trial was 189 days, and defendant's two granted motions for continuance accounted for 83 days, making the remaining 106 days well within Montana's acceptable delay limit. Asserting the right to a speedy trial on the day of the trial was

not timely. No unfair prejudice was shown to result from denial of the motion. The court properly denied a motion to dismiss for lack of a speedy trial. St. v. Walker, 225 M 415, 733 P2d 352, 44 St. Rep. 363 (1987).

Denial of Speedy Trial — Failure to Meet Threshold Test: Kerns appealed forgery conviction, arguing that District Court's denial of motions to dismiss for lack of speedy trial constituted institutional delay and violated his right to a speedy trial. The Supreme Court ruled that unless there is a period of delay long enough to be presumptively prejudicial, no inquiry is required. Since Kerns failed to meet Montana's four-part threshold test, no presumption of delay attaches. St. v. Kerns, 223 M 172, 725 P2d 1190, 43 St. Rep. 1632 (1986), followed in St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988).

Institutional Delay — No Prejudice When Defendant Already Incarcerated: A 256-day delay triggered the four-part Barker test and shifted the burden to the prosecution to give a reasonable excuse for the delay or show why the delay did not prejudice the defendant. Sixty-one days of the delay were attributable to defendants; the remaining 195 days were attributable to institutional delay, which weighs less heavily against the state in the Barker balancing process. Defendant was not prejudiced by the delay because he was already incarcerated on another charge and there was no evidence of additional or unusual anxiety. St. v. Palmer, 223 M 25, 723 P2d 956, 43 St. Rep. 1503 (1986).

Delay Charged to Defendant — Waiver of Speedy Trial by Defendant: No denial of defendant's right to speedy trial occurred where defendant had previously filed multiple waivers of his right to speedy trial, pending a great number of motions and voluminous supporting briefs, and subsequently was granted an extension to allow substitution of counsel, which resulted in an additional 2-month delay. St. v. Harvey, 219 M 402, 713 P2d 517, 43 St. Rep. 46 (1986).

DUI — 13-Month Delay — Failure to Rebut Presumption of Prejudice: Defendant was not tried on DUI charge for nearly 13 months after being charged. The Supreme Court held that the delay of 13 months was sufficient to shift burden to the prosecution to explain reason for delay and to create a presumption that the delay had prejudiced the defendant. Here the prosecution neither explained the delay nor offered evidence to rebut the presumption of prejudice. Hamilton v. Hayden, 218 M 425, 709 P2d 156, 42 St. Rep. 1708 (1985).

Delay of 52 Days for Transfer to Answer Another County's Charges — No Violation: For speedy trial purposes, a 52-day delay during which defendant was transferred to another county to answer charges filed in that county could not be charged against the state. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985).

General Extradition Delay Rules: For speedy trial purposes, those days during which an accused resists extradition will be included in the period of delay, and only those days will be charged against the accused. Those days during which the prosecution either does not diligently demand extradition or diligently pursue it will be included in the period of delay and charged against the prosecution. Those days during which the prosecution diligently pursues extradition and the accused does not resist it will not be included in the period of delay, and inclusion of those days, as in St. v. Ackley, 201 M 252, 653 P2d 851, 39 St. Rep. 2091 (1982), is no longer the rule. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985).

No Presumption of Prejudice — 104-Day Delay: For speedy trial purposes, a 104-day delay was well within the guidelines for acceptable length of delay and was not presumptively prejudicial. Thus, the other three parts of the Barker test need not be considered. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985).

Delay of Nine Months Caused by Defendant: Although the defendant was not brought to trial for 9 months, the State met its burden of showing there was a reasonable excuse for this delay and the defendant was not prejudiced. During that period, defense counsel achieved several substitutions of judges and pursued various defense theories. The defendant was responsible for much of the delay in being brought to trial. His continued incarceration was attributable to actions by defense counsel in preparing a defense. Such incarceration was not oppressive for purposes of the speedy trial right. The delay of the defense will not serve as grounds for denial of the right to a speedy trial. St. v. Cutner, 214 M 189, 692 P2d 466, 41 St. Rep. 2404 (1984).

Defendant Not Prejudiced by 214-Day Institutional Delay: Defendant was not denied his right to a speedy trial. He was ready for trial, and the State indicated its readiness for trial in a timely fashion. There were no oppressive tactics employed. The cause for the 214-day delay is narrowed to pure institutional delay, and only that may be balanced against the defendant's prejudice. The State carried its burden of showing lack of prejudice, and, when the burden shifted, the defendant failed to present evidence that he was prejudiced by the delay. St. v. Chavez, 213 M 434, 691 P2d 1365, 41 St. Rep. 2219 (1984), followed in St. v. Haskins, 220 M 199,

714 P2d 119, 43 St. Rep. 290 (1986). See also St. v. Bartnes, 234 M 522, 764 P2d 1271, 45 St. Rep. 2101 (1988).

Prosecution Dismissed When State Does Not Show Good Cause for Six-Month Misdemeanor Delay: On October 12, 1983, the State filed a misdemeanor charge against the defendant. On the same day, he appeared and pleaded not guilty and the court set trial for February 28, 1984, well within the statutory 6-month deadline. On January 15, 1984, the assigned trial judge announced his retirement effective February 3, 1984. On April 12, 1984 (the precise date on which 6 months had expired from the date the defendant had entered his plea), defense counsel moved to dismiss the complaint because the defendant had not been tried within the required 6 months. The charge was properly dismissed because the defendant did not seek a postponement and the State, which had numerous opportunities to request another trial setting but failed to do so, did not demonstrate good cause in not prosecuting within the time limit. St. v. Ronningen, 213 M 358, 691 P2d 1348, 41 St. Rep. 2168 (1984), but see St. v. Belgarde, 244 M 500, 798 P2d 539, 47 St. Rep. 1762 (1990).

"Speedy Trial" Constitutional Tests to Apply Only to Felony Cases: The defendant was charged with a misdemeanor offense. As the State did not prosecute within the 6-month statutory deadline, the charge was dismissed. The State contends that a speedy trial constitutional analysis should be applied in determining whether the State has demonstrated good cause for its failure to meet the 6-month deadline. However, the speedy trial constitutional tests apply only in the case of felonies and will not be applied in misdemeanor cases if, as here, the statutory deadline is more strict than any constitutional analysis would be required to be. The statute contains the sole standard for determining whether good cause for the delay has been shown. St. v. Ronningen, 213 M 358, 691 P2d 1348, 41 St. Rep. 2168 (1984), followed in St. v. Belgarde, 244 M 500, 798 P2d 539, 47 St. Rep. 1762 (1990).

Delay of 396 Days — 360 Days of Institutional Delay: Defendant was tried 396 days after filing the complaint in Justice's Court. The Supreme Court held that 360 to 368 days of that time were caused by state "institutional delays", primarily caused by prosecutorial inaction, and thus, because a defendant has no duty to prosecute himself, the state failed in its duty to speedily try the defendant. In analyzing the four factors adopted in Barker v. Wingo, the court held that the state failed in its burden relating to the length and reason of delay, that the state failed to sufficiently rebut the presumption that the delay resulted in prejudice to the defendant, and that the assertion requirement by the defendant is fulfilled when a defendant asserts his right to a speedy trial at any time before the trial. St. v. Britton, 213 M 155, 689 P2d 1256, 41 St. Rep. 2018 (1984), followed in St. v. Haskins, 220 M 199, 714 P2d 119, 43 St. Rep. 290 (1986). See also St. v. Kipp, 1999 MT 197, 295 M 399, 984 P2d 733, 56 St. Rep. 762 (1999).

Trial De Novo — Statutory Right: The defendant was convicted in City Court of driving under the influence of alcohol. He appealed his conviction to District Court and his trial de novo was not held until 492 days later. On appeal the Supreme Court held that this section is inapplicable to a trial de novo in District Court. The statutory speedy trial requirements of this section were complied with in City Court. However, the defendant's right to a speedy trial guaranteed by Art. II, sec. 24, Mont. Const., and implemented by this section was violated, necessitating reversal of his conviction. St. v. Knox, 207 M 537, 675 P2d 950, 41 St. Rep. 126 (1984), followed, as to inapplicability to a trial de novo in District Court, in St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998).

Eleven-Month Delay — No Prejudice: A petitioner who was tried for a felony 11 months after arrest was not denied a speedy trial. He was released on his own recognizance during that time, and though the state caused the delay, it was not shown to have done so consciously or intentionally. In addition, the petitioner failed to show prejudice to his defense. Creekmore v. District Court, 745 F2d 1236 (9th Cir. 1984).

Judge, Jury, and Prosecutor Failing to Appear for Trial — Not Grounds for Dismissal — Continuance Without Notice: Defendant moved to dismiss because on the date originally set for trial the defendant, his attorney, and witnesses appeared, but for disputed reasons the judge, jury, and prosecution failed to appear. The District Court was correct in denying the motion because there was no delay prejudicing defendant's right to a speedy trial, and although it would be advisable, there is no rule that courts must give notice of continuances. St. v. Roll, 206 M 259, 670 P2d 566, 40 St. Rep. 1635 (1983).

Delays Resulting From Defendant's Refusal to Waive Extradition — Right to Speedy Trial Not Violated: Where the defendant was arrested on burglary and other charges on April 21, decided on May 18 not to waive extradition to Montana, a governor's warrant was issued on June 15, the defendant waived extradition on June 30, had his initial appearance on July 6, an information was filed against him on July 22, he was arraigned on July 29, and trial was begun after several

delays on November 2, the District Court did not err in denying the defendant's motion to dismiss the charges because his right to a speedy trial was violated. The delay caused by the extradition proceedings was a delay of the defendant's own making, so the time period of that delay, 60 days, must be subtracted from the time of total delay. Under the rationale of Barker v. Wingo, 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182 (1972), and St. v. Fife, 193 M 486, 632 P2d 712, 38 St. Rep. 1334 (1981) (concluding that a delay of 194 days was presumptively prejudicial to the defendant's right to a speedy trial), the court could not say that the remaining delay of 135 days was prejudicial to the defendant, and under those cases, his right was therefore not violated. St. v. Smith, 206 M 99, 670 P2d 96, 40 St. Rep. 1533 (1983).

Economic Damage as Prejudice: Defendant quit a job in Indiana to return to Montana to face criminal charges. Economic hardship is recognized as one form of prejudice that can flow from the deprivation of a defendant's speedy trial right. St. v. Bailey, 201 M 473, 655 P2d 494, 39 St. Rep. 2242 (1982), distinguished in St. v. Johnson, 2000 MT 180, 300 M 367, 4 P3d 654, 57 St. Rep. 727 (2000).

Length of Delay Between First and Second Information: The defendant was charged with attempted sale of dangerous drugs (now criminal distribution of dangerous drugs). The information was dismissed for failure to follow 46-11-203. Several attempts were made by the State to reinstate the information. A new information was eventually filed. Defendant alleged that he was denied a speedy trial and argued that the time between the first and second information should be included in the length of delay. The Supreme Court agreed. During that time the defendant was an accused, thus the right to a speedy trial attaches. St. v. Bailey, 201 M 473, 655 P2d 494, 39 St. Rep. 2242 (1982), distinguished in St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988).

Length of Delay — No Prejudice:

When defendant presented no defense at trial and demonstrated no prejudice whatsoever from delay of robbery trial, there was no error in District Court's denial of motion to dismiss for lack of speedy trial, even though: (1) there had been a delay of 319 days (although the defendant had been incarcerated on other charges elsewhere during this time); (2) most of the delay was the fault of the state unrelated to the complexity of the case; and (3) defendant asserted his right to a speedy trial on six separate occasions. A balance of all factors demonstrated defendant was not prejudiced by a lack of a speedy trial. St. v. Worden, 188 M 94, 611 P2d 185 (1980).

While a delay of 350 days between arrest and trial cannot be considered per se a violation of the defendant's right to a speedy trial, it does shift the burden to the prosecution to explain the reason for the delay and to show the absence of prejudice to the defendant. The prosecution's explanation that the delay was attributable to several appearances by the defendant in the Montana Supreme Court, difficulties arising from the defendant's refusal to plead, and problems which arose because the case was the first homicide prosecuted under the new criminal code and new capital punishment scheme was accepted by the court. Both sides had more preparation time before the trial because of the delay, much of which cannot be charged to either party. Under these circumstances, the defendant's right to a speedy trial was not prejudiced. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Factors to Consider:

Applying the factors to be balanced as enumerated in St. v. Puzio & Allen, 182 M 163, 595 P2d 1163 (1979), the Supreme Court required the State to explain the reason for a 382-day delay between arrest and trial and to show the absence of prejudice to the defendant. No prejudice was found since the delay was largely attributable to substitutions of defense counsel that operated to benefit the defendant. St. v. Shurtliff, 187 M 235, 609 P2d 303 (1980).

There are four factors to be considered in determining whether the right to a speedy trial is violated: (1) length of delay; (2) reason for delay; (3) defendant's assertion of the right; and (4) prejudice to the defendant. Length of delay is a triggering mechanism, and a delay of 317 days is sufficient to trigger an inquiry into the other factors. A delay due to the operation of the system is chargeable to the State. An accused must take some affirmative action to obtain a trial to be entitled to a discharge for delay. This burden is satisfied by making an appropriate motion. The incarceration of the defendant for the period of the delay demonstrates affirmative prejudice against him. St. v. Puzio & Allen, 182 M 163, 595 P2d 1163 (1979). See also St. v. Cutner, 214 M 189, 692 P2d 466, 41 St. Rep. 2404 (1984).

Effect of Appeal by State: An appeal by the State of an order for a change in venue must be charged against the State in determining whether the defendant's right to a speedy trial has been violated. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Factors — Burden — Unintentional Delay: The length of the delay, the reason for the delay, the defendant's assertion of his speedy trial rights, and prejudice to the defendant are factors

which must all be considered together with other relevant circumstances. The court must engage in a difficult and sensitive balancing process. A delay of 249 days between arrest and trial shifts the burden of explaining the reason for the delay and showing the absence of prejudice to appellant to the State. Unintentional delay, such as the inability of the State to provide a judge to hear the case and the inadvertent scheduling of the trial on a holiday, must be weighed less heavily than intentional delay in determining the validity of a speedy trial claim. Prejudice to the defendant because of delay is ascertained with a consideration of the following interests of a claimant: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety or concern of the accused; and (3) limitation of the possibility the defense will be impaired. St. v. Dess, 184 M 116, 602 P2d 142 (1979), following St. v. Bretz, 185 M 253, 605 P2d 974 (1979), and St. v. Cassidy, 176 M 385, 578 P2d 735 (1978).

Accrual of Right: To determine whether a defendant has been denied due process because of a lack of a speedy trial, the time begins to run from the day of arrest and not the day the amended information was filed. He was accused of a crime on the day of his arrest, and his right to a speedy trial accrued as of that date. A pretrial delay of 207 days is sufficiently long to trigger a speedy trial inquiry and shift to the State the burden of explaining the delay and showing absence of prejudice. St. v. Freeman, 183 M 334, 599 P2d 368 (1979).

Good Cause for Delay: Although the defendant was not brought to trial until 8 months after the entry of a plea, there was good cause for the delay because the defendant made four motions which had to be fully considered and there were several substitutions of presiding judges, often at the defendant's request. Also, under these circumstances it could not be said that the defendant's trial was not postponed upon his application. St. v. Nelson, 178 M 280, 583 P2d 435 (1978).

Not Proper Issue in Asylum State: The issue of lack of speedy trial is not properly cognizable by a court of the asylum state in a habeas corpus proceeding in that court contesting extradition to another state. In re Hart, 178 M 235, 583 P2d 411 (1978).

Speedy Trial — Dismissal With Prejudice: A request by the defense counsel for a trial postponement is not a waiver of the constitutional right to a speedy trial as it is incumbent upon the County Attorney to provide a prompt trial. A trial court has discretion to disallow reprosecution when the accused has been prejudiced by a 406-day delay, as it would tend to negate the right protected by dismissal due to denial of a speedy trial. St. v. Steward, 168 M 385, 543 P2d 178 (1975). (Annotator's Comment: Case gives guidelines for Montana trial courts in determining whether to dismiss with or without prejudice.)

Prejudicial Delay of Trial: The rights of an accused convict, who was held in maximum security without counsel for a period of 4 months and whose trial was held 7 months after his motion for a speedy trial (during which time many of his witnesses disappeared), were severely prejudiced, and upon appeal the conviction and sentence were vacated with prejudice. Fitzpatrick v. Crist, 165 M 382, 528 P2d 1322 (1974).

Delay of 16 Months Not Prejudicial: A delay of 16 months in the filing of an arson charge, due to misplacement of evidence samples by the prosecution, was not prejudicial to the defendant. St. v. Burtchett, 165 M 280, 530 P2d 471 (1974), certiorari denied, Burtchett v. St., 420 US 974, 43 L Ed 2d 654, 95 S Ct 1397 (1975). This language was clarified in St. v. Krinitt, 251 M 28, 813 P2d 936, 48 St. Rep. 1088 (1991).

Dismissal Granted:

Although the defendant was not brought to trial within 6 months after the filing of the information as required under former law, the defendant was not denied his right to a speedy trial because the trial had originally been set for a date within the 6-month period and was removed from the trial calendar only when the defendant sought supervisory control on an original procedure filed in the Supreme Court, even though the cause was not set for trial until 2 months after the Supreme Court had denied the defendant's petition for supervisory control and returned the matter to the trial court. St. v. Lagerquist, 152 M 21, 445 P2d 910 (1968).

Under a former statute providing that the court shall dismiss charges against a defendant who is not brought to trial within 6 months after the filing of the information unless the trial has been postponed upon the application of the defendant, the defendant was entitled to a dismissal, even though the defendant had demurred to the information and had not entered a plea, since the County Attorney had failed to call up the demurrers for a hearing as he was entitled to do before the 6-month period had expired. State ex rel. Sullivan v. District Court, 150 M 203, 433 P2d 146 (1967).

Collateral References

Criminal Law *key* 178, 303, 576.

22 C.J.S. Criminal Law §§287 through 291; 22A C.J.S. Criminal Law §§554, 555.

21 Am. Jur. 2d Criminal Law §§479, 481.

Dismissal of state criminal charge in furtherance of, or in interest of, justice. 71 ALR 5th 1.

Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information. 39 ALR 4th 899.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes. 43 ALR 3d 281.

46-13-402. Effect of order to dismiss.

Commission Comments

1991 Comment: This statute preserves the statement contained in 1987 MCA 46-13-106 that explains the effect of an order to dismiss. However, the statute only retains the basic principle. The special procedure provided for when dismissal results from a "defect in the institution of a proceeding" is no longer retained. It is recognized that this is still a viable procedure, and 46-11-401, concerning the form of the charge, is intended to preserve that principle. It was determined that restating the principle in more certain terms within this statute was unnecessary.

Compiler's Comments

1991 Amendment: Deleted second sentence that read: "However, if the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint or if it appears at any time before judgment that a mistake has been made in charging the proper offense, the court may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new complaint, indictment, or information"; and made minor changes in style.

Case Notes

Reinstatement of Dismissed Information Impermissible: Defendant filed a brief in support of dismissal based on a lack of District Court jurisdiction. Absent any reply brief or request for extension, the court found the challenge to jurisdiction well-taken and dismissed the information and the charges. The order of dismissal was filed, but through oversight the order was not served on the attorneys. Counsel subsequently filed briefs, including a motion to set aside dismissal, but not until after the time for appealing the dismissal had expired. The court nevertheless held a hearing on the motion and reinstated the information, upon which defendant was then convicted. The Supreme Court reversed, noting that this section does not provide for reinstatement of a dismissed information. The reinstatement was a reversal of the District Court's decision on the motion to dismiss and was impermissible. Because a valid information did not exist, defendant's trial, conviction, and sentence under the reinstated information were invalid. St. v. Onstad, 234 M 487, 764 P2d 473, 45 St. Rep. 2071 (1988), followed, with regard to dismissal "with prejudice" in a criminal case, in St. v. District Court, 265 M 445, 877 P2d 1008, 51 St. Rep. 599 (1994), in which it was held that an order of dismissal in a criminal case, while not technically a judgment as that term is defined in the code of criminal procedure, is nevertheless a final adjudication of the case, is conclusive of the rights of the parties as is a final judgment, and is not subject to continuing jurisdiction by the trial court.

Collateral References

Bail *key* 74(1); Criminal Law *key* 302(1); Indictment and Information *key* 144.

8 C.J.S. Bail §§146 through 149, 176 through 219; 22A C.J.S. Criminal Law §§543 through 555; 42 C.J.S. Indictments and Informations §§233, 255.

CHAPTER 14
MENTAL COMPETENCY OF ACCUSED

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc

F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

1991 Chapter Comments: This chapter is substantially a restatement of the 1987 code governing the examination and prosecution of a defendant suffering from a mental disease or defect. See 1987 MCA 46-14-101 through 46-14-401. The provisions contained in Rule 12.2 of the Federal Rules of Criminal Procedure were considered, but it was determined that that rule did not adequately preserve the procedure that has evolved in Montana. This matter has been the subject of considerable controversy, but the 1987 provisions were retained.

These statutes do not include any of the provisions of either the Federal Rules of Criminal Procedure or the Uniform Rules of Criminal Procedure. The amendments are made to recognize established procedures and to conform to the format of the statutes.

Chapter Case Notes

Finding of Competency Based on Prior Mental Health Reports Proper When Defendant Refuses to Cooperate: Defendant, charged with drug possession, refused court-appointed counsel and unequivocally refused to cooperate with or participate in a psychiatric evaluation to determine competency. The District Court advised the defendant that it would find him mentally competent to proceed to trial based on previous staff observations and reports and records from prior proceedings. Following a trial and subsequent conviction on the drug charges, the defendant appealed, alleging that the District Court's failure to hold an evidentiary hearing on the issue of competency violated his constitutional rights. On appeal, the Supreme Court acknowledged that a claim of incompetency cannot be waived by the defendant and noted that the court has a duty to order a hearing sua sponte if there is good faith doubt as to a defendant's competency. In this case, however, the defendant failed to avail himself of the opportunity to provide the court with evidence of sufficient doubt as to require a competency hearing. As a result, the District Court's reliance on previous hospital reports in finding the defendant competent to proceed to trial was proper. St. v. Bartlett, 282 M 114, 935 P2d 1114, 54 St. Rep. 268 (1997), followed in St. v. Bostwick, 1999 MT 237, 296 M 149, 988 P2d 765, 56 St. Rep. 924 (1999).

Constitutionality of Statutory Scheme Involving Evidence of Mental Disease or Defect — Due Process Rights Protected: Prior to the 1979 changes in Montana law, insanity was treated as an affirmative defense that the defendant had to establish by a preponderance of the evidence. Now a defendant may submit evidence of mental disease or defect without applying any particular evidentiary standard. Byers contended that failure to instruct a jury on the traditional insanity defense contravened the fundamental legal principle that criminal sanctions will only be imposed on persons who act with wrongful intent in the commission of an offense, in violation of his right to due process. However, the Montana statutory scheme in this chapter, provides adequate due process protection at various stages by: (1) under 46-14-103, considering defendant's state of mind before trial by analyzing whether defendant is able to understand the proceedings and assist counsel in the defense; (2) under 46-14-102, allowing the presentation of evidence that defendant suffers from mental disease or defect and did not have the requisite mental state; and (3) under 46-14-311, considering during sentencing whether at the time of the commission of the offense, defendant's mental disease or defect rendered defendant unable to appreciate the criminality of defendant's behavior or to conform defendant's behavior to the requirements of law. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), following St. v. Korell, 213 M 316, 690 P2d 992 (1984).

Instruction on Antisocial Conduct Properly Refused: In a deliberate homicide case, the District Court properly refused the defendant's proposed instruction on antisocial conduct that read: "Antisocial conduct is defined as conduct which is marked by behavior deviating from the social norm. Anti-social conduct does not include suicide attempts, masochistic behavior, hallucinations, delusions, disturbed sleeping patterns, emotional lability [sic], or physical complaints." The court found no authoritative basis for the instruction and rejected it in favor of

the state's paraphrased version of St. v. Watson, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984), in conformance with Montana law. St. v. Ballenger, 227 M 308, 738 P2d 1291, 44 St. Rep. 1107 (1987).

Insanity Defense — Due Process Challenge: Defendant, a Vietnam veteran, had several disturbing experiences during the war. He had psychological problems upon his return. While working at St. Patrick Hospital in Missoula, he developed animosity towards his supervisor. He felt he had to kill his supervisor before the supervisor killed him. He armed himself and went to the supervisor's home, where he entered and began shooting. In an ensuing struggle, a knife was also used and both men were injured. Defendant was charged with attempted deliberate homicide and aggravated assault. Defendant gave notice he intended to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. In 1979, the Legislature abolished the traditional use of the insanity defense. Before trial, evidence may be presented to show defendant is unfit to stand trial under 46-14-221. A defendant unable to understand the proceedings or assist in his defense may not be prosecuted under 46-14-103. At trial, evidence of mental disease or defect is admissible when relevant to prove that at the time of the offense, defendant did not have the state of mind that is an element of the offense charged. Under 46-14-102, this evidence may show that the defendant did not act knowingly or purposely. The State retains the burden of proving each element of the offense beyond a reasonable doubt. If the jury finds the State did not prove the requisite mental state, under 46-14-201 (renumbered 46-14-214), it is to return a not guilty verdict. Following a verdict of guilty, the trial judge, under 46-14-311, must consider any relevant evidence to determine whether the defendant was able to appreciate the criminality of his acts or conform his conduct to the law at the time of the offense. Section 46-14-312 governs where the defendant is sentenced based on the judge's finding. Defendant contended that this statutory scheme violated the Due Process Clause of the 14th amendment (similar to Art. II, sec. 17, Mont. Const.). Defendant contended that the traditional insanity defense was so firmly imbedded in the common law that it was a fundamental right. United State Supreme Court decisions provide that the Due Process Clause does not require use of a particular insanity test or allocation of burden of proof. The Montana Supreme Court held that Montana's statutory scheme does not unconstitutionally shift the state's burden of proof of the necessary elements of the offense. The State retains its traditional burden of proving all elements beyond a reasonable doubt. In addition, the sentencing judge must consider mitigating factors. A defendant can be sentenced to imprisonment only after a finding that he was not suffering, at the time of the offense, from a mental disease or defect rendering him incapable of appreciating the criminality of his conduct or unable to conform his conduct to the law. The statutory scheme does not violate due process. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984).

Defendant Sane at Time of Crime — Insane at Other Times: Defendant, convicted of aggravated assault, contended that sentencing a man suffering from severe mental illness to prison violates the constitutional ban against cruel and unusual punishment as well as 53-21-101. When a defendant is convicted and claims that he was suffering at the time of the crime from a mental disease or defect that rendered him incapable of conforming his conduct to the requirements of the law, the sentencing judge is to consider the relevant evidence of the defendant's disorder. If the judge finds the defendant did not suffer mental illness at the time of the crime, he is to be sentenced according to the guidelines in Title 46, ch. 18. If the finding is to the contrary, the defendant must be sentenced to Warm Springs. Despite the lack of provisions in this chapter for sentencing a defendant who was sane at the time of the crime but may be insane at other times, Title 53, ch. 21, relating to treatment of the mentally ill, does not apply to criminal defendants. The defendant's claim that he is covered by Title 53, ch. 21, is in error. Without a finding of insanity followed by sentencing to a penal institution without provision for adequate treatment, defendant has suffered no statutory or constitutional violation. St. v. Mercer, 191 M 418, 625 P2d 44, 38 St. Rep. 312 (1981).

Examination After Trial — New Evidence on Mental Defect: Application for new trial based on a psychiatric examination that could have been conducted prior to trial but was not conducted until after was properly denied. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Part 1
Relevance of Mental Disease or Defect

Part Case Notes

Constitutionality of Mental Defect Provisions: The Supreme Court rejected defendant's contention that the Montana provision for notice of mental defect or disease and the mental defect or disease provisions in 46-14-101 through 46-14-401 (46-14-401 was renumbered

46-14-217) and 46-15-301 are unconstitutional. (In 1985, 46-15-301 was repealed and replaced with 46-15-321 [now repealed] through 46-15-329.) St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

46-14-101. Mental disease or defect — purpose — definition.

Commission Comments

1991 Comment: While this statute appears to be a definition of "mental disease or defect", it is actually an exclusion. The statute, therefore, is not moved to the general definition section.

Source: Model Penal Code, section 4.01.

This section will give a more positive test for separating "criminals" from those persons who are mentally irresponsible. Under the existing Montana law, probably a combination of the right-wrong irresistible impulse test, the jury frequently becomes confused, and the total condition of the accused's mind is never fully brought to bear on whether he should have been held accountable for his actions.

It is felt that this section provides as simple and as positive a test as is possible at the present time for separating the truly mentally irresponsible from the "criminal" without the invitation to the abuse of the "defense of insanity" that is inherent in the indefinite language of many tests of criminal responsibility.

While it recognizes the objective of the more modern tests that lack of understanding and lack of control need not be total in order to excuse, and that the question is one of degree, yet it does not excuse (as does the Model Penal Code rule for example), for a "substantial impairment" of either of these capacities. Rather in order to excuse, the impairment must be so great that the trier of fact can say that the accused was unable to appreciate the criminality of his conduct, or that he was unable to conform his conduct to the requirements of society.

This section is intended to expand the application of the existing Montana law to include any psychical abnormalities or subnormalities such as emotional deficiencies that have reached the dimension that they can be termed mental diseases or defects and not otherwise. While the section will expand the application of the existing Montana law in this respect, actually it does not depart from the language or test laid down in State v. Peel, 23 Mont. 358, "Unable to appreciate the nature or the consequences of his action or so far deprived of volition by the overwhelming violence of mental disease that he is unable to choose the right and avoid the wrong."

The breadth of the test of insanity provided herein should be read in conjunction with [46-14-211 through 46-14-213], which leaves control of the accused, if judged mentally deficient, entirely in the hands of the court. A defendant, if acquitted on the ground of mental disease or defect, will be committed to the Montana State Hospital, and cannot be discharged without leave of the committing court. This provision should prevent spurious insanity defenses.

Compiler's Comments

2003 Amendment: Chapter 595 inserted (1) establishing a legal standard of mental disease or defect and outlining application of the standard; inserted (2)(a) defining mental disease or defect; inserted (2)(b)(ii) through (2)(b)(iv) clarifying that the definition of mental disease or defect does not include a developmental disability or drug or alcohol intoxication or addiction; and made minor changes in style. Amendment effective October 1, 2003.

1997 Amendment: Chapter 42 before "this chapter" deleted "46-14-204, 46-14-312, 46-14-313, and". Amendment effective March 12, 1997.

1991 Amendment: At beginning inserted "46-14-204, 46-14-312, 46-14-313, and" and at end substituted "behavior" for "conduct"; and made minor change in style.

Applicability of Commission Comments: Because Ch. 713, L. 1979, deleted the first subsection (providing that one is not responsible for criminal conduct if at the time of the conduct a mental disease or defect resulted in inability to either appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law) the commission comments are largely inapplicable in interpreting the existing language. See, however, 46-14-102 and 46-14-201 (renumbered 46-14-214), under which mental disease or defect can be used to show one did not have a state of mind which is an element of the offense.

Case Notes

Mental Disease or Defect Affirmatively Defined: Noting that Montana does not offer a statutory definition of mental disease or defect, the Supreme Court held that pursuant to 46-14-302, the Legislature intends courts to interpret the term and that an affirmative definition is necessary to resolve the ambiguity between legal and medical definitions. Modifying the definition in the New York Criminal Procedure Law, the court defined mental disease or defect under this section as an affliction with a mental disease or mental condition that is manifested

by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment, and rehabilitation. This affirmative definition complements but does not alter the exclusion in this section of an abnormality manifested only by repeated criminal or other antisocial behavior. Wooster appealed from a decision that he continued to be a danger to society, thus preventing his release from the state hospital where he was confined after being acquitted and determined incompetent to stand trial for the deliberate homicide of his daughters. The appropriate inquiry in determining whether an acquittee no longer suffers from a mental disease or defect is whether the acquittee suffers from a present mental disease or defect that causes the person to present a substantial risk, which the state must prove in civil proceedings by clear and convincing evidence. It is not necessary that the court find that an acquittee have the same mental disease or defect that was present when the acquittee was originally committed. Wooster's mental evaluation showed that he would be dangerous if released without supervision and further treatment, and the District Court did not err in concluding that Wooster posed a continuing danger to himself and others, warranting further confinement at the state hospital. However, the Supreme Court remanded for further determination of whether Wooster's antisocial personality disorder met the affirmative definition of mental disease or defect. St. v. Wooster, 1999 MT 22, 293 M 195, 974 P2d 640, 56 St. Rep. 103 (1999). Wooster I was affirmed in St. v. Wooster, 2001 MT 4, 304 M 56, 16 P3d 409 (2001). See also Jones v. U.S., 463 US 354, 77 L Ed 2d 694, 103 S Ct 3043 (1983), Foucha v. La., 504 US 71, 118 L Ed 2d 437, 112 S Ct 1780 (1992), and Kans. v. Hendricks, 521 US 346, 138 L Ed 2d 501, 117 S Ct 2072 (1997).

Instruction on Antisocial Conduct Properly Refused: In a deliberate homicide case, the District Court properly refused the defendant's proposed instruction on antisocial conduct that read: "Antisocial conduct is defined as conduct which is marked by behavior deviating from the social norm. Anti-social conduct does not include suicide attempts, masochistic behavior, hallucinations, delusions, disturbed sleeping patterns, emotional lability [sic], or physical complaints." The court found no authoritative basis for the instruction and rejected it in favor of the state's paraphrased version of St. v. Watson, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984), in conformance with Montana law. St. v. Ballenger, 227 M 308, 738 P2d 1291, 44 St. Rep. 1107 (1987).

Application of Section to Defendant — No Sandstrom Violation: A jury instruction that stated that the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or antisocial conduct was a proper statement of the law. Further, in this case, the instruction did not create an impermissible Sandstrom-like presumption because substantial evidence was presented indicating that defendant had a mental disease that was not manifested only by criminal or antisocial conduct. Thus, there was no basis for the jury to presume that the mental disease of the defendant should be disregarded. St. v. Watson, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984).

No Impermissible Mandatory Presumption: This section does not create an unconstitutional mandatory presumption as to defendant's mental state or intent. St. v. Watson, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984).

Long-Term Effects of Alcoholism: Under former law, when the defense of intoxication shifted to a defense based on expert testimony as to the long-term effects of alcoholism, it became a defense of mental disease or defect within the purview of the statutes requiring notice. St. v. Ostwald, 180 M 530, 591 P2d 646 (1979).

Submission of Defense to Jury — When Justified: Under former law, to justify submitting the defense of mental disease or defect excluding responsibility to the jury, the defendant must have introduced some evidence showing: (1) that he had a mental disease or defect at the time of the incident; and (2) that as a result of such mental disease or defect the defendant was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. St. v. Neel, 177 M 93, 580 P2d 456 (1978).

M'Naughten and "Irresistible Impulse" Rules Abandoned: The M'Naughten and "irresistible impulse" rules no longer apply, having been supplanted by the definition of criminal irresponsibility in subsection (1) of 46-14-101 (since deleted). The definition in subsection (1) was the same as that adopted by the American Law Institute in Article IV, Section 4.01, of the Model Penal Code except that the Montana Legislature substituted "is unable" for "lacks substantial capacity"; by that change the Legislature intended to impose a stricter test for mental incapacity than that contemplated by the Model Penal Code. State ex rel. Krutzfeldt v. District Court, 163 M 164, 515 P2d 1312 (1973). (Annotator's Note: Definition is now found in 46-14-311.)

Attorney General's Opinions

Commitment for Psychiatric Examination: Justices' Courts and City Courts are not within the scope of this chapter, and Justices of the Peace and City Court Judges do not have jurisdiction to commit criminal defendants for psychiatric examination. 36 A.G. Op. 71 (1976).

Law Review Articles

In Re Ests. of Swansons: The Slayer Statute and the Impact of a Guilty Plea on Collateral Estoppel in Montana, Arant, 71 Mont. L. Rev. 217 (2010).

46-14-102. Evidence of mental disease or defect or developmental disability admissible to prove state of mind.

Commission Comments

Source: The source is Model Penal Code, section 4.02(1).

Compiler's Comments

2003 Amendment: Chapter 452 after "defect" inserted "or developmental disability". Amendment effective October 1, 2003.

1991 Amendment: After "admissible" deleted "whenever it is relevant"; and made minor change in style.

Case Notes

Evidence of Knowing or Purposeful Action Despite Mental Disease or Defect — Aggravated Assault Conviction Affirmed: Meckler was convicted of aggravated assault and committed to the Department of Public Health and Human Services for life. Meckler contended that he could not be found guilty of aggravated assault because he lacked the ability to conform his conduct to the requirements of the law due to a mental disease or defect. It was undisputed that Meckler suffered from paranoid schizophrenia and was not taking his medications at the time he committed the offense; however, the presence of a mental disease or defect does not necessarily preclude that person from acting purposely or knowingly. Evidence showed that Meckler knew that he struck the victim and that the victim suffered serious bodily injury as a result and showed that Meckler was lucid, coherent, and functional prior to and after the attack. Thus, the trial court correctly concluded that Meckler's volitional act was done knowingly or purposely, and the assault conviction was affirmed. The mental disease or defect was properly considered at sentencing rather than as an element of the offense. St. v. Meckler, 2008 MT 277, 345 M 302, 190 P3d 1104 (2008).

When Defendant's Mental State May Be Considered — Insanity Defense Not Allowed: There is no constitutional right to an insanity defense in Montana, but a defendant's mental disease or defect may be considered at three separate stages of a criminal proceeding: (1) prior to trial, when a defendant may be examined to determine the ability to understand the proceedings and participate in the defense; (2) at trial, when a defendant may introduce evidence of mental disease or defect whenever relevant to prove an absence of the requisite mental state; and (3) at sentencing, when a convicted defendant may claim that at the time of the offense the defendant was suffering from a mental disease or defect that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's conduct to the requirements of law. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004).

Deliberate Homicide by Intoxicated Defendant — Consideration of Intoxication Properly Excluded on Issue of Intent: Egelhoff was found heavily intoxicated in an automobile in which his two companions lay, shot in their heads by a revolver similar to Egelhoff's. Egelhoff's revolver had been fired twice, and he had gunpowder residue on his hands. The Montana Supreme Court held that a jury instruction and part of 45-2-203 providing that "an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense" violated Egelhoff's right to due process of law. The Montana Supreme Court overruled any portion of St. v. Byers, 261 M 17, 861 P2d 860 (1993), holding to the contrary and, citing Teague v. Lane, 489 US 288 (1989), applied its decision to cases pending upon direct review but not to cases pending upon collateral review. St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995). On the state's writ of certiorari to the United States Supreme Court, the court reversed, holding that the due process of law clause of the United States Constitution was not violated by the instruction and 45-2-203. Mont. v. Egelhoff, 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (1996), followed in St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004).

Constitutionality — No Shift of Burden of Proof to Defense — Evidence of Mental Disease or Defect Not Affirmative Defense: Defendant contended that this section unconstitutionally shifts the burden to the defense to prove that defendant did not have the requisite mental state to

commit deliberate homicide because of a mental disease or defect, rather than requiring the state to prove the mental state as an element of the crime. This section enables a defendant to present evidence concerning a claim of mental disease or defect, but it does not require a defendant to prove beyond a reasonable doubt that the disease absolutely negated the required state of mind. To require that proof would be to determine that the presentation of that evidence rises to the level of an affirmative defense. However, evidence of mental disease or defect is not an affirmative defense. It is up to the jury to determine the interaction of any mental disease or defect that a defendant may have and the required state of mind to commit the act in question. This section does not relieve the state of its burden to prove all elements of the crime and is constitutional. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), following St. v. Watson, 211 M 401, 686 P2d 879 (1984), and St. v. Korell, 213 M 316, 690 P2d 992 (1984), distinguishing Walker v. Endell, 850 F2d 470 (9th Cir. 1987), overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995), and followed in St. v. Santos, 273 M 125, 902 P2d 510, 52 St. Rep. 865 (1995).

Defense of Extreme Mental or Emotional Stress — No Reduction in Charges Absent Preponderance of Evidence That Reduction Warranted: Byers claimed that his assertion of the affirmative defense of extreme mental or emotional stress reduced the charge of deliberate homicide to mitigated deliberate homicide. He did not ask for a directed verdict, but rather asked the judge to determine as a matter of law that the jury could consider only mitigated deliberate homicide. However, in order for the charge to be reduced, the jury must be convinced by a preponderance of the evidence that a reduction is warranted. The determination of the weight to be given to testimony regarding mental or emotional stress is within the exclusive province of the jury as trier of fact. In Byers' case, the testimony of defense and state experts was contradictory and inconsistent and the jury chose to accept the conclusion that Byers was not under extreme mental or emotional stress at the time of the crime. Therefore, denial of Byers' motion to reduce the charge was not error. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), distinguishing St. v. Frates, 160 M 431, 503 P2d 47 (1972), St. v. Grenfell, 172 M 345, 564 P2d 171 (1977), and St. v. Kamrud, 188 M 100, 611 P2d 188 (1980), and overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

No Conclusive Presumption of Criminal Intent in Presentation of Evidence of Mental Disease or Defect — Sandstrom Not Contravened: Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979), established that the due process clause of the U.S. Constitution prohibits the use of a presumption that relieves the prosecution from the burden of proving mental state by requiring an inference of the existence of criminal intent from the fact of criminal conduct. Under this section, evidence of a mental disease or defect is admissible to prove that a criminal defendant did or did not have a state of mind that is an element of the charged offense. Cowan contended that because mental disease or defect does not constitute a valid defense to a criminal charge in Montana, a conclusive presumption is established as to mental state in violation of Sandstrom. However, under Leland v. Oreg., 343 US 790, 96 L Ed 1302, 72 S Ct 1002 (1952), the due process clause does not require the use of a particular insanity test or allocation of burden of proof, and the constitutionality of the abolition of the insanity defense has been affirmed in St. v. Korell, 213 M 316, 690 P2d 992 (1984). Cowan further contended that if, under 45-5-112, any evidence of organized or integrated conduct will suffice to establish criminal conduct beyond a reasonable doubt in spite of clear manifestations of insanity, then no one will ever be acquitted on grounds of insanity because it would be impossible for anyone to cause harm without engaging in a minimal level of organized conduct. However, 45-5-112 establishes a permissive inference rather than a conclusive presumption, and an inference does not violate the Sandstrom rule. Therefore, the Montana statutes governing the presentation of evidence of mental disease or defect do not establish a conclusive or unrebuttable presumption of criminal intent in contravention of the due process clause or Sandstrom. St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993).

Testimony Refused Absent Pretrial Notice: The District Court properly refused to allow testimony offered under this section relating to evidence that defendant suffered from a mental disease or defect when the defense did not give pretrial notice of relying on mental disease or defect as required under 46-14-201 (renumbered 46-14-214). St. v. Popescu, 237 M 493, 774 P2d 395, 46 St. Rep. 996 (1989).

Evidence of Abused Spouse Syndrome Not Applicable in Support of Credibility: The District Court did not err in refusing to authorize expenditures for retention of an expert who would testify to the effects of abused spouse syndrome when the defendant did not seek the testimony in regard to whether the necessary state of mind was present to justify homicide, but rather to support the defendant's credibility. St. v. Dannels, 226 M 80, 734 P2d 188, 44 St. Rep. 472 (1987).

Epilepsy as Developmental Disability — Defense of Lack of Intent: The defendant Walker did not produce any evidence in support of his contention that his epilepsy affected his ability to form the requisite intent at the time the crimes were committed. In fact, results of a mental examination tended to disprove his theory. The Supreme Court declined to rule on the issue of whether epilepsy could constitute a developmental disability negating the element of intent, if properly proven. Instead, the court applied the rule set out in St. v. Hilton, 183 M 13, 597 P2d 1171 (1979), that when a defendant properly pleads guilty, he waives all factual defenses as well as constitutional violations which occurred prior to the plea. St. v. Walker, 220 M 70, 712 P2d 1348, 43 St. Rep. 182 (1986).

Purpose or Knowledge — Substantial Evidence to Support: Defendant appeared at the home of the victim and rang the doorbell. When the victim answered, defendant entered, chased her through the house, cornered her, and strangled her for 10 to 20 seconds with a rope. Defendant fled, and the victim asked two construction workers for help. The workers chased and caught defendant. Defendant notified the prosecution of his intention to rely on mental disease or defect as a defense. Defendant contended that he did not possess the requisite mental elements of purposely or knowingly. Defendant was convicted of aggravated assault. On appeal, the defendant contended the evidence was insufficient to prove purpose or knowledge. The Supreme Court found that defendant remembered the entire incident. He was aware of his conduct. He tried to conceal his reason for fleeing, which tended to prove he had done something wrong. This evidence supported a finding that he acted knowingly. Defendant also acted purposely. His conduct was not the result of reflex. He possessed the rope prior to entering the home and harmed the woman because he thought she owed him money. This tended to prove his conscious object to engage in strangling the victim. The evidence was sufficient to support the finding that defendant acted purposely or knowingly. St. v. Raty, 214 M 114, 692 P2d 17, 41 St. Rep. 2354 (1984).

Insanity Defense — Due Process Challenge: Defendant, a Vietnam veteran, had several disturbing experiences during the war. He had psychological problems upon his return. While working at St. Patrick Hospital in Missoula, he developed animosity towards his supervisor. He felt he had to kill his supervisor before the supervisor killed him. He armed himself and went to the supervisor's home, where he entered and began shooting. In an ensuing struggle, a knife was also used and both men were injured. Defendant was charged with attempted deliberate homicide and aggravated assault. Defendant gave notice he intended to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. In 1979, the Legislature abolished the traditional use of the insanity defense. Before trial, evidence may be presented to show defendant is unfit to stand trial under 46-14-221. A defendant unable to understand the proceedings or assist in his defense may not be prosecuted under 46-14-103. At trial, evidence of mental disease or defect is admissible when relevant to prove that at the time of the offense, defendant did not have the state of mind that is an element of the offense charged. Under 46-14-102, this evidence may show that the defendant did not act knowingly or purposely. The State retains the burden of proving each element of the offense beyond a reasonable doubt. If the jury finds the State did not prove the requisite mental state, under 46-14-201 (renumbered 46-14-214), it is to return a not guilty verdict. Following a verdict of guilty, the trial judge, under 46-14-311, must consider any relevant evidence to determine whether the defendant was able to appreciate the criminality of his acts or conform his conduct to the law at the time of the offense. Section 46-14-312 governs where the defendant is sentenced based on the judge's finding. Defendant contended that this statutory scheme violated the Due Process Clause of the 14th amendment (similar to Art. II, sec. 17, Mont. Const.). Defendant contended that the traditional insanity defense was so firmly imbedded in the common law that it was a fundamental right. United State Supreme Court decisions provide that the Due Process Clause does not require use of a particular insanity test or allocation of burden of proof. The Montana Supreme Court held that Montana's statutory scheme does not unconstitutionally shift the state's burden of proof of the necessary elements of the offense. The State retains its traditional burden of proving all elements beyond a reasonable doubt. In addition, the sentencing judge must consider mitigating factors. A defendant can be sentenced to imprisonment only after a finding that he was not suffering, at the time of the offense, from a mental disease or defect rendering him incapable of appreciating the criminality of his conduct or unable to conform his conduct to the law. The statutory scheme does not violate due process. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984).

Insanity Defense Restriction — Not Cruel and Unusual: Defendant, a Vietnam veteran, had several disturbing experiences during the war. He had psychological problems upon his return. While working at St. Patrick Hospital in Missoula, he developed animosity towards his

supervisor. He felt he had to kill his supervisor before the supervisor killed him. He armed himself and went to the supervisor's home, where he entered and began shooting. In an ensuing struggle, a knife was also used and both men were injured. Defendant was charged with attempted deliberate homicide and aggravated assault. Defendant gave notice he intended to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. Defendant contended that Montana's abolition of insanity as an affirmative defense violated the eighth amendment to the United States Constitution's prohibition of cruel and unusual punishment (similar to Art. II, sec. 22, Mont. Const.). The Supreme Court held that the criminal code does not permit punishment of a mentally ill person who has not committed a crime. The sentencing court is required to review the convicted defendant's mental condition at the time of the offense under 46-14-311. If the court finds a mental disease or defect existed, the defendant is placed in an appropriate institution for care and treatment. This independent review of mental condition is designed to prevent the imposition of cruel and unusual punishment. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984), followed in St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993).

Failure to Rebut Defendant's Witnesses — Other Evidence Considered: The failure of the State to rebut the defendant's witnesses regarding his drugged condition did not make the evidence submitted by the defendant "uncontroverted evidence" requiring a directed verdict for acquittal; the State introduced evidence in its case in chief regarding the defendant's condition sufficient to meet its burden for submitting the case to the jury. St. v. Doney, 194 M 22, 636 P2d 1377, 38 St. Rep. 1707 (1981).

Jury Instructions on Diminished Capacity Defense — Constitutionality — Burden of Proof on Defendant: Under 46-14-201 (renumbered 46-14-214) (prior to the 1979 amendment), the State required the defendant to prove his legal insanity. Defendant objected, however, to the jury instruction on mental disease or defect (diminished capacity), saying it unconstitutionally shifted the burden to him to disprove intent, an essential element of the crime charged. Because psychiatric evaluation as to subtle gradations of mental impairment is highly subjective and not within the common experience of the layman juror, the State may in fairness require a defendant to convince the jury of his diminished capacity by a preponderance of the evidence. The State meticulously proved the facts constituting the deliberate homicide and aggravated kidnapping crimes beyond any reasonable doubt, based on all the evidence, including the evidence of defendant's alleged mental disease or defect. The State could then constitutionally refuse to sustain the affirmative defense of diminished capacity unless the defendant proved that defense by a preponderance of the evidence. The instructions here required defendant to establish his diminished capacity by raising a reasonable doubt, rather than by proof by a preponderance of the evidence. They posited a more liberal burden of proof than that to which the defendant was entitled. The instructions were therefore constitutional. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Burden of Proof:

On remand from the U.S. Supreme Court to decide the issue of whether the trial court's instruction on mental disease or defect unconstitutionally shifted the burden of proof of the state of mind to the defendant, the Supreme Court concluded that not only did the instructions not shift to the defendant the burden of disproving any element of the offenses charged, but the instructions, when read together, also required the defendant to establish his diminished capacity merely by raising a reasonable doubt, rather than proof by a preponderance of the evidence. The Supreme Court held that to prove a defense under this section, a defendant must prove by a preponderance of the evidence that he lacked the ability, due to mental disease or defect, to form that criminal mental state which is defined by statute as an element of the crime with which he is charged. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

An instruction that the amount of evidence sufficient to raise a reasonable doubt of insanity entitles the defendant to an acquittal is erroneous, as insanity must be proven by a preponderance of the evidence. St. v. Caryl, 168 M 414, 543 P2d 389 (1975).

The State was not obliged to present proof of the defendant's sanity in a rape prosecution. St. v. Olson, 156 M 339, 480 P2d 822 (1971).

Declaratory of Common Law: The provision that an insane person cannot be tried or punished was held declaratory of the common law as it had existed at least since Blackstone's day. St. v. Kitchens, 129 M 331, 286 P2d 1079 (1955).

Law Review Articles

State v. Cowan: The Consequences of Montana's Abolition of the Insanity Defense, Stimpson, 55 Mont. L. Rev. 503 (1994).

After Abolition: The Present State of the Insanity Defense in Montana, Bender, 45 Mont. L. Rev. 133 (Winter 1984).

Insanity and the Criminal Law in Montana, Smith, 8 Mont. L. Rev. 1 (1947).

Insanity as a Defense in the Criminal Law of Montana, Coombs, 1 Mont. L. Rev. 69 (1940).

Breaking the Stone Tablet: Criminal Law Without the Insanity Defense, Thomas, 19 Idaho L. Rev. 239 (1983).

Collateral References

Experts: admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR 4th 666.

Modern status of test of criminal responsibility—state cases. 9 ALR 4th 526.

Addiction: drug addiction or related mental state as defense to criminal charge. 73 ALR 3d 16.

Amnesia as affecting capacity to commit crime or stand trial. 46 ALR 3d 544.

Diminished responsibility: mental or emotional condition as diminishing responsibility for crime. 22 ALR 3d 1228.

Burden of proof: modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case. 17 ALR 3d 146.

46-14-103. Mental disease or defect or developmental disability excluding fitness to proceed.

Commission Comments

Source: Model Penal Code, section 4.04.

The standard established by this section for fitness to proceed is the most universally accepted of all the standards now being used. The present Montana section merely refers to "insanity" but it has been interpreted in case law to mean the same as the language of the proposed section. See State v. Kitchens, 129 Mont. 331, 286 P.2d 1079 (1955) interpreting R.C.M. 1947, section 94-9301. Thus, the defendant's capacity to understand and defend must be determined prior to trial. Defendant's fitness to proceed is determined by the court based on either the psychiatric report provided for in [46-14-206] or upon a separate hearing. The procedure for determining fitness to proceed and all related steps are set out in [46-14-221 and 46-14-222].

Compiler's Comments

2003 Amendment: Chapter 452 after "defect" inserted "or developmental disability". Amendment effective October 1, 2003.

1991 Amendment: Made minor changes in style.

Case Notes

Indicia of Accused's Competency — Sua Sponte Competency Hearing Not Required Absent Good Faith Doubt Regarding Competency: During proceedings on an intimidation charge, McCarthy behaved inappropriately at times and submitted incoherent and confusing documents and his demeanor was odd and destructive. Following conviction, McCarthy contended that the trial court should have ordered a competency hearing sua sponte to determine McCarthy's competence to stand trial. The state asserted that the trial court was not presented with substantial evidence that McCarthy was incompetent, pointing out that McCarthy's competency was never questioned and no medical opinion on the issue was presented. The Supreme Court agreed with the state. A court has a duty to order a competency hearing sua sponte if the court has reasonable grounds for concluding that there is a good faith doubt as to a defendant's competency, but in determining whether to order a hearing, the court does not rely on a single indicia of doubt, but must instead rely on the totality of events. Indicia may include the accused's demeanor at trial, a prior medical opinion regarding competency, the nature of the crime, the accused's past behavior, and a claimed defense of mental instability. Here, McCarthy had a rational and factual understanding of the proceedings, his statements did not call into question his mental health, and he presented no medical opinions regarding his competency. Therefore, the trial court did not have reasonable grounds for concluding that there was a good faith doubt as to McCarthy's competency and thus was not required to order a competency hearing sua sponte. St. v. McCarthy, 2004 MT 312, 324 M 1, 101 P3d 288 (2004). See also St. v. Bartlett, 282 M 114, 935 P2d 1114 (1997), St. v. Bostwick, 1999 MT 237, 296 M 149, 988 P2d 765 (1999), and St. v. Garner, 2001 MT 222, 306 M 462, 36 P3d 346 (2001).

When Defendant's Mental State May Be Considered — Insanity Defense Not Allowed: There is no constitutional right to an insanity defense in Montana, but a defendant's mental disease or defect may be considered at three separate stages of a criminal proceeding: (1) prior to trial, when a defendant may be examined to determine the ability to understand the proceedings and

participate in the defense; (2) at trial, when a defendant may introduce evidence of mental disease or defect whenever relevant to prove an absence of the requisite mental state; and (3) at sentencing, when a convicted defendant may claim that at the time of the offense the defendant was suffering from a mental disease or defect that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's conduct to the requirements of law. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004).

Failure to Hold Hearing to Determine Defendant's Competence to Stand Trial Not Erroneous — Competency Standard: Following conviction for theft and forgery, Garner argued that he was not competent at the time that he entered guilty pleas because he was not taking prescribed antidepressant medication and that his conduct at trial, coupled with his attorney's expressed doubt about his competence, provided enough evidence to require a competency hearing. The state contended that evidence was insufficient to require a hearing. The Supreme Court agreed with the state. Constitutional due process requirements and this section provide that a person who is unable to understand the proceedings or assist in the defense as a result of mental disease or defect may not be tried, convicted, or sentenced for commission of an offense as long as the incapacity endures. The standard for determining whether an accused is competent to stand trial is whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings. When sufficient doubt is raised as to an accused's competency to stand trial, the District Court has a duty to sua sponte order a hearing on the issue; however, there is no fixed or immutable signs that invariably indicate the need for further inquiry because that inquiry is necessarily based on the individual circumstances presented. A defendant's use of drugs does not per se necessitate a competency hearing. Here, Garner clearly had a strained relationship with his attorney, but insisted that his depression was not a basis for the strained relationship and repeatedly told the court that he was competent to proceed. Despite Garner's argument that his overall behavior at trial necessitated a competency hearing, the Supreme Court found, after examining the record, that Garner's behavior indicated a fair degree of competency. Garner capably questioned witnesses and presented a cogent account of his actions and failed to raise any issue before the court relating to not having the antidepressant medication prior to entering the guilty pleas. The evidence presented before the trial judge did not raise a bona fide doubt as to Garner's capacity to participate in his trial. Garner's alternative argument, that the District Court should have at least held a retrospective competency hearing when presented with additional evidence of a previous suicide attempt and past psychological treatment, was also unpersuasive. Given that 7 years elapsed since Garner's hospitalization and the fact that Garner failed to demonstrate how the additional evidence affected his competence to stand trial, the District Court properly declined to hold a retrospective competency hearing. St. v. Garner, 2001 MT 222, 306 M 462, 36 P3d 346 (2001).

Indicia of Sufficient Doubt of Competency to Proceed: As set out in Griffin v. Lockhart, 935 F2d 926 (8th Cir. 1991) (citing Drope v. Mo., 420 US 162, 43 L Ed 2d 103, 95 S Ct 896 (1975)), factors determining whether sufficient doubt exists as to defendant's fitness to proceed to trial necessitating a competency hearing include: (1) evidence of irrational behavior by the accused; (2) the demeanor of the accused at trial; and (3) any prior medical opinion on the competency of the accused to stand trial. Here, Bostwick's own counsel repeatedly expressed doubt regarding Bostwick's competency to proceed; Bostwick took two standardized competency tests that raised additional concerns; the medical report contained conflicting evidence regarding competence; and Bostwick's medical history was not obtained. Thus, the indicia of Bostwick's incompetence established sufficient doubt regarding his fitness to proceed to trial to require a competency hearing. The case was remanded to determine if a meaningful retrospective competency hearing could be held, and the District Court was instructed as to how to proceed whether or not Bostwick was found to be competent. St. v. Bostwick, 1999 MT 237, 296 M 149, 988 P2d 765, 56 St. Rep. 924 (1999).

Finding of Competency Based on Prior Mental Health Reports Proper When Defendant Refuses to Cooperate: Defendant, charged with drug possession, refused court-appointed counsel and unequivocally refused to cooperate with or participate in a psychiatric evaluation to determine competency. The District Court advised the defendant that it would find him mentally competent to proceed to trial based on previous staff observations and reports and records from prior proceedings. Following a trial and subsequent conviction on the drug charges, the defendant appealed, alleging that the District Court's failure to hold an evidentiary hearing on the issue of competency violated his constitutional rights. On appeal, the Supreme Court acknowledged that a claim of incompetency cannot be waived by the defendant and noted that the court has a duty to order a hearing sua sponte if there is good faith doubt as to a defendant's

competency. In this case, however, the defendant failed to avail himself of the opportunity to provide the court with evidence of sufficient doubt as to require a competency hearing. As a result, the District Court's reliance on previous hospital reports in finding the defendant competent to proceed to trial was proper. St. v. Bartlett, 282 M 114, 935 P2d 1114, 54 St. Rep. 268 (1997), followed in St. v. Bostwick, 1999 MT 237, 296 M 149, 988 P2d 765, 56 St. Rep. 924 (1999).

Attorney's Voluntary Disclosure of Confidential Statements — No Waiver of Attorney-Client Privilege: Defendant's court-appointed attorney called himself to the stand to testify about defendant's inconsistent statements. Based on the District Court's acceptance of the testimony, the Supreme Court found the following factors prejudiced defendant's right to a fair trial: (1) the attorney's testimony of defendant's statements was extremely prejudicial and had limited probative value; (2) the state presented no evidence that defendant intended to waive his right not to divulge this privileged information; and (3) given defendant's unfamiliarity with courtroom procedure, defendant's right against self-incrimination need not be surrendered in order to assert a statutory right. Conviction was reversed. St. v. Statczar, 228 M 446, 743 P2d 606, 44 St. Rep. 1668 (1987).

Competency to Testify as a Witness: A 1976 psychiatric report performed by Warm Springs State Hospital declared an arson defendant unfit to proceed because of mental disease or defect. In a subsequent unrelated proceeding in which this person was to testify merely as a witness, the 1976 psychiatric report did not require a conclusion that he was incompetent to testify as a witness. St. v. Stephens, 198 M 140, 645 P2d 387, 39 St. Rep. 822 (1982).

Declaratory of Common Law: The provision that an insane person cannot be tried or punished was held declaratory of the common law as it had existed at least since Blackstone's day. St. v. Kitchens, 129 M 331, 286 P2d 1079 (1955).

Collateral References

Criminal Law *key* 625, 981(1).

22A C.J.S. Criminal Law §§777, 795.

"Mentally retarded": competency to stand trial of criminal defendant diagnosed as "mentally retarded"—modern cases. 23 ALR 4th 493.

Part 2
Procedure When Mental Disease or Defect an Issue

Part Case Notes

Finding of Competency Based on Prior Mental Health Reports Proper When Defendant Refuses to Cooperate: Defendant, charged with drug possession, refused court-appointed counsel and unequivocally refused to cooperate with or participate in a psychiatric evaluation to determine competency. The District Court advised the defendant that it would find him mentally competent to proceed to trial based on previous staff observations and reports and records from prior proceedings. Following a trial and subsequent conviction on the drug charges, the defendant appealed, alleging that the District Court's failure to hold an evidentiary hearing on the issue of competency violated his constitutional rights. On appeal, the Supreme Court acknowledged that a claim of incompetency cannot be waived by the defendant and noted that the court has a duty to order a hearing sua sponte if there is good faith doubt as to a defendant's competency. In this case, however, the defendant failed to avail himself of the opportunity to provide the court with evidence of sufficient doubt as to require a competency hearing. As a result, the District Court's reliance on previous hospital reports in finding the defendant competent to proceed to trial was proper. St. v. Bartlett, 282 M 114, 935 P2d 1114, 54 St. Rep. 268 (1997), followed in St. v. Bostwick, 1999 MT 237, 296 M 149, 988 P2d 765, 56 St. Rep. 924 (1999).

Fitness to Proceed Within Discretion of Trial Court — Test: In cases where mental disease or defect is an issue, the determination as to whether defendant is fit to proceed is within the discretion of the trial court. The test, as defined in St. v. Austad, 197 M 70, 641 P2d 1373 (1981), is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him. St. v. Statczar, 228 M 446, 743 P2d 606, 44 St. Rep. 1668 (1987), followed in St. v. Santos, 273 M 125, 902 P2d 510, 52 St. Rep. 865 (1995).

Bifurcated Trial Not Allowed:

The defendant argued that it was error for the trial court to refuse to grant a bifurcated trial on the issue of his insanity/diminished mental capacity to commit the crime. The Supreme Court held that a defendant who relies on a defense of mental disease or defect is not entitled to a bifurcated trial on that issue. McKenzie v. Osborne, 195 M 26, 640 P2d 368, 38 St. Rep. 1745 (1981).

The denial of the defendant's motion for severance for trial of the issues of his guilt or innocence and his sanity was proper since this chapter provides for those matters to be presented at the same trial and to the same jury. St. v. Olson, 156 M 339, 480 P2d 822 (1971).

Failure to Appoint Psychiatric Expert to Assist Defense — No Error: It is not error for a District Court to refuse to appoint a psychiatric expert to assist defense counsel absent a showing of prejudice. McKenzie v. Osborne, 195 M 26, 640 P2d 368, 38 St. Rep. 1745 (1981).

Constitutionality of Mental Defect Provisions: The Supreme Court rejected defendant's contention that the Montana provision for notice of mental defect or disease and the mental defect or disease provisions in 46-14-101 through 46-14-401 (46-14-401 was renumbered 46-14-217) and 46-15-301 are unconstitutional. (In 1985, 46-15-301 was repealed and replaced with 46-15-321 [now repealed] through 46-15-329.) St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Jury Instruction as to Effect of Acquittal: Under former law, a court could refuse to give an instruction which would inform the jury of the result of an acquittal by reason of mental disease or defect because such result is a wholly extraneous consideration, not connected with the jury's role in determining factual issues before it. St. v. French, 166 M 196, 531 P2d 373 (1975).

Trial of Issue of Sanity to Both Court and Jury: Under former law, a defendant who elected to try the issue of sanity to the trial judge alone was not, after an unfavorable finding by the court, foreclosed from presenting the defense of insanity to the jury. State ex rel. Krutzfeldt v. District Court, 163 M 164, 515 P2d 1312 (1973).

Part Law Review Articles

Determination of Insanity: This note discusses St. v. Noble, 142 M 284, 384 P2d 504 (1963). Niklas, 25 Mont. L. Rev. 151 (1963).

Insanity as a Defense in the Criminal Law of Montana, Coombs, 1 Mont. L. Rev. 69 (1940).

Part Collateral References

22A C.J.S. Criminal Law §§777 through 795.

46-14-202. Examination of defendant.

Commission Comments

[See compiler's comments below.]

1991 Comment: This statute amends the 1987 code in three areas. First, subsection (1) contains an amendment recognizing that the court and the prosecution, as well as the defense, may request an examination to determine whether the defendant is fit to proceed. Second, the amended statute recognizes that the psychology profession is distinct from the medical profession and that methods of examination accepted by either profession are appropriate. Compare subsection (3) and 1987 MCA 46-14-202(3). Third, subsection (4) has been amended to provide for the costs of an examination in instances in which the defendant is indigent.

Commission Comment Not Divided: This section is a recodification of part of section 95-505, R.C.M. 1947. Section 46-14-203 (renumbered 46-14-206) is also derived from section 95-505. The commission comments to section 95-505 are printed in their entirety under 46-14-202.

Source: Model Penal Code, section 4.05.

[Sections 46-14-202 and 46-14-203 (renumbered 46-14-206), prior to amendment in 1979, provide] for a single psychiatric examination of the defendant to determine the issues of: (a) mental disease or defect as an affirmative defense; (b) competency of the defendant to stand trial; and (c) when directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged. This proposal avoids the need for a separate psychiatric examination on each issue.

[Section 46-14-202(1)] contains alternative methods for designating the examining psychiatric experts, depending on the varying conditions within a particular jurisdiction. Also, the court retains the power to select experts of its own choosing. This provision allowing a psychiatrist retained by the defendant to witness and participate in the psychiatric examination is designed to assure the defendant an expert of his own choice. This arrangement may be of considerable value in avoiding the so-called battle of experts. The commission also agreed that there should be a time limit imposed on this examination commitment. The sixty-day period [deleted in 1974] was deemed reasonable.

[Section 46-14-202(3)] is self-explanatory. This provision clarifies a point which was not included in the prior sections. [Section 46-14-206] lists the contents of the psychiatric report which will provide the psychiatric examiner with a guide as to what the report must contain. It is the hope of the commission that these concrete requirements will aid the examiner in making the kind of report that will assist the defense counsel, prosecutor and the court. [Section 46-14-206] is the commission's attempt to solve a very difficult problem. This provision is correlated with

[46-14-217] on how much of the communication with the psychiatric examiner will be privileged. If the statements made by the defendant to the psychiatric examiner are not privileged, the defendant may be cautioned by his lawyer not to answer any questions, thus making the examination difficult if not impossible.

The constitutionality of sections providing for a psychiatric examination of the defendant by court-appointed experts, as provided in [46-14-202(1)], who may be summoned by the court to testify at the trial, has been uniformly sustained in recent decisions.

Compiler's Comments

2007 Amendment: Chapter 140 in (1) in two places and in (4)(a)(i) before "court" deleted "district"; in (4)(a)(i) after "paid" inserted "by the court or, in district court proceedings" and at end substituted "except as provided in subsection (4)(a)(iv)" for "as provided in 3-5-901"; in (4)(a)(ii) at beginning after "if" deleted "the defendant was represented by an attorney assigned pursuant to the Montana Public Defender Act, Title 47, chapter 1, and", after "paid by" inserted "the defendant or, if the defendant was represented by an attorney pursuant to the Montana Public Defender Act, Title 47, chapter 1, by", and at end after "defender" inserted "except as provided by subsection (4)(a)(iv)"; in (4)(a)(iii) at beginning after "if" deleted "the defendant was represented by an attorney assigned pursuant to the Montana Public Defender Act, Title 47, chapter 1, and", after "equally by the" inserted "court or, in district court proceedings, by the", after "administrator, and" inserted "the defendant or, if the defendant was represented by an attorney assigned pursuant to the Montana Public Defender Act, Title 47, chapter 1, by", and at end after "defender" inserted "except as provided in subsection (4)(a)(iv)"; inserted (4)(a)(iv) providing that costs and expenses may not be charged to the court administrator or state public defender offices; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 deleted former (4) that read: "(4) If the defendant is indigent or the examination occurs at the request of the prosecution, the cost of the examination must be paid by the state as provided in 3-5-901"; inserted (4)(a) designating payment of costs of examination and other associated expenses by office of court administrator, by office of state public defender, or equally by both offices; and inserted (4)(b) defining other associated expenses. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2001 Amendments — Composite Section: Chapter 303 in (1) in two places and in (2) after "licensed clinical psychologist" inserted "or advanced practice registered nurse"; and made minor changes in style. Amendment effective April 20, 2001.

(Version effective July 1, 2002) Chapter 585 at end of (4) substituted "must be paid by the state as provided in 3-5-901" for "must be paid by the county or the state, or both, according to procedures established under 3-5-902(1)"; and made minor changes in style.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1991 Amendment: Near beginning of (1) substituted "motion requesting an examination" for "notice of his intent to rely on a mental disease or defect under 46-14-201" and after "proceed" inserted "is raised by the district court, prosecution, or defense counsel"; in (3), after "medical", inserted "or psychological"; at beginning of (4) inserted "If the defendant is indigent or the examination occurs at the request of the prosecution"; and made minor changes in style.

1987 Amendment: In (1), in two places, and once in (2), after "qualified psychiatrist", inserted "or licensed clinical psychologist".

1985 Amendment: Inserted (4) requiring county, state, or both to pay costs of psychiatric examination.

1983 Amendment: In (1), substituted "Montana state hospital" for "Warm Springs state hospital".

1981 Amendment: Substituted "If the defendant or his counsel files a written notice of his intent to rely on a mental disease or defect under 46-14-201 (renumbered 46-14-214) or raises the issue of his fitness to proceed" for "When there is reason to doubt the defendant's fitness to proceed or reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause" in (1).

Case Notes

Additional Commitment Period Proper Given Findings That Defendant Could Regain Fitness to Proceed in Reasonable Time: Following Yarnall's charge of deliberate homicide, the District Court committed Yarnall for a psychiatric evaluation. One evaluating doctor concluded that Yarnall was unfit to proceed, and another doctor opined that Yarnall was fit to proceed. Following a fitness hearing, the District Court concluded that Yarnall was unfit to proceed and committed him to state custody for so long as the unfitness endured. The court set a review

hearing for about 2 months later and also set a trial date. Two other doctors subsequently testified that Yarnall remained unfit but suggested that there was a possibility that fitness could be regained. The District Court interpreted 46-14-221 to mean that Yarnall could be recommitted for another 6 months and the situation reviewed in 90 days. At the review hearing, Yarnall was considered fit to proceed, pleaded guilty, and was sentenced to a 40-year term. The Supreme Court subsequently decided in St. v. Meeks, 2002 MT 246, 312 M 126, 58 P3d 167 (2002), that a District Court must dismiss criminal charges against a defendant who has been found unfit to proceed if after a 90-day review there is no evidence to suggest that the defendant will regain fitness within the reasonably foreseeable future. Yarnall then moved to withdraw his guilty plea and have the charges dismissed based on Meeks, but the motion was denied. On appeal, the Supreme Court cited the post-Meeks decision in St. v. Tison, 2003 MT 342, 318 M 465, 81 P3d 471 (2003), in which an additional commitment at the expiration of the 90-day review prescribed in 46-14-221 was improper absent findings regarding the defendant's fitness to proceed. In Yarnall's case, the District Court did make specific findings that Yarnall could regain fitness in the reasonably foreseeable future. The Supreme Court distinguished Meeks and Tison and held that the District Court properly weighed the evidence and concluded that it could order an additional commitment because it was not prepared to find that Yarnall would not regain fitness. The District Court acted within the statutory directives of 46-14-221 and thus did not err in denying Yarnall's motion to dismiss. St. v. Yarnall, 2004 MT 333, 324 M 164, 102 P3d 34 (2004).

Dismissal of Charges Required if Defendant's Fitness to Proceed Undetermined After Ninety Days — Civil Proceedings Mandated Upon Dismissal: Pursuant to Jackson v. Ind., 406 US 715 (1972), after only a pretrial competency hearing, it is unconstitutional to hold a person who is unfit to proceed without following civil and criminal commitment procedures provided by state law. Due process requires, at a minimum, some rational relationship between the nature and duration of commitment and its purpose. Thus, 46-14-221 requires the committing court to review a defendant's fitness to proceed within 90 days of the original commitment, and if, after 90 days, the court finds that the defendant is still unable to proceed and will not be fit to proceed within the reasonably foreseeable future, the proceeding against the defendant must be dismissed. However, dismissal does not mandate freedom for a potentially violent mentally ill individual. The statute provides that once the criminal proceeding is dismissed, the next mandatory step is to pursue civil commitment proceedings under Title 53, ch. 20 or 21. However, an alternative procedure is available under this section, in which the court may set the time for determining fitness to proceed. St. v. Tison, 2003 MT 342, 318 M 465, 81 P3d 471 (2003), following St. v. Meeks, 2002 MT 246, 312 M 126, 58 P3d 167 (2002).

Authority of Municipal Court to Commit Mentally Incapacitated Defendant: A plain reading of 3-6-104 provides that Municipal Courts have all powers and duties of District Courts over matters within their jurisdiction, including the power and duty to commit mentally incapacitated criminal defendants to the Department of Public Health and Human Services, pursuant to the procedures and requirements of this title, if the Municipal Court determines that the defendant suffers from a mental disease or defect and lacks the fitness to proceed to trial. If there is any question regarding a Municipal Court's commitment of a criminal defendant, the issue may be appealed to the District Court pursuant to 3-5-303. Great Falls v. Dept. of Public Health and Human Services, 2002 MT 108, 309 M 467, 47 P3d 836 (2002).

No Attribution to the State of Psychological Report Requested by Defendant — Minor Errors in Timing of Report Held Not Prejudicial: After committing a murder, Scarborough, a schizophrenic, requested a mental evaluation. The evaluation was done by the State Hospital, and the report of the results was given to the prosecution. Scarborough then asked for a psychological evaluation by his own experts. That request was granted by the District Court. The state then asked for an evaluation by its own expert, and that request was also granted. Scarborough objected to the use by the prosecution of the report resulting from the evaluation performed at the State Hospital, arguing that the state had two reports to his one, but both the reports were allowed by the District Court. The Supreme Court said that the only possible way that the use of both reports could have been prejudicial to Scarborough was if the State Hospital report was attributed to the state. The Supreme Court did not so attribute that report, noting that the evaluation was requested by Scarborough and that the review of the state's investigation file by the State Hospital physicians as part of the evaluation did not somehow convert the state hospital evaluation from one requested by the defense to one requested by the state. The Supreme Court also noted that even if the report by the State Hospital was attributed to the state, the state did not have an unfair advantage because Scarborough was examined by two physicians, making the state and Scarborough even in the number of physicians used, and

the state did not have more medical experts testify than did Scarborough. The Supreme Court also held that the District Court error of allowing the state's expert to examine Scarborough somewhat earlier than the District Court should have did not prejudice Scarborough's defense. St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

No Prejudice From Alleged Ineffective Assistance of Counsel During Pretrial Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the pretrial phase, applying the two-pronged test in Strickland v. Wash., 466 US 668 (1984). Dawson alleged that counsel was ineffective in failing to: (1) object to the procedure and use of Dawson's psychiatric evaluation; (2) advise him of his rights during the evaluation process; and (3) conduct an adequate pretrial investigation. On the first point, the procedure followed and the use of the psychiatric evaluation were consistent with the statutory procedure in effect at the time, and counsel had no reason to question it. On the second point, Dawson satisfied the deficiency prong of the Strickland test because he should have been informed of the potential consequences of participating in the evaluation; however, there was no evidence that Dawson was prejudiced at trial or sentencing. Dawson's version of the crimes was consistent with his defense theory, and at no time did he admit killing the victims, so counsel's failure to advise him of his Miranda rights was not prejudicial. On the third point, Dawson could not establish prejudice as a result of counsel's failure to obtain complete records and staff notes of the evaluation, to investigate Dawson's possible epilepsy, or to investigate or pursue Dawson's drug use—at trial or at sentencing as a mitigating factor. The District Court did not err when it found that Dawson did not receive ineffective assistance at the pretrial phase. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000). See also St. v. Armfield, 214 M 229, 693 P2d 1226 (1984), St. v. Smith, 217 M 453, 705 P2d 1110 (1985), and Hans v. St., 283 M 379, 942 P2d 674 (1997).

Indicia of Sufficient Doubt of Competency to Proceed: As set out in Griffin v. Lockhart, 935 F2d 926 (8th Cir. 1991) (citing Drope v. Mo., 420 US 162, 43 L Ed 2d 103, 95 S Ct 896 (1975)), factors determining whether sufficient doubt exists as to defendant's fitness to proceed to trial necessitating a competency hearing include: (1) evidence of irrational behavior by the accused; (2) the demeanor of the accused at trial; and (3) any prior medical opinion on the competency of the accused to stand trial. Here, Bostwick's own counsel repeatedly expressed doubt regarding Bostwick's competency to proceed; Bostwick took two standardized competency tests that raised additional concerns; the medical report contained conflicting evidence regarding competence; and Bostwick's medical history was not obtained. Thus, the indicia of Bostwick's incompetence established sufficient doubt regarding his fitness to proceed to trial to require a competency hearing. The case was remanded to determine if a meaningful retrospective competency hearing could be held, and the District Court was instructed as to how to proceed whether or not Bostwick was found to be competent. St. v. Bostwick, 1999 MT 237, 296 M 149, 988 P2d 765, 56 St. Rep. 924 (1999).

Ineffective Assistance Claims Denied — No Right to Miranda Warning When Defendant Requests Psychiatric Exam — Duty to Inform Defendant of Consequences of Participation in Evaluation: The defendant alleged that counsel failed to provide effective counsel based on lack of communication, adequacy of advice regarding mitigated deliberate homicide, adequacy of advice regarding mental illness, requesting and agreeing to the dissemination of mental health evaluations, ineffectiveness of the investigation and preparation for trial, and abandonment of the appeal. The Supreme Court denied the petition for postconviction relief except to allow the defendant to amend the petition to address appealable sentencing issues. The defense counsel's acquiescence to dissemination of the mental health report pursuant to this section is not grounds for a finding of ineffective assistance of counsel. Subsequently decided case law cannot be used to judge an attorney's conduct at the time of representation. A defendant has no constitutional right to be informed of Miranda rights when, through the defendant's attorney, the defendant requests a psychiatric exam. Counsel has a duty to inform a defendant of the consequences of participation in a psychiatric evaluation. In this case, the defendant was not prejudiced by the defense counsel's alleged failure to inform the defendant of the right to remain silent during the mental health evaluation. Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Ineffective Assistance Claims Denied — No Prejudice Shown Under Strickland Test: Applying the Strickland test for determining effectiveness of counsel, the Supreme Court dismissed defendant's claims that he was ineffectively represented at trial, during the penalty phase proceedings, and during the course of direct appeal, including claims based on: (1) failure to object to prosecutor's statements that defendant was intoxicated at the time of the crime, when that was in fact true, and to object to an intoxication instruction that was based on statutory language; (2) failure to object to closing arguments during which the prosecutor portrayed himself as the victim and narrated in the first person (following U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)); (3) failure to object to the lack of corroborating evidence regarding a witness's testimony when the objection lacked merit and would have been properly overruled (following St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993)); (4) failure to investigate and pursue a mental defect defense after defendant's own psychologist of choice found him capable of going to trial (see Harris v. Vasquez, 949 F2d 1497 (9th Cir. 1990)); (5) failure to move for a substitute judge when there was no reasonable probability that the outcome of the trial would have differed with another judge presiding; (6) failure to request a change of venue absent evidence of juror bias and failure to adequately voir dire the jury when there was no reasonable probability that the outcome of the trial would have differed had voir dire been conducted more thoroughly; (7) ineffectiveness in investigating a witness's background when counsel's investigation fell within the wide range of competent assistance; (8) failure to investigate defendant's suicide attempt; (9) failure to object to certain jury instructions allowing inference of the existence of the requisite mental state from the acts of the accused (following St. v. Cowan, 260 M 510, 861 P2d 884 (1993)); (10) failure to object to instructions setting out the elements of aggravated kidnapping when defendant did not specify which of the alternatives in the instruction were objectionable (following Schad v. Ariz., 501 US 624, 115 L Ed 2d 555, 111 S Ct 2491 (1991)); (11) failure to object to the absence of Native Americans on the jury when, given recent census data, counsel could not have demonstrated that Native Americans were underrepresented on the panel; and (12) failure to object to the presence of armed officers in the courtroom (following Holbrook v. Flynn, 475 US 560, 89 L Ed 2d 525, 106 S Ct 1340 (1986)). Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Error to Deny Standby Counsel's Motion for Mental Examination of Defendant: Prior to Bartlett's trial for possession of dangerous drugs with intent to sell, his standby counsel moved for a mental examination to determine competency to stand trial. The motion was denied. The Supreme Court held that a motion by the standby counsel for a mental examination under this section must be granted as a matter of right. The District Court erred by denying the motion, and the conviction was reversed. St. v. Bartlett, 271 M 429, 898 P2d 98, 52 St. Rep. 520 (1995).

Appointment of Only One Mental Expert Required: Cox contended that the testimony of an additional expert on prison conditions would have benefited the defense of mental disease or defect. However, a court is required to appoint only one qualified psychiatrist or licensed clinical expert when mental disease or defect is at issue. Because a psychiatrist had already been appointed to determine Cox's mental state, including his ability to form the requisite mental state for the crime of burglary, it was not an abuse of discretion for the court to deny Cox's request to present evidence of the prison conditions expert's testimony at trial. St. v. Cox, 266 M 110, 879 P2d 662, 51 St. Rep. 680 (1994).

Second Psychiatric Evaluation Properly Denied: Defendant was given one psychiatric evaluation. The statute does not provide for a second evaluation. The District Court did not err in denying his motion for a second evaluation merely because defendant thought the findings of the first evaluation were unfair. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985), followed in St. v. Gray, 258 M 424, 853 P2d 93, 50 St. Rep. 596 (1993).

Privileged Matter — Psychiatric Report on Criminal Defendant: Report of doctor appointed by the lower court (on motion of defendant's counsel) to conduct an examination of defendant pursuant to 46-14-202 was a privileged communication under 27-1-804, and lower court properly dismissed action alleging that the report was false, fraudulent, defamatory, and caused mental anguish. Burgess v. Silverglat, 217 M 186, 703 P2d 854, 42 St. Rep. 1123 (1985).

Failure to Appoint Psychiatric Expert to Assist Defense — No Error: It is not error for a District Court to refuse to appoint a psychiatric expert to assist defense counsel absent a showing of prejudice. McKenzie v. Osborne, 195 M 26, 640 P2d 368, 38 St. Rep. 1745 (1981).

Failure to Designate Psychiatrist: The failure to designate a particular psychiatrist in a court order pursuant to this section is not reversible error because the spirit of the section was substantially fulfilled in that the examination was conducted by a qualified psychiatrist and there was no substantial interference with the defendant's rights. St. v. Buckman, 193 M 145, 630 P2d 743, 38 St. Rep. 1007 (1981).

State Prison as "Other Suitable Facility": The District Court did not err in committing the defendant to the state prison for psychological examination because this section allows such a commitment to a hospital or "other suitable facility". St. v. Buckman, 193 M 145, 630 P2d 743, 38 St. Rep. 1007 (1981).

Hearsay Allegations and Unobjected to Psychiatric Examination No Basis for Error: Where the defendant robbery suspect's defense counsel failed to object to the court's order sending the defendant to the state prison for a psychiatric examination and relied instead upon subsequent extra-record statements of prison employees about the inability of the prison to properly conduct the evaluation, there was no basis upon which to find that error had been committed by the District Court. St. v. Ritchson, 193 M 112, 630 P2d 234, 38 St. Rep. 1015 (1981).

Role of Superintendent of Warm Springs State Hospital: Defendant, charged with burglary and theft, filed notice that he intended to rely upon the defense of mental disease or defect and was sent to Warm Springs State Hospital for an examination. In appealing his conviction, the defendant alleged that the District Court had erred in denying his motion for a second psychiatric evaluation because the original examination was not conducted personally by the superintendent of the hospital, as designated in the order for the evaluation. The Supreme Court, after reviewing the record as a whole, concluded that the defendant's evaluation was in compliance with the court order and the statutory requirements. St. v. Kyle, 189 M 38, 614 P2d 1059 (1980).

Attorney General's Opinions

Financial Obligation for Psychiatric Evaluation in Criminal Trials: The county is financially responsible for psychiatric evaluations conducted to determine whether a criminal defendant is mentally fit to proceed at trial. (See 1985, 2003, and 2005 amendments.) 37 A.G. Op. 37 (1977).

No Commitment by JPs and City Courts: Justices of the Peace and City Court Judges have no authority to commit persons for examination under this section. (See Great Falls v. Dept. of Public Health and Human Services, 2002 MT 108, 309 M 467, 47 P3d 836 (2002).) 36 A.G. Op. 71 (1976).

Collateral References

Psychiatric examination: right of accused in criminal prosecution to presence of counsel at court-appointed or -approved psychiatric examination. 3 ALR 4th 910.

46-14-204. Prosecution's right to examination.

Commission Comments

1991 Comment: This statute preserves 1987 MCA 46-14-201(1). The statute contains a reciprocal requirement that when the prosecution receives a report of examination, that report must be disclosed to the defense within 10 days.

Compiler's Comments

2001 Amendment: Chapter 303 in (1) at end after "licensed clinical psychologist" inserted "or advanced practice registered nurse"; and made minor changes in style. Amendment effective April 20, 2001.

Case Notes

Additional Commitment Period Proper Given Findings That Defendant Could Regain Fitness to Proceed in Reasonable Time: Following Yarnall's charge of deliberate homicide, the District Court committed Yarnall for a psychiatric evaluation. One evaluating doctor concluded that Yarnall was unfit to proceed, and another doctor opined that Yarnall was fit to proceed. Following a fitness hearing, the District Court concluded that Yarnall was unfit to proceed and committed him to state custody for so long as the unfitness endured. The court set a review hearing for about 2 months later and also set a trial date. Two other doctors subsequently testified that Yarnall remained unfit but suggested that there was a possibility that fitness could be regained. The District Court interpreted 46-14-221 to mean that Yarnall could be recommitted for another 6 months and the situation reviewed in 90 days. At the review hearing, Yarnall was considered fit to proceed, pleaded guilty, and was sentenced to a 40-year term. The Supreme Court subsequently decided in St. v. Meeks, 2002 MT 246, 312 M 126, 58 P3d 167 (2002), that a District Court must dismiss criminal charges against a defendant who has been found unfit to proceed if after a 90-day review there is no evidence to suggest that the defendant will regain fitness within the reasonably foreseeable future. Yarnall then moved to withdraw his guilty plea and have the charges dismissed based on Meeks, but the motion was denied. On appeal, the Supreme Court cited the post-Meeks decision in St. v. Tison, 2003 MT 342, 318 M 465, 81 P3d 471 (2003), in which an additional commitment at the expiration of the 90-day review prescribed in 46-14-221 was improper absent findings regarding the defendant's fitness

to proceed. In Yarnall's case, the District Court did make specific findings that Yarnall could regain fitness in the reasonably foreseeable future. The Supreme Court distinguished Meeks and Tison and held that the District Court properly weighed the evidence and concluded that it could order an additional commitment because it was not prepared to find that Yarnall would not regain fitness. The District Court acted within the statutory directives of 46-14-221 and thus did not err in denying Yarnall's motion to dismiss. St. v. Yarnall, 2004 MT 333, 324 M 164, 102 P3d 34 (2004).

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Authority of Prosecution to Conduct Mental Examination When Defense Based on Extreme Mental or Emotional Stress and Not Mental Disease or Defect: Park, who was charged with forgery and deliberate homicide, filed notice of his intent to use the affirmative defense that extreme mental and emotional stress caused him to commit the offenses and gave notice of his intent to use expert psychological testimony in the course of his defense. The state requested an examination of Park by its own psychological expert, but Park objected to the oral part of the requested examination on the grounds that his defense was not reliance upon a mental disease or defect and the state therefore had no right to a psychological examination. The Supreme Court, citing St. v. Hess, 252 M 205, 828 P2d 382 (1992), held that although 46-14-205 does not expressly grant the prosecution access for psychological testing purposes to a defendant who bases a defense upon mental or emotional stress, that section does apply generally to a defense based upon mental state to be proved by expert psychological testimony and therefore applied to Park's defense. In reaching this conclusion, the Supreme Court noted that: (1) fairness requires that if the defendant is going to rely upon his mental state, the state be allowed to test the defendant as to that mental state; (2) it was not holding that the state has a right of access for psychological testing purposes to every defendant in a case relying upon mitigated deliberate homicide, only that the state has the right in those cases in which the defendant puts the defendant's mental state at issue; and (3) access by the state to the defendant should not depend upon whether a defendant actually presents psychological testimony because to so require would put the state at a disadvantage and delay the trial. Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Examination of Defendant by State Psychiatrist — Supervisory Control Granted to Prevent Denial of Defendant's Fifth Amendment Right Against Self-Incrimination: Park, who was charged with forgery and deliberate homicide, filed notice of his intent to use the affirmative defense that extreme mental and emotional stress caused him to commit the offenses and gave notice of his intent to use expert psychological testimony in the course of his defense. The state requested an examination of Park by its own psychological expert, but Park objected to the oral part of the requested examination on the grounds that, first, his defense was not reliance upon a mental disease or defect and the state therefore had no right to a psychological examination, and, second, he did not want to discuss his offenses with the psychological expert for fear of waiving his constitutional right against self-incrimination. The Supreme Court, citing Mapes v. District Court, 250 M 524, 822 P2d 91 (1991), held that the case was appropriate for supervisory control because Park was faced with the loss of a constitutional right as part of the psychological

interview and appeal could not prevent the loss of that right. Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

46-14-205. Access to defendant for examination.

Compiler's Comments

2001 Amendment: Chapter 303 near beginning after "licensed clinical psychologist" inserted "or advanced practice registered nurse"; and made minor changes in style. Amendment effective April 20, 2001.

1991 Amendment: Near beginning substituted "prosecution" for "state" and after "psychologist" deleted "or other expert"; and made minor changes in style.

1987 Amendment: Near beginning after "qualified psychiatrist" inserted "licensed clinical psychologist".

Case Notes

Defense of Mental State for Mitigated Deliberate Homicide — Right of Defendant to Refuse to Answer Questions by State Psychological Expert — Remedy for Unrebuttable Testimony: Park, who was charged with forgery and deliberate homicide, filed notice of his intent to use the affirmative defense that extreme mental and emotional stress caused him to commit the offenses and gave notice of his intent to use expert psychological testimony in the course of his defense. The state requested an examination of Park by its own psychological expert, but Park objected to the oral part of the requested examination on the grounds that his defense was not reliance upon a mental disease or defect and the state therefore had no right to a psychological examination. In its decision granting supervisory control over the proceedings, the Supreme Court held that: (1) Park did not by the use of the defense of mitigated deliberate homicide waive his right to remain silent guaranteed by the U.S. and Montana Constitutions when questioned by the state's psychological expert; (2) by invoking his right against self-incrimination in the interview with the state's psychological expert, Park should not be able to put his version of the facts in the case before the jury through the testimony of his own psychological expert because giving the defendant that right would be similar to allowing Park to testify but not be subject to cross-examination, which the Supreme Court held in St. v. Wilson, 193 M 318, 631 P2d 1273 (1981), a defendant would not be allowed to do; and (3) if Park refuses to talk to the state's psychological expert but takes the witness stand in his own defense, the state's expert may listen to Park's testimony and respond accordingly to that testimony. Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998), distinguished in St. v. Hill, 2000 MT 308, 302 M 415, 14 P3d 1237, 57 St. Rep. 1301 (2000), holding Park inapplicable when defendant failed to place his mental state directly at issue by alleging existence of mental disease or defect.

Testimony Allowed Despite Failure to Disclose Diagnosis Before Trial — Sanctions Appropriate: A medical expert examined defendant before trial in order to determine defendant's mental state but neglected to include a diagnosis. The trial court correctly concluded that the state breached its duty to disclose as required by 46-15-327. Under 46-15-329, the court allowed the expert to testify but did not allow testimony as to the diagnosis. Defendant contended that he was effectively prevented from cross-examining the expert for fear of inadvertently bringing up the diagnosis and that cross-examination prohibited his right to address the discovery violation. The sanctions applied against the state were within the court's discretion because the actual testimony was no different from what was contemplated and defendant could point to no damage caused by the testimony. The court did not abuse its discretion by allowing the expert to testify after it was established that the state had failed to disclose the diagnosis before trial. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Authority to Compel Evaluation When Defense Based on Battered Woman Syndrome: Defendant Hess contended that the District Court had no authority to compel a psychiatric and psychological evaluation of a defendant who asserts the affirmative defense of justifiable use of force based on battered woman syndrome. Defendant asserted that statutes governing the procedure for mental evaluation when mental state is an issue do not expressly provide for battered woman syndrome or place the defendant's mental state at issue when the syndrome is a factor. The Supreme Court noted that the defendant put her own mental state at issue by relying on that defense and then calling an expert to testify in support of that defense; therefore, this section authorizes the state to request an evaluation for the limited purposes of rebuttal once mental state becomes an issue, despite the lack of a specific statutory reference to the defense of justifiable use of force based on battered woman syndrome. St. v. Hess, 252 M 205, 828 P2d 382, 49 St. Rep. 217 (1992), followed, with respect to a psychological defense not based upon mental

disease or defect, in Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Failure to Appoint Psychiatric Expert to Assist Defense — No Error: It is not error for a District Court to refuse to appoint a psychiatric expert to assist defense counsel absent a showing of prejudice. McKenzie v. Osborne, 195 M 26, 640 P2d 368, 38 St. Rep. 1745 (1981).

Examination by Either Prosecution or Defense: The court's denial of the State's motion for a psychiatric examination was reversed because any psychiatrist or other expert may testify regarding a defendant's mental condition provided he has examined the defendant, and this section allows for such examination by either the prosecution or the defense. A psychiatrist chosen by the State should have been allowed to examine the defendant in addition to the one used by the defense. State ex rel. Nelson v. District Court, 173 M 221, 566 P2d 1382 (1977).

46-14-206. Report of examination.

Commission Comments

1991 Comment: This statute preserves 1987 MCA 46-14-203 but reflects several differences. First, subsection (1) has been amended to require the examiner's opinion as to whether the defendant is seriously mentally ill. Subsection (1)(b) is also amended to allow the court to require an opinion as to whether the defendant can appreciate the criminality of his conduct or conform his conduct to the requirements of law. Finally, the statute does not retain the requirement that examination reports be filed in triplicate with the County Clerk. Notice of the existence of such a report, the discovery rules, and the principles of good faith were considered to have rendered the provision unnecessary.

Source: See commission comments to 46-14-202.

Compiler's Comments

2003 Amendment: Chapter 452 in (1)(b) after "disorder" inserted "as defined in 53-21-102"; in (1)(c), (1)(e), and (2) after "defect" inserted "or developmental disability"; and made minor changes in style. Amendment effective October 1, 2003.

1997 Amendment: Chapter 490 in (1)(b), after "defendant", substituted "suffers from a mental disorder and may require commitment" for "is seriously mentally ill, as defined in 53-21-102". Amendment effective July 1, 1997.

Saving Clause: Section 40, Ch. 490, L. 1997, was a saving clause.

1993 Amendment: Chapter 397 in (1) substituted "must" for "may"; and at end of (1)(b) inserted "or is seriously developmentally disabled, as defined in 53-20-102". Amendment effective April 19, 1993.

1991 Amendment: In (1) substituted "may" for "shall"; at end of (1)(b) inserted "including an opinion as to whether the defendant is seriously mentally ill as defined in 53-21-102"; inserted (1)(e) concerning opinion of defendant's capacity to appreciate criminality of behavior or to conform behavior; deleted (3) that read: "(3) The report of the examination shall be filed in triplicate with the clerk of court, who shall deliver copies to the county attorney and to counsel for the defendant"; and made minor changes in style.

Case Notes

No Attribution to the State of Psychological Report Requested by Defendant — Minor Errors in Timing of Report Held Not Prejudicial: After committing a murder, Scarborough, a schizophrenic, requested a mental evaluation. The evaluation was done by the State Hospital, and the report of the results was given to the prosecution. Scarborough then asked for a psychological evaluation by his own experts. That request was granted by the District Court. The state then asked for an evaluation by its own expert, and that request was also granted. Scarborough objected to the use by the prosecution of the report resulting from the evaluation performed at the State Hospital, arguing that the state had two reports to his one, but both the reports were allowed by the District Court. The Supreme Court said that the only possible way that the use of both reports could have been prejudicial to Scarborough was if the State Hospital report was attributed to the state. The Supreme Court did not so attribute that report, noting that the evaluation was requested by Scarborough and that the review of the state's investigation file by the State Hospital physicians as part of the evaluation did not somehow convert the state hospital evaluation from one requested by the defense to one requested by the state. The Supreme Court also noted that even if the report by the State Hospital was attributed to the state, the state did not have an unfair advantage because Scarborough was examined by two physicians, making the state and Scarborough even in the number of physicians used, and the state did not have more medical experts testify than did Scarborough. The Supreme Court also held that the District Court error of allowing the state's expert to examine Scarborough

somewhat earlier than the District Court should have did not prejudice Scarborough's defense. St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

No Prejudice From Alleged Ineffective Assistance of Counsel During Pretrial Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the pretrial phase, applying the two-pronged test in Strickland v. Wash., 466 US 668 (1984). Dawson alleged that counsel was ineffective in failing to: (1) object to the procedure and use of Dawson's psychiatric evaluation; (2) advise him of his rights during the evaluation process; and (3) conduct an adequate pretrial investigation. On the first point, the procedure followed and the use of the psychiatric evaluation were consistent with the statutory procedure in effect at the time, and counsel had no reason to question it. On the second point, Dawson satisfied the deficiency prong of the Strickland test because he should have been informed of the potential consequences of participating in the evaluation; however, there was no evidence that Dawson was prejudiced at trial or sentencing. Dawson's version of the crimes was consistent with his defense theory, and at no time did he admit killing the victims, so counsel's failure to advise him of his Miranda rights was not prejudicial. On the third point, Dawson could not establish prejudice as a result of counsel's failure to obtain complete records and staff notes of the evaluation, to investigate Dawson's possible epilepsy, or to investigate or pursue Dawson's drug use—at trial or at sentencing as a mitigating factor. The District Court did not err when it found that Dawson did not receive ineffective assistance at the pretrial phase. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000). See also St. v. Armfield, 214 M 229, 693 P2d 1226 (1984), St. v. Smith, 217 M 453, 705 P2d 1110 (1985), and Hans v. St., 283 M 379, 942 P2d 674 (1997).

Report Finding No Disease or Defect: A report of a psychiatrist from the state hospital finding no mental disease or defect (see 1997 amendment) precludes the granting of a pretrial acquittal. St. v. French, 166 M 196, 531 P2d 373 (1975).

46-14-213. Psychiatric or psychological testimony upon trial.

Commission Comments

1991 Comment: This statute is amended in two ways. First, subsection (1) does not retain the provision that prevents the jury from being informed that either the court or the Superintendent of the Montana State Hospital chose the expert. That code provision was considered unnecessary. Second, the statute contains an additional statement expressly barring an expert opinion before a jury on the ultimate issue of the defendant's mental state or mental capacity.

Compiler's Comments

2001 Amendment: Chapter 303 throughout section after "licensed clinical psychologist" inserted "or advanced practice registered nurse"; and made minor changes in style. Amendment effective April 20, 2001.

1991 Amendment: In (1) deleted former second sentence that read: "If the issue is being tried before a jury, the jury may not be informed that the psychiatrist or licensed clinical psychologist was designated by the court or by the superintendent of the Montana state hospital" and in second sentence and near beginning of (2), after "psychologist", deleted "or other expert"; in (2) near end of first sentence before "diagnosis", inserted "and the medical or psychological" and at end deleted "at the time of the commission of the offense charged, and his opinion as to the ability of the defendant to have a particular state of mind which is an element of the offense charged", in second sentence, near beginning before "diagnosis", inserted "examination and", after "diagnosis" deleted "and opinion", near end, before "diagnosis", inserted "examination or medical or psychological", and after "diagnosis" deleted "or opinion", and inserted last sentence prohibiting opinion on ultimate issue of state of mind that is an element of offense charged; and made minor changes in style.

1987 Amendment: Throughout section, after "psychiatrist", inserted reference to "licensed clinical psychologist" and made minor changes in phraseology.

1983 Amendment: In (1), substituted "Montana state hospital" for "Warm Springs state hospital".

Case Notes

Expert Testimony Not Targeting Defendant's State of Mind During Crimes Properly Admitted: In Sandrock's trial for sexual intercourse without consent, incest, and witness tampering, Sandrock maintained that he was suffering from a mental disease or defect and could not have committed the crimes because he could not have formed the requisite mental state. A medical expert testified that although Sandrock was an oddball, he knew right from wrong when he wrote several letters to his wife outlining his intended actions. Sandrock moved for a mistrial because the expert's testimony violated the prohibition on ultimate issue testimony. The motion was denied, and on appeal, the Supreme Court affirmed. Although a medical expert may not offer an opinion on the ultimate issue of whether a defendant had a particular state of mind that is an element of an offense, the expert may state the nature of a medical examination and the medical or psychological diagnosis of the defendant's mental condition, and testimony in the form of an opinion or inference that would otherwise be admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. Here, the expert's testimony did not target the ultimate issue of whether Sandrock actually possessed the requisite mental states at the time that the crimes were committed, so the mistrial motion was properly denied. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004). See also St. v. Santos, 273 M 125, 902 P2d 510 (1995).

When Defendant's Mental State May Be Considered — Insanity Defense Not Allowed: There is no constitutional right to an insanity defense in Montana, but a defendant's mental disease or defect may be considered at three separate stages of a criminal proceeding: (1) prior to trial, when a defendant may be examined to determine the ability to understand the proceedings and participate in the defense; (2) at trial, when a defendant may introduce evidence of mental disease or defect whenever relevant to prove an absence of the requisite mental state; and (3) at sentencing, when a convicted defendant may claim that at the time of the offense the defendant was suffering from a mental disease or defect that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's conduct to the requirements of law. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004).

Refusal of Opinion Testimony Regarding Defendant's Mental State Not Erroneous: The District Court refused to admit the opinion testimony of two doctors regarding Hoffman's mental state at the time that Hoffman committed aggravated assault. Hoffman asserted that under Rules 702 and 704, M.R.Ev. (Title 26, ch. 10), the court erred by precluding the opinion testimony, in violation of due process. However, the language of this section and the decision in St. v. Santos, 273 M 125, 902 P2d 510 (1995), proscribe such testimony and controlled the situation here. The testimony was properly refused. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), distinguishing St. v. Fish, 190 M 461, 621 P2d 1072 (1980).

No Prejudice From Alleged Ineffective Assistance of Counsel During Pretrial Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the pretrial phase, applying the two-pronged test in Strickland v. Wash., 466 US 668 (1984). Dawson alleged that counsel was ineffective in failing to: (1) object to the procedure and use of Dawson's psychiatric evaluation; (2) advise him of his rights during the evaluation process; and (3) conduct an adequate pretrial investigation. On the first point, the procedure followed and the use of the psychiatric evaluation were consistent with the statutory procedure in effect at the time, and counsel had no reason to question it. On the second point, Dawson satisfied the deficiency prong of the Strickland test because he should have been informed of the potential consequences of participating in the evaluation; however, there was no evidence that Dawson was prejudiced at trial or sentencing. Dawson's version of the crimes was consistent with his defense theory, and at no time did he admit killing the victims, so counsel's failure to advise him of his Miranda rights was not prejudicial. On the third point, Dawson could not establish prejudice as a result of counsel's failure to obtain complete records and staff notes of the evaluation, to investigate Dawson's possible epilepsy, or to investigate or pursue Dawson's drug use—at trial or at sentencing as a mitigating factor. The District Court did not err when it found that Dawson did not receive ineffective assistance at the pretrial phase. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000). See also St. v. Armfield, 214 M 229, 693 P2d

1226 (1984), St. v. Smith, 217 M 453, 705 P2d 1110 (1985), and Hans v. St., 283 M 379, 942 P2d 674 (1997).

Admission of Psychiatrist's Opinion of Defendant's State of Mind During Theft Not Error With Respect to Conviction for Murder: Santos appealed his murder convictions on the basis that the state's expert witness commented on his mental state during the theft committed in conjunction with the murders. He also stated that the commission comments to this section prohibit expert testimony before a jury on the ultimate issue of the defendant's mental state or mental capacity. The Supreme Court held that the admission of testimony concerning Santos's mental state during the theft was error but was harmless error with respect to his murder convictions. The Supreme Court also held that the commission comments to this section go beyond the scope of the statutory language, that the statute is clear on its face, and that an expert witness may give an opinion on mental state or mental capacity. St. v. Santos, 273 M 125, 902 P2d 510, 52 St. Rep. 865 (1995).

Involuntary Commitment — Appointment of Two Professionals — One May Testify: The lower court appointed two psychiatrists—one to examine G.S. and one to present those findings at the commitment hearing since the examining doctor would be unavailable. The Supreme Court held that the lower court did not err in allowing the second psychiatrist to offer an opinion on the subject's mental condition without formally examining the patient, but relying, instead, on the first doctor's report. Of critical importance is the fact that the doctor who ultimately did diagnose G.S.'s mental condition was available for cross-examination. The critical requirement of professional justification was satisfied. Rule 703, Montana Rules of Evidence, clearly provides that one doctor can state his expert opinion based on another doctor's report. Section 46-14-213(1) does not apply since the Montana Rules of Civil Procedure apply to involuntary commitment procedures. In re G.S., 215 M 384, 698 P2d 406, 42 St. Rep. 451 (1985).

Harmless Error to Violate Statutory Prohibition: The State, over the objection of the defendant, brought out that a psychiatrist had been appointed by the court. The Supreme Court held that although the District Court should not have allowed the questions to be answered in violation of this section, in this case it was harmless error. St. v. Gratzer, 209 M 308, 682 P2d 141, 41 St. Rep. 727 (1984).

Involuntary Intoxication — Limits on Expert Testimony: Defendant was convicted of burglary after being found in a store in a shopping mall after hours. Defendant was admittedly a chronic alcoholic who could not control his drinking; he contended he was therefore involuntarily intoxicated at the time of the crime. As part of his defense he intended to have a psychiatrist and a psychologist testify that his intoxicated condition deprived him of the capacity to appreciate the criminality of his conduct. The expert testimony was excluded through a motion in limine. The Supreme Court, relying on St. v. Ostwald, 180 M 530, 591 P2d 646 (1979), held that the proffer of expert testimony comes within this section, which specifically limits the testimony an expert may give. It does not include opinions on the ability to appreciate the criminality of conduct or to conform conduct to the requirements of the law. St. v. Peavler, 195 M 379, 636 P2d 270, 38 St. Rep. 1937 (1981).

Psychiatric Testimony on Intent Element — Permissible for Rebuttal: Defendant Fish had an argument with Miller at the bar where Miller worked over money Miller owed Fish. A fight ensued, which was broken up by patrons. Fish left saying he would settle with Miller. Fish recruited some friends and went to Miller's trailer park. Miller had already arrived and had friends with him. Fish, upon discovering that Miller was at home, began knocking and pounding on the door. Fish's friends, Hubbard and Lodge, were with him. Lodge began kicking the door. Miller got a gun and shot through the door, killing Lodge. Hubbard got in his truck, and Miller put the gun through the truck window. Hubbard took the gun away from Miller, who ran from the truck. Hubbard shot and killed Miller. Fish was convicted of attempted burglary, and Hubbard was convicted of mitigated deliberate homicide. Hubbard contends the trial court erred by refusal to allow a psychiatrist to testify as to his mental state at the time Miller was shot. With respect to either deliberate homicide or mitigated deliberate homicide, the State must prove that the defendant "purposely or knowingly" caused the death of another human being. "Purposely or knowingly" are statutory descriptions of various states of the human mind. They are particular elements included in the definition of the offense. No element of an offense can be presumed, and thus the requisite state of mind must be established by the prosecution and believed by the jury beyond a reasonable doubt. The offered testimony included a conclusion that Hubbard, under the surrounding circumstances, more than likely did not intend to kill Miller when he shot but only intended to stop or apprehend him. The testimony would have gone to support a general rebuttal of the intent requirement. This was a proper subject for expert psychiatric testimony. To exclude testimony offered by Hubbard as rebuttal to an essential element of the crime denied him a full

evidentiary hearing and deprived him of a fair trial. St. v. Fish, 190 M 461, 621 P2d 1072, 37 St. Rep. 2065 (1980).

Collateral References

Qualification of nonmedical psychologist to testify as to mental condition or competency. 72 ALR 5th 529.

Admissibility of results of computer analysis of defendant's mental state. 37 ALR 4th 510.

Expert witness: admissibility on issue of sanity of expert opinion based partly on medical, psychological or hospital reports. 55 ALR 3d 551.

46-14-214. Form of verdict and judgment — determination of maximum period of confinement — victim findings.

Commission Comments

Source: Model Penal Code, section 4.03.

Subsection (1)[, prior to amendment deleting it in 1979,] was the alternative provision offered by the drafters of the Model Code. This language required the defendant to establish the defense of insanity by a preponderance of the evidence. Placing this burden of proof on the defendant was consistent with the [former] Montana section, R.C.M. 1947, section 94-119(2) and the cases thereunder. The American jurisdictions were almost equally divided on the question of burden of proof of insanity. The alternative position required the prosecution to establish defendant's sanity beyond a reasonable doubt. A third position, taken by the state of Oregon, required that the defendant prove the defense of irresponsibility beyond a reasonable doubt.

The commission chose the alternative which required the defendant to prove irresponsibility by a preponderance of the evidence because it was consistent with the past practice which proved satisfactory. Also, this alternative seemed to be the most equitable of the three alternatives offered, and it was consistent with the English view that every man is presumed sane and responsible until the contrary is proved to the jury's satisfaction. (See: State v. Vettere, 76 Mont. 574, 248 Pac. 179.)

The notice provision [in present subsection (1)] is required to avoid surprise and to encourage a fair determination of the issues by a knowledgeable presentation of the facts and issues by both prosecutor and defense counsel. Defendant's failure to give the required notice precludes the use of this defense. However, the judge has the discretion to allow such notice at a later time. [See also 46-15-323.]

If the defendant fails to give notice of his intent to rely on a defense of lack of specific intent he does not lose that defense, but he will be limited to "lay" testimony which generally is not effective for a defense of mental disease or defect. But, if the state introduces expert testimony in rebuttal, then the defendant should be allowed the same kind of testimony in his rebuttal. The [d]esirability of giving the trial judge the power to raise the defense in a proper case, where the defendant refused to permit his counsel to do so, was considered but was omitted as being too great an interference with the conduct of the defense. However, it may be considered by the judge in determining the defendant's fitness to proceed.

The purpose of the language in subsection (2) is to establish a basis for commitment of a defendant acquitted of the crime charged on the ground of mental disease or defect. The commitment would be to the proper state institution rather than to prison. The commission believes that it is necessary to provide for such a commitment. For details of the commitment procedure, see [46-14-301 through 46-14-304].

Compiler's Comments

2003 Amendment: Chapter 164 inserted (2) concerning court determination of maximum sentence; inserted (3) concerning victim; and made minor changes in style. Amendment effective October 1, 2003.

1991 Amendment: Deleted (1) that read: "(1) Evidence of mental disease or defect is not admissible in a trial on the merits unless the defendant, at the time of entering his plea of not guilty or within 10 days thereafter or at such later time as the court may for good cause permit, files a written notice of his purpose to rely on a mental disease or defect to prove that he did not have a particular state of mind which is an essential element of the offense charged. Otherwise, except on good cause shown, he shall not introduce in his case in chief expert testimony in support of that defense"; and made minor changes in style.

1981 Amendment: Substituted "When the defendant is found not guilty of the charged offense or offenses or any lesser included offense for the reason" for "When the defendant is acquitted on the ground" at the beginning of (2).

Case Notes

Testimony Refused Absent Pretrial Notice: The District Court properly refused to allow testimony offered under 46-14-102 relating to evidence that defendant suffered from a mental disease or defect when the defense did not give pretrial notice of relying on mental disease or defect as required under this section. St. v. Popescu, 237 M 493, 774 P2d 395, 46 St. Rep. 996 (1989).

Conviction of Lesser Included Offense — Lack of Mental State as Defense — No Mental State Verdict Form: The trial court refused defendant's request for a verdict form that stated that the defendant was found not guilty of attempted deliberate homicide due to mental disease or defect. The jury found him not guilty of that offense but did find him guilty of the lesser included offense of aggravated assault. The defendant alleged that due to his drugged state he lacked the necessary mental state to commit the offense charged and that the jury finding of not guilty of the charged offense on that basis yet guilty of the lesser offense constituted inconsistent and irreconcilable verdicts. The Supreme Court held that although a mental state verdict form would have been preferable in determining whether the trial court abused its discretion in refusing a new trial, it must look at every fact that the jury reasonably could have deduced from all the evidence, and in this case the basis for the conviction for the lesser included offense could have been based on several grounds. St. v. Doney, 194 M 22, 636 P2d 1377, 38 St. Rep. 1707 (1981).

Notice of Defense — Right to Voir Dire on the Subject: The defendant's attack on the constitutionality of the provision of Montana law which required notice of intent to use the mental disease or defect defense was rejected. In so doing, the Montana Supreme Court emphasized both a Montana precedent and the fact that the statute is nearly identical to a federal rule promulgated by the U.S. Supreme Court and approved by Congress. The Montana Supreme Court also emphasized that the purpose of the statute was to provide notice and thus to prevent surprise and to eliminate the necessity for a trial continuance for further case preparation when the defense is raised. The fact of notice does not amount to a plea, and it could not be used in any way as evidence in a trial on the merits. Further, the defendant was properly denied the right to voir dire the jury on the subject of mental disease or defect because he did not give any notice of intent to use the defense. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Long-Term Effects of Alcoholism: Under former law, when the defense of intoxication shifts to a defense based on expert testimony as to the long-term effects of alcoholism, it becomes a defense of mental disease or defect within the purview of the statutes requiring notice. St. v. Ostwald, 180 M 530, 591 P2d 646 (1979).

Failure to File Notice of Defense — Effect on Voir Dire: The defendant refused to give notice as required by the statute. He claimed prejudice because he was not allowed to voir dire on the subject of mental disease and defect. However, at the time he wished to voir dire he had not complied with the notice and the issue could not at that time be presented to the jury. The court was correct in refusing to allow the voir dire. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Defenses of Insanity and Self-Defense:

There was no reversible error in making the defendant comply with the insanity and self-defense notice provisions of 46-15-301 (repealed and replaced with 46-15-321 [now repealed] through 46-15-329 in 1985) when the state court had already decided that the section required reciprocal duties of the prosecution, the State operated in good faith at the trial, and the facts otherwise revealed no prejudice to the defendant. Radford v. Stewart, 472 F2d 1161 (9th Cir. 1973).

The court held that the language of 46-15-301 (repealed and replaced with 46-15-321 [now repealed] through 46-15-329 in 1985), prior to amendment, as it related to the defenses of insanity and self-defense, should be interpreted as directory only. State ex rel. Sikora v. District Court, 154 M 241, 462 P2d 897 (1969).

Constitutionality:

Under former law, the defendant's rights under the 5th, 6th, and 14th amendments of the United States Constitution were not violated by the operation of 46-15-301 (repealed and replaced with 46-15-321 [now repealed] through 46-15-329 in 1985) because neither the defendant's witness list nor his notice of insanity and self-defense was used to make a prima facie case against him. Radford v. Stewart, 320 F. Supp. 826 (D.C. Mont. 1970), affirmed in 472 F2d 1161 (9th Cir. 1973).

While this section may be unconstitutionally applied, it is constitutional on its face and not repugnant to the 4th, 5th, 6th, and 14th amendments of the United States Constitution. State ex rel. Sikora v. District Court, 154 M 241, 462 P2d 897 (1969), followed in St. v. Davidson, 266 M 404, 880 P2d 1331, 51 St. Rep. 867 (1994).

Untimely Filing of Notice of Defense: Under former law the trial judge could allow psychiatric proof even though the motion was untimely but, when the defendant's counsel did not comply with a court order to submit all motions of defense at the time of pleading to the information or during the 6-month delay in going to trial, the trial court properly denied the defendant's notice of intention to rely on mental disease or defect as not being timely filed. St. v. Bentley, 155 M 383, 472 P2d 864 (1970).

Verdict Upon Finding of Insanity: Under former law when the defendant, charged with assault in the first degree, relied wholly upon the defense of insanity, the court's instruction that the jury might find the defendant guilty of assault in the first, second, or third degree or not guilty was inaccurate; the jury should have been told that, if they found him not guilty because insane, their verdict should be "not guilty by reason of insanity". St. v. Crowe, 39 M 174, 102 P 579 (1909).

Collateral References

21 Am. Jur. 2d Criminal Law §§736 through 738.

46-14-217. Admissibility of statements made during examination or treatment.

Commission Comments

Source: Model Penal Code, section 4.09.

This section embodies the view that the important expert knowledge of the mental condition of the defendant acquired by examination or treatment on order of the court should be fully available in evidence in any proceeding where his mental condition may properly be in issue; but to safeguard the defendant's right and to make possible the feeling of confidence essential for effective psychiatric diagnosis or treatment, the defendant's statements made for this purpose may not be put in evidence on any other issue.

The proposed provision covers not only statements made during a psychiatric examination but also statements made during treatment. These statements are only admissible on the issue of mental condition. This should make both the examination and treatment palatable to the defendant and also expedite the work of the psychiatrist.

Compiler's Comments

1991 Amendment: In first sentence, near beginning after "psychiatric", inserted "or psychological" and near end, after "person", substituted "at trial" for "in any criminal proceeding, except a sentencing hearing conducted under 46-14-311", in second sentence, after "communication", substituted "only when and after the defendant presents evidence that due to a mental disease or defect the defendant did not have a particular state of mind that is an element of the offense" for "unless it constitutes an admission of guilt of the crime" and deleted former last sentence that read: "In a hearing held under 46-14-311, the court may hear and consider any such statement even if it constitutes an admission of guilt"; and made minor changes in style.

Case Notes

Testimony at Sentencing Hearing by Counselor Who Evaluated Defendant in Different Case Not Violation of Privileged Communication: At defendant's sentencing hearing, the court allowed testimony from a counselor who had performed a psychosexual evaluation on defendant in connection with an earlier unrelated case. Defendant contended on appeal that the counselor's testimony should not have been allowed under the rules of evidence. The Supreme Court disagreed, noting that under St. v. Race, 285 M 177, 946 P2d 641 (1997), the rules of evidence are not applicable or controlling in sentencing hearings and that a statement covered by the psychotherapist-patient privilege that may be inadmissible at trial is admissible at a sentencing hearing. Further, the counselor's statement in question here was a matter of public record and did not constitute violation of a privileged communication. A sentencing court is allowed to have the fullest information possible concerning a defendant's life and characteristics in order to individualize punishment, and the testimony at issue helped the sentencing court frame the punishment in this case. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

No Prejudice From Alleged Ineffective Assistance of Counsel During Pretrial Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel

during the pretrial phase, applying the two-pronged test in Strickland v. Wash., 466 US 668 (1984). Dawson alleged that counsel was ineffective in failing to: (1) object to the procedure and use of Dawson's psychiatric evaluation; (2) advise him of his rights during the evaluation process; and (3) conduct an adequate pretrial investigation. On the first point, the procedure followed and the use of the psychiatric evaluation were consistent with the statutory procedure in effect at the time, and counsel had no reason to question it. On the second point, Dawson satisfied the deficiency prong of the Strickland test because he should have been informed of the potential consequences of participating in the evaluation; however, there was no evidence that Dawson was prejudiced at trial or sentencing. Dawson's version of the crimes was consistent with his defense theory, and at no time did he admit killing the victims, so counsel's failure to advise him of his Miranda rights was not prejudicial. On the third point, Dawson could not establish prejudice as a result of counsel's failure to obtain complete records and staff notes of the evaluation, to investigate Dawson's possible epilepsy, or to investigate or pursue Dawson's drug use—at trial or at sentencing as a mitigating factor. The District Court did not err when it found that Dawson did not receive ineffective assistance at the pretrial phase. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000). See also St. v. Armfield, 214 M 229, 693 P2d 1226 (1984), St. v. Smith, 217 M 453, 705 P2d 1110 (1985), and Hans v. St., 283 M 379, 942 P2d 674 (1997).

Disclosure of Complete Defense Psychiatric Report at Sentencing Phase When Doctor to Testify: Section 26-1-807 and this section, relating to confidentiality of communications between a psychologist or psychiatrist and client, are codifications of rules of evidence. Rules of evidence are not applicable or controlling at a sentencing hearing. Furthermore, appellant waived any privilege as to his psychiatric report when he decided to present the doctor's testimony at the sentencing hearing. At that point, the complete report was necessary for the court to properly evaluate the doctor's testimony. The court did not err in ordering the defense to provide the court with the complete report for the court to consider in relation to sentencing. St. v. Race, 285 M 177, 946 P2d 641, 54 St. Rep. 1099 (1997).

Admissibility of Statements Regarding Mental State: Defendant's expert testified that defendant indicated during examination that his recollections of a shooting incident were hazy. In rebuttal, prosecution's expert testified that shortly before and shortly after the incident, defendant was capable of making conscious choices, which defendant asserted was an inadmissible admission of guilt. However, both statements spoke to defendant's mental condition at the time of the incident and were thus admissible. Further, defendant opened the door to the prosecution's testimony by the initial examination of his own witness and could not later object to the responsive interrogation by the state. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Psychiatrist's Testimony Beyond Scope of Question of Mental Capacity: A psychiatrist testified that defendant's mental capacity enabled him to recall certain elements of the case against him. Since defendant placed his mental condition at issue, psychiatrist's testimony was generally admissible. However, the psychiatrist's testimony of defendant's recall of incriminating evidence came dangerously close to violating defendant's right against self-incrimination. Although the Supreme Court did not decide this issue (since the case was reversed on other grounds), it cautioned the lower court to refrain from admitting evidence of defendant's mental condition if such evidence implies or constitutes an admission of guilt of the crime charged. St. v. Statczar, 228 M 446, 743 P2d 606, 44 St. Rep. 1668 (1987).

Psychologist/Patient Privilege — Exception: The court properly permitted testimony of the respondent's institutional psychologist and psychiatrist, in spite of the psychologist/patient and physician/patient privileges, because mental health professionals on the hospital staff qualify as "neutral factfinders". In re Miller, 175 M 318, 573 P2d 1155 (1977); In re Sonsteng, 175 M 307, 573 P2d 1149 (1977). See also St. v. Clark, 209 M 473, 682 P2d 1339, 41 St. Rep. 833 (1984).

46-14-221. Determination of fitness to proceed — effect of finding of unfitness — expenses.

Commission Comments

Commission Comment Not Divided: This section is a recodification of part of section 95-506, R.C.M. 1947. Section 46-14-222 is also derived from section 95-506. The commission comments to section 95-506 are printed in their entirety under 46-14-221.

Source: Model Penal Code, section 4.06.

[Sections 46-14-221 and 46-14-222 outline] a new procedure for determining when a defendant is or is not fit to proceed to trial. The new procedure adopts the growing minority

proposition of excluding a jury trial on the issue of fitness to proceed. The court makes this determination based on either the psychiatric examination conducted under [46-14-202] or else from a separate hearing. If the report from [46-14-202] is used, the defendant may summon the experts who conducted the examination and cross-examine them and offer other evidence on the question.

[Section 46-14-222] also expresses the minority view that a hearing is necessary to determine if the defendant has regained fitness to proceed. The majority of American jurisdictions and Montana (R.C.M. 1947, section 94-9306) [repealed in 1967] only require the certificate of the institutional superintendent or an independent determination of the court without a hearing. The commission felt that it was desirable to allow the defendant or his legal representative to make the motion for the hearing as well as the court, superintendent of the Montana State Hospital or the prosecution. With this additional language all interested parties have a right to move for a hearing to have the proceedings resumed.

The provision permitting the court to dismiss the prosecution, if because of the lapse of time it would be unjust to continue it, is novel in codified American law but not in actual practice. The result is usually reached at the discretion of the county attorney through the entry of a nolle prosequi. However, this plea is not available in Montana (R.C.M. 1947, 94-9506) [repealed in 1967], but the same result is now reached under R.C.M. 1947, section 94-9505 [repealed in 1967] as will be reached under the proposed section. There would seem to be some value in vesting such a power in the court, to be exercised where either, due to lapse of time the defendant is unable to produce witnesses or evidence once available which is essential to his defense, or where because of the length of the intervening period, which he has spent in a mental institution, subsequent to the alleged wrongful conduct, it seems "unjust" to subject him to trial and punishment.

Basically [46-14-221(4)] authorizes the judge to rule on any objection which might be raised by counsel prior to trial. The primary purpose is to relieve the defendant of a pending criminal charge in those cases in which the charge could be quashed prior to trial but for the defendant's mental condition. It is not intended to jeopardize the defendant's legal position while the defendant remains unfit to proceed to trial. The defendant might receive an unfavorable ruling based on a legal objection made by his counsel while he is unfit to proceed to trial and mentally incapable to assist in his defense. However, since the determination could only be made on those matters which are "susceptible of a fair determination without the personal participation of the defendant" nothing is lost that would not otherwise be lost. The case remains in the hands of "defense counsel."

Compiler's Comments

2007 Amendment: Chapter 140 in (5) at beginning inserted exception clause, after "expenses of" substituted "transporting" for "sending", near middle after "human services, of" substituted "the care, custody, and treatment of the defendant at the facility, and of transporting" for "keeping the defendant there, and of bringing", after "payable by the" inserted "court or, in district court proceedings, by the", and at end after "administrator" deleted "as a district court expense as provided for in 3-5-901"; inserted (6) providing that certain costs may not be charged to the office of court administrator; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 130 in (5) near middle after "appropriate" substituted "facility" for "institution". Amendment effective October 1, 2005.

(Version effective July 1, 2006) Chapter 449 in (5) substituted "appropriate facility" for "appropriate institution", near end after "payable by the" deleted "state" and inserted "office of court administrator", and after "expense" inserted reference to 3-5-901. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2003 Amendment: Chapter 452 in (2)(a) near middle after "appropriate" substituted "mental health facility, as defined in 53-21-102, or residential facility, as defined in 53-20-102" for "institution" and at end after "endures" inserted "or until disposition of the defendant is made pursuant to this section, whichever occurs first"; in (2)(b) at beginning of first sentence substituted "facility" for "institution"; at beginning of (3)(b) inserted language requiring proceeding to be dismissed if court determines defendant lacks fitness to proceed due to mental disorder and after "Title 53" substituted "chapter 21" for "chapter 20 or 21, whichever is appropriate"; in (3)(c) near middle substituted "defined in 53-20-102" for "provided in 53-20-102(5)" and at end inserted "to determine the disposition of the defendant pursuant to those provisions"; in (5) near middle substituted "department of public health and human services" for "department of corrections"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 585 at end of (5) substituted "are payable by the state as a district court expense" for "are chargeable to the state and payable according to procedures established under 3-5-902(1)"; and made minor changes in style. Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1995 Amendments — Phrase Change: Chapter 211 inserted (2)(b) concerning individualized treatment plan and procedure for noncompliance; in (4), after "trial and", inserted "that is made"; and made minor changes in style.

Section 21, Ch. 255, L. 1995, directed the Code Commissioner to change references in the MCA to a person who is developmentally disabled or to a developmentally disabled person to a person with developmental disabilities. The change was not to be made to the phrase "seriously developmentally disabled". In (3), the Code Commissioner has made the change and corrected the subsection reference to 53-20-102 pursuant to sec. 73, Ch. 18, L. 1995.

Chapter 546 in (2), in two places, and in (5), in two places, substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 800 throughout section substituted "prosecutor" for "county attorney"; in (1), near beginning of first sentence after "raised by", inserted "the court" and in fifth sentence substituted "subpoena" for "summon"; and made minor changes in style.

1987 Amendment: In (1), in last sentence after "psychiatrists", inserted "or licensed clinical psychologists".

1985 Amendment: In (5) near end after "chargeable to the state" substituted "and payable according to procedures established under 3-5-902(1)" for "but the state may recover them from the estate of the defendant".

1983 Amendment: In first sentence of (1), deleted "only" after "may be raised" and inserted "or by the county attorney"; in (2), inserted second and third sentences relating to review of fitness after 90 days and dismissal if it is found that defendant apparently will not become fit; and in (3), substituted "as provided in 53-20-102(4), the proceeding against him shall be dismissed and the county attorney shall petition the court in the manner provided in chapter 20 of Title 53" for "as defined by 53-20-102, the proceeding against him shall be suspended, except as provided in subsection (4) of this section, and the court shall proceed to secure treatment as provided in chapter 20, part 1, or chapter 21, part 1, of Title 53".

1981 Amendment: Substituted "or his counsel" for "with the advice of counsel" and made a minor change in phraseology in (1); and deleted "in the first instance" before "chargeable", substituted "state" for "county in which the indictment was found or the information filed" after "chargeable to the", substituted "state" for "county" before "may recover", and deleted "if he has any, or from a town, city, or county bound to provide for and maintain him elsewhere" after "estate of the defendant" in (5).

Case Notes

No Causal Connection Between Cognitive Disorder and Alleged Criminal Activity — Commitment Order Unwarranted: D.M.S. was charged with two felony DUIs and was the primary suspect in a felony arson investigation involving five vehicle fires. Following a competency evaluation, the District Court adjudicated D.M.S. unfit to proceed in the criminal cases because of the mental disease or defect of cognitive disorder not otherwise specified (NOS), combined with alcohol abuse, borderline intellectual functioning, and antisocial personality disorder. The charges were subsequently dismissed, and the County Attorney immediately filed a petition to commit D.M.S. to the state hospital. After detention and evaluation of D.M.S. at the state hospital, the doctor who conducted the evaluation concluded that D.M.S. did not meet the criteria for commitment. D.M.S. moved to dismiss the petition, but the motion was denied and the case went to trial. The jury found that D.M.S. would be a danger if untreated, and the District Court ordered a 90-day commitment. After the commitment was served, D.M.S. appealed the commitment order. The state did not present any evidence indicating that because of the cognitive disorder NOS, as opposed to alcoholism or antisocial behavior, D.M.S. caused injury or posed a threat of injury to self or others. Therefore, the evidence did not establish a causal connection between the cognitive disorder NOS and the behavior described in the reports or alleged by law enforcement officers. Absent a causal connection, even when viewed in a light most favorable to the state, a rational trier of fact could not have found D.M.S. in need of

commitment to the state hospital. The Supreme Court reversed the commitment order and remanded for further proceedings. In re D.M.S., 2009 MT 41, 349 M 257, 203 P3d 776 (2009), following In re Mental Health of A.K., 2006 MT 166, 332 M 511, 139 P3d 849 (2006).

Additional Commitment Period Proper Given Findings That Defendant Could Regain Fitness to Proceed in Reasonable Time: Following Yarnall's charge of deliberate homicide, the District Court committed Yarnall for a psychiatric evaluation. One evaluating doctor concluded that Yarnall was unfit to proceed, and another doctor opined that Yarnall was fit to proceed. Following a fitness hearing, the District Court concluded that Yarnall was unfit to proceed and committed him to state custody for so long as the unfitness endured. The court set a review hearing for about 2 months later and also set a trial date. Two other doctors subsequently testified that Yarnall remained unfit but suggested that there was a possibility that fitness could be regained. The District Court interpreted this section to mean that Yarnall could be recommitted for another 6 months and the situation reviewed in 90 days. At the review hearing, Yarnall was considered fit to proceed, pleaded guilty, and was sentenced to a 40-year term. The Supreme Court subsequently decided in St. v. Meeks, 2002 MT 246, 312 M 126, 58 P3d 167 (2002), that a District Court must dismiss criminal charges against a defendant who has been found unfit to proceed if after a 90-day review there is no evidence to suggest that the defendant will regain fitness within the reasonably foreseeable future. Yarnall then moved to withdraw his guilty plea and have the charges dismissed based on Meeks, but the motion was denied. On appeal, the Supreme Court cited the post-Meeks decision in St. v. Tison, 2003 MT 342, 318 M 465, 81 P3d 471 (2003), in which an additional commitment at the expiration of the 90-day review prescribed in this section was improper absent findings regarding the defendant's fitness to proceed. In Yarnall's case, the District Court did make specific findings that Yarnall could regain fitness in the reasonably foreseeable future. The Supreme Court distinguished Meeks and Tison and held that the District Court properly weighed the evidence and concluded that it could order an additional commitment because it was not prepared to find that Yarnall would not regain fitness. The District Court acted within the statutory directives of this section and thus did not err in denying Yarnall's motion to dismiss. St. v. Yarnall, 2004 MT 333, 324 M 164, 102 P3d 34 (2004).

Dismissal of Charges Required if Defendant's Fitness to Proceed Undetermined After Ninety Days — Civil Proceedings Mandated Upon Dismissal: Pursuant to Jackson v. Ind., 406 US 715 (1972), after only a pretrial competency hearing, it is unconstitutional to hold a person who is unfit to proceed without following civil and criminal commitment procedures provided by state law. Due process requires, at a minimum, some rational relationship between the nature and duration of commitment and its purpose. Thus, this section requires the committing court to review a defendant's fitness to proceed within 90 days of the original commitment, and if, after 90 days, the court finds that the defendant is still unable to proceed and will not be fit to proceed within the reasonably foreseeable future, the proceeding against the defendant must be dismissed. However, dismissal does not mandate freedom for a potentially violent mentally ill individual. The statute provides that once the criminal proceeding is dismissed, the next mandatory step is to pursue civil commitment proceedings under Title 53, ch. 20 or 21. However, an alternative procedure is available under 46-14-202, in which the court may set the time for determining fitness to proceed. St. v. Tison, 2003 MT 342, 318 M 465, 81 P3d 471 (2003), following St. v. Meeks, 2002 MT 246, 312 M 126, 58 P3d 167 (2002).

Indicia of Sufficient Doubt of Competency to Proceed: As set out in Griffin v. Lockhart, 935 F2d 926 (8th Cir. 1991) (citing Drope v. Mo., 420 US 162, 43 L Ed 2d 103, 95 S Ct 896 (1975)), factors determining whether sufficient doubt exists as to defendant's fitness to proceed to trial necessitating a competency hearing include: (1) evidence of irrational behavior by the accused; (2) the demeanor of the accused at trial; and (3) any prior medical opinion on the competency of the accused to stand trial. Here, Bostwick's own counsel repeatedly expressed doubt regarding Bostwick's competency to proceed; Bostwick took two standardized competency tests that raised additional concerns; the medical report contained conflicting evidence regarding competence; and Bostwick's medical history was not obtained. Thus, the indicia of Bostwick's incompetence established sufficient doubt regarding his fitness to proceed to trial to require a competency hearing. The case was remanded to determine if a meaningful retrospective competency hearing could be held, and the District Court was instructed as to how to proceed whether or not Bostwick was found to be competent. St. v. Bostwick, 1999 MT 237, 296 M 149, 988 P2d 765, 56 St. Rep. 924 (1999).

Vacating Hearing Without Fitness Determination — Abuse of Discretion: Proceedings against defendant, who was charged with intimidation and stalking, were suspended after defendant was declared mentally ill and unable to understand or assist in proceedings. While hospitalized,

defendant was later determined not unfit to proceed and, without a review of the fitness determination, pleaded guilty to the charges pursuant to a plea agreement. After retaining new counsel, defendant unsuccessfully petitioned the District Court to withdraw the guilty plea. On appeal, the Supreme Court ruled that the District Court erred in vacating the fitness hearing and in accepting defendant's guilty plea without first making a determination that defendant had regained fitness to proceed. St. v. Drga, 916 M 739, 916 P2d 739, 53 St. Rep. 401 (1996). See also St. v. Meeks, 2002 MT 246, 312 M 126, 58 P3d 167 (2002), which held that the District Court is required to strictly comply with this section by dismissing pending criminal charges upon a determination that defendant was unfit to proceed.

Involuntary Medication of Unfit Defendant Prohibited During Commitment: A defendant who is awaiting trial and who has been determined to be mentally unfit to proceed may not be involuntarily medicated or treated for an underlying mental condition under this section during the statutorily prescribed 90-day commitment period. Curtis v. District Court; Vilensky v. District Court, 266 M 231, 879 P2d 1164, 51 St. Rep. 776 (1994).

Developmental Disability Affecting Fitness to Proceed to Trial: A developmental disability may affect a defendant in such a way as to render him unfit to proceed to trial; however, a developmental disability does not automatically mandate a finding of lack of fitness. That is for the trial court, in its discretion, to determine. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982).

Dusky Test Adopted — Present Ability and Understanding: The test of fitness to proceed to trial must be whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. (Citing Dusky v. U.S., 362 US 402, 4 L Ed 2d 825, 80 S Ct 789 (1960).) St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982).

Attorney General's Opinions

Returning Patients to Warm Springs State Hospital — Financial Responsibility: Prior to the 1981 amendment, a Sheriff who returned a patient to Warm Springs pursuant to 7-32-2144 when the patient was subjected to an involuntary civil or a criminal commitment was entitled to reimbursement for his costs from the applicable county for a person committed pursuant to 46-14-221 and 46-14-222 or the institution to which the person was committed when committed pursuant to 46-14-301, 53-21-121, 53-21-124, and 53-21-127. 37 A.G. Op. 129 (1978).

Financial Obligation for Psychiatric Evaluation in Criminal Trials: Prior to the 1981 amendment, the county was financially responsible for psychiatric evaluations conducted to determine whether a criminal defendant was mentally fit to proceed at trial. (See, also, the 1985 amendment.) 37 A.G. Op. 37 (1977).

Collateral References

Criminal Law *key* 625.

21 Am. Jur. 2d Criminal Law §§57 through 71.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic"—modern state cases. 33 ALR 4th 1062.

46-14-222. Proceedings if fitness regained.

Commission Comments

Source: See commission comments to 46-14-221.

Compiler's Comments

2005 Amendment: Chapter 130 near end of last sentence after "appropriate" substituted "facility" for "institution". Amendment effective October 1, 2005.

1995 Amendment: Chapter 546 in two places substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 800 near middle of first sentence substituted "prosecution" for "county attorney"; and made minor changes in style.

Case Notes

Vacating Hearing Without Fitness Determination — Abuse of Discretion: Proceedings against defendant, who was charged with intimidation and stalking, were suspended after defendant was declared mentally ill and unable to understand or assist in proceedings. While hospitalized,

defendant was later determined not unfit to proceed and, without a review of the fitness determination, pleaded guilty to the charges pursuant to a plea agreement. After retaining new counsel, defendant unsuccessfully petitioned the District Court to withdraw the guilty plea. On appeal, the Supreme Court ruled that the District Court erred in vacating the fitness hearing and in accepting defendant's guilty plea without first making a determination that defendant had regained fitness to proceed. St. v. Drga, 916 M 739, 916 P2d 739, 53 St. Rep. 401 (1996).

Attorney General's Opinions

Returning Patients to Montana State Hospital — Financial Responsibility: Prior to the 1981 amendment, a Sheriff who returned a patient to Montana State Hospital pursuant to 7-32-2144 when the patient was subjected to an involuntary civil or a criminal commitment was entitled to reimbursement for his costs from the applicable county for a person committed pursuant to 46-14-221 and 46-14-222 or the institution to which the person was committed when committed pursuant to 46-14-301, 53-21-121, 53-21-124, and 53-21-127. 37 A.G. Op. 129 (1978).

Collateral References

Criminal Law *key* 625.

21 Am. Jur. 2d Criminal Law §§77 through 81.

Part 3
Disposition of Defendant

46-14-301. Commitment upon finding of not guilty by reason of lack of mental state — hearing to determine release or discharge — limitation on confinement.

Commission Comments

Source: Section 4.08 of M.P.C.

The legal effect of acquittal on the ground of mental disease or defect excluding responsibility is characterized by (a) mandatory commitment of the defendant to an appropriate institution upon such an acquittal, (b) dangerousness to himself or others as the criterion for continued custody, (c) power only in the committing court (other than as affected by habeas corpus) to discharge or release the defendant, (d) probationary release as an alternative to absolute discharge, (e) application for release or discharge to be made by the superintendent of the Montana State Hospital or by the defendant with limitations as to the frequency of applications by the defendant. The provisions for automatic commitment are in accordance with the practice in England and a minority of American jurisdictions. It not only provides the public with the maximum immediate protection, but may also work to the advantage of mentally diseased or defective defendants by making the defense of irresponsibility more acceptable to the public and to the jury. It seems preferable to make dangerousness the criterion for continued custody rather than to provide that the committed person may be discharged or released when restored to sanity as defined by the mental hygiene laws. Although his mental disease may have greatly improved, such a person may still be dangerous because of factors in his personality and background other than mental disease. Also, such a standard provides a possible means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal. The prescribed procedure protects both the public and the defendant by providing for an independent psychiatric examination of the defendant before action on the application for release, and then either for summary favorable action on the application or a full hearing. The provision for release on probation furnishes additional protection to the public in the case of those individuals who need some supervision upon their return to the community.

The proposed provision gives the community court the exclusive power (aside from habeas corpus) to discharge or release the defendant. The proposed law is much stricter than traditional laws in this area, it gives procedural protection to both the defendant and the general public.

Although a few states have prescribed a minimum time the committed person must be kept in custody, and have restricted the frequency with which application for his release may be made, [46-14-303] allows the superintendent of the Montana State Hospital to make or renew such application at any time. Applications by the patient are limited by what is thought to be the period necessary to observe him initially (six months) and by the interval probably necessary for a significant change in his condition to occur after any application has been denied (one year).

Compiler's Comments

2003 Amendment: Chapter 164 in (4) inserted second sentence concerning period of commitment and third sentence concerning involuntary civil commitment proceedings. Amendment effective October 1, 2003.

1995 Amendment: Chapter 546 in (2)(a), (3), (4), and (5) substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 397 substituted (2) relating to types of offenses court shall evaluate for former (2) that read: "(2) The court, upon finding that the defendant may not be discharged or released without danger to others, shall order the defendant committed to the custody of the superintendent of the Montana state hospital to be placed in an appropriate institution for custody, care, and treatment"; in (3), near beginning of first sentence, substituted "director of the department of corrections and human services" for "superintendent", before "be discharged" substituted "must" for "may", and after "released" substituted "or whether the commitment may be extended because the person continues to suffer from a mental disease or defect that renders the person a danger to the person or others" for "without danger to others", in second sentence substituted "district court in the district in which the person has been placed" for "third judicial district", at end of third sentence inserted "and the court that originally ordered the commitment", and in fourth sentence substituted "state" for "defendant", after "prove by" substituted "clear and convincing evidence that the person may not" for "a preponderance of the evidence that the defendant may", and after "released" inserted remainder of (3) outlining substantial risks; in (4) substituted "person" for "defendant", after "custody of the" substituted "director of the department of corrections and human services" for "superintendent of the Montana state hospital", and after "appropriate" substituted "mental health facility" for "institution"; inserted (5) relating to required annual review and petition for discharge; and made minor changes in style. Amendment effective April 19, 1993.

1991 Amendment: Made minor changes in style.

1983 Amendment: In (2) and (4), substituted "Montana state hospital" for "Warm Springs state hospital".

1981 Amendment: Substituted "found not guilty for the reason" for "acquitted on the ground" after "When a defendant is" at the beginning of (1); in (1), after "essential element of the offense charged, the court shall order", inserted "a predisposition investigation in accordance with 46-18-112 and 46-18-113, which must include an investigation of the present mental condition of the defendant. If the trial was by jury, the court shall hold a hearing to determine the appropriate disposition of the defendant. If the trial was by the court, the court may hold a hearing to obtain any additional testimony it considers necessary to determine the appropriate disposition of the defendant. In either case, the testimony and evidence presented at the trial shall be considered by the court in making its determination"; inserted "The court, upon finding that the defendant may not be discharged or released without danger to others, shall order the defendant" at the beginning of (2); substituted "A person committed to the custody of the superintendent shall have a hearing within 180 days of his confinement" for "A person so confined shall have a hearing, unless waived, within 50 days of his confinement" at the beginning of (3); and inserted the sentence "The hearing shall be conducted by the court which ordered the commitment unless the court transfers jurisdiction to the third judicial district." in the middle of (3).

Case Notes

Release of Stalker Unsafe — Continuing Custody Warranted: Following conviction on felony stalking charges, Cooney was diagnosed with an erotomanic type of delusional disorder that manifested itself in an obsession with delusional beliefs that another person was in love with him. The District Court found that Cooney continued to suffer from a mental disease or defect and that if released, Cooney was capable of again acting on his delusional beliefs, creating a substantial risk of serious bodily injury to his victim. Cooney's stalking activities over 8 years caused the victim a great deal of emotional anguish related to fears for her own and her family's safety and may have resulted in a diagnosable psychiatric condition for her. Coupled with the opinion of two experts that Cooney would likely resume stalking activities if released, the District Court did not err in committing Cooney to the continuing custody of the Department of Public Health and Human Services. (See 2003 amendment.) St. v. Cooney, 1998 MT 208, 290 M 414, 963 P2d 1272, 55 St. Rep. 886 (1998).

Denial of Unconditional Release Proper When Condition Unchanged and Risk of Reoffending Exists: Woods was charged with felony assault (now assault with a weapon) in 1974. Following examination at Montana State Hospital, he moved for and was granted acquittal based on mental disease or defect and was committed to the hospital. Pursuant to this section, Woods sought unconditional release in 1994, contending that he was not seriously mentally ill, that his pedophilia was in remission, and that he posed no risk or threat. The trial court disagreed and

twice denied the petition for release. Despite Woods's contention that he should be released because the state failed to meet its burden of proof at the first hearing and that the statutes do not provide for sequential hearings, on appeal, the Supreme Court found that Woods was not deprived of due process. Although experts agreed that Woods was not seriously mentally ill, the question was whether his mental disease or defect presented a substantial risk or threat of injury to person or property. Following St. v. Korell, 222 M 112, 720 P2d 688 (1986), the court noted that the fact that a mental condition is in remission supports an inference that the condition still exists. Woods refused treatment for pedophilia while incarcerated, and his condition remained unchanged from the time of placement at the hospital. Absent treatment, the risk that Woods would reoffend constituted a sufficient substantial risk of imminent threat of injury to others that denial of the petition for unconditional release was affirmed. (See 2003 amendment.) St. v. Woods, 285 M 46, 945 P2d 918, 54 St. Rep. 1036 (1997).

No Appeal, Based on Constitutionality of Offense Charged, From Judgment of Not Guilty by Reason of Mental Disease or Defect: Kaplan was charged with seven counts of stalking under 45-5-220, arising from her repeated contact with her former martial arts instructor. Kaplan moved to dismiss the charges on grounds that 45-5-220 is unconstitutional. Following a briefing, the motion was denied. By stipulation, Kaplan was subsequently found not guilty by reason of mental disease or defect. Because Kaplan was not convicted, there was no judgment of conviction from which to appeal. Therefore, the denial of her motion to dismiss, absent a judgment of conviction, was not itself an appealable order. The proper method of challenging a finding of mental disease or defect is found in 46-14-301 through 46-14-303. Appealing the constitutionality of the statute under which the person was charged is not an option. St. v. Kaplan, 275 M 108, 910 P2d 240, 53 St. Rep. 60 (1996), followed in St. v. Violette, 2009 MT 19, 349 M 81, 201 P3d 804 (2009).

Burden of Proof — Applicable Standard: This section does not establish a standard of requiring that the defendant carry the burden of proving that there is "no potential for harm". The defendant satisfied his burden under this section by submitting a therapy program recommended by Warm Springs State Hospital (now Montana State Hospital) that was not opposed by the state. St. v. Leischner, 200 M 272, 650 P2d 797, 39 St. Rep. 1737 (1982).

Multiple Charges — Acquittal by Reason of Lack of Mental State on Some Charges — Conviction on Other Charges: Prior to 1981 amendments, the court held that "acquitted", as used near the beginning of the section, meant total acquittal under which the defendant would be released but for the commitment provision of this section. Thus, a defendant charged with multiple offenses who was acquitted on some of the offenses by reason of a lack of mental state and convicted of other offenses is not to be committed under this section because to hold otherwise would be to create the situation where a judge may be caught between statutes mandating both the commitment and the imprisonment of a defendant. St. v. Doney, 194 M 22, 636 P2d 1377, 38 St. Rep. 1707 (1981).

Jury Instruction — Commitment on Acquittal: It was not error to refuse to give a jury instruction stating that acquittal due to mental disease or defect results in a commitment of the defendant to Montana State Hospital. Following St. v. French, 166 M 196, 531 P2d 373 (1975), it is the jury's function to determine the facts relative to guilt or innocence, not to consider alternatives available to the court following the verdict. St. v. Buckman, 193 M 145, 630 P2d 743, 38 St. Rep. 1007 (1981).

Allowable Conditions of Release: A person released from custody in Warm Springs State Hospital after commitment stemming from acquittal of a crime by reason of insanity may not be subjected to release conditions which as applied to such person would be unconstitutional. Thus, the imposition of probation conditions having the tone or effect of being punitive is expressly disapproved. However, some form of overseeing by the parole division may be acceptable in order to balance the competing interests of the person released and the public. In re Application of Zion v. Xanthopoulos, 178 M 468, 585 P2d 1084 (1978).

Acquittal for Mental Disease or Defect — Appeal by State:

Under former law, a judgment of acquittal on the ground of mental disease or defect excluding responsibility could not be directly appealed by the State. St. v. Nelson, 178 M 280, 583 P2d 435, 35 St. Rep. 1496 (1978).

Under former law, the State had no right of direct appeal of an acquittal by reason of mental defect excluding responsibility because the defendant was not free of control by the court as in the case of dismissal. St. v. Hagerud, 174 M 361, 570 P2d 1131 (1977).

Constitutionality of Mental Defect Provisions: The Supreme Court rejected defendant's contention that the Montana provision for notice of mental defect or disease and the mental defect or disease provisions in 46-14-101 through 46-14-401 (46-14-401 was renumbered

46-14-217) and 46-15-301 are unconstitutional. (In 1985, 46-15-301 was repealed and replaced with 46-15-321 [now repealed] through 46-15-329.) St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Attorney General's Opinions

Returning Patients to Montana State Hospital — Financial Responsibility: Prior to the 1981 amendment to 46-14-221, a Sheriff who returned a patient to Montana State Hospital pursuant to 7-32-2144 when the patient was subjected to an involuntary civil or a criminal commitment was entitled to reimbursement for his costs from the applicable county for a person committed pursuant to 46-14-221 and 46-14-222 or the institution to which the person was committed when committed pursuant to 46-14-301, 53-21-121, 53-21-124, and 53-21-127. 37 A.G. Op. 129 (1978).

Collateral References

Criminal Law *key* 625.

21 Am. Jur. 2d Criminal Law §§72 through 76.

Validity of statutory provision for commitment to mental institution of one acquitted of crime on ground of insanity without formal determination of mental condition at time of acquittal. 50 ALR 3d 144.

46-14-302. Discharge or release upon motion of director.

Commission Comments

[See commission comments to 46-14-301.]

Compiler's Comments

2001 Amendment: Chapter 303 in (3) and (5) near beginning after "licensed clinical psychologist" inserted "or advanced practice registered nurse"; and made minor changes in style. Amendment effective April 20, 2001.

1995 Amendment: Chapter 546 in (1), (2), (3), (4), and (6)(c) substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 397 in (1), (3), and (6)(c) substituted "director of the department of corrections and human services" for "superintendent of the Montana state hospital"; in (1), near beginning before "custody", substituted "director's" for "superintendent's", near middle, after "others", inserted language relating to lack of substantial risks, before "shall" substituted "director" for "superintendent", before "court" inserted "district", after "committed" inserted "unless that court transfers jurisdiction to the court in the district in which the person has been placed", and at end substituted "person" for "defendant"; inserted (2) relating to application for discharge or release in annual treatment review; in first sentence of (3), after "least", reduced appointees from "two persons" to "one person" and in second sentence substituted "mental health facility" for "institution" and at end substituted "persons suffering from mental disease or defect" for "irresponsible persons"; inserted (4) relating to testimony of professional person at committed person's hearing; in (5), after "condition", substituted language relating to lack of substantial risks for "without danger to the person or others" and after "discharge" deleted "or release on conditions that the court determines to be necessary"; in (6)(a), after "released", inserted language outlining lack of substantial risks; in (6)(b), after "upon the", substituted "state to prove by clear and convincing evidence that the person may not be" for "committed person to prove by a preponderance of the evidence that the person may" and after "released" inserted remainder of subsection relating to substantial risks; and made minor changes in style. Amendment effective April 19, 1993.

1991 Amendment: Near end of (1) substituted "prosecutor" for "county attorney"; in (3), after "psychologist", deleted "which the court considers necessary"; and made minor changes in style.

1987 Amendment: In (2), near beginning after "two", inserted "persons who are"; and in (2) and (3), after "psychiatrists", inserted "or licensed clinical psychologists".

1983 Amendment: In (1), (2), and (4), substituted "Montana state hospital" for "Warm Springs state hospital".

Applicability of Commission Comments: See compiler's comments to 46-14-301.

Case Notes

Substantial Evidence of Risk of Serious Bodily Injury if Mental Patient Released From Custody: Cooney was convicted of stalking a woman in 1994. In 1996, Cooney was charged with stalking the same woman but was found unfit to proceed and was committed to an institution for as long as the unfitness continued. Cooney ultimately pleaded not guilty by reason of mental disease or defect and was committed to the state hospital. In January 1998, the commitment was

extended, but in December 1998, the state petitioned for Cooney's conditional release and the District Court ordered a mental evaluation. Following the evaluation, the state moved to dismiss the petition, citing Cooney's psychiatric decompensation. The court held that Cooney presented a substantial risk of serious bodily injury or death to himself or others and continued the commitment, and Cooney appealed. The Supreme Court affirmed, finding that the evidence presented, including the record of Cooney's history, medical opinions regarding Cooney's continuing delusional disorder, the stalking victim's statement about her fears should Cooney be released, and medical opinions about Cooney's likely actions and the victim's likely reaction if Cooney were released, clearly established that, if released, Cooney presented a substantial risk of causing serious mental impairment in another person and therefore posed a substantial risk of serious bodily injury or death to himself or others. St. v. Cooney, 2000 MT 138, 300 M 31, 1 P3d 956, 57 St. Rep. 558 (2000).

Mental Disease or Defect Affirmatively Defined: Noting that Montana does not offer a statutory definition of mental disease or defect, the Supreme Court held that pursuant to this section, the Legislature intends courts to interpret the term and that an affirmative definition is necessary to resolve the ambiguity between legal and medical definitions. Modifying the definition in the New York Criminal Procedure Law, the court defined mental disease or defect under 46-14-101 as an affliction with a mental disease or mental condition that is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment, and rehabilitation. This affirmative definition complements but does not alter the exclusion in 46-14-101 of an abnormality manifested only by repeated criminal or other antisocial behavior. Wooster appealed from a decision that he continued to be a danger to society, thus preventing his release from the state hospital where he was confined after being acquitted and determined incompetent to stand trial for the deliberate homicide of his daughters. The appropriate inquiry in determining whether an acquittee no longer suffers from a mental disease or defect is whether the acquittee suffers from a present mental disease or defect that causes the person to present a substantial risk, which the state must prove in civil proceedings by clear and convincing evidence. It is not necessary that the court find that an acquittee have the same mental disease or defect that was present when the acquittee was originally committed. Wooster's mental evaluation showed that he would be dangerous if released without supervision and further treatment, and the District Court did not err in concluding that Wooster posed a continuing danger to himself and others, warranting further confinement at the state hospital. However, the Supreme Court remanded for further determination of whether Wooster's antisocial personality disorder met the affirmative definition of mental disease or defect. St. v. Wooster, 1999 MT 22, 293 M 195, 974 P2d 640, 56 St. Rep. 103 (1999). See also Jones v. U.S., 463 US 354, 77 L Ed 2d 694, 103 S Ct 3043 (1983), Foucha v. La., 504 US 71, 118 L Ed 2d 437, 112 S Ct 1780 (1992), and Kans. v. Hendricks, 521 US 346, 138 L Ed 2d 501, 117 S Ct 2072 (1997).

Denial of Unconditional Release Proper When Condition Unchanged and Risk of Reoffending Exists: Woods was charged with felony assault (now assault with a weapon) in 1974. Following examination at Montana State Hospital, he moved for and was granted acquittal based on mental disease or defect and was committed to the hospital. Pursuant to 46-14-301, Woods sought unconditional release in 1994, contending that he was not seriously mentally ill, that his pedophilia was in remission, and that he posed no risk or threat. The trial court disagreed and twice denied the petition for release. Despite Woods's contention that he should be released because the state failed to meet its burden of proof at the first hearing and that the statutes do not provide for sequential hearings, on appeal, the Supreme Court found that Woods was not deprived of due process. Although experts agreed that Woods was not seriously mentally ill, the question was whether his mental disease or defect presented a substantial risk or threat of injury to person or property. Following St. v. Korell, 222 M 112, 720 P2d 688 (1986), the court noted that the fact that a mental condition is in remission supports an inference that the condition still exists. Woods refused treatment for pedophilia while incarcerated, and his condition remained unchanged from the time of placement at the hospital. Absent treatment, the risk that Woods would reoffend constituted a sufficient substantial risk of imminent threat of injury to others that denial of the petition for unconditional release was affirmed. St. v. Woods, 285 M 46, 945 P2d 918, 54 St. Rep. 1036 (1997).

Temporary Release From Custody: Although this section does not specifically refer to home visits, District Courts have jurisdiction to hear and make determinations on applications for temporary release from custody, such as home visits, in accordance with this section. St. v. Leischner, 200 M 272, 650 P2d 797, 39 St. Rep. 1737 (1982).

Allowable Conditions of Release: A person released from custody in Montana State Hospital after commitment stemming from acquittal of a crime by reason of insanity may not be subjected to release conditions which as applied to such person would be unconstitutional. Thus, the imposition of probation conditions having the tone or effect of being punitive is expressly disapproved. However, some form of overseeing by the parole division may be acceptable in order to balance the competing interests of the person released and the public. In re Application of Zion v. Xanthopoulos, 178 M 468, 585 P2d 1084 (1978).

Collateral References

Criminal Law *key* 625.

21 Am. Jur. 2d Criminal Law §§77 through 81.

Conditions of release: validity of conditions imposed when releasing person committed to institution as consequence of acquittal of crime on ground of insanity. 2 ALR 4th 934.

46-14-303. Application for discharge or release by committed person.

Commission Comments

Source: See commission comments to 46-14-301.

Compiler's Comments

1995 Amendment: Chapter 546 near end of first sentence substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 397 in first sentence, near beginning before "court", inserted "district", after "committed" inserted "unless that court transfers jurisdiction to the court in the district in which the person has been placed", and at end substituted "director of the department of corrections and human services" for "superintendent of the Montana state hospital". Amendment effective April 19, 1993.

1991 Amendment: In first sentence, after "prescribed", substituted "in 46-14-302" for "above"; and made minor changes in style.

1983 Amendment: Substituted "Montana state hospital" for "Warm Springs state hospital".

Case Notes

Constitutionality of Release Procedure: Under the facts of the case, the Circuit Court rejected the argument that it was a violation of equal protection for this chapter to fail to provide a method of release of a committed person substantially equivalent to the method provided to those committed under Title 53, ch. 21, who are not accused of a crime. Appellant was twice held to be a danger to the community, and 46-14-303 provides a recurringly available means of release. Houghton v. South, 743 F2d 1438 (9th Cir. 1984).

Probative Value of Original Evaluation in Petition for Release: In 1977, Olson petitioned for release from Montana State Hospital. The State, in opposing the petition, introduced psychiatric evidence from the 1970 rape trial in which he was found not guilty by reason of insanity. The Supreme Court said that 46-14-303 calls for a determination of the mental condition of the committed person as of the time for the petition for release. As the interval between the original evaluation and the subsequent petition for release lengthens, the earlier testimony loses its probative value. St. v. Olson, 181 M 323, 593 P2d 724 (1979).

Relevance of Criminal Acts to Petition for Release: The mere fact that an insanity acquittee on de facto self-imposed "probation" for 5 years has committed criminal assault is not reason enough to warrant his continued confinement at Montana State Hospital. The State must show that the 1977 criminal assault was related to the mental disorder diagnosed in 1970 that resulted in his acquittal of a rape charge and commitment to Warm Springs. St. v. Olson, 181 M 323, 593 P2d 724 (1979).

Self-Determined Conditional Releasee: In 1971, Olson was found not guilty of rape by reason of insanity and committed to Montana State Hospital. A year later he walked away, and the authorities of the state hospital failed to notify the committing court or any law enforcement officials of his departure. For the next 5 years, he lived in Great Falls with his wife and family. In 1977, he was returned to Montana State Hospital and then petitioned for release. The court found "in a very real sense his status was that of a conditional, albeit self-determined, releasee, the condition frankly being that he avoid contact with the law. For the five year period specified in 46-14-304, Olson lived up to this condition." St. v. Olson, 181 M 323, 593 P2d 724 (1979).

Allowable Conditions of Release: A person released from custody in Montana State Hospital after commitment stemming from acquittal of a crime by reason of insanity may not be subjected to release conditions which as applied to such person would be unconstitutional. Thus, the

imposition of probation conditions having the tone or effect of being punitive is expressly disapproved. However, some form of overseeing by the parole division may be acceptable in order to balance the competing interests of the person released and the public. In re Application of Zion v. Xanthopoulos, 178 M 468, 585 P2d 1084 (1978).

Requirements for Release After Acquittal: A person acquitted of a crime on the ground of mental disease or defect may later be released from commitment in the state hospital only if the release is recommended both by the hospital superintendent and also by the District Judge after hearing and determination beyond a reasonable doubt that the person committed will not be dangerous in the foreseeable future. State ex rel. Main v. District Court, 164 M 501, 525 P2d 28 (1974).

Collateral References

Criminal Law *key* 625.

21 Am. Jur. 2d Criminal Law §§71 through 81, 82 through 84.

46-14-304. Revocation of conditional release.

Commission Comments

Source: See commission comments to 46-14-301.

Compiler's Comments

1995 Amendment: Chapter 546 in (3) substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 397 at beginning of (1) substituted "The court may order revocation of a person's conditional release" for "If within 5 years after the conditional release of a committed person"; substituted (1)(b) relating to existence of substantial likelihood of mental disease or defect that causes substantial risk for "that for the safety of the person or for the safety of others the person's conditional release should be revoked"; at beginning of (3) inserted "If the court finds that the conditional release should be revoked" and in middle substituted "director of the department of corrections and human services" for "superintendent of the Montana state hospital"; and made minor changes in style. Amendment effective April 19, 1993.

1991 Amendment: After "recommitted to the" inserted "custody of the"; and made minor changes in style.

1983 Amendment: Substituted "Montana state hospital" for "Warm Springs state hospital".

Case Notes

Hearsay Exception Applicable to Testimony of Release Center Director in Considering Revocation of Conditional Release: The defendant asserted that testimony of the director of the release center where the defendant was committed was improperly admitted at a hearing to determine whether revocation of release was proper based on the defendant's behavior. The Supreme Court held that the director's testimony, based on regularly written reports of behavioral problems and counseling sessions kept in the regular course of business and prepared by a staff therapist, was credible, reliable, and well-grounded within the hearsay exception established in Rule 803(6), M.R.Ev. (Title 26, ch. 10). St. v. Edmundson, 246 M 241, 805 P2d 1289, 47 St. Rep. 1937 (1990).

Right to Confrontation Not Applicable to Revocation of Conditional Release — Civil Proceeding: The right to confrontation guaranteed by the sixth amendment to the U.S. Constitution (similar to Art. II, sec. 24, Mont. Const.) only attaches to criminal proceedings. The process established for the commitment, discharge, release, and recommitment of a person to the Warm Springs State Hospital, as established in 46-14-301, et seq., is civil in nature, and the confrontation clause does not apply to hearings held as part of that process. St. v. Edmundson, 246 M 241, 805 P2d 1289, 47 St. Rep. 1937 (1990).

Standard Applicable to Evidence Offered in Hearing on Revocation of Conditional Release: Following the standard set out in St. v. Kern, 212 M 385, 695 P2d 1300 (1984), the evidence a court relies on in revoking conditional release under this section must satisfy the court that the conduct of the person on release has not been in keeping with conditions of the release agreement and that the conduct raises a question of safety of the person and the public. St. v. Edmundson, 246 M 241, 805 P2d 1289, 47 St. Rep. 1937 (1990).

Relevance of Criminal Acts to Petition for Release: The mere fact that an insanity acquittee on de facto self-imposed "probation" for 5 years has committed criminal assault is not reason enough to warrant his continued confinement at Montana State Hospital. The State must show that the 1977 criminal assault was related to the mental disorder diagnosed in 1970 that resulted in his acquittal of a rape charge and commitment to Warm Springs. St. v. Olson, 181 M 323, 593 P2d 724 (1979).

Self-Determined Conditional Releasee: In 1971, Olson was found not guilty of rape by reason of insanity and committed to Montana State Hospital. A year later he walked away, and the authorities of the state hospital failed to notify the committing court or any law enforcement officials of his departure. For the next 5 years, he lived in Great Falls with his wife and family. In 1977, he was returned to Montana State Hospital and then petitioned for release. The court found "in a very real sense his status was that of a conditional, albeit self-determined, releasee, the condition frankly being that he avoid contact with the law. For the five year period specified in 46-14-304, Olson lived up to this condition." St. v. Olson, 181 M 323, 593 P2d 724 (1979).

Collateral References

Criminal Law *key* 625.

21 Am. Jur. 2d Criminal Law §§82 through 84.

46-14-311. Consideration of mental disease or defect or developmental disability in sentencing.

Compiler's Comments

2009 Amendment: Chapter 268 in (1) in first sentence near middle after "claims" inserted language concerning the time of the omnibus hearing or the time of any change of plea, in last sentence after "and shall" substituted language regarding the sentencing court's consideration of the results of the presentence investigation for "require additional evidence that it considers necessary for the determination of the issue, including examination of the defendant and a report of the examination as provided in 46-14-202 and 46-14-206"; inserted (2) requiring the sentencing court to order a presentence investigation and report; and made minor changes in style. Amendment effective April 17, 2009.

Applicability: Section 4, Ch. 268, L. 2009, provided: "[This act] applies to a defendant convicted on a verdict of guilty or a plea of guilty or nolo contendere on or after [the effective date of this act]." Effective April 17, 2009.

2003 Amendment: Chapter 452 near middle after "defect" inserted "or developmental disability"; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 395 near beginning inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendment: In two places substituted "the defendant's behavior" for "his conduct"; and made minor changes in style.

Case Notes

District Court Conclusion as to Mental Disease or Defect Not to Be Disturbed Unless Unsupported by Record: Gallmeier was convicted of robbery and sentenced to prison. Gallmeier contended that the District Court was required to impose a sentence with the Department of Public Health and Human Services (DPHHS) because of Gallmeier's mental condition. The Supreme Court will not disturb a District Court's conclusion regarding a defendant's mental disease or defect unless that conclusion is unsupported by the record. In this case, the District Court determined at the sentencing hearing that Gallmeier's mental illness had not influenced Gallmeier's behavior to the degree that a sentence in the state mental institution would be more appropriate. Therefore, the Supreme Court affirmed the District Court's determination that Gallmeier did not meet the burden of proof for commitment to DPHHS. St. v. Gallmeier, 2009 MT 68, 349 M 424, 203 P3d 852 (2009), following St. v. Pittman, 2005 MT 70, 326 M 324, 109 P3d 237 (2005).

Correct Finding of No Mental Illness During Revocation Proceeding: During Price's sentence revocation proceedings, the District Court found that Price did not suffer from a mental illness. Noting that under St. v. Boulton, 2006 MT 170, 332 M 538, 140 P3d 482 (2006), the revoking court may consider evidence of a mental disease or defect, the Supreme Court considered the District Court's conclusion and affirmed based on the record that there was no evidence that Price suffered from a mental illness. Several experts testified that Price was personality-disordered but did not suffer from a psychosis, and Price's own actions showed that he wanted to intimidate people g;CNS122162em believe he was violent. St. v. Price, 2008 MT 319, 346 M 106, 193 P3d 921 (2008).

Evidence of Knowing or Purposeful Action Despite Mental Disease or Defect — Aggravated Assault Conviction Affirmed: Meckler was convicted of aggravated assault and committed to the Department of Public Health and Human Services for life. Meckler contended that he could not be found guilty of aggravated assault because he lacked the ability to conform his conduct to the requirements of the law due to a mental disease or defect. It was undisputed that Meckler suffered from paranoid schizophrenia and was not taking his medications at the time he committed the offense; however, the presence of a mental disease or defect does not necessarily

preclude that person from acting purposely or knowingly. Evidence showed that Meckler knew that he struck the victim and that the victim suffered serious bodily injury as a result and showed that Meckler was lucid, coherent, and functional prior to and after the attack. Thus, the trial court correctly concluded that Meckler's volitional act was done knowingly or purposely, and the assault conviction was affirmed. The mental disease or defect was properly considered at sentencing rather than as an element of the offense. St. v. Meckler, 2008 MT 277, 345 M 302, 190 P3d 1104 (2008).

Inapplicability of Mental Disease or Defect Sentencing Provisions to Probation Revocation Proceedings: Boulton asserted that because her probation violations were the result of a mental illness, she should have been sentenced to continued probation with intense supervision pursuant to 46-14-312 and this section, rather than committed to the Department of Corrections. The state argued that sentencing provisions related to a defendant with a mental disease or defect apply only to original sentencing and not to sentence revocation proceedings. The Supreme Court agreed with the state. It is generally irrelevant whether a probation violation may have been committed while a probationer was suffering a mental disease or defect. Rather, the question is whether the purposes of rehabilitation are being achieved and whether, by virtue of subsequent criminal conduct or evidence that a probationer's behavior was not in compliance with the rules and objectives of the probation, the objectives of probation are best served by continued liberty or by incarceration. The alternative sentencing provisions of 46-14-312 and this section do not apply in sentence revocation proceedings, although the revoking court may consider evidence of a mental disease or defect during the proceedings. In the present case, after Boulton pleaded true to multiple probation violations, the revoking court concluded that evidence of Boulton's mental disorders did not warrant placement in the state hospital, consistent with the testimony of Boulton's psychiatrist, and that placement with the Department better served the purposes of probation. Revocation of Boulton's sentence was affirmed. St. v. Boulton, 2006 MT 170, 332 M 538, 140 P3d 482 (2006), following St. v. Averill, 2001 MT 161, 306 M 106, 30 P3d 1059 (2001).

Consideration of Defendant's Mental State During Revocation Proceedings — Commitment to Department of Corrections Affirmed: After Burke admitted violating five probation conditions, the District Court considered several sentencing alternatives during revocation proceedings. In doing so, the court considered Burke's mental condition, allowing a confidential mental health evaluation. The psychologist determined that Burke suffered from several mental conditions requiring medication, but found no indication of organic impairment, mental retardation, or psychoses, and could not say with medical certainty that the mental condition caused Burke to violate parole. The psychologist opined that Burke understood his legal situation and had the capacity to plan a legal strategy with counsel and recommended placement at the state hospital. The District Court acknowledged Burke's mental condition, but found that the condition did not render Burke unable to appreciate the criminality of his behavior or to conform his behavior to the requirements of the law, so Burke's suspended sentence was revoked, and Burke was committed to the Department of Corrections for the remainder of the original sentence. Burke appealed on grounds that he should instead have been sentenced to the Department of Public Health and Human Services, but the Supreme Court disagreed. The District Court had wide latitude in sentencing Burke, and absent a showing that the District Court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason, resulting in substantial injustice, the sentence was affirmed. St. v. Burke, 2005 MT 250, 329 M 1, 122 P3d 427 (2005).

Review of Finding of Mental Disease or Defect — Abuse of Discretion Standard: The Supreme Court reviews a District Court determination of the existence of a mental disease or defect to determine whether the District Court has abused its discretion. An abuse of discretion occurs when the District Courts acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. St. v. Burke, 2005 MT 250, 329 M 1, 122 P3d 427 (2005), following St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003).

When Defendant's Mental State May Be Considered — Insanity Defense Not Allowed: There is no constitutional right to an insanity defense in Montana, but a defendant's mental disease or defect may be considered at three separate stages of a criminal proceeding: (1) prior to trial, when a defendant may be examined to determine the ability to understand the proceedings and participate in the defense; (2) at trial, when a defendant may introduce evidence of mental disease or defect whenever relevant to prove an absence of the requisite mental state; and (3) at sentencing, when a convicted defendant may claim that at the time of the offense the defendant was suffering from a mental disease or defect that rendered the defendant unable to appreciate

the criminality of the defendant's behavior or to conform the defendant's conduct to the requirements of law. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004).

Proper Consideration of Defendant's Mental State to Justify Sentencing With Department of Corrections Rather Than Department of Public Health and Human Services: Following a drug conviction, the District Court considered Rathbun's mental condition pursuant to this section and determined that Rathbun did not meet the burden of proof for commitment to the Department of Public Health and Human Services. Rathbun was instead sentenced to concurrent 10-year sentences with the Department of Corrections, and Rathbun appealed, but the Supreme Court affirmed. The District Court properly considered Rathbun's mental state at the time that the offenses occurred, and the sentences were within the parameters established by statute. Rathbun did not meet the burden of proof under this section, and the commitment to the Department of Corrections was a proper application of the appropriate commitment regime to avoid cruel and unusual punishment. St. v. Rathbun, 2003 MT 210, 317 M 66, 75 P3d 3334 (2003).

Independent Judicial Finding of Mental Disease or Defect — Sufficient Judicial Independence Found to Support Sentence: Scarborough, a schizophrenic, was found guilty of deliberate homicide and attempted deliberate homicide and was sentenced to life imprisonment without parole. He was also found guilty of robbery and was sentenced to 40 years, to run consecutively, and was also sentenced to an additional 10 years on each of three counts for use of a weapon. On appeal, Scarborough argued that the sentence was improper because the District Court had failed to make an independent finding of whether he suffered from a mental disease or defect, and had simply adopted the jury's finding as the District Court's own findings. The Supreme Court noted the language of the District Court's finding in which the District Court held that it "cannot" make the finding requested by Scarborough and that, as far as the jury's finding that Scarborough acted knowingly and purposefully went, the District Court held that the "Court sees no reason to interfere with that finding and, in fact, concurs with those findings". Based upon this record, the Supreme Court held that it was clear that the District Court "independently considered the issue and, like the jury, concluded that Scarborough did not suffer from a mental disease or defect", that the District Court had complied with the requirements of this section, and that the sentence was therefore not improper. St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Mental Disease Not Affecting Ability to Appreciate Criminality of Behavior — Prison Sentence, Rather Than Hospitalization, Appropriate: Smith contended that the District Court erred in concluding that he did not suffer from a mental disease or defect that rendered him unable to appreciate the criminality of his behavior or to conform it to the requirements of law, pursuant to 46-14-312 and this section, and that because of his personality disorder, he should have been sentenced to the state hospital rather than the state prison for felony assault and assault on a peace officer in order to satisfy state principles of prevention and reformation in light of his unique and particular posture as a mentally ill person. However, even assuming that Smith had a mental disease or defect, the District Court found that Smith's mental condition did not have the effect of rendering him unable to appreciate the criminality of his behavior or to conform it to the requirements of law. Smith failed to satisfy this additional element of this section, so hospitalization was not required under 46-14-312. St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000).

Psychological Evaluation in Record — Upholds Defendant's Ability to Appreciate Criminality of Acts — Conflicting Evidence: Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged her ability to appreciate the criminality of her offense. The Supreme Court reviewed the record and noted that Collier was given four different mental examinations and that three of the four found Collier to be competent and fit to proceed with the charges against her. Although the fourth evaluation found Collier suffering from diminished capacity due to her mental illness, the Supreme Court held that the District Court properly resolved the conflicting evidence before it and did not abuse its discretion in not sentencing Collier to a mental institution. St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

Section Not Violative of Constitutional Right to Jury Trial: Defendant argued that 46-14-312 allows the court to decide the issue of mental disease or defect when considering the issue as part of the sentencing scheme, in violation of the constitutional right to a trial by jury guaranteed by the sixth amendment to the U.S. Constitution (similar to Art. II, sec. 24, Mont. Const.). However, by the time 46-14-312 is applied, defendant has already received a trial. The effect of considering the issue at sentencing does not nullify the jury verdict but rather provides a further precaution for the protection of both defendant and society by allowing mental disease or defect to be taken

into account as it relates to appropriate institutionalization. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Sentence to Prison Not Abuse of Discretion: Although defendant was suffering from a mental defect at the time he committed deliberate homicide, the defect did not render him unable to appreciate the criminality of his conduct or render him unable to conform his conduct to the requirements of law. Therefore, the trial court did not abuse its discretion when it sentenced defendant to prison rather than a mental hospital. St. v. Tibbitts, 226 M 36, 733 P2d 1288, 44 St. Rep. 439 (1987).

Mental Disease or Defect Diagnosed After Trial and Sentencing — Case Remanded: When defendant was diagnosed after trial and sentencing as suffering from organic brain syndrome, progressive dementia, and possibly Alzheimer's disease, the Supreme Court remanded the issue of mental disease to the sentencing court for review, as this evidence was clearly relevant to defendant's sentence for sexual assault. St. v. Long, 223 M 502, 726 P2d 1364, 43 St. Rep. 1948 (1986).

Sentencing Court to Determine Mental Disease or Defect: Defendant appeared at the home of the victim and rang the doorbell. When the victim answered, defendant entered, chased her through the house, cornered her, and strangled her for 10 to 20 seconds with a rope. Defendant fled, and the victim asked two construction workers for help. The workers chased and caught defendant. Defendant notified the prosecution of his intention to rely on mental disease or defect as a defense. Defendant contended that he did not possess the requisite mental elements of purposely or knowingly. Defendant was convicted of aggravated assault. Defendant asked the court to sentence him to Warm Springs. The court sentenced him to the Montana State Prison. On appeal, the defendant contended this was error due to diminished mental capacity. On appeal, the Supreme Court remanded, stating that under the statutory scheme, once the defendant has been found guilty, the court must determine if the defendant was suffering from a mental disease or defect at the time of the offense. If the court finds this to be the case, he is sentenced to the care of the Director of the Department of Institutions (now Department of Public Health and Human Services). Because the trial court did not make the mandatory finding concerning mental disease or defect, the case was remanded for resentencing. St. v. Raty, 214 M 114, 692 P2d 17, 41 St. Rep. 2354 (1984). However, see St. v. Gray, 258 M 424, 853 P2d 93, 50 St. Rep. 596 (1993).

Independent Assessment by Judge Required: Defendant, a Vietnam veteran, had several disturbing experiences during the war. He had psychological problems upon his return. While working at St. Patrick Hospital in Missoula, he developed animosity towards his supervisor. He felt he had to kill his supervisor before the supervisor killed him. He armed himself and went to the supervisor's home, where he entered and began shooting. In an ensuing struggle, a knife was also used and both men were injured. Defendant was charged with attempted deliberate homicide and aggravated assault. Defendant gave notice he intended to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. Four doctors testified before the jury concerning defendant's mental condition, and all filed written evaluations with the court. After the jury found defendant guilty, the judge, in announcing sentence, said he would not question the jury's finding regarding mental condition. On appeal, the Supreme Court said this action negated the judge's role under 46-14-311, which is designed to avoid cruel and unusual punishment. The jury is to consider mental disease or defect only as it relates to criminal state of mind. The judge must independently assess the defendant's sanity and fitness for penal punishment. The sentence was vacated and remanded for resentencing. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984).

Insanity Defense Restriction — Not Cruel and Unusual: Defendant, a Vietnam veteran, had several disturbing experiences during the war. He had psychological problems upon his return. While working at St. Patrick Hospital in Missoula, he developed animosity towards his supervisor. He felt he had to kill his supervisor before the supervisor killed him. He armed himself and went to the supervisor's home, where he entered and began shooting. In an ensuing struggle, a knife was also used and both men were injured. Defendant was charged with attempted deliberate homicide and aggravated assault. Defendant gave notice he intended to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. Defendant contended that Montana's abolition of insanity as an affirmative defense violated the eighth amendment to the United States Constitution's prohibition of cruel and unusual punishment (similar to Art. II, sec. 22, Mont. Const.). The Supreme Court held that the criminal code does not permit punishment of a

mentally ill person who has not committed a crime. The sentencing court is required to review the convicted defendant's mental condition at the time of the offense under 46-14-311. If the court finds a mental disease or defect existed, the defendant is placed in an appropriate institution for care and treatment. This independent review of mental condition is designed to prevent the imposition of cruel and unusual punishment. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984), followed in St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993).

Volitionally Impaired Defendant — Due Process Met: Defendant was charged with attempted deliberate homicide and aggravated assault. He gave notice of his intent to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. After conviction, defendant appealed, contending that Montana's statutory insanity defense scheme did not recognize those who lack the ability to conform their conduct to the law. He contended that this elimination of the involuntariness defense violated due process. The Supreme Court held that the volitional aspect of mental disease or defect has not been eliminated from Montana law. Consideration of that factor has been transferred from the jury to the sentencing judge under 46-14-311. Section 45-2-202 provides that a voluntary act is a material element of every offense. That section and the definition of involuntary act in 45-2-101(31) adequately provide for an involuntariness defense. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984).

Distinction Between Medical Diagnosis of Mental Illness and Legal Finding of Mental Disease Relieving Criminal Responsibility: A medical diagnosis of mental illness that requires treatment and a legal finding of mental disease that relieves criminal responsibility are distinguishable. It is possible to be diagnosed as suffering from a mental illness for medical and treatment purposes and, from a legal standpoint, still be criminally culpable. If the mental disease does not satisfy the conditions in 46-14-311 relating to culpability, a sentence of imprisonment may properly be imposed under 46-14-312. St. v. Watson, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984).

Level of Impairment — Applicability of Section: This section and 46-14-312 involve a defendant seeking commitment after he has been convicted, and the findings provided in 46-14-312 affect sentencing only, not conviction. Involved are a standard of impairment and a consideration of evidence that are or may be different from those involved in the conviction. The proper provisions relating to the level of impairment for commitment on acquittal are found at 46-14-301, and another level of impairment is considered for exception to mandatory minimum sentencing in 46-18-222. St. v. Doney, 194 M 22, 636 P2d 1377, 38 St. Rep. 1707 (1981).

Submission of Defense to Jury — When Justified: Under former law, to justify submitting the defense of mental disease or defect excluding responsibility to the jury, the defendant must have introduced some evidence showing: (1) that he had a mental disease or defect at the time of the incident; and (2) that as a result of such mental disease or defect the defendant was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. St. v. Neel, 177 M 93, 580 P2d 456 (1978).

Evidence of Subsequent Adjudication of Incompetence: It was within the court's discretion to exclude evidence that a guardian had been appointed for the defendant and that he had been declared incompetent 9 months after the commission of a homicide because the passage of time may have so altered conditions that the adjudication may have been irrelevant to the issue of the defendant's mental condition at the time of the offense. St. v. French, 166 M 196, 531 P2d 373 (1975).

Negative Report From Psychiatrist: Under former law, a report of a psychiatrist from the state hospital finding no mental disease or defect precluded the granting of a pretrial acquittal. St. v. French, 166 M 196, 531 P2d 373 (1975).

M'Naughten and "Irresistible Impulse" Rules Abandoned: The M'Naughten and "irresistible impulse" rules no longer apply, having been supplanted by the definition of criminal irresponsibility in subsection (1) of 46-14-101 (since deleted). The definition in subsection (1) was the same as that adopted by the American Law Institute in Article IV, Section 4.01, of the Model Penal Code except that the Montana Legislature substituted "is unable" for "lacks substantial capacity"; by that change the Legislature intended to impose a stricter test for mental incapacity than that contemplated by the Model Penal Code. State ex rel. Krutzfeldt v. District Court, 163 M 164, 515 P2d 1312 (1973). (Annotator's Note: Definition is now found in 46-14-311.)

46-14-312. Sentence to be imposed.

Compiler's Comments

2003 Amendment: Chapter 452 in (2) in first sentence and in (3)(c) after "defect" inserted "or developmental disability"; in (2) in middle of second and third sentences after "defendant"

inserted "and recommendations of the professionals who have evaluated the defendant", in second sentence after "mental health facility" inserted "as defined in 53-21-102, residential facility, as defined in 53-20-102, or developmental disabilities facility, as defined in 53-20-202", and in third sentence after "another" substituted "correctional, mental health, residential, or developmental disabilities" for "correctional or mental health"; and made minor changes in style. Amendment effective October 1, 2003.

1995 Amendments: Chapter 256 in (2), in first sentence after "placed", inserted clause requiring consideration of recommendations of professionals providing treatment to defendant and substituted "correctional or mental health facility" for "institution" and inserted second sentence allowing Director to transfer defendant to facility that will better serve defendant's needs.

Chapter 546 in (2), in first sentence, substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendments: Chapter 262 made minor changes in style.

Chapter 397 inserted (3)(c) that read: "(c) the defendant suffers from a mental disease or defect but is not a danger to the defendant or others"; inserted (3)(d)(iii) that read: "(iii) the defendant will no longer benefit from active inpatient treatment for the mental disease or defect"; and made minor changes in style. Amendment effective April 19, 1993.

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 800 made minor changes in style.

1987 Amendment: At beginning of (3) inserted "Either the director or" and after "certifies that" substituted (3)(a) through (3)(c) relating to mental disease or defect certifications for "the defendant has been cured of the mental disease or defect"; and made minor changes in style.

Case Notes

District Court Conclusion as to Mental Disease or Defect Not to Be Disturbed Unless Unsupported by Record: Gallmeier was convicted of robbery and sentenced to prison. Gallmeier contended that the District Court was required to impose a sentence with the Department of Public Health and Human Services (DPHHS) because of Gallmeier's mental condition. The Supreme Court will not disturb a District Court's conclusion regarding a defendant's mental disease or defect unless that conclusion is unsupported by the record. In this case, the District Court determined at the sentencing hearing that Gallmeier's mental illness had not influenced Gallmeier's behavior to the degree that a sentence in the state mental institution would be more appropriate. Therefore, the Supreme Court affirmed the District Court's determination that Gallmeier did not meet the burden of proof for commitment to DPHHS. St. v. Gallmeier, 2009 MT 68, 349 M 424, 203 P3d 852 (2009), following St. v. Pittman, 2005 MT 70, 326 M 324, 109 P3d 237 (2005).

Correct Finding of No Mental Illness During Revocation Proceeding: During Price's sentence revocation proceedings, the District Court found that Price did not suffer from a mental illness. Noting that under St. v. Boulton, 2006 MT 170, 332 M 538, 140 P3d 482 (2006), the revoking court may consider evidence of a mental disease or defect, the Supreme Court considered the District Court's conclusion and affirmed based on the record that there was no evidence that Price suffered from a mental illness. Several experts testified that Price was personality-disordered but did not suffer from a psychosis, and Price's own actions showed that he wanted to intimidate people and have them believe he was violent. St. v. Price, 2008 MT 319, 346 M 106, 193 P3d 921 (2008).

Inapplicability of Mental Disease or Defect Sentencing Provisions to Probation Revocation Proceedings: Boulton asserted that because her probation violations were the result of a mental illness, she should have been sentenced to continued probation with intense supervision pursuant to 46-14-311 and this section, rather than committed to the Department of Corrections. The state argued that sentencing provisions related to a defendant with a mental disease or defect apply only to original sentencing and not to sentence revocation proceedings. The Supreme Court agreed with the state. It is generally irrelevant whether a probation violation may have been committed while a probationer was suffering a mental disease or defect. Rather, the question is whether the purposes of rehabilitation are being achieved and whether, by virtue of subsequent criminal conduct or evidence that a probationer's behavior was not in compliance with the rules and objectives of the probation, the objectives of probation are best served by continued liberty or by incarceration. The alternative sentencing provisions of 46-14-311 and

this section do not apply in sentence revocation proceedings, although the revoking court may consider evidence of a mental disease or defect during the proceedings. In the present case, after Boulton pleaded true to multiple probation violations, the revoking court concluded that evidence of Boulton's mental disorders did not warrant placement in the state hospital, consistent with the testimony of Boulton's psychiatrist, and that placement with the Department better served the purposes of probation. Revocation of Boulton's sentence was affirmed. St. v. Boulton, 2006 MT 170, 332 M 538, 140 P3d 482 (2006), following St. v. Averill, 2001 MT 161, 306 M 106, 30 P3d 1059 (2001).

Proper Consideration of Defendant's Mental State to Justify Sentencing With Department of Corrections Rather Than Department of Public Health and Human Services: Following a drug conviction, the District Court considered Rathbun's mental condition pursuant to 46-14-311 and determined that Rathbun did not meet the burden of proof for commitment to the Department of Public Health and Human Services. Rathbun was instead sentenced to concurrent 10-year sentences with the Department of Corrections, and Rathbun appealed, but the Supreme Court affirmed. The District Court properly considered Rathbun's mental state at the time that the offenses occurred, and the sentences were within the parameters established by statute. Rathbun did not meet the burden of proof under 46-14-311, and the commitment to the Department of Corrections was a proper application of the appropriate commitment regime to avoid cruel and unusual punishment. St. v. Rathbun, 2003 MT 210, 317 M 66, 75 P3d 3334 (2003).

Plea Bargain Specifying Placement at State Hospital — Transfer From State Hospital to State Prison Within Sentencing Court's Statutory Authority: Lamb left a bomb on his neighbor's doorstep, then called police the next day to report that he thought that he had done so. Lamb was convicted of attempted aggravated assault and possession of a destructive device and, following a plea bargain, was sentenced to 20 years at the state hospital. After 5 months, a determination was made that the placement was inappropriate, and Lamb was transferred to the state prison. Lamb petitioned for postconviction relief and was transferred back to the hospital. The state then petitioned for sentence review and recommended transfer back to the prison, and the District Court granted the petition. Lamb appealed, arguing that because the original sentence was made pursuant to a binding plea agreement and was for commitment to the state hospital and not the state prison, any modification of that sentence was illegal. The Supreme Court disagreed. Under this section, the District Court may transfer a defendant previously committed to the state hospital to a correctional facility if certain statutory criteria are met. The statute provides a procedure whereby the Director of the Department of Corrections or the defendant may petition for sentence review if a professional person certifies that the defendant no longer suffers from a mental disease or defect, and once the petition is filed, the District Court is free to make any order within its original sentencing authority. Here, the petition was properly filed, and the sentence was within that allowed for the crimes charged, so transfer to the state prison was not illegal. St. v. Lamb, 2001 MT 241, 307 M 54, 36 P3d 871 (2001).

Question Whether Parole Denied for Failure to Satisfy Additional Treatment Conditions — Remand: Ringewold pleaded guilty to two counts of felony assault and was sentenced to a total of 14 years' commitment to the Department of Corrections. The next day, Ringewold was placed in the state hospital. The placement order allowed Ringewold to petition for a conditional release from the hospital, but did not specify any conditions. About 17 months later, Ringewold petitioned for release from the hospital. The state agreed that a hearing on the petition was proper, but argued that if it was found that Ringewold no longer suffered from a mental disease or defect that presented a risk to Ringewold or others, it was appropriate to remand Ringewold to the Department. The District Court ordered an independent mental evaluation, but it was never performed. Ringewold then filed another petition for release, but about the same time, the hospital staff determined that Ringewold would no longer benefit from active inpatient treatment and transferred him to the state prison pursuant to this section. At the request of counsel, Ringewold was transferred back to the state hospital, with the state conceding that hospital placement was proper and that Ringewold should be allowed to petition for release pursuant to this section. About 4 months later, the Department Director sought an order transferring Ringewold back to the prison on grounds that Ringewold continued to suffer from a dangerous mental disorder but would no longer benefit from active inpatient treatment for the disorder. At a conditional release hearing about 9 months later, the District Court orally resentenced Ringewold to 8 years in prison. The court specified that the total sentence not exceed more than the original sentence, but the court also conditioned Ringewold's parole on completion of an anger management course, moral reconation therapy, and chemical dependence treatment. In a written amended judgment about 1 month later, the District Court reimposed the original

14-year sentence and restated the parole conditions. Ringewold appealed. The Supreme Court held that under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the oral pronouncement of sentence was legally effective and constituted final judgment. However, it was not possible to determine from the record whether the additional conditions added to the sentence improperly lengthened Ringewold's sentence, so the case was remanded for supplementation of the factual record to determine if Ringewold was being denied consideration for parole because of failure to satisfy the additional treatment conditions and, if so, to strike the conditions from the amended judgment, because under those circumstances, the practical effect of the conditions would be to lengthen the sentence in violation of this section. St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001).

Independent Judicial Finding of Mental Disease or Defect — Sufficient Judicial Independence Found to Support Sentence: Scarborough, a schizophrenic, was found guilty of deliberate homicide and attempted deliberate homicide and was sentenced to life imprisonment without parole. He was also found guilty of robbery and was sentenced to 40 years, to run consecutively, and was also sentenced to an additional 10 years on each of three counts for use of a weapon. On appeal, Scarborough argued that the sentence was improper because the District Court had failed to make an independent finding of whether he suffered from a mental disease or defect, and had simply adopted the jury's finding as the District Court's own findings. The Supreme Court noted the language of the District Court's finding in which the District Court held that it "cannot" make the finding requested by Scarborough and that, as far as the jury's finding that Scarborough acted knowingly and purposefully went, the District Court held that the "Court sees no reason to interfere with that finding and, in fact, concurs with those findings". Based upon this record, the Supreme Court held that it was clear that the District Court "independently considered the issue and, like the jury, concluded that Scarborough did not suffer from a mental disease or defect", that the District Court had complied with the requirements of 46-14-311, and that the sentence was therefore not improper. St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Mental Disease Not Affecting Ability to Appreciate Criminality of Behavior — Prison Sentence, Rather Than Hospitalization, Appropriate: Smith contended that the District Court erred in concluding that he did not suffer from a mental disease or defect that rendered him unable to appreciate the criminality of his behavior or to conform it to the requirements of law, pursuant to 46-14-311 and this section, and that because of his personality disorder, he should have been sentenced to the state hospital rather than the state prison for felony assault and assault on a peace officer in order to satisfy state principles of prevention and reformation in light of his unique and particular posture as a mentally ill person. However, even assuming that Smith had a mental disease or defect, the District Court found that Smith's mental condition did not have the effect of rendering him unable to appreciate the criminality of his behavior or to conform it to the requirements of law. Smith failed to satisfy this additional element of 46-14-311, so hospitalization was not required under this section. St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000).

Section Not Violative of Constitutional Right to Jury Trial: Defendant argued that this section allows the court to decide the issue of mental disease or defect when considering the issue as part of the sentencing scheme, in violation of the constitutional right to a trial by jury guaranteed by the sixth amendment to the U.S. Constitution (similar to Art. II, sec. 24, Mont. Const.). However, by the time this section is applied, defendant has already received a trial. The effect of considering the issue at sentencing does not nullify the jury verdict but rather provides a further precaution for the protection of both defendant and society by allowing mental disease or defect to be taken into account as it relates to appropriate institutionalization. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), overruled in part by St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Sentence to Prison Not Abuse of Discretion: Although defendant was suffering from a mental defect at the time he committed deliberate homicide, the defect did not render him unable to appreciate the criminality of his conduct or render him unable to conform his conduct to the requirements of law. Therefore, the trial court did not abuse its discretion when it sentenced defendant to prison rather than a mental hospital. St. v. Tibbitts, 226 M 36, 733 P2d 1288, 44 St. Rep. 439 (1987).

Transfer From State Hospital to State Prison — Not Cruel and Unusual Punishment: District Court's amended sentencing order transferring defendant from Montana State Hospital at Warm Springs to Montana State Prison did not constitute cruel and unusual punishment when it was based on medical opinions that the defendant did not suffer from a treatable mental illness. St. v. Korell, 222 M 112, 720 P2d 688, 43 St. Rep. 1101 (1986).

Sentencing Court to Determine Mental Disease or Defect: Defendant appeared at the home of the victim and rang the doorbell. When the victim answered, defendant entered, chased her through the house, cornered her, and strangled her for 10 to 20 seconds with a rope. Defendant fled, and the victim asked two construction workers for help. The workers chased and caught defendant. Defendant notified the prosecution of his intention to rely on mental disease or defect as a defense. Defendant contended that he did not possess the requisite mental elements of purposely or knowingly. Defendant was convicted of aggravated assault. Defendant asked the court to sentence him to Warm Springs. The court sentenced him to the Montana State Prison. On appeal, the defendant contended this was error due to diminished mental capacity. On appeal, the Supreme Court remanded, stating that under the statutory scheme, once the defendant has been found guilty, the court must determine if the defendant was suffering from a mental disease or defect at the time of the offense. If the court finds this to be the case, he is sentenced to the care of the Director of the Department of Institutions (now Department of Public Health and Human Services). Because the trial court did not make the mandatory finding concerning mental disease or defect, the case was remanded for resentencing. St. v. Raty, 214 M 114, 692 P2d 17, 41 St. Rep. 2354 (1984). However, see St. v. Gray, 258 M 424, 853 P2d 93, 50 St. Rep. 596 (1993).

Independent Assessment by Judge Required: Defendant, a Vietnam veteran, had several disturbing experiences during the war. He had psychological problems upon his return. While working at St. Patrick Hospital in Missoula, he developed animosity towards his supervisor. He felt he had to kill his supervisor before the supervisor killed him. He armed himself and went to the supervisor's home, where he entered and began shooting. In an ensuing struggle, a knife was also used and both men were injured. Defendant was charged with attempted deliberate homicide and aggravated assault. Defendant gave notice he intended to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. Four doctors testified before the jury concerning defendant's mental condition, and all filed written evaluations with the court. After the jury found defendant guilty, the judge, in announcing sentence, said he would not question the jury's finding regarding mental condition. On appeal, the Supreme Court said this action negated the judge's role under 46-14-311, which is designed to avoid cruel and unusual punishment. The jury is to consider mental disease or defect only as it relates to criminal state of mind. The judge must independently assess the defendant's sanity and fitness for penal punishment. The sentence was vacated and remanded for resentencing. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984).

Insanity Defense Restriction — Not Cruel and Unusual: Defendant, a Vietnam veteran, had several disturbing experiences during the war. He had psychological problems upon his return. While working at St. Patrick Hospital in Missoula, he developed animosity towards his supervisor. He felt he had to kill his supervisor before the supervisor killed him. He armed himself and went to the supervisor's home, where he entered and began shooting. In an ensuing struggle, a knife was also used and both men were injured. Defendant was charged with attempted deliberate homicide and aggravated assault. Defendant gave notice he intended to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. Defendant contended that Montana's abolition of insanity as an affirmative defense violated the eighth amendment to the United States Constitution's prohibition of cruel and unusual punishment (similar to Art. II, sec. 22, Mont. Const.). The Supreme Court held that the criminal code does not permit punishment of a mentally ill person who has not committed a crime. The sentencing court is required to review the convicted defendant's mental condition at the time of the offense under 46-14-311. If the court finds a mental disease or defect existed, the defendant is placed in an appropriate institution for care and treatment. This independent review of mental condition is designed to prevent the imposition of cruel and unusual punishment. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984), followed in St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993).

Distinction Between Medical Diagnosis of Mental Illness and Legal Finding of Mental Disease Relieving Criminal Responsibility: A medical diagnosis of mental illness that requires treatment and a legal finding of mental disease that relieves criminal responsibility are distinguishable. It is possible to be diagnosed as suffering from a mental illness for medical and treatment purposes and, from a legal standpoint, still be criminally culpable. If the mental disease does not satisfy the conditions in 46-14-311 relating to culpability, a sentence of imprisonment may properly be imposed under this section. St. v. Watson, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984).

Three Hundred-Year Prison Sentence of Mentally Ill Defendant Upheld: Sentencing defendant, who was found mentally ill but criminally culpable, to the Montana State Prison for a term of 300 years without the possibility of parole or furlough was not cruel and unusual punishment. The District Court had stated, among other things, that defendant was very dangerous and there was no treatment program that would alter his behavior. St. v. Watson, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984).

Level of Impairment — Applicability of Section: This section and 46-14-311 only involve a defendant seeking commitment after he has been convicted, and the findings provided by this section involve the discretion of the trial judge and only affect sentencing, not conviction. Involved are a standard of impairment and a consideration of evidence that are or may be different from those involved in the conviction. The proper provisions relating to the level of impairment for commitment on acquittal are found at 46-14-301, and another level of impairment is considered for exception to mandatory minimum sentencing in 46-18-222. St. v. Doney, 194 M 22, 636 P2d 1377, 38 St. Rep. 1707 (1981).

Defendant Sane at Time of Crime — Insane at Other Times: Defendant, convicted of aggravated assault, contended that sentencing a man suffering from severe mental illness to prison violates the constitutional ban against cruel and unusual punishment as well as 53-21-101. When a defendant is convicted and claims that he was suffering at the time of the crime from a mental disease or defect that rendered him incapable of conforming his conduct to the requirements of the law, the sentencing judge is to consider the relevant evidence of the defendant's disorder. If the judge finds the defendant did not suffer mental illness at the time of the crime, he is to be sentenced according to the guidelines in Title 46, ch. 18. If the finding is to the contrary, the defendant must be sentenced to Montana State Hospital. Despite the lack of provisions in this chapter for sentencing a defendant who was sane at the time of the crime but may be insane at other times, Title 53, ch. 21, relating to treatment of the mentally ill, does not apply to criminal defendants. The defendant's claim that he is covered by Title 53, ch. 21, is in error. Without a finding of insanity followed by sentencing to a penal institution without provision for adequate treatment, defendant has suffered no statutory or constitutional violation. St. v. Mercer, 191 M 418, 625 P2d 44, 38 St. Rep. 312 (1981), distinguished in St. v. Watson, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984).

Standard of Proof Improperly Applied: Under former law, it was error for the court in a pretrial evidentiary hearing to acquit the defendant by reason of mental disease or defect excluding responsibility when the judge failed to apply the proper standard for measuring the proof required to satisfy the court; thus, review by Writ of Supervisory Control was appropriate. St. v. Hagerud, 174 M 361, 570 P2d 1131 (1977).

Requirement That Mental Defect Be "Plain and Obvious": Under former law, while the opinion of a psychiatrist who examined the defendant was uncontradicted, the court could properly have found his opinion was based upon determinations of fact which were for a jury to determine. Therefore, the existence of a mental defect at the time of the incident was not so "plain and obvious" as to require that a motion for acquittal be granted without trial. State ex rel. Nelson v. District Court, 173 M 221, 566 P2d 1382 (1977).

Burden of Proof: Under former law, an instruction that the amount of evidence sufficient to raise a reasonable doubt of insanity entitles the defendant to an acquittal is erroneous, as insanity must be proven by a preponderance of the evidence. St. v. Caryl, 168 M 414, 543 P2d 389 (1975).

Requirements for Acquittal: Under former law, there were three requirements for acquittal: (1) a report finding mental disease or defect at the time of the criminal conduct; (2) the court's determination that the mental disease or defect excluded responsibility; and (3) the defendant's motion for acquittal. St. v. French, 166 M 196, 531 P2d 373 (1975).

Evidence Sufficient for Acquittal: Under former law, the defendant's motion for acquittal should have been granted when the uncontradicted testimony of a doctor, based on examination, testing, and observation over a period of several years, was to the effect that the defendant had been unable to conform his conduct to the law at the time of the crime. However, the entry of an acquittal does not allow the defendant to be released from the mental institution until a determination by the District Judge that the defendant is no longer dangerous. State ex rel. Main v. District Court, 164 M 501, 525 P2d 28 (1974).

Declaratory of Common Law: The provision that an insane person cannot be tried or punished was held declaratory of the common law as it had existed at least since Blackstone's day. St. v. Kitchens, 129 M 331, 286 P2d 1079 (1955).

Law Review Articles

In Re Ests. of Swansons: The Slayer Statute and the Impact of a Guilty Plea on Collateral Estoppel in Montana, Arant, 71 Mont. L. Rev. 217 (2010).

46-14-313. Discharge of defendant from supervision.

Compiler's Comments

1991 Amendment: Deleted reference to subsection (2) of 46-14-312.

CHAPTER 15
PRODUCTION OF EVIDENCE

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

1991 Chapter Comments: This chapter provides that under limited circumstances, either party may obtain and use depositions in felony criminal proceedings. These statutes combine elements of both the federal and state provisions governing depositions. None of the provisions in these statutes should significantly change established procedure.

Chapter Case Notes

Negligent Suppression of Evidence — Harmless Error: In an appeal involving the negligent suppression of evidence, the court agreed with appellant that the state acted improperly in suppressing four taped witness statements during discovery and a possibly incriminating statement made by appellant during his arrest and in endorsing an additional witness on the first day of trial. However, the court found that the suppressed evidence was either repetitive of other testimony or minimally supportive of a self-defense theory, and that since the defense knew of the additional witness' connection with and importance in the case, it could not convincingly claim surprise at the endorsement. Therefore, all errors were held to be harmless and not grounds for reversal. St. v. Wallace, 223 M 454, 727 P2d 520, 43 St. Rep. 1908 (1986), followed, with regard to application of harmless error rule to admissibility of hearsay testimony, in St. v. Alexander, 265 M 192, 875 P2d 345, 51 St. Rep. 474 (1994).

Motion In Limine to Exclude Documents and Testimony — General Testimony on Same Subject Allowed — No Effect on Substantial Rights of Defendant: A homicide defendant claimed error because the District Court granted the State a motion in limine refusing the introduction of specific documentary and testimonial evidence relating to an earlier incident involving the defendant and the victim that could have established the defendant's frame of mind relevant to self-defense in the homicide. The Supreme Court held that the refusal to admit such evidence did not affect substantial rights of the defendant because general testimony was admitted establishing that the incident occurred and what its general outcome was. St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984).

Chapter Law Review Articles

Discovery in the Federal Criminal System, Kampfe & Dostal, 36 Mont. L. Rev. 189 (1975).

Part 1
Subpoenas and Witnesses

Part Commission Comments

1991 Part Comments: This part sets forth those statutes allowing for the use of subpoenas, postcharge, to gather evidence or to have witnesses appear and give testimony. The statutes are largely an adaptation of the 1987 code, but elements of the Federal Rules of Criminal Procedure have been used as well.

In reviewing the 1987 code concerning postcharge issuance of subpoenas, some irregularities were noted. For example, the general provisions did not allow relief from a subpoena and only the code concerning the subpoena of an out-of-state witness provided penalties for the failure to appear. These statutes address matters of relief and penalties that generally apply to the entire subpoena process.

No attempt was made to significantly alter the 1987 code provisions recognizing out-of-state subpoenas and establishing the interstate cooperation procedures. The statutes establish a generally applied and carefully regulated subpoena practice. Nothing in this part is intended to substantially alter established procedure.

Part Case Notes

Listing of New Witnesses Ten Days Before Trial — Defense Acquiescence in Noncontinuance: The state gave notice 10 days prior to trial of intent to possibly call 12 additional witnesses. After defense objection, the state agreed not to call five of those witnesses, whereupon the defense appeared to acquiesce in the decision not to continue the trial date. The trial court did not abuse its discretion in allowing the new witnesses. St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987).

Compulsory Process — Non-American Witness: A defendant's right to compulsory process is not violated by the absence of a witness when an American court lacks the power to compel the attendance of a witness who is not a citizen of the United States. St. v. Twoteeth, 219 M 101, 711 P2d 789, 42 St. Rep. 1873 (1985).

Prosecution Witness Endorsed on Day of Trial — Failure to Request Continuance: Under the circumstances, the District Court did not abuse its discretion in allowing the prosecution to endorse a psychological counselor, an assistant to the doctor treating the victim, as a witness on the day of the trial. The counselor was previously interviewed by the defense, and the doctor had long been identified as a prosecution witness. The defense did not petition for a continuance, which should have been done if it was believed the endorsement left the defense inadequately prepared. St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984), followed in St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Part Collateral References

Witnesses *key* 8, 10, 21, 22.

97 C.J.S. Witnesses §§19, et seq., 44.

81 Am. Jur. 2d Witnesses §§1 through 49.

46-15-101. Subpoenas.

Commission Comments

1991 Comment: This statute establishes the rule allowing any party to a criminal proceeding to subpoena any witness to appear and give testimony. The statute is a hybrid adaptation of the 1987 code and a statement from the Uniform Rules of Criminal Procedure. No significant change in subpoena practice is intended, but the statute does isolate the use of subpoenas for the appearance of a witness.

Subsection (1) preserves the primary provisions concerning the subpoena practice. See 1987 MCA 46-15-101. The statute is limited only to the subpoena of witnesses. The introductory clause "After the filing of charges" has been added to denote that this subpoena is used only after charges are filed.

Subsection (2) retains the content requirements of a subpoena as stated in the second sentence of 1987 MCA 46-15-101. These requirements are in addition to the requirement that a subpoena be directed toward a specific individual.

Subsection (3) adopts a sentence from the uniform rule concerning the subpoena of witnesses. The statute allows the witness who is served a subpoena to apply to the issuing court to quash or modify the subpoena. The statute's language is lifted directly from the uniform rule. See Rule 731(c), Unif. R. Crim. P. The 1987 code did not expressly provide an aggrieved party with an avenue of relief. Thus, to this degree, the statute alters established procedure.

Commission Comment Not Divided: This section is a recodification of part of section 95-1801, R.C.M. 1947. Sections 46-15-102 through 46-15-104 (renumbered 46-15-107, 46-15-115, and 46-15-116) are also derived from section 95-1801. The commission comments to section 95-1801 are printed in their entirety under 46-15-101.

Source: Kentucky Rule 7.02, R.C.M. 1947, sections 94-8904, 94-8905 and Illinois Supreme Court Rules on Discovery—25-5 and Federal Rule 16. Colorado Rules 17 (d) 4.

The purpose of [46-15-115] is to prevent an indigent defendant from indiscriminately subpoenaing unnecessary witnesses and greatly adding to expenses. After 6 witnesses, the defendant is required to go before the judge and justify the need for additional witnesses. Also, if any one witness is to be paid more than the usual fee, a court order is needed.

[Section 46-15-116] is substantially the same as the present code and merely authorizes the judge to reimburse or pay the expenses of a witness subpoenaed for a defendant. Reference to this is also made in [46-8-201, now repealed]. (See [26-2-501] which deals with witnesses' fees.) It is intended that [46-15-116] be sufficiently broad to allow the trial judge ample discretion to pay what he believes reasonable in the particular case. The provision does not attempt to particularize any of the expenses which might occur. The primary purpose of [46-15-322 through 46-15-329] is to allow discovery of necessary material by either the prosecution or the defendant from third parties.

Procedure for allowing discovery of the prosecution by the defendant and of the defendant by the prosecution is provided for in [part 3] of this chapter.

Compiler's Comments

1995 Amendment: Chapter 138 at end of (2) inserted sentence relating to modification by agreement or by amended subpoena; and inserted (4) providing that subpoena remains in effect unless quashed or until final determination of action.

1993 Amendment: Chapter 262 inserted second sentence of (1) that read: "The court shall maintain a list of the names of the persons to whom subpoenas are issued."

1991 Amendment: In (1), at beginning, inserted "After the filing of charges and", after "attorney" deleted "the court", and at end inserted "with the name of the person to whom each subpoena is directed, commanding the person to appear and to give testimony"; in (2), near end after "testimony", deleted "and produce objects and documents"; inserted (3) concerning quashing or modifying subpoena; and made minor changes in style.

Case Notes

Subpoena of Materials in Prosecutor's Custody: The showing necessary to gain access to material in the hands of the prosecutor is greater than is required to obtain material in the hands of third parties. No error was involved because of a 1-week delay in compliance with a demand made by the defendant after the trial had begun. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Availability of Investigative Subpoena: A subpoena must be issued by a court and is not available to the Attorney General or other prosecuting attorneys independent of a court or grand jury. Under former law a subpoena was not available in cases not filed. State ex rel. Woodahl v. District Court, 166 M 31, 530 P2d 780 (1975).

Collateral References

Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings. 12 ALR 4th 771.

Sufficiency of evidence to support or require finding that out-of-state witness in criminal case in "material witness" justifying certificate to secure attendance under Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings. 12 ALR 4th 742.

Availability under Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings of subpoena duces tecum. 7 ALR 4th 836.

Accused's right to interview witness held in public custody. 14 ALR 3d 652.

46-15-105. Persons imprisoned in state prison or in another county.

Case Notes

When Writ Necessary: When a state court desired that a prisoner be produced for use as a witness and the custodian was not the Sheriff of the county in which the court requiring the prisoner sat, a Writ of Habeas Corpus was held necessary, notwithstanding a former statute providing for temporary removal of imprisoned witnesses by order of a trial court. U.S. v. Schultz, 37 F2d 619 (9th Cir. 1930).

Collateral References

Prisons *key* 13.

72 C.J.S. Prisons and Rights of Prisoners §§17 through 25.

81 Am. Jur. 2d Witnesses §§270, 271.

46-15-106. Subpoenas for production of evidence.

Commission Comments

1991 Comment: This statute reflects the 1987 code only to the extent that it provides for the production of certain evidence on the basis of a subpoena. See 1987 MCA 46-15-101. The statute is modeled primarily after the federal rule governing such subpoenas. Although similar to the procedure for the subpoena of witnesses, the provisions have been separated for clarity.

Subsection (1) is a restatement of the federal rule allowing subpoenas to issue for the production of evidence. The provision requires that the subpoena be directed toward a person and that it identify the evidence desired to be produced. The adoption of this provision should not significantly alter established procedure. Compare 1987 MCA 46-15-101 and Rule 17(c), Fed. R. Crim. P.

Subsection (2) allows the court to control the manner in which and the extent to which evidence is produced under a subpoena. The court may direct which evidence should be produced and the time and place that it is to be produced. See Rule 17(c), Fed. R. Crim. P.

Subsection (3) allows the aggrieved party to apply for relief from an oppressive or otherwise unreasonable subpoena. This provision is reflected both in the federal rules and the uniform rules. See Rule 17(c), Fed. R. Crim. P., and Rule 731(c), Unif. R. Crim. P. Although the relief provision is not expressly recognized in the 1987 code, the provision does reflect prevailing practice.

46-15-107. Service of subpoenas.

Commission Comments

1991 Comment: This statute is a restatement of 1987 MCA 46-15-102 and contains provisions governing the service of subpoenas. The statute offers no changes to the 1987 code and is reflective of the service provisions present in the federal rules. Compare 1987 MCA 46-15-102 and Rule 17(d) and 17(e), Fed. R. Crim. P.

Compiler's Comments

1991 Amendment: Near end of (1) substituted "prosecution" for "state"; and made minor changes in style.

Case Notes

Jurisdiction to Issue Contempt Order — Service of Witness Subpoena Proper: The subpoena was delivered by the Deputy Sheriff to the relator's secretary who, in turn, showed the relator the subpoena. Because the secretary was over 18 years of age and was not a party to the action, the requirements of this section were fulfilled and the District Court had jurisdiction to issue a contempt order for disobedience to the witness subpoena. There was sufficient evidence to support the finding of contempt. State ex rel. Anderson v. District Court, 188 M 77, 610 P2d 1183 (1980).

46-15-112. Subpoena of witness in this state to testify in another state.

Commission Comments

1991 Comment: This statute is a restatement of the 1987 code that permitted a subpoena for a witness to appear in another state to have effect in this state. Under this statute, a subpoena for the appearance of a person in another state's proceedings may be reviewed and accepted by the District Court Judge in this state. If accepted, the District Court may order the person sought by the out-of-state subpoena to be held until arrangements may be made. The court also has discretion to simply order the person to appear for the out-of-state proceeding. This provision is one of many interstate cooperation provisions present in the code and was not amended.

Not retained in this statute is the provision concerning the compensation of witnesses. See 1987 MCA 46-15-112(4). The compensation of subpoenaed witnesses has been provided for in 46-15-116.

Compiler's Comments

1991 Amendment: In (2), in two places in first sentence, substituted "subpoena" for "summons"; in (3), after "judge", deleted "being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability" and after "subpoena" deleted "or summons"; deleted (4) that read: "(4) If the witness who is summoned as provided in this section, after being paid or tendered by some properly authorized

person the sum of 10 cents a mile for each mile and $5 for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state"; and made minor changes in style.

Collateral References

Witnesses *key* 6.

97 C.J.S. Witnesses §17.

46-15-113. Subpoena of witness in another state to testify in this state.

Commission Comments

1991 Comment: This statute is a restatement of the 1987 code that allowed for the subpoena of a person in another state to appear in this state for certain criminal proceedings. Because this is one of many interstate cooperative agreements in the criminal code, it was not amended. Along with 46-15-112, this statute does not attempt to address witness fees, which are provided for in 46-15-116.

Compiler's Comments

1991 Amendment: Deleted former (3) that read: "(3) Whenever a witness is summoned to attend and testify in this state, he shall be tendered the sum of 10 cents a mile for each mile and $5 for each day that he is required to travel and attend as a witness. If the state wherein the witness is found has by statutory enactment required that the summoned witness be paid an amount in excess of the amount specified in the preceding sentence, the witness may be tendered the amount required by that state"; in (3) substituted "subpoena" for "summons"; in (4), after "directed", deleted "in the summons", after "disobeys" substituted "an order" for "a summons", and at end inserted "in accordance with Title 3, chapter 1, part 5, or in accordance with 45-7-309"; and made minor changes in style.

Case Notes

Reimbursement for Costs Incurred in Procuring Witness Testimony: Hardaway sought reimbursement for costs incurred in procuring the testimony of two out-of-state witnesses, one who appeared in person under subpoena and one who was deposed telephonically. The District Court denied reimbursement because Hardaway's counsel was retained rather than court-appointed. However, the only prerequisites that appear in the applicable statutes are that the court has revenue available and that the witness be subpoenaed. The procedural requirements of this section for compelling the attendance of an out-of-state witness do not apply to an out-of-state witness who voluntarily appears and acknowledges service of a subpoena. Further, under 46-15-202, costs of a telephonic deposition are within the scope of a reimbursable deposition. The statutes do not distinguish between court-appointed and retained attorneys, but rather rely on the indigency of the defendant. Hardaway was declared indigent and remained so throughout the proceedings and, as such, was entitled to reimbursement for witness costs and deposition costs. St. v. Hardaway, 1998 MT 224, 290 M 516, 966 P2d 125, 55 St. Rep. 936 (1998).

Denial of Motion to Provide Travel Costs of Immaterial Out-of-State Witnesses: The District Court did not err in denying defendant's motion for provision of travel expenses for out-of-state defense witnesses after finding that the testimony of defendant and the victim covered all the testimony the out-of-state witnesses could possibly have provided, rendering testimony by the out-of-state witnesses immaterial. St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992).

Decision on Materiality of Witness' Testimony Discretionary: A trial court's finding as to the materiality of a witness when applying this statute will not be disturbed absent a clear showing of abuse of discretion. St. v. Sanderson, 214 M 437, 692 P2d 479, 42 St. Rep. 94 (1985), followed in St. v. Van Pelt, 247 M 99, 805 P2d 549, 48 St. Rep. 109 (1991).

46-15-115. Subpoena for witness when defendant unable to pay.

Commission Comments

1991 Comment: This statute is an adoption of the federal rule allowing a subpoena to issue at the state's expense on behalf of an indigent defendant. See Rule 17(b), Fed. R. Crim. P. The statute requires that the defendant show that he is indigent and that the witness sought is necessary to an adequate defense. Subsection (1) is a reflection of the federal rule. Subsection (2) reflects the restraints under 1987 MCA 46-15-103 that required a court order for the subpoena of more than six witnesses.

Source: See commission comments to 46-15-101.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (1) after "defendant" inserted "acting pro se"; in (2) after "indigent" inserted reference to acting pro se and not represented by public defender; inserted (3) requiring witness costs to be paid by office of state public defender in certain cases; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1991 Amendment: Inserted (1) concerning subpoena of witness for defendant unable to pay; in (2) deleted last two sentences that read: "If a witness is to be paid more than the regular fee or there are more than six witnesses to be paid, an order of the court or judge is needed. Such order may be made upon proper showing by affidavit or otherwise"; and made minor changes in style.

Case Notes

Purpose of Limitation: The purpose of a former statute providing that the clerk should not subpoena more than six witnesses for each party except upon an order of the court was to control the expenses of the county. It was a limitation upon the clerk of the court and not upon the judge. When the court allows more than six witnesses to testify for the State, the defendant is not prejudiced by the absence of an express order made by the court. St. v. Cockrell, 131 M 254, 309 P2d 316 (1957).

Materiality of Testimony of Additional Witnesses: It is proper for the court to require the defendant, upon a request for a subpoena for additional witnesses, to disclose the materiality of their testimony. St. v. O'Brien, 18 M 1, 43 P 1091, 44 P 399 (1896).

46-15-116. Fees, costs, and expenses.

Commission Comments

1991 Comment: This statute is a combination of several subsections of 1987 MCA 46-15-104 and is intended to control the payment or recovery of fees, costs, and expenses related to the use of a subpoena.

Subsection (1) reflects the 1987 code that allowed for the payment of witness fees. A reference to Title 26, ch. 2, part 5, which also governs the payment of witness fees, has been expressly provided. The subsection permits the court to order the payment to an expert witness of a fee greater than that otherwise provided by law. Expert witnesses often will not cooperate for the usual witness fee.

Subsection (2) provides for the reimbursement of reasonable and necessary expenses of subpoenaed witnesses. The provision allows the court to fix the amount of such expenses and order that the expenses be paid.

Subsection (3) combines the two provisions allowing the payment of fees and expenses for witnesses summoned either from or by another state. Compare subsection (3) and 1987 MCA 46-15-112(4) and 46-15-113(3). Rather than state the amount of compensation such a witness is entitled to, the subsection allows travel, meals, and lodging to be compensated at the rate given to state employees. Thus, the statute expressly refers to Title 2, ch. 18, part 5. Outside of the potential increase in witness fees, this provision is not intend to alter established procedure.

Subsection (4) reflects the 1987 MCA 46-15-104(1) provision that addressed the payment of expenses of certain witnesses. The statute allows reimbursement to the county by the state for certain of these expenses. The adoption of this statute should not alter established procedure.

Commission Comment Not Divided: This section is a recodification of part of section 95-1801, R.C.M. 1947. Sections 46-15-102 through 46-15-104 (renumbered 46-15-107, 46-15-115, and 46-15-116) are also derived from section 95-1801. The commission comments to section 95-1801 are printed in their entirety under 46-15-101.

Source: See commission comments to 46-15-101.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (1) at end inserted exception clause; in (3) after "witnesses" inserted reference to indigent defendant not represented by public defender; in (5) after "paid" deleted "by the state according to procedures required by the supreme court administrator under 3-5-902" and inserted reference to 26-2-506; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2001 Amendment: Chapter 585 at end of (2) after "pay the expenses" deleted "from the appropriate city or county treasury"; in (4) substituted "The witness fees, costs, and expenses must be paid by the state according to procedures required by the supreme court administrator under 3-5-902" for "According to procedures required by the supreme court administrator, under 3-5-902, the clerk of the district court shall submit to the administrator a detailed statement

containing a list of witnesses and the amount of expenses paid to each witness by the county. Upon receipt and verification of the statement, the administrator shall promptly reimburse the designated county for all or a portion of the witness expenses. The county shall deposit the amount reimbursed in its general fund unless the county has a district court fund. If the county has a district court fund, the amount reimbursed must be deposited in the district court fund"; and made minor changes in style. Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1993 Amendments: Chapter 262 near end of (2), before "county", inserted "appropriate city or"; and in (4), at end of third sentence, inserted "unless the county has a district court fund" and inserted last sentence that read: "If the county has a district court fund, the amount reimbursed must be deposited in the district court fund."

Chapter 330 in (4), at end of third sentence, inserted "unless the county has a district court fund" and inserted last sentence that read: "If the county has a district court fund, the amount reimbursed must be deposited in the district court fund." Amendment effective April 13, 1993.

1991 Amendments: Chapter 704 in (4), near beginning, substituted "required by the supreme court administrator" for "established by the department of commerce" and in first and second sentences substituted "administrator" for "department". Amendment effective July 1, 1991.

Chapter 800 in (1), near beginning, substituted "judge" for "magistrate", after "subpoena" deleted "or in pursuance of an undertaking, the judge, at his discretion, by a written order may direct the clerk of the court to draw his warrant upon the county treasurer in favor of such witness for a reasonable sum, to be specified in the order, for the necessary expenses of", after "witness" inserted "shall receive the witness fee prescribed by Title 26, chapter 2, part 5", and inserted last sentence concerning additional fees for experts; inserted (2) concerning payment of witness expenses; inserted (3) concerning out-of-state witness payments; in (4), near beginning, deleted reference to subsection (1) of 3-5-902 and at end, after "fund", deleted "unless the county has a district court fund. If the county has a district court fund, the amount reimbursed must be deposited in such fund"; and made minor changes in style.

1985 Amendments: Chapter 680 inserted (2) requiring Clerk to submit to Department a list of witnesses and expenses paid them and providing for reimbursement of the county and deposit of the reimbursement.

Chapter 1, Sp. L. 1985, amended Ch. 680, L. 1985, by substituting references to "department of commerce" for references to "supreme court administrator" in three places in (2).

Case Notes

Reimbursement for Costs Incurred in Procuring Witness Testimony: Hardaway sought reimbursement for costs incurred in procuring the testimony of two out-of-state witnesses, one who appeared in person under subpoena and one who was deposed telephonically. The District Court denied reimbursement because Hardaway's counsel was retained rather than court-appointed. However, the only prerequisites that appear in the applicable statutes are that the court has revenue available and that the witness be subpoenaed. The procedural requirements of 46-15-113 for compelling the attendance of an out-of-state witness do not apply to an out-of-state witness who voluntarily appears and acknowledges service of a subpoena. Further, under 46-15-202, costs of a telephonic deposition are within the scope of a reimbursable deposition. The statutes do not distinguish between court-appointed and retained attorneys, but rather rely on the indigency of the defendant. Hardaway was declared indigent and remained so throughout the proceedings and, as such, was entitled to reimbursement for witness costs and deposition costs. St. v. Hardaway, 1998 MT 224, 290 M 516, 966 P2d 125, 55 St. Rep. 936 (1998).

Denial of Motion to Provide Travel Costs of Immaterial Out-of-State Witnesses: The District Court did not err in denying defendant's motion for provision of travel expenses for out-of-state defense witnesses after finding that the testimony of defendant and the victim covered all the testimony the out-of-state witnesses could possibly have provided, rendering testimony by the out-of-state witnesses immaterial. St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992).

46-15-120. Exemption from arrest and service of process.

Compiler's Comments

1991 Amendment: Throughout section substituted "subpoena" for "summons"; in (2), after "in that state", deleted "or while returning therefrom" and substituted "subpoena" for "summons or order"; and made minor changes in style.

Collateral References

Arrest *key* 9, 60; Process *key* 120.

6A C.J.S. Arrest §§5, 78 through 81; 72 C.J.S. Process §§33 through 41.

5 Am. Jur. 2d Arrest §§103 through 119; 62B Am. Jur. 2d Process §143.

Part 2
Depositions

46-15-201. When depositions may be taken.

Commission Comments

1991 Comment: Subsection (1) is largely a restatement of 1987 MCA 46-15-201(1) and is relatively restrictive on the availability of depositions in criminal cases, although the statute allows a deposition of anyone who will be leaving the state regardless of his legal residency status. The statute also provides that a witness may be required to produce physical evidence at the time of the deposition. [The Commission's proposal to allow for deposition in felony cases was amended to apply to District or Municipal Court cases to reflect elimination of trial de novo on appeal from Municipal Court.]

Subsection (2) adopts provisions from the federal rules providing for subpoenas for deposition witnesses and allowing for convenient deposition locations. The federal rule has been adopted because the 1987 code did not plainly state this requirement. See 1987 MCA 46-15-201 and 46-15-202 and Rule 17(f)(2), Fed. R. Crim. P.

Subsection (3) incorporates provisions of 1987 MCA 46-11-601, which provided for the arrest of material witnesses. This is in accordance with the constitutional provision allowing for the detention of certain persons. See Art. II, sec. 23, Mont. Const. The Commission felt that the "administration of justice" standard was sufficient by itself and granted the court wide discretion. The right to counsel is not expressly included. The statute allowing the assignment of counsel is sufficiently broad to allow counsel to be appointed if needed. See 46-8-101 and comment.

Commission Comment Not Divided: This section is a recodification of part of section 95-1802, R.C.M. 1947. Sections 46-15-202 through 46-15-204 are also derived from section 95-1802.

Source: Kentucky Rule 7.10, Federal Rule 15(b), 15(d), R.C.M. 1947, section 94-9110, Federal Rule 15(e), and M.R.Civ.P. 26(e); Federal Rule 15(f), and Second Preliminary Draft of Proposed F.R. Criminal Procedure 15(g) March 1964.

The purpose of [46-15-201] is to set forth the limited use of depositions in criminal cases. They are only to be used when the state or defendant needs a deposition to avoid the loss of a witness material to the case.

[Section 46-15-203 (now repealed, but see 46-15-202(5) through (7))] is designed to protect the rights of personal confrontation and cross-examination of the witness by defendant. Provision is also made for paying the expense of defendant and his counsel when a deposition is taken at the instance of the state or a witness.

Compiler's Comments

1993 Amendment: Chapter 262 at beginning of second sentence of (1)(c) and in (2), before "court", deleted "district".

1991 Amendment: At beginning of (1) inserted "In district or municipal court cases, a deposition may be taken"; in (1) (b) substituted "is likely to be absent from the state at the time of the trial or hearing" for "is or may become a nonresident of the state"; in (1)(c), at beginning of second sentence before "court", inserted "district" and after "court" deleted "at any time after the preliminary hearing or the filing of the indictment or the information"; substituted (2) concerning deposition of witness for "If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court must direct that his deposition be taken at the expense of the state. After the deposition has been subscribed, the court shall discharge the witness"; inserted (3) concerning arrest of material witness for defendant charged with felony; and made minor changes in style.

Case Notes

Video Deposition Properly Admitted in Absence of Material Witness at Trial: Five days before trial the state deposed a material witness and recorded the deposition on video. Hart was present at the deposition and was able to cross-examine the witness. The witness was subpoenaed to appear at trial, but when the witness did not appear, the state moved for admission of the video deposition. The trial court concluded that the state had followed appropriate procedures and admitted the video deposition into evidence. Hart contended on appeal that admitting the video deposition was error because the witness was not unavailable. The state showed that a good faith effort was made to secure the witness's presence, but the witness nevertheless failed to appear. Hart presented no issue that he was unable to address during the deposition, nor did Hart point to any specific prejudice caused by use of the video. Therefore, the District Court did not abuse its

discretion in allowing the video deposition to be played for the jury. The District Court was affirmed. St. v. Hart, 2009 MT 268, 352 M 92, 214 P3d 1273 (2009).

Defense Interviews When Accompanied by Court Reporter Held Not to Be Depositions — No Right of Accused to Confront Witnesses in Interviews: After Robert's incarceration awaiting trial on forgery charges, defense counsel arranged to interview prosecution witnesses at the prosecutor's office. When defense counsel arrived, he was accompanied by a court reporter. Counsel told the prosecutor that the interviews were actually "depositions" and requested that Robert be brought from his jail cell, to which the prosecutor refused. The Supreme Court held that the "depositions" were only interviews, regardless of their characterization by defense counsel, because the prerequisites for a deposition provided in this section had not been satisfied, no motion had been made to the court requesting the deposition, and notice had not been given of the time and place of the deposition. Citing St. v. Reynolds, 243 M 1, 792 P2d 1111 (1990), the Supreme Court held that Robert had no constitutional right to be present at the interviews because the right to confront witnesses is a right that applies at trial. St. v. Lane, 279 M 128, 927 P2d 989, 53 St. Rep. 1082 (1996).

Denial of Motion to Depose Main Witness — No Error: The District Court did not abuse its discretion in denying defendant's motion to depose the prosecution's main witness when it was found that the witness was not immediately available for deposition or trial, motion to continue the trial was granted, defendant was granted an interview with the witness, defendant had access to prosecution files at all times, during trial the witness was subject to defendant's cross-examination, and defendant was given every opportunity to prepare an adequate defense. St. v. Tilly, 227 M 138, 737 P2d 484, 44 St. Rep. 945 (1987).

When Denial of Deposition Not Error: Denial by the trial court of a request by defendant to depose FBI witnesses in Washington, D.C., was not error, where the FBI witnesses would be available for cross-examination at trial and where a continuance was offered by the court to allow defense to meet the testimony of the FBI witnesses. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982).

When Deposition of Witness Ordered: Defendant contended that the District Court's refusal to order depositions of a rape victim's sister and brother-in-law was reversible error. Defendant contended the depositions were necessary because the witnesses refused to be interviewed by defense counsel unless some member of the County Attorney's office was present. An interview under circumstances directed by the witness would reflect unwillingness only if the attached conditions make it unable for defense counsel to discover needed material. No party other than a witness may dictate conditions of an interview since there was no indication that the condition here was set at the prosecution's suggestion, the District Court was within its discretion in refusing defendant's motion. St. v. Pecora, 190 M 115, 619 P2d 173 (1980).

Proof of Unwillingness of Witness: An affidavit showing that a witness had not answered the defendant's mailed request to contact his attorney to arrange for an interview did not sufficiently establish the witness's unwillingness to provide information so as to require a court-ordered deposition. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

Accused's Rights — State Requiring Witness's Statement: The accused's rights were not violated on the theory that a witness was intimidated into giving damaging testimony by the County Attorney's threat of holding the witness unless she gave a statement. Petition of Gallagher, 150 M 476, 436 P2d 530 (1968).

No Time Limitation: There is not any limitation as to the time when depositions in criminal cases may be taken. St. v. Vanella, 40 M 326, 106 P 364 (1910).

Collateral References

Criminal Law *key* 627.2.

26B C.J.S. Depositions §§11, 12, 20, 59, 67, et seq., 109, et seq.; 97 C.J.S. Witnesses §12, et seq.

23 Am. Jur. 2d Deposition and Discovery §§139, 140, 142, 171, et seq.

Tape recording: right of accused in state courts to inspection or disclosure of tape recording of his own statements. 10 ALR 4th 1092.

Discovery: sanctions against defense in criminal case for failure to comply with discovery requirements. 9 ALR 4th 837.

Accused's right to depose prospective witnesses before trial in state court. 2 ALR 4th 704.

Rap sheets: accused's right to discovery or inspection of "rap sheets" or similar police records about prosecution witnesses. 95 ALR 3d 832.

Interference by prosecution with defense counsel's pretrial interrogation of witnesses. 90 ALR 3d 1231.

Personnel records: accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case. 86 ALR 3d 1170.

Jurors: right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors. 86 ALR 3d 571.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR 3d 181.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. 7 ALR 3d 8.

46-15-202. Procedure for taking depositions.

Commission Comments

1991 Comment: This statute is a combination of 1987 MCA 46-15-202 and Rule 15 of the Federal Rules of Criminal Procedure. No significant change in deposition practice is foreseen as a result of this statute.

Subsection (2) preserves the essence of 1987 MCA 46-15-202(2) but adopts some language from the federal rules. The federal language recognizes that the defendant cannot be deposed without consent and that cross-examinations during the deposition are limited as they would be during trial. The adoption of these provisions should not significantly alter established procedure.

Subsection (3) retains the requirements of 1987 MCA 46-15-202(3) and adopts some language from the federal rules requiring that nonprivileged statements previously made by the witness be made available at the time of the deposition. The release of such statements is required in the interest of fairness.

Subsection (4) is directly contrary to the federal rule and allows objections to testimony and other evidence produced at the taking of a deposition to be reserved for later determination. See Rule 15(f), Fed. R. Crim. P. The statute retains 1987 MCA 46-15-204(4).

Subsection (5) is based on Rule 15(b) of the Federal Rules of Criminal Procedure. See also 46-15-323.

Subsection (6) concerns a defendant who is not in custody. The subsection includes a provision from the federal rules that failure to appear after proper notice is considered a waiver. See Rule 15(b), Fed. R. Crim. P. The adoption of the waiver provision prevents subsequent challenges to the use of a deposition due to complacency or inaction on the part of the defendant.

Subsection (7) uses the language of the federal rule for reasons of clarity. This provision should not alter established procedure.

Source: See commission comments to 46-15-201.

Compiler's Comments

1993 Amendment: Chapter 262 in third sentence of (1), before "district", inserted "municipal or"; in second sentence of (2), first sentence of (3), near end of (4), and near middle of (7), before "court", deleted "district"; at end of (7) substituted requirement that transcript costs be paid by the city for a Municipal Court proceeding and by the state for a District Court proceeding for payment by the state; and made minor changes in style.

1991 Amendment: In (1) and (2), before "court", inserted "district"; in (2), in second sentence after "request", deleted "of a defendant" and inserted last sentence concerning consent of party defendant to deposition; at beginning of (3) substituted "deposition must be filed with the district court making the order" for "court shall transmit the deposition to the clerk of the court making the order, there to be filed" and inserted second sentence concerning availability of nonprivileged statement of witness being deposed; inserted (4) concerning objections; inserted (5) concerning right to be present at deposition; inserted (6) concerning failure to appear at deposition; inserted (7) concerning payment for deposition; and made minor changes in style.

Case Notes

Reimbursement for Costs Incurred in Procuring Witness Testimony: Hardaway sought reimbursement for costs incurred in procuring the testimony of two out-of-state witnesses, one who appeared in person under subpoena and one who was deposed telephonically. The District Court denied reimbursement because Hardaway's counsel was retained rather than court-appointed. However, the only prerequisites that appear in the applicable statutes are that the court has revenue available and that the witness be subpoenaed. The procedural requirements of 46-15-113 for compelling the attendance of an out-of-state witness do not apply to an out-of-state witness who voluntarily appears and acknowledges service of a subpoena. Further, under this section, costs of a telephonic deposition are within the scope of a reimbursable deposition. The statutes do not distinguish between court-appointed and retained attorneys, but rather rely on the indigency of the defendant. Hardaway was declared indigent

and remained so throughout the proceedings and, as such, was entitled to reimbursement for witness costs and deposition costs. St. v. Hardaway, 1998 MT 224, 290 M 516, 966 P2d 125, 55 St. Rep. 936 (1998).

Defense Interviews When Accompanied by Court Reporter Held Not to Be Depositions — No Right of Accused to Confront Witnesses in Interviews: After Robert's incarceration awaiting trial on forgery charges, defense counsel arranged to interview prosecution witnesses at the prosecutor's office. When defense counsel arrived, he was accompanied by a court reporter. Counsel told the prosecutor that the interviews were actually "depositions" and requested that Robert be brought from his jail cell, to which the prosecutor refused. The Supreme Court held that the "depositions" were only interviews, regardless of their characterization by defense counsel, because the prerequisites for a deposition provided in 46-15-201 had not been satisfied, no motion had been made to the court requesting the deposition, and notice had not been given of the time and place of the deposition. Citing St. v. Reynolds, 243 M 1, 792 P2d 1111 (1990), the Supreme Court held that Robert had no constitutional right to be present at the interviews because the right to confront witnesses is a right that applies at trial. St. v. Lane, 279 M 128, 927 P2d 989, 53 St. Rep. 1082 (1996).

Collateral References

Sanctions against defense in criminal case for failure to comply with discovery requirements. 9 ALR 4th 837.

46-15-204. Use of depositions at trial.

Commission Comments

1991 Comment: This statute replaces 1987 MCA 46-15-204. The Commission felt that the general statement of this statute would allow sufficient use of a deposition at trial and saw no need to restate evidentiary rules. The statute should not significantly alter established procedure.

Source: See commission comments to 46-15-201.

Compiler's Comments

1991 Amendment: Substituted present language concerning use of deposition for any purpose allowed by Montana Rules of Evidence for former text that read: "(1) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears that:

(a) the witness is dead;

(b) the witness is out of the state of Montana unless it appears that the absence of the witness was procured by the party offering the deposition;

(c) the witness is unable to attend or testify because of sickness or infirmity; or

(d) the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

(2) Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(3) If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(4) Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

(5) For the purposes of this section, the word "deposition" shall in addition include any sworn testimony previously given by a witness which has been recorded and transcribed by a qualified stenographer and given in the presence of the defendant and cross-examined by him or his attorney on matters relevant to the trial or hearing where such deposition is sought to be used".

See compiler's comments to 46-15-201.

Case Notes

Video Deposition Properly Admitted in Absence of Material Witness at Trial: Five days before trial the state deposed a material witness and recorded the deposition on video. Hart was present at the deposition and was able to cross-examine the witness. The witness was subpoenaed to appear at trial, but when the witness did not appear, the state moved for admission of the video deposition. The trial court concluded that the state had followed appropriate procedures and admitted the video deposition into evidence. Hart contended on appeal that admitting the video deposition was error because the witness was not unavailable. The state showed that a good faith effort was made to secure the witness's presence, but the witness nevertheless failed to appear.

Hart presented no issue that he was unable to address during the deposition, nor did Hart point to any specific prejudice caused by use of the video. Therefore, the District Court did not abuse its discretion in allowing the video deposition to be played for the jury. The District Court was affirmed. St. v. Hart, 2009 MT 268, 352 M 92, 214 P3d 1273 (2009).

Denial of Motion to Depose Main Witness — No Error: The District Court did not abuse its discretion in denying defendant's motion to depose the prosecution's main witness when it was found that the witness was not immediately available for deposition or trial, motion to continue the trial was granted, defendant was granted an interview with the witness, defendant had access to prosecution files at all times, during trial the witness was subject to defendant's cross-examination, and defendant was given every opportunity to prepare an adequate defense. St. v. Tilly, 227 M 138, 737 P2d 484, 44 St. Rep. 945 (1987).

Availability of Witness: Allowing the testimony of the purchasers in a drug case to be presented by deposition was error when no subpoena had been issued for the purchasers. St. v. LaCario, 163 M 511, 518 P2d 982 (1974).

Testimony From Preliminary Hearing: The testimony of a witness given at the preliminary hearing in the defendant's presence, when the witness had been cross-examined by the defendant's counsel and the testimony had been recorded and transcribed by a court reporter, was expressly admissible in evidence under this section when a proper foundation had first been laid by showing that the witness could not be located for trial. St. v. Bouldin, 153 M 276, 456 P2d 830 (1969).

Part 3
Discovery — Immunity for Witnesses

Part Case Notes Under Former Law

Sections 46-15-301 through 46-15-303 were repealed by Ch. 202, L. 1985, which replaced the repealed sections with 46-15-321 (now repealed) through 46-15-329. Generally speaking, the new law retains the substance of the repealed law but provides for expanded and expedited discovery. The case notes for the repealed law are retained here as part case notes under former law so that they may be used to the extent they are still relevant.

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GENERALLY

Suppression of Material Evidence — Denial of Due Process: Defendant was a suspect in a rape case. He was interviewed by a police officer and told him he was having problems with smoking and the devil. They discussed his mental problems. Defendant was later charged with the crime. A standard omnibus order of discovery was granted. During the trial, the prosecution learned that the police interview was much more extensive than reported. Defense counsel was notified immediately. His motion in limine was denied, and defendant was convicted. On appeal, the Supreme Court held that only intentional or deliberate suppression of evidence is a per se violation of due process sufficient to reverse or nullify a conviction. Negligent or passive suppression will overturn a conviction if prejudice is shown. Generally, suppressed evidence must be material to either guilt or punishment. In order to obtain a new trial, the accused must show the materiality of the evidence. The Supreme Court remanded the case for a new trial because the suppressed evidence was indicative of mental illness. The evidence was material and exculpatory, and its suppression was prejudicial to defendant. St. v. Patterson, 203 M 509, 662 P2d 291, 40 St. Rep. 600 (1983). See also St. v. Licht, 266 M 123, 879 P2d 670, 51 St. Rep. 686 (1994).

Suppression Question — Psychological Evaluation — Standard of Review: Where two expert witnesses present conflicting evidence during a suppression hearing as to results of their psychological evaluations of the defendant and the District Court finds one expert's testimony to be more credible than the other's, such determination will be disturbed on appeal only if it is not supported by substantial credible evidence. In re R.P.S., 188 M 317, 613 P2d 999 (1980), following St. v. Grimestad, 183 M 29, 598 P2d 198 (1979).

JUSTIFIABLE USE OF FORCE

Justifiable Use of Force Raised Sua Sponte by Court: At the close of evidence in a misdemeanor assault nonjury trial, the court raised the defense of justifiable use of force sua sponte. Although this section requires that defendant give notice of his intent to rely on such a defense, the trial court also has the authority to raise the defense. The power of the trial court to resolve questions of law necessarily includes the power to determine what the questions of law are. St. v. Nicholls, 200 M 144, 649 P2d 1346, 39 St. Rep. 1635 (1982).

NOTICE OF WITNESSES

No Error in Refusal to Allow Two Impeachment Witnesses After Start of Trial — Failure to Object at Trial Precluding Raising Issue on Appeal: After commencement of his trial on charges of attempted deliberate homicide, LaDue moved to add two additional witnesses, asserting that they would verify that two other witnesses were essentially coordinating their testimony to LaDue's disadvantage and that the other witnesses' testimony at trial differed substantially from their earlier statements to police. The motion was denied. LaDue was convicted on a lesser charge and appealed. After examining the record, the Supreme Court concluded that the testimony of the two additional witnesses was not probative and that the independent statements to police shortly after the incident were not notably inconsistent with the oral testimony at trial. Further, LaDue did not suggest a motive for the other witnesses to fix their testimony to his disadvantage, and no such nefarious intent could be gleaned from the record. LaDue failed to establish good cause for adding two new witnesses after the trial commenced, and the District Court did not err in refusing their testimony. The court properly inquired as to the nature of the testimony to be offered by the proposed witnesses and the circumstances surrounding the matter in controversy. Thus, the court had sufficient information to rule, and the ruling was not in error. St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

Witness Added During Trial — Inability to Voir Dire Insufficient to Warrant New Trial: Amendments adding to the witness list after trial has started necessarily deprive the opposing party of the opportunity to voir dire prospective jurors with a particular class of witnesses in mind. However, the denial of this opportunity was not so material as to give rise to a claim for a new trial nor did it demonstrate abuse of trial court discretion for allowing witnesses from the particular class to testify. St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988).

Jurisdiction of District Court to Add Witness to List While Appeal Pending Moot Because of Later Reviews by District Court: An appeal was pending before the Supreme Court at the time the District Court granted the state's motion to add a name to the witness list. Any question of the District Court's jurisdiction to add the name became moot because the District Court twice again reviewed the issue of the witness testifying after the Supreme Court ruled on the appeal. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986).

State Adding Expert Witness to Witness List Shortly Before Trial — Harmless Error: In determining whether the state had good cause to add an expert soil-testing witness to the witness list as required under 46-15-301 (repealed in 1985 and replaced with 46-15-321 [now repealed] through 46-15-329), the Supreme Court examined: (1) the state's lack of knowledge of the witness until just prior to the time of the trial; (2) the delay in having the witness testify to allow the defense to procure a similar witness; and (3) the state's attempts to locate a similar witness for the defense. Any error in relation to the witness' testimony was harmless considering the testimony of the witness and the fact that the District Court granted a defense motion to strike his testimony when it was determined that a defense witness could not be made available and gave a cautionary instruction relating to the stricken testimony. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986).

Withholding of Informants' Names — Harmless Error: Defendant moved for a continuance when, with a trial date set for August 2, the informants' names were not revealed to defendant's attorney until late July 30 and the County Attorney knew defendant's attorney would be out of town on August 1. The District Court denied defendant's motion, and the Supreme Court affirmed. The Supreme Court held that although the Sheriff and police acted improperly in refusing to comply with the District Court's order to disclose the informants' names, this was harmless error in this case and was not grounds for a continuance. The District Court did not abuse its discretion in denying the continuance because the informants could provide nothing that would refute the state's case. The Supreme Court stated that it did not condone the actions of the law enforcement agencies or the County Attorney. St. v. Warnick, 216 M 102, 699 P2d 1049, 42 St. Rep. 675 (1985).

Notice of Witness to Other Acts or Wrongs — Sex Assault Witness in Sex Assault Case — New Trial: If the prosecution intends to introduce evidence of other crimes, wrongs, or acts it must

notify the defendant of that intent and identify the purpose for which the evidence will be introduced. In this sexual assault case, it was reversible error requiring a new trial when the State did not give such notice, and the witness testified that defendant had previously kissed her despite her resistance. St. v. Berg, 215 M 431, 697 P2d 1365, 42 St. Rep. 518 (1985).

Nondisclosure of Rebuttal Witness — Error: Defendant, a Vietnam veteran, had several disturbing experiences during the war. He had psychological problems upon his return. While working at St. Patrick Hospital in Missoula, he developed animosity towards his supervisor. He felt he had to kill his supervisor before the supervisor killed him. He armed himself and went to the supervisor's home, where he entered and began shooting. In an ensuing struggle, a knife was also used and both men were injured. Defendant was charged with attempted deliberate homicide and aggravated assault. Defendant gave notice he intended to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. The night before the final day of trial, the County Attorney's office found a bar owner who would testify that a couple of days before the shooting he purchased the ammunition used by defendant. Since defendant had twice requested this purchase, it tended to rebut his claim that he did not act knowingly or purposely. On cross-examination, defense counsel found that the witness had contacted the prosecution the day before and moved for a mistrial. The trial court found there was no designed surprise and denied the motion. Defense counsel refused an offered continuance and chose not to examine the witness further. On appeal, the Supreme Court found that failure to give the court and defendant notice of the new rebuttal witness constituted clear error. The court found the error harmless in this case but admonished prosecutors for the future. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984).

Witness Added Five Days Before Trial — Three More Witnesses Added Morning of Trial — Not Error to Deny Continuance — Subject of Testimony Considered: It was not error for the District Court to deny a motion for continuance to a criminal defendant when the State added an extra witness 5 days before trial and then added three more witnesses on the morning of trial. The witness added 5 days before trial, an expert, was available for interviewing by the defense during those 5 days, and her testimony was basically corroborated by the defendant. The other three witnesses, local medical employees, testified (per stipulation) on chain of custody of the evidence and (not per stipulation, but de minimis) on preparation and shipping procedures of the evidence. St. v. Smith, 208 M 66, 676 P2d 185, 41 St. Rep. 176 (1984).

Failure to Reveal Alibi — Undisclosed Witnesses Allowed: Defendant was convicted of robbery and felony theft. On appeal, he contended that he was denied due process when the State was allowed to use rebuttal witnesses on the last day of trial without giving notice of the witnesses as required by statute. The State contended that because defendant refused to inform the State of the nature of his alibi, the State did not know prior to trial if the information possessed by the rebuttal witnesses was relevant. The District Court allowed defense counsel to talk to the witnesses. No motion for a continuance was made. The statute allows the District Court to permit additions to the witness list for good cause. Defendant's failure to reveal the substance of his alibi was sufficient cause. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983).

No Formal Notice Given — State Knowledge That Witnesses Were to Be Called: After a jury trial, defendant was convicted of assault. In his opening statement, defendant's attorney had said he would call two witnesses who would testify that defendant had acted in self-defense. The State did not object to this assertion. In cross-examining the victim, defendant's attorney laid the foundation for the impeachment testimony to come from the two witnesses alluded to in the opening statement. The State did not object to this line of questioning. However, after resting its case, the State filed a motion in limine requesting that the defense not be permitted to present the testimony of the two witnesses because of the defendant's failure to comply with the notice provisions of this section. The District Court granted the State's motion. Later, in the State's rebuttal in closing argument, the State mentioned defendant's failure to produce the witnesses he had promised during the opening statement. On appeal, the Supreme Court reversed and ordered a new trial. The court ruled that reversal was required by the State's unethical argument to the jury. The Supreme Court further ruled that although no formal written notice within the time limits required under this section had been given, the trial court abused its discretion in not permitting the defense witnesses to testify because the State knew the defendant intended to rely on self-defense and the State's motion in limine was filed too late under local court rules. Finally, the court ruled that the State by its failure to object earlier had waived its right to file the motion in limine. St. v. Keller, 204 M 1, 662 P2d 604, 40 St. Rep. 614 (1983).

No Formal Notice — Good Cause: In a trial for assault, the defendant's attorney stated in his opening statement to the jury that he intended to produce two witnesses who would impeach the victim's testimony. The two had not witnessed the assault but claimed that the victim had told them how the fight had started and who was the first aggressor. Later in the trial, the State's motion to exclude the testimony for failure to comply with the notice provisions of this section was granted. The Supreme Court reversed on this and other grounds and ruled that the District Court should have determined whether the notice requirement could have been dispensed with under the good cause exception. The ruling was based on the fact that there was a factual dispute on the extent of the State's knowledge of defendant's intent to call the two witnesses and because the defendant had provided legal authority to the District Court to the effect that a nonincident impeachment witness, one who is called only to impeach a witness on the ground of a prior inconsistent statement, does not fall within the ambit of such a notice statute. St. v. Keller, 204 M 1, 662 P2d 604, 40 St. Rep. 614 (1983).

Addition of Witnesses to List — Surprise: Montana law provides for the prosecution to furnish to the defendant the names of witnesses it proposes to call. Additions may be made after arraignment. The proper procedure when surprise is claimed from the addition of new prosecution witnesses is to ask for a continuance so that the defendant may prepare. For several reasons, prejudice did not result from the addition of 58 new witnesses on the day of trial. The defendant objected to the addition of witnesses but never requested a continuance. Further, the prosecution was cautioned that the defendant's counsel must be given the opportunity to talk with and examine the new witnesses. Finally, defendant knew of the proposed testimony from either their reports filed earlier or from the court's examination of the County Attorney about the reason for the new witnesses and the nature of their testimony in the presence of the defendant's attorney. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980). [See the subsection (3) 5-day rebuttal witness rule, enacted after decision in this case.]

Rebutting Versus Giving New Evidence: Defendant, as his own sole witness, testified he knew nothing of the planned robbery of a gas station and did not ask a coconspirator to contact friends who worked there. On rebuttal, the coconspirator testified that defendant was aware of the robbery and had asked the coconspirator to telephone the station. Such testimony tended to disprove defendant's testimony and thus was proper rebuttal testimony and not new evidence requiring compliance with this section's notice provisions. St. v. Williams, 185 M 140, 604 P2d 1224 (1979).

Witness List Amended on First Day of Trial — Continuance Denied: The trial court properly denied a defense motion for a continuance after permitting the State to amend its witness list on the morning of trial since the State informed the defendant's counsel of a change in the information within hours after the new witness negotiated a plea involving an agreement to testify. The defense counsel knew of the development on Friday but chose to keep other commitments, thus he was estopped from claiming surprise. St. v. McClean, 179 M 178, 587 P2d 20 (1978).

Witness List Amended on First Day of Trial — No Continuance Requested:

The defendant was not prejudiced when, on the first day of the trial, the District Court endorsed two more witnesses for the prosecution because the defendant's counsel and the County Attorney had already discussed the endorsement, the two names were set out in the information as victims, the County Attorney showed good cause for failing to list the names specifically as witnesses prior to the trial, and the defendant's counsel could have asked for a postponement or a continuance. St. v. Booke, 178 M 225, 583 P2d 405 (1978).

The lower court did not err in allowing the addition of the names of 58 new witnesses to the amended information on the day of trial when the defendant failed to ask for a continuance, the witnesses were not prejudicial to the defendant, and the court was careful to provide the defendant with protection against surprise and to ensure that the defendant was able to prepare for the testimony. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Failure of State to List Witnesses Upon Request: When the State failed to list witnesses on an information and continually failed to provide a list of witnesses even after a request by the defendant to do so and a promise by the Deputy County Attorney to the court that he would do so, the State did not make a sufficient showing of "good cause" to add witnesses on the day of trial. Therefore, the defendant had no burden to move for a continuance of the trial date. St. v. Haag, 176 M 395, 578 P2d 740 (1978), distinguished in St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988).

Good Cause to List Additional Witnesses: When the State moved, 6 days before trial, to list additional witnesses, alleging they were discovered after the original information was filed and were necessary to prove its case in light of the defendant's affirmative defense of mental disease

or defect, good cause was shown and the motion should have been granted. State ex rel. Nelson v. District Court, 173 M 221, 566 P2d 1382 (1977).

Addition of Expert Witness in Midtrial: The court did not err in permitting the endorsement of an x-ray by a radiologist as a witness added in midtrial by the prosecution when the defense counsel knew of the existence of the x-ray prior to trial and nothing indicated an intentional or deliberate withholding of evidence by the State or lack of good cause. St. v. Gafford, 172 M 380, 563 P2d 1129 (1977).

Amendment of Witness List — Remedy When Surprise Claimed: The proper procedure when surprise is claimed from the addition of witnesses is to ask for a continuance so that the defendant may prepare. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Effect of State's Noncompliance With Court Order: Reversal was required when the prosecution withheld evidence and notice of witnesses in violation of orders of the court. St. v. Keller, 170 M 372, 553 P2d 1013 (1976).

Amendment of Witness List During Trial: Allowing the amendment of the witness list requested because of evidentiary matters developed during presentation of the State's case was not an abuse of discretion on the part of the trial judge when the court offered the accused a continuance and there was no objection to witnesses based on surprise by the defendant. St. v. Klein, 169 M 350, 547 P2d 75 (1976). See also St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988).

Amendment of Witness List — Victim: Allowing the amendment of the witness list to include the victim of the crime was not an abuse of discretion on the part of the trial judge. St. v. Campbell, 160 M 111, 500 P2d 801 (1972).

Adding Witnesses — Harmless Error: The defendant was not prejudiced by the prosecution's citation, when adding witnesses, of section 94-8904, R.C.M. 1947, which had been repealed and replaced by 46-15-301, MCA (and which, in 1985, was itself repealed and replaced with 46-15-321 [now repealed] through 46-15-329), since that section is a continuation of section 94-8904, R.C.M. 1947. St. v. Rozzell, 157 M 443, 486 P2d 877 (1971).

Failure to List Witness Excused: In the absence of surprise, testimony concerning the defendant's oral admission of guilt was properly admitted even though the State had not supplied the names of witnesses to the admission. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

NOTICE OF DEFENSE — ALIBI

Reasonably Specific Date in Information — Double Jeopardy Protected: Information charging incest indicated a 10-month period during which the crime was committed. The court found the information sufficiently specific since victim resided with defendant father during entire period and defendant could not establish deprivation of alibi defense. The court applied the test set forth in St. v. Clark, 209 M 473, 682 P2d 1339, 41 St. Rep. 833 (1984), and held that the two-part test was satisfied. Defendant contended that the broad time frame alleged in the information subjected him to double jeopardy. The court rejected the argument, noting that the State is barred by Art. II, sec. 25, Mont. Const., from retrying defendant for the offense to this particular victim during the time in question. St. v. D.B.S., 216 M 234, 700 P2d 630, 42 St. Rep. 770 (1985).

Definition of "Alibi": An alibi is a defense that places defendant at the relevant time in a different place than the scene of the crime and so removed therefrom as to render it impossible for the defendant to be the guilty party. St. v. Berg, 215 M 431, 697 P2d 1365, 42 St. Rep. 518 (1985).

Irrelevant Alibi — No Time Correlation: The defense did not, as required by 46-15-301 (repealed in 1985 and replaced with 46-15-321 [now repealed] through 46-15-329), give the prosecution pretrial notice of the identity of and intent to call an alibi witness. The judge therefore struck the witness' testimony. Defendant claimed error on appeal. The witness was not an alibi witness, because he testified he was with defendant from about 7:30 to 8:10, and both defendant and the victim testified defendant arrived at the scene of the crime at about 8:10. It was within the court's discretion to strike the testimony, because it was not relevant. St. v. Berg, 215 M 431, 697 P2d 1365, 42 St. Rep. 518 (1985).

Frivolous Alibi Defense Denied — Harmless Error: Defendant was convicted of aggravated assault, aggravated burglary, and attempted sexual intercourse without consent. On appeal, defendant contended that he should have been allowed to assert an alibi defense within 10 days after entering his not guilty plea to an amended information. Defendant was charged on August 24, 1981, and was arraigned on an amended information on December 18, 1981, at which time he entered a not guilty plea and moved to assert his alibi defense. Defendant was specifically reminded of his right to assert the defense at his August arraignment and was again asked if he intended to use the defense in November. Defendant contended that he had good cause for not

asserting the defense earlier in that he was unable to locate his mother or his friend. The court found that this was not good cause but held that the amended information was a new document requiring a separate arraignment, giving defendant a statutory right to assert the defense within 10 days of the later arraignment. The court found, however, that in this case the purported defense was frivolous as a matter of law and that the error was therefore harmless. St. v. Wells, 202 M 337, 658 P2d 381, 40 St. Rep. 127 (1983).

No Notice of Alibi Defense — Testimony Restricted: The trial court did not err in granting the prosecution's motion in limine to restrict the testimony of the defendant's mother as to the whereabouts of the defendant during the time of the robbery since notice of an alibi defense was not given as required by this section. St. v. Johnson, 179 M 61, 585 P2d 1328 (1978).

Alibi Defense — Instruction Rejected: The court properly rejected an instruction concerning the defense of alibi since the defendant's case was not founded upon alibi and no notice of such a defense was given. St. v. McGuinn, 177 M 215, 581 P2d 417 (1978).

Notice of Alibi — Restricting State's Case: A defendant cannot restrict the State's case by asserting an intent to rely on an alibi defense for a limited period of time within which the crime could have occurred. St. v. Hall, 171 M 33, 554 P2d 755 (1976).

Amendment of Information After Notice of Alibi: A motion to amend the date on the information, made after the defendant pleaded not guilty and entered a notice of alibi defense, was properly denied, since it would destroy the defense and be a substantial prejudice to the rights of the defendant. St. v. Tropf, 166 M 79, 530 P2d 1158 (1975).

NOTICE OF DEFENSE — MENTAL DISEASE OR DEFECT

Defense Based on Long-Term Effects of Alcoholism: Under former law, when the defense of intoxication shifts to a defense based on expert testimony as to the long-term effects of alcoholism, it becomes a defense of mental disease or defect within the purview of the statutes requiring notice. St. v. Ostwald, 180 M 530, 591 P2d 646 (1979).

Failure to File Notice of Defense — Effect on Voir Dire: The defendant refused to give notice as required by the statute. He claimed prejudice because he was not allowed to voir dire on the subject of mental disease and defect. However, at the time he wished to voir dire he had not complied with the notice and the issue could not at that time be presented to the jury. The court was correct in refusing to allow the voir dire. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Defenses of Insanity and Self-Defense:

There was no reversible error in making the defendant comply with the insanity and self-defense notice provisions of this section when the state court had already decided that the section required reciprocal duties of the prosecution, the State operated in good faith at the trial, and the facts otherwise revealed no prejudice to the defendant. Radford v. Stewart, 472 F2d 1161 (9th Cir. 1973).

This section, as it related to the defenses of insanity and self-defense, should be interpreted as directory only. State ex rel. Sikora v. District Court, 154 M 241, 462 P2d 897 (1969).

Failure to File Notice of Defense: Under former law, the trial judge could allow psychiatric proof even though the motion was untimely but, when the defendant's counsel did not comply with a court order to submit all motions of defense at the time of pleading to the information or during the 6-month delay in going to trial, the trial court properly denied the defendant's notice of intention to rely on mental disease or defect as not being timely filed. St. v. Bentley, 155 M 383, 472 P2d 864 (1970).

CONSTITUTIONALITY

Effective Assistance of Counsel — Failure to Challenge Constitutionality of Statute: Failure of defense counsel to object to testimony of a rebuttal witness on the grounds that he had not received notice of the witness's testimony, based on a United States Supreme Court decision holding that an Oregon statute which required a defendant utilizing an alibi defense to furnish notice and a witness list violated due process because it did not provide reciprocal discovery for the defendant of the State's rebuttal witnesses, does not fall outside the range of competent counsel. The decision to challenge the constitutionality of a statute is a matter of legal judgment. St. v. Rose, 187 M 74, 608 P2d 1074 (1980). [The year after this case was decided, this section was amended to require the State to give notice of witnesses rebutting certain defenses.]

Mental Defect Provisions: The Supreme Court rejected defendant's contention that the Montana provision for notice of mental defect or disease and the mental defect or disease provisions in 46-14-101 through 46-14-401 (46-14-401 was renumbered 46-14-217) and 46-15-301 are unconstitutional. (In 1985, 46-15-301 was repealed and replaced with 46-15-321 [now repealed] through 46-15-329.) St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Fourth, Fifth, Sixth, and Fourteenth Amendments:
Under former law, the defendant's rights under the 5th, 6th, and 14th amendments of the United States Constitution were not violated by the operation of 46-15-301 because neither the defendant's witness list nor his notice of insanity and self-defense was used to make a prima facie case against him. (In 1985, 46-15-301 was repealed and replaced with 46-15-321 [now repealed] through 46-15-329.) Radford v. Stewart, 320 F. Supp. 826 (D.C. Mont. 1970), affirmed in 472 F2d 1161 (9th Cir. 1973).

While this section may be unconstitutionally applied, it is constitutional on its face and not repugnant to the 4th, 5th, 6th, and 14th amendments of the United States Constitution. State ex rel. Sikora v. District Court, 154 M 241, 462 P2d 897 (1969), followed in St. v. Davidson, 266 M 404, 880 P2d 1331, 51 St. Rep. 867 (1994).

DISCOVERY OF WRITINGS AND OBJECTS

Destruction of Potentially Exculpatory Evidence — Reversal Not Required: Defendant contended that potentially exculpatory evidence from a fire site was destroyed negligently by state fire experts and that the condition of the fire scene prevented his expert from examining the evidence, thereby robbing defendant of his right to present a complete defense. The Supreme Court found that defendant was not entitled to a reversal due to suppression of evidence because: (1) the deputy fire marshal carefully preserved any burned material with evidentiary value while removing nonevidentiary material from the site; (2) a front-end loader used to clean up the scene removed only irrelevant and nonexculpatory debris and never disrupted evidentiary material; (3) all evidentiary material was available at all times for inspection by defendant's expert; and (4) defendant presented no factual basis that the debris was exculpatory or was vital to his defense. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Newly Discovered Evidence — Material Cumulative — Different Result at New Trial Not Probable: An "intelligence" file relating to problems involving the deceased was kept by the Sheriff's office. For the homicide trial, defense demanded all materials held by the Sheriff's office concerning the case, but through apparent inadvertence, the file was not turned over to the defense. It was not discovered until 5 months after the trial during a search of the Sheriff's files by defense counsel and an assistant County Attorney. The District Court did not abuse its discretion in denying a new trial after it had determined: that the file was not deliberately suppressed; that the material in the file was testified to at the trial and the material would have been cumulative; and that the material was not germane to the defendant's defense of use of justifiable force. The Supreme Court held that under the rules set forth in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959), a new trial was not necessary because the file was not so material that it would probably produce a different result upon another trial. St. v. Kutnyak, 211 M 155, 685 P2d 901, 41 St. Rep. 1277 (1984).

Late Notice of Evidence to Be Used — Waiver of Continuance: The night before trial the prosecutor phoned the defense and gave notice that he would use a piece of evidence of a prior criminal act. Judicially mandated notice was served the next morning. The judge granted a 2 ½-day continuance to the defense. Defense counsel waived his right to additional time when he told the judge after the continuance that he had had enough time to investigate the evidence and did not need time beyond the 2 ½ days. St. v. Azure, 208 M 233, 676 P2d 785, 41 St. Rep. 302 (1984).

Police Officer's Handwritten Notes — Not Discoverable — No Good Cause Shown: The defendant attempted to discover the contents of a police officer's handwritten notes of interviews with defendant's witnesses. This section requires a good cause showing before discovery of the handwritten notes is allowed. Defendant did not make the good cause showing. He had continued access to the witnesses and could have discovered the contents of the notes by asking the witnesses what they said to the police officer. Even if the witnesses were hostile, defendant could have discovered the contents of the interviews by other discovery methods such as depositions. St. v. Willis, 207 M 170, 673 P2d 134, 40 St. Rep. 1969 (1983).

Right of Criminal Defendant to Juvenile Record of Victim or Witness: A defendant in a criminal case has the right to obtain only that part of the juvenile record of a victim or witness that relates to charges, adjudications, and status following an adjudication. He does not have the right to obtain the rest of the record containing sensitive or private information, case reports, interviews, and other material. Camitsch v. Risley, 705 F2d 351 (9th Cir. 1983).

Refusal to Review Police Reports for Discoverability — Issue Not Appealable — Not Raised in District Court: The trial court did not err in refusing to review police reports to determine if the reports contained exculpatory material and were discoverable since the record does not indicate that the defendant focused on the police reports or made any written motion for the court to

review the reports. For this reason, the issue was not properly before the Supreme Court. The matter cannot be used to put the trial court in error if it was not brought specifically to the court's attention. St. v. Hansen, 194 M 197, 633 P2d 1202, 38 St. Rep. 1541 (1981).

Omnibus Hearing — Admission of After-Acquired Reports: The District Court did not err in failing to suppress two lab reports that were not contained in the omnibus hearing order. The State had not withheld the information; rather, it had only received the reports the day before the trial. The defendant bypassed his opportunity to have the trial continued. The District Court, after denying the motion to suppress, gave the defendant an overnight continuance to prepare further. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980), followed in St. v. Ayers, 2003 MT 114, 315 M 395, 68 P3d 768 (2003).

Discovery of "Rap Sheet" Disallowed — Witness' Bias a Jury Question: The defendant, convicted of theft in the holdup of a truckstop, contended that the trial court had erred in refusing to allow discovery of the "rap sheet" of a suspected accomplice. Defendant argued on appeal that he was denied due process. The reviewing court disagreed saying that (unlike the defendant in the case this defendant relied upon, who was unable to make a record from which to argue the witness' bias or lack of impartiality because the witness' criminal record could not be presented to the jury) this defendant was permitted to present fully evidence of the criminal character and bias of the suspected accomplice. The jury was aware of the immunity bargain between the witness and the prosecution and of the witness' complicity in the truckstop theft. The trial court's denial of the defendant's motion was well within its discretion to control cross-examination. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Timeliness of Discovery — Statements of Witnesses: In light of the discovery provisions in 46-15-302 and 46-15-303 (repealed in 1985 and replaced with 46-15-321 [now repealed] through 46-15-329), the Revised Commission Comments indicating the showing necessary to get access to material in the hands of the prosecutor, and the recognition that in most criminal cases in Montana discovery is conducted on a more informal basis without resort to motion and hearing procedures, the Supreme Court found that the defendant's allegation that the State failed to timely furnish him with the statements of its witnesses was without merit. Any delay was waived by the defendant's failure to file a demand and motion for the material until after trial had begun. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978). See also St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Denial of Discovery: A motion to discover papers went unruled upon, and no objection was made. Therefore, the substantial rights of the defendant were not violated, and a conviction will not be overturned due to harmless error. St. v. Armstrong, 172 M 296, 562 P2d 1129 (1977).

Subpoena of Materials in Prosecutor's Custody: The showing necessary to gain access to material in the hands of the prosecutor is greater than is required to obtain material in the hands of third parties. No error was involved because of a 1-week delay in compliance with a demand made by the defendant after the trial had begun. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Effect of State's Noncompliance With Court Order: Reversal was required when the prosecution withheld evidence and notice of witnesses in violation of orders of the court. St. v. Keller, 170 M 372, 553 P2d 1013 (1976).

Amendment of Witness List When Accused Did Not Claim Surprise or Accept Offer of a Continuance: Allowing the amendment of the witness list requested because of evidentiary matters developed during presentation of the State's case was not an abuse of discretion on the part of the trial judge when the court offered the accused a continuance and there was no objection to witnesses based on surprise by the defendant. St. v. Klein, 169 M 350, 547 P2d 75 (1976).

Failure of State to Produce Evidence: When it appeared that the State's failure to produce certain items of physical evidence pursuant to an order to do so was due to the negligent loss, misplacement, or destruction of the items, the District Court correctly refused to grant the defendant's motion to dismiss since he could not show that the failure to produce affected the outcome of the case. St. v. Craig, 169 M 150, 545 P2d 649 (1976).

MOTION TO PRODUCE CONFESSION OR ADMISSION

Failure to Produce Statements — Must Be Prejudicial: Defendant was convicted of deliberate homicide. On appeal he challenged the introduction of several statements not included within the "Notice of Confessions and/or Admissions" filed by the State in response to his motion. The Supreme Court found that the statements should not have been admitted but that the District Court allowed defense counsel the opportunity to interview all possible witnesses to the statements before allowing them and issued an admonishing instruction on one of the

statements. The purpose of the production of confessions and admissions statute is to allow the defendant to prepare a defense to the statements. While the substance of the statements may have been detrimental to defendant, he did not demonstrate any prejudice arising from the failure to provide notice of the statements as distinguished from the introduction of the statements. Allowing the examination of witnesses and giving the admonishing instruction removed any prejudice from the introduction of the statements. St. v. Weinberger, 204 M 278, 665 P2d 202, 40 St. Rep. 844 (1983).

Surprise at Retrial: The defendant objected to the testimony of a witness based on surprise. On appeal the case was remanded on other grounds, and the Supreme Court said the defendant will suffer no prejudice because of surprise at retrial. St. v. Blackbird, 187 M 270, 609 P2d 708 (1980).

Timeliness of Discovery: In light of the discovery provisions in 46-15-302 and 46-15-303 (repealed in 1985 and replaced with 46-15-321 [now repealed] through 46-15-329), the Revised Commission Comments indicating the showing necessary to get access to material in the hands of the prosecutor, and the recognition that in most criminal cases in Montana discovery is conducted on a more informal basis without resort to motion and hearing procedures, the Supreme Court found that the defendant's allegation that the State failed to timely furnish him with the statements of its witnesses was without merit. Any delay was waived by the defendant's failure to file a demand and motion for the material until after trial had begun. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Surprise Testimony Discounted: The Supreme Court rejected the defendant's contention that trial testimony constituted surprise and should have been excluded when a witness testifying as to admissions made by the defendant quoted certain profane and vulgar language not previously mentioned in a statement provided to the defendant by the prosecution. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

Failure to List Witness Excused: In the absence of surprise, testimony concerning the defendant's oral admission of guilt was properly admitted even though the State had not supplied the names of witnesses to the admission. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

Part Collateral References

Expert: right of accused in state courts to have expert inspect, examine, or test physical evidence in possession of prosecution—modern cases. 27 ALR 4th 1188.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like—modern cases. 27 ALR 4th 105.

Case-related notes: right of prosecution to discovery of case-related notes, statements, and reports—state cases. 23 ALR 4th 799.

Discovery: sanctions against defense in criminal case for failure to comply with discovery requirements. 9 ALR 4th 837.

46-15-322. Disclosure by prosecution.

Commission Comments

1991 Comment: This statute preserves the 1987 code procedure that required certain disclosures by the prosecution. See 1987 MCA 46-15-322.

The statute substitutes the phrase "Upon request" for the former language. Subject to limitations of other statutes, this amendment permits discovery at any time during the proceedings. The requirement that the prosecution develop an inventory list of the information available has been eliminated. The Commission determined that the listing requirement was a burden on the prosecution and felt that permitting direct disclosure was sufficient.

Subsection (1)(a) continues the requirement for the disclosure of witness statements. Subsection (1)(b) preserves the requirement that the prosecution disclose statements made by the defendant. The required disclosure of expert witness reports or statements, as well as actual test results, is retained in subsection (1)(c). Subsection (1)(d) reflects the requirement that certain tangible evidence be made available to the defense. The mandatory disclosure of any exculpatory evidence uncovered by the prosecution is retained by subsection (1)(e).

Subsection (3) allows that certain restrictions or stipulations may be imposed to protect physical evidence disclosed under this statute. See 1987 MCA 46-15-322(3).

Subsection (5) preserves 1987 MCA 46-15-322(5) by permitting the disclosure of things not otherwise attainable in a normal investigation. Under the 1987 code, the disclosure of summaries of witness statements may have been tolerated. The subsection amends the code to expressly state that the preparation and existence of summaries of witness statements need not be disclosed.

Subsection (6) requires the prosecution to disclose the existence of rebuttal witnesses who may be called to refute any affirmative defense raised by the prosecution. Unless the affirmative defense is properly raised, the prosecution is not obligated to disclose rebuttal witnesses. See St. v. Sage, 221 Mont. 192 (1986).

Source: Sections 46-15-322 through 46-15-329 are based on an Arizona rule of criminal procedure. See 17 A.R.S. Rules of Criminal Procedure, Rule 15.

Compiler's Comments

1993 Amendment: Chapter 262 at end of (2)(c) inserted "and 46-15-324(3)"; and made minor changes in style.

1991 Amendment: Throughout section substituted references to defendant for references to accused; in (1), at beginning, inserted "request" and deleted "arraignment in district court or at such later time as the court may for good cause permit"; at beginning of (1)(c) deleted "the names and addresses"; at beginning of (1)(d) deleted "a list or copies of"; at end of (1)(e) substituted "the defendant's potential sentence" for "his punishment therefore"; in (2), before "control", deleted "possession or"; in (2)(b) substituted "an investigative subpoena" for "a search warrant"; at end of (2)(c) deleted "and 46-15-324(3)"; in (3) deleted former first sentence that read: "The prosecutor, upon written request, shall make available to the defendant for examination, testing, and reproduction any specified items contained in the list submitted under subsection (1)(d)" and at end substituted "subsection (1)(d)" for "this section"; in (5) inserted last sentence concerning preparation or disclosure of summaries of witness testimony; and made minor changes in style.

Case Notes

No Error in Permitting State to Offer Expert Testimony Rebutting Matters Raised by Defense for First Time at Trial — No Error in Failure to Disclose Nonexistent Written Report: During Jackson's homicide trial, Jackson presented unexpected expert testimony regarding the manner that wounds were received by a victim of the shooting. The state then called its forensic medical examiner as a rebuttal witness. Although the rebuttal witness was listed prior to trial, Jackson contended that the state erroneously failed to disclose the witness's report. The Supreme Court concluded that Jackson failed to establish a violation of the state's disclosure requirements because the rebuttal witness did not offer an opinion until Jackson's expert opined regarding the bullet's path for the first time at trial and because disclosure is required of only written reports or statements, and there was no report made by the rebuttal witness that could be disclosed. St. v. Jackson, 2009 MT 427, 354 M 63, 221 P3d 1213 (2009).

State's Alleged Failure to Reveal Exculpatory Evidence Unfounded — New Trial Not Warranted: Jackson asserted that a new trial was warranted because the state committed a Brady violation by failing to disclose exculpatory statements made to a professional counselor by a deputy who was wounded during an altercation with Jackson in which another deputy was killed, in which the wounded deputy stated that he felt responsible for the other officer's death. The District Court denied Jackson's motion for a new trial, and on appeal the Supreme Court found no reversible error. The state disclosed the name of the counselor well before trial, identifying the counselor as a person with whom the deputy had discussed the shooting, and the jury heard evidence from other witnesses that the deputy felt guilty about the incident. Thus, the record did not support Jackson's claim that exculpatory evidence was withheld, and denial of Jackson's motion was not an abuse of discretion. St. v. Jackson, 2009 MT 427, 354 M 63, 221 P3d 1213 (2009).

Failure of State to Disclose Findings of Forensics Expert in Homicide Trial — Harmless Error: Morrisey retained a forensics expert to testify during Morrisey's homicide trial. The state had a forensics expert as well, and Morrisey moved for disclosure of the state's expert's findings. The state declined to disclose the findings on grounds that its expert would not be called as a witness during the state's case-in-chief, but only to rebut Morrisey's expert. The trial court denied Morrisey's discovery motion. Following trial, Morrisey appealed on grounds that the state violated 46-15-322 by failing to disclose its expert's conclusions. The Supreme Court agreed that under 46-15-322(1)(c), the prosecution was required to disclose the written report of the state's expert who examined the evidence, regardless of whether the expert was a witness in the state's case-in-chief, and noted that by refusing the disclosure request, the prosecution bound itself not to call the expert as a witness. When the state subsequently called its expert to give an opinion on the evidence, that testimony was objectionable. However, Morrisey had the opportunity to cross-examine the state's expert at length, so any error in allowing the expert's testimony was not prejudicial and was considered harmless. The trial court was affirmed. St. v. Morrisey, 2009 MT 201, 351 M 144, 214 P3d 708 (2009).

No Notice to Defendant of Testimony of Officer Who Ordered DUI Blood Test — Denial of Motion to Suppress DUI Blood Test Affirmed: Grela was taken to the hospital following a vehicle accident. The officer at the scene noticed several empty and full beer cans and a half-full bottle of whiskey in and around the vehicle. Grela was unconscious, but the officer requested a DUI blood test, and Grela was subsequently charged in Municipal Court with DUI. Grela asserted that the test results should be suppressed because he did not consent to withdrawal of the blood and because the state should have provided notice that the officer would be called as an expert witness. The suppression motion was denied and Grela appealed, but the Supreme Court affirmed. Based on the best evidence available to the officers at the accident scene and at the hospital, the officer's belief that Grela was incapable of refusing the blood test was reasonable, so the blood was legally drawn and the test results were admissible. Additionally, Grela was given a copy of the officer's accident report as requested, so Grela had notice that the officer would testify as to the reasons underlying the officer's belief that Grela was incapable of refusing the blood test, and it was not necessary that the officer be disclosed as an expert. Billings v. Grela, 2009 MT 172, 350 M 511, 209 P3d 222 (2009).

Dismissal for Loss of Exculpatory Taped Evidence Not Warranted When Witness Available to Testify in Person: The prosecution lost a videotape of a witness's interview with the sheriff on the night of a stabbing for which Herman was accused. Herman moved to dismiss the case for loss of the tape, which Herman asserted contained exculpatory evidence. The District Court denied the motion and Herman appealed, but the Supreme Court affirmed. Nothing indicated that the state had deliberately or intentionally destroyed the evidence, which would have constituted a per se due process violation, but rather the state appeared to have lost the evidence because of negligence or lack of due diligence, which required Herman to show that the evidence was material, of substantial use, and exculpatory in order to have the case dismissed. Here, even though the tape was destroyed, the witness was available and testified in person regarding the same exculpatory matters contained on the tape. Therefore, Herman's due process rights were not violated because comparable evidence was available. St. v. Herman, 2009 MT 101, 350 M 109, 204 P3d 1254 (2009). See also St. v. Halter, 238 M 408, 777 P2d 1313 (1989).

Defendant's Possession of Detective's Summary Notes From Witness Interviews — Claim of Suppression of Exculpatory Evidence Denied: A detective repeatedly interviewed a witness in Giddings' homicide trial but did not keep the original notes or recordings from the interviews; instead, the detective destroyed the notes after summarizing the interviews, although Giddings was provided with a copy of the summaries. Giddings asserted that the destruction of the original interview materials amounted to the destruction of possible exculpatory evidence in violation of Giddings' right to due process. The Supreme Court disagreed. In order to show that a suppression of material evidence constitutes a due process violation, a defendant must meet the criteria of Brady v. Maryland, 373 US 83 (1963), which includes a showing that: (1) the state possessed evidence, including impeachment evidence, favorable to the defense; (2) defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the evidence; and (4) there was a reasonable probability that the outcome of the proceedings would have been different had the evidence been disclosed. Giddings failed to show a Brady violation. Giddings could not show that the destroyed interview notes had or did not have exculpatory value. Giddings had the opportunity to obtain similar evidence by interviewing the detective and the witness and failed to show that the trial outcome would have been different had he possessed the original materials rather than the summaries. Giddings' motion to dismiss on grounds of destruction of exculpatory evidence was properly dismissed. St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009), following St. v. Johnson, 2005 MT 318, 329 M 497, 125 P3d 1096 (2005), and distinguishing St. v. Swanson, 222 M 357, 722 P2d 1155 (1986).

No Showing That Allegedly Withheld State Evidence Constituted Brady Violation — Due Process Not Violated: Giddings moved that the state's case should be dismissed because the state withheld evidence in a homicide trial, which prohibited defense counsel from having sufficient time to analyze scientific evidence to find exculpatory evidence and from having the necessary information to effectively impeach the state witnesses, resulting in a due process violation. The District Court denied the motion, and Giddings appealed. The Supreme Court held that Giddings failed to meet the criteria for showing an improper withholding of information under Brady v. Maryland, 373 US 83 (1963), by failing to prove that any of the information was exculpatory or to demonstrate a reasonable possibility that the evidence would have changed the outcome. Instead, Giddings offered only sweeping generalizations and broad accusations rather than the specific elements necessary to prove a Brady violation. Giddings also failed to establish that the state's actions denied the right to effective assistance of counsel or the right to confront

the accusers. Denial of Giddings' motion to dismiss was affirmed. St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009).

Theory That Prosecution Suppressed Material Evidence Favorable to Accused Not Considered for First Time on Appeal: Following conviction for attempted deliberate homicide, drug possession, threats and improper influence in official and political matters, and criminal endangerment, Johnson appealed on grounds that the prosecution had suppressed favorable exculpatory material evidence prior to trial. However, Johnson failed to object at trial or show how the evidence could have been exculpatory. Additionally, Johnson failed to provide a sufficient record and raised the issue for the first time on appeal, so the Supreme Court declined to consider the argument. St. v. Johnson, 2005 MT 318, 329 M 497, 125 P3d 1096 (2005), followed in St. v. Ditton, 2006 MT 235, 333 M 483, 144 P3d 783 (2006).

Failure of Prosecution to Disclose Immaterial Financial Documents to Defendant — No Brady Violation: During a theft case against Field, police briefly possessed financial documents from the hotel that Field managed but returned the documents to the hotel when it was determined that the documents were not material to the case, and the prosecutor was unaware of the documents until Field requested them after trial. Nevertheless, Field asserted that he should be granted a new trial pursuant to Brady v. Md., 373 US 83 (1963), because the prosecution failed to turn over the documents to him during discovery. The Supreme Court disagreed, finding no Brady violation. There was no evidence that Field sought to obtain the documents from the hotel or that the prosecution failed to honor a request to produce the documents while in the state's possession. Field's failure to procure the documents before trial was a tactical maneuver and not the result of a constitutional violation. St. v. Field, 2005 MT 181, 328 M 26, 116 P3d 813 (2005).

Failure to Provide Notice That Arresting Officer Would Appear as Witness — No Error: At Boettiger's DUI bench trial in Justice's Court, the arresting officer testified regarding Boettiger's actions on the day in question. Boettiger was convicted and appealed to District Court, but the state did not provide Boettiger with written notice that the officer would again be a witness. Nevertheless, the District Court allowed the officer to testify over Boettiger's objection, and Boettiger's counsel subjected the officer to extensive cross-examination. Boettiger was again convicted and on appeal alleged error in the state's failure to list the officer as a potential witness. The Supreme Court did not condone the failure to provide notice but found that Boettiger knew that the officer would testify again and failed to demonstrate prejudice as a result of the officer's testimony. The Supreme Court disregarded the irregularity because it did not affect Boettiger's substantive rights, and the conviction was affirmed. St. v. Boettiger, 2004 MT 313, 324 M 20, 101 P3d 285 (2004), following St. v. Sol, 282 M 69, 936 P2d 307 (1997).

Failure to Establish Substantial Need for Discovery of Arresting Officer's Personnel File: During Peterson's trial for careless driving and DUI, the District Court relied in part on the arresting officer's experience in DUI cases and on the officer's training and awards. Peterson sought to discover the arresting officer's personnel file for purposes of cross-examination. The motion was denied because Peterson failed to demonstrate a substantial need for the file. On appeal, the Supreme Court agreed. Because Peterson failed to show a substantial need for the file, the District Court did not err in declining to order that the file be made available. Billings v. Peterson, 2004 MT 232, 322 M 444, 97 P3d 532 (2004).

Allowing Late Witness Not Error When Entire Case File Timely Provided to Defendant: The trial court allowed the state to add an expert to the list of prosecution witnesses 4 days before trial. Defendant contended that the disclosure of the intent to have the witness testify was untimely and prejudicial. The Supreme Court disagreed in light of the fact that the state provided defendant with the entire case file, including the expert's report, several months prior to trial, and the state did not refuse to comply with any request from defendant to examine evidence in the prosecution's control. The statutory disclosure requirements were met. St. v. Bailey, 2004 MT 87, 320 M 501, 87 P3d 1032 (2004), distinguishing St. v. Smith, 220 M 364, 715 P2d 1301 (1986), and Superior Enterprises, LLC v. Mont. Power Co., 2002 MT 139, 310 M 198, 49 P3d 565 (2002).

No Showing That Evidence Exculpatory or Intentionally Withheld — Summary Dismissal Proper: Hiebert sued the county and several county officials for withholding exculpatory evidence in Hiebert's trial for sexual assault. The District Court dismissed the suit on summary judgment, and Hiebert appealed. The prosecution has a duty to disclose all favorable evidence to the defense, and when considering the withholding of exculpatory evidence from the defense, a due process violation of Brady v. Md., 373 US 83 (1963), occurs if: (1) the evidence at issue is favorable to the accused, either because it has exculpatory or impeachment value; (2) the evidence was willfully or inadvertently suppressed by the state; and (3) the suppression resulted in prejudice to the accused. In this case, Hiebert failed to demonstrate that evidentiary

transcripts were exculpatory or withheld intentionally, other than by speculating that one official lied in testifying that the transcript was not withheld, and speculation is insufficient to avoid summary judgment. The Supreme Court affirmed summary judgment. Hiebert v. Cascade County, 2002 MT 233, 311 M 471, 56 P3d 848 (2002).

Defendant Aware of Exculpatory Statement Prior to Trial — No Different Result Had Prosecutor Disclosed Evidence: The state interviewed a child abuse victim a few days before Thompson's trial for sexual assault. At the interview, the victim made several contradictory statements about who abused her, including an exculpatory statement that Thompson did not abuse her. Thompson's wife was present at the interview and reported the statement to Thompson and his attorney, who decided to use the information at trial for cross-examination and impeachment purposes. Following Thompson's conviction, he claimed entitlement to relief because the state failed to disclose the exculpatory evidence, arguing that even if he knew about the statement, the state had an independent duty to notify him. The state contended that it was not required to notify Thompson of evidence about which he already knew. Citing Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422 (2000), the Supreme Court concluded that there was no reasonable probability that the result would have been different had the prosecution informed Thompson of the victim's comments and declined to set aside the conviction based on the state's failure to disclose. St. v. Thompson, 2001 MT 119, 305 M 342, 28 P3d 1068 (2001).

Failure to Disclose Inculpatory Evidence Violative of Continuing Duty to Disclose: Stewart was charged with attempting to fraudulently obtain dangerous drugs by altering a prescription from his doctor. Stewart was given prescriptions for three drugs and attempted to fill two at a local pharmacy. The pharmacist believed that one of the two prescriptions had been altered by changing the number of pills from "30" to "80" and refused to return it to Stewart, despite Stewart's request. In the opening statement, Stewart's defense was that someone else in his house had altered the prescription without his knowledge and that, believing the problem was with the doctor's handwriting, he had requested return of the prescription so that he could take it to another pharmacist with whom he had previously dealt and who could better read the handwriting. After hearing this argument and realizing that the third prescription might be at the other pharmacy, the prosecutor dispatched an officer to retrieve it and, upon inspection, discovered that it was altered in an identical manner. On cross-examination after Stewart presented his defense, the prosecutor placed the third prescription in front of Stewart and asked him to identify it. Stewart's attorney objected on grounds that she had never seen it or been notified of its existence. The trial court overruled the objection and allowed the third prescription into evidence, effectively destroying Stewart's defense and changing the entire tenor of the case. During closing, the prosecutor referred to the third prescription 12 times, even though Stewart had never been charged with any crime in connection with it. Stewart argued on appeal that if the third prescription had been revealed when it was discovered, he would have had time to reconsider his decision to testify or exercise his right to remain silent. The Supreme Court found that withholding discoverable inculpatory evidence until a defendant asserts a defense based on the apparent nonexistence of that evidence amounts to trial by ambush that forecloses other possibly viable defenses. Montana's statutory disclosure requirements do not hinge on whether evidence is inculpatory or exculpatory, but simply mandate that the state disclose all additional information or material in its possession, and the penalty for intentional failure to do so may include holding counsel in contempt or declaring a mistrial. The state should have disclosed the third prescription to the defense as part of its continuing duty of disclosure, and the District Court erred in admitting the prescription as evidence. The case was reversed and remanded for a new trial. St. v. Stewart, 2000 MT 379, 303 M 507, 16 P3d 391, 57 St. Rep. 1615 (2000).

Applicability of Brady Rule — Evidence of Accomplice's Rape, Criminal History, and Violent Background Insufficient for New Trial: In a postconviction relief proceeding, petitioner claimed that the state's failure at the first trial to disclose the accomplice's criminal history or sexual assault allegation was prejudicial and warranted a new trial. The Supreme Court found this argument completely without merit. Although the evidence may have been helpful in impeaching the accomplice's testimony, in no way could the failure to disclose this information reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Even in the absence of the accomplice's testimony, there was an overwhelming abundance of other accomplice testimony and corroborative evidence to establish petitioner's guilt. The state did not violate Brady with regard to the guilt phase of petitioner's trial because any favorable information that the state failed to disclose was not material to petitioner's guilt or innocence. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Refusal to Impose Sanctions for Discovery Violations Affirmed Absent Prejudice or Surprise: Golder argued in a motion in limine and in briefs that the timing of the state's formal disclosure

of two witnesses and the nature of their testimony constituted unfair surprise and jeopardized his right to a fair trial. The District Court held that Golder had sufficient notice and denied any sanctions for discovery abuse. The court had ordered disclosure of the materials requested, and that order was ultimately complied with. The refusal to impose sanctions for discovery violations is within the court's discretion. The Supreme Court examined the record and affirmed, finding that any noncompliance with discovery orders was not willful and that no prejudice resulted. St. v. Golder, 2000 MT 239, 301 M 368, 9 P3d 635, 57 St. Rep. 999 (2000), following St. v. Waters, 228 M 490, 743 P2d 617 (1987).

Negligent, Not Intentional, Failure to Provide Defendant With Witness Interview Transcript — No Showing of Materiality of Evidence in Light of Defendant's Confession of Crime: Three taped interviews were conducted with a sexual assault victim. The first two related to Baker's alleged assault of the victim, while the third related to separate allegations that the victim had also been abused by a family member, although Baker's name was also mentioned. Baker was not provided with a copy or transcript of the third interview prior to trial. When that information came out at trial, Baker was provided a copy and viewed it during a recess. Following the break and Baker's review of the transcript, Baker moved for a mistrial on grounds that the prosecution's failure to provide a transcript had denied him exculpatory evidence and impaired his ability to cross-examine witnesses, violating his right to due process and a fair trial. The motion was denied, and Baker appealed. Citing St. v. Brown, 1999 MT 133, 294 M 509, 982 P2d 468 (1999), the Supreme Court noted that an intentional suppression of exculpatory evidence by the prosecution is a per se violation of due process. However, in this case, the state's failure to provide Baker with a transcript of the third interview was negligent rather than intentional, so it did not amount to a due process violation unless the evidence was material, of substantial use, vital to the defense, and exculpatory. In light of the fact that Baker had admitted during one interview that he assaulted the victim and related details of the incident, there was no reasonable probability that the outcome of the trial would have been different had the state disclosed the third interview prior to trial. Baker failed to meet the burden of establishing materiality, so his due process right was not violated, nor did the court err in denying his motion for a mistrial. St. v. Baker, 2000 MT 235, 301 M 323, 8 P3d 817, 57 St. Rep. 976 (2000). See also St. v. Buckles, 1999 MT 79, 294 M 95, 979 P2d 177 (1999).

No Brady Violation When Petitioner Could Have Obtained Evidence by Other Available Means: Ellenburg asserted that the state committed a Brady violation (see Brady v. Md., 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963)) and violated his due process rights by the state's loss or destruction of potentially exculpatory documents seized from his office without a warrant while Ellenburg was in prerelease status in the intensive supervision program following his imprisonment at the state prison. Applying Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395 (1999), the Supreme Court noted that one element of proving a Brady violation is that the petitioner did not possess the evidence and could not have obtained it with reasonable diligence. In this case, the court affirmed, finding no Brady violation because Ellenburg did not demonstrate that he was unable to obtain comparable evidence by other reasonably available means. St. v. Ellenburg, 2000 MT 232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000).

Reasonableness of In Camera Review of Exculpatory Evidence in Balancing Defendant's Right to Review With Victim's Right to Confidentiality: Duffy sought access to confidential reports, many of which were handwritten notes from mental health professionals who were involved in the treatment of Duffy's daughters whom Duffy was alleged to have assaulted. The District Court examined the documents in camera and ordered a redacted one-page copy to be disclosed to defense counsel. Duffy asserted that the in camera procedure was unfair because review by a judge is no substitute for review by the defendant's advocate. However, equally important to the defendant's right to discover exculpatory evidence is the victim's right to protect confidential relations. When these competing interests conflict, they must be balanced by the District Court through in camera review, and the court did not err in doing so. To allow defense counsel general access to a victim's confidential records could adversely affect the state's interest in uncovering and treating abuse. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000), following St. v. Donnelly, 244 M 371, 798 P2d 89 (1990). See also Pa. v. Ritchie, 480 US 39 (1986).

Question of Gun Ownership — Pawnshop Records Allowed as Rebuttal to Character Evidence Regarding Defendant's Credibility: Weitzel was charged with felony assault. The state's witnesses testified that Weitzel had assaulted Brewer with a handgun. As part of Weitzel's character evidence, he testified that he did not presently own a handgun, but went on to describe how he had purchased a handgun as a gift for his brother several years earlier. Weitzel's brother confirmed that he had received a gun as a gift and corroborated that Weitzel did not presently own a handgun. Over Weitzel's objection, the District Court allowed the state to introduce, as

rebuttal evidence, pawnshop records showing that Weitzel had pawned a handgun in 1996 and then retrieved it, ruling that the evidence was very relevant to Weitzel's credibility. On appeal, Weitzel alleged error in the introduction of the pawnshop records, contending that there was no basis in the record for the introduction and that the state failed to follow Rule 404(b), M.R.Ev. (Title 26, ch. 10), and this section when it did not disclose the records in advance of trial. The Supreme Court held that Weitzel opened the door to the rebuttal testimony by choosing to testify as to his gun ownership. The records were properly introduced to rebut the misimpression that Weitzel had purchased only one handgun in the past, as a gift for his brother. Further, the state was not obligated to disclose its knowledge of the records before trial because the prosecution is under no statutory duty to provide pretrial notice of a witness called to impeach the credibility of a defense witness. The rebuttal evidence did not become relevant until Weitzel and his brother testified, and the state had no reason to know in advance of trial that Weitzel would defend against the charges by testifying that he did not own or possess any handguns. Once Weitzel opened the door to the question of his character, the state was not precluded from presenting rebuttal testimony without adhering to the notice requirements. St. v. Weitzel, 2000 MT 86, 299 M 192, 998 P2d 1154, 57 St. Rep. 368 (2000), following St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994).

Criteria Necessary to Establish Brady Violation: The suppression by the prosecution of material evidence favorable to the accused violates the due process rights of the accused, pursuant to Brady v. Md., 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963), including failing to disclose an agreement with a prosecution witness in exchange for testimony if the agreement provides tangible benefits. When there is no agreement, there is no duty to disclose. To establish a Brady violation, the petitioner must establish that: (1) the state possessed evidence, including impeachment evidence, favorable to the defense; (2) the petitioner did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. Here, Gollehon asserted that pretrial and posttrial agreements by the state with a prosecution witness prejudiced Gollehon's due process rights because if the jury had known of the agreements, the credibility of the witness would have been in doubt. However, aside from a guarantee of the witness's safety, which was disclosed to the jury at trial, Gollehon could not establish a Brady violation through the existence of an undisclosed pretrial agreement. Further, in order for posttrial assistance to be relevant, there must have been an agreement for parole before trial in order to support a Brady violation. In the absence of evidence of a pretrial agreement, there can be no Brady violation because no evidence was suppressed from the jury. Gollehon's claim for relief was denied. Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395, 56 St. Rep. 811 (1999), followed in St. v. Ellenburg, 2000 MT 232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000), and St. v. Johnson, 2005 MT 318, 329 M 497, 125 P3d 1096 (2005). See also Giglio v. U.S., 405 US 150, 766 L Ed 2d 104, 92 S Ct 763 (1972), Alderson v. Zant, 22 F3d 1541 (11th Cir. 1994), and Mills v. Singletary, 63 F3d 999 (11th Cir. 1995).

Release of Victim's Belongings to Family — No Negation of Circumstantial Facts: Buckles was involved in a one-car accident wherein his passenger was killed and drugs were found at the scene. Buckles' blood test indicated traces of drugs, and he was charged with negligent homicide and possession with intent to sell. Buckles contended that the state deliberately suppressed material evidence relevant to the charge of possession with intent to sell when it released the passenger's personal effects to the passenger's mother, claiming that if Buckles had had access to the passenger's belongings before they were released, an expert might have found traces of drugs that would suggest that the passenger, rather than Buckles, possessed the drugs found at the scene. The Supreme Court noted that all the passenger's belongings had been documented and logged and that, even if there were a trace of drugs found in the passenger's belongings, that evidence would not negate the very strong circumstantial facts indicating that the drugs were hidden at the accident scene by Buckles and that they were originally in Buckles' bag. Buckles could have proceeded to trial and established ownership of the items through his own testimony and testimony of the passenger's mother, but this Buckles did not do. The negligent homicide and possession with intent to sell convictions were affirmed. St. v. Buckles, 1999 MT 79, 294 M 95, 979 P2d 177, 56 St. Rep. 331 (1999).

No Evidence of Intentional or Negligent Suppression of Exculpatory Evidence: The defendant argued that the state had suppressed evidence of conversations by law enforcement personnel with an individual who indicated to them that the defendant was innocent of the crimes charged. The Supreme Court affirmed the lower court's finding that the state had not suppressed evidence, that the defendant knew of the existence of the individual, and that the individual had

potentially favorable evidence but that the defense had not obtained the individual's testimony through its own failure to act. St. v. Berger, 1998 MT 170, 290 M 78, 964 P2d 725, 55 St. Rep. 686 (1998).

Admissibility of Booking Photograph Not Part of Reciprocal Discovery Package: McKeon contended that a booking photograph taken 2 days after commission of a robbery unfairly surprised him, allowing the prosecution an unfair advantage and prejudicing his case because the photograph was not part of the reciprocal discovery package and was produced only the day before trial. The Iowa state trooper who had arrested McKeon brought the photograph when he came to Montana to testify, and as soon as the prosecution became aware of the photograph, McKeon was notified. McKeon had based his mistaken identity defense on the fact that the witness description of a robbery suspect did not match his appearance at trial, but the booking photograph showed that the description was accurate at the time of the robbery. Absent a showing that the prosecution had intentionally withheld the photograph until immediately before trial, the Supreme Court held that the prosecution had complied with the spirit of the discovery rules. McKeon's decision to alter his appearance at trial from his described appearance at the time of the robbery was a strategic decision that failed, and admission of the booking photograph did not result in unfair prejudice. St. v. McKeon, 282 M 397, 938 P2d 643, 54 St. Rep. 404 (1997).

No Obligation for State to Furnish Summaries of Testimony — Failure to Provide Transcript — No Surprise or Prejudice Found: Sol was convicted in Justice's Court of DUI and appealed to District Court. He argued that the state had failed to make available to him summaries of witnesses' testimony and had failed to deliver to him a copy of a summary of the testimony of one of the state's experts after he was informed of the identity of the expert. The Supreme Court held that there was no requirement in this section for the state to provide a summary of the testimony of any witness and that the state's obligation to provide reports completed by its expert had been satisfied by notification of where the reports could be obtained. The Supreme Court also noted that Sol was unable to point to any prejudice or surprise that he suffered as a result of the alleged discovery violations. Because Sol had failed to order a transcript of the District Court trial in compliance with former Rule 9(b), M.R.App.P. (now superseded), the Supreme Court was unable to determine whether disputed evidence had been offered at trial and, if it was, whether it resulted in surprise or prejudice. St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Alleged Failure to Disclose Confession During Discovery — No Prior Record of Confession — Confession First Alleged by Peace Officer at Trial: Defendant moved for a mistrial because the state did not disclose to him during discovery the testimony that a peace officer gave at trial as to the defendant's confession to the officer. The court correctly found that any prejudice to defendant was removed when his counsel, during cross-examination, elicited from the officer testimony that there was no record, written, taped, or otherwise, of a confession and that the officer's testimony that defendant confessed was an assumption the officer made from certain statements of defendant, which were not themselves an admission of guilt. Moreover, the material from which the officer made the assumption was available to defendant during discovery, and defendant did not make a contemporaneous objection to the testimony at trial. The lower court properly refused to grant a mistrial. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996).

Conditional Disclosure of Videotape Including Undercover Agent: Although this section allows a prosecutor to impose reasonable conditions on the disclosure of physical evidence during discovery, it is a per se violation of due process for the state to intentionally or deliberately suppress evidence of facts that would be favorable to the defendant. The state provided a videotape of illegal hunting activities engaged in by defendant, but edited the tape, especially those parts that might identify its undercover investigator. The state allowed the defendant's attorney to view the unedited tape. There was no discovery violation. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996).

Failure to Make Motion for Production of Information — Denial of Motion to Exclude Testimony on Subject of Information: Defendant requested a peace officer's personnel file and monthly activity reports, and the state refused the request. Because defendant did not make a motion to the court for production of the information, the court properly denied his motion shortly before the trial to exclude the officer's testimony. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996).

No Duty to Disclose Which Items Produced During Discovery Would Be Introduced at Trial: During discovery, the state produced a photo of defendant and records showing a hunting license suspension. The District Court properly denied the defendant's motion to exclude them at trial when defendant moved for their exclusion on the grounds that the state had not told him it would

introduce them at trial. The state had no such duty. The duty is to produce material that "may" be used at trial. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996).

Duty of Prosecution to Give Defendant All Requested Exculpatory Information — Applicability of Brady Rule — Remand for Resentencing: Under Brady v. Md., 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963), the prosecution is required to give a criminal defendant all requested exculpatory information material either to the defendant's guilt or to punishment. Under U.S. v. Bagley, 473 US 667, 87 L Ed 2d 481, 105 S Ct 3375 (1985), the prosecution must also deliver to the defendant all evidence significant for impeachment purposes. In order to require reversal of a defendant's conviction or sentence, a Brady violation must relate to material information. The standard for materiality was set out in Kyles v. Whitley, 514 US 419, 131 L Ed 2d 490, 115 S Ct 1555, 63 USLW 4303 (1995), holding that the defendant must show that there is a reasonable probability that had the information been provided, the result would have been different. The effect of suppressed Brady material must be considered collectively rather than on an item-by-item basis. In the present case, defendant raised numerous issues in an attempt to show that the state had failed to disclose certain materials. After examining each issue, the Supreme Court found that all but two were immaterial and that those two would not have affected the outcome of the trial even if they had been disclosed. However, there was a reasonable probability that had that information been provided to the defendant, the result of the sentencing hearing could have been different if the undisclosed information could have been used to support defendant's contention of mitigating circumstances. Therefore, the court vacated the sentences and remanded for resentencing. Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995), followed in Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), and St. v. Buckles, 1999 MT 79, 294 M 95, 979 P2d 177, 56 St. Rep. 331 (1999). See also Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000), holding that it was harmless error for the District Court to fail to address new claims in its Findings of Fact, Conclusions of Law and Order dismissing petitioner's amended petition for postconviction relief.

Informant's Violation of Employment Contract With Police Not Exculpatory Evidence: Hatfield argued that Turner violated the terms of his contract with the police because at the time that he bought drugs from Hatfield, he had not been directed by the investigating officer. Hatfield contended that if he had known of the contract before trial, he would have been able to use the contract violations to impeach the veracity of Turner's testimony. The Supreme Court held that Hatfield was able to present his version of events concerning the drug sale and that the jury apparently believed the state's account. Therefore, there was no basis to conclude that the employment contract would have tended to negate Hatfield's guilt. There was no duty on the state's part to disclose the contract's existence. St. v. Hatfield, 269 M 307, 888 P2d 899, 52 St. Rep. 1 (1995).

Calling of Rebuttal Witness Without Prior Notice — Not Prejudicial Error: The state called a witness on rebuttal that appeared to be an attempt to rebut defendant's alibi defense in violation of the notice requirements of this section. However, defendant's objection to the testimony was sustained, and the witness stepped down. Defendant was thus not prejudiced by the testimony of the witness despite the fact that proper notice was not given. St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994).

New Trial Not Granted Based on Defendant's Argument That His Failure to Discover Victim's Blood Test Was Excusable Mistake: Barrack moved for a new trial on the basis that the state had not provided him with the results of the victim's blood test and that he had not obtained the results until he subpoenaed them from the hospital prior to sentencing. The Supreme Court held that the state had no duty to provide the test results when it had never requested or obtained the results from the hospital and when the defendant could have obtained the results from the hospital at any time. St. v. Barrack, 267 M 154, 882 P2d 1028, 51 St. Rep. 983 (1994), following St. v. Heth, 230 M 268, 750 P2d 103 (1988).

Mandatory Disclosure Required: The state failed to turn over evidence of prior contact with defendant prior to trial but maintained that under St. v. Shaver, 233 M 438, 760 P2d 1230 (1988), there was no duty to disclose the types of information set out in this section until the state actually developed exculpatory information. Clarifying Shaver, the Supreme Court found that while subsection(1)(e) of this section imposes a mandatory duty on the prosecution to disclose all material that might be generically referred to as exculpatory, subsections (1)(a) through (1)(d) and (2) contain no such limiting language. Under the plain language of those subsections, the prosecution is obligated to fully disclose all material and information listed that is within the prosecution's possession and control, whether inculpatory or exculpatory. It is not up to the state or its agents to decide the inculpatory or exculpatory nature of the material or information. That decision lies with the defendant. St. v. Licht, 266 M 123, 879 P2d 670, 51 St. Rep. 686 (1994),

followed in St. v. Hatfield, 269 M 307, 888 P2d 899, 52 St. Rep. 1 (1995), and discussed in St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Denial of Defendant's Access to Rape Victim's Counselor and Counselor's Records Upheld: Muir was convicted of sexual intercourse without consent with a victim under 16 years of age. Prior to and during trial, Muir requested access to the victim's psychological counselor and to the counselor's records because the counselor was listed as a potential witness. However, after an in camera review of the records by the District Court, Muir was given access only to an investigator's note of an interview with the victim's counselor. The Supreme Court held that Muir was properly denied access to the counselor and the counselor's records because the victim's conversations with the counselor are privileged and the District Court found no exculpatory evidence in the records. Citing St. v. Reynolds, 243 M 1, 792 P2d 1111 (1990), the Supreme Court also reasoned that a defendant's right to pretrial discovery is not equivalent to a defendant's constitutional right of confrontation and that Muir had shown no correlation between the victim's emotional problems and her consent to sexual intercourse. St. v. Muir, 263 M 211, 867 P2d 1094, 51 St. Rep. 19 (1994).

Defendant to Request Copies of Evidentiary Documents: The prosecution sent Gollehon a list of 211 pieces of evidence and a letter stating that if he wanted copies of any of the documents to notify the state. Gollehon did not request any documents and did not claim any discovery violations during trial. On appeal, he argued that the state had failed to provide him with copies of evidence to be used against him. The Supreme Court held that, after offering to provide copies of evidence, the state may assume that the defendant has copies of any evidence not requested and held that the state has no duty to provide copies not requested. St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1718 (1993).

Claim of Discovery Violation During Trial — Lack of Proof That State Failed to Provide Pertinent Evidence: Gollehon claimed that he learned during the course of trial of a possible discovery violation, whereupon he moved for dismissal or, in the alternative, for a continuance. Both motions were denied. Investigators for the state had provided Gollehon with 213 pieces of evidence gathered in the case, including lists of witnesses that had been questioned. Gollehon did not request the lists and made the decision not to personally interview the witnesses or question them on the stand. Gollehon could not provide any evidence that any exculpatory evidence would have been obtained and was therefore not entitled to claim a discovery abuse. The motions were properly denied. St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993).

Introduction of Undisclosed Tape Recording for Impeachment Purposes: Defendant argued that the trial court erred in allowing the state to use an undisclosed tape recording to impeach one of the defense's witnesses. The Supreme Court held that this section does not require disclosure of recorded statements when used to impeach defense witnesses. St. v. Stewart, 253 M 475, 833 P2d 1085, 49 St. Rep. 540 (1992).

Chain of Custody — Drugs Under Official Seal: Briner contended that two packets of methamphetamine he allegedly sold were improperly admitted into evidence because there were several fatal gaps in the chain of custody. The state did not offer testimony from the person who mailed the packets from the Sheriff's office to the state crime lab for testing, the person who received them at the crime lab and mailed them back to the Sheriff, or the person at the Sheriff's office who received them from the crime lab and returned them to the evidence locker. However, the time periods in question were after the drugs were in official custody and under seal, and Briner showed no evidence to overcome the resulting presumption that there was no tampering with the drugs. St. v. Briner, 253 M 158, 831 P2d 1365, 49 St. Rep. 402 (1992).

Reasonable Means by Defense Counsel to Obtain Comparable Evidence — No Prejudice in Allowing Testimony: On the morning of the trial, defendant filed a motion in limine to exclude the testimony of two witnesses because the prosecution failed to produce a copy of the written statement of one of the witnesses that was given to the Sheriff's office on the night of the incident. The witness stated that she had thrown away her copy, and no statement was ever produced. Defendant argued that allowing the testimony constituted prejudicial error. Following the standard for lost or destroyed evidence set out in St. v. Halter, 238 M 408, 777 P2d 1313 (1989), the Supreme Court affirmed the denial of the motion in limine because defense counsel had other reasonable means to obtain comparable evidence during the 9 months prior to trial and had failed to allege the exculpatory value of the evidence or to show how the introduction of the written statement could have changed the outcome of the trial. St. v. West, 252 M 83, 826 P2d 940, 49 St. Rep. 170 (1992), followed in St. v. Sweet, 1998 MT 30, 287 M 336, 954 P2d 1133, 55 St. Rep. 110 (1998). See also St. v. Brown, 1999 MT 133, 294 M 509, 982 P2d 468, 56 St. Rep. 536 (1999).

Proper Addition of Witness Twenty-Four Days Before Trial — No Surprise: The state moved to add a witness after arraignment, replacing "Unknown, State Crime Lab" on the information with the name of the scientist later determined to be testifying. Disclosure was not made earlier because it was not known which scientist would testify; however, there was no indication of willful noncompliance with the discovery statutes. A 24-day period was sufficient to eliminate surprise. The motion to add the witness was properly granted. St. v. Van Voast, 247 M 194, 805 P2d 1380, 48 St. Rep. 160 (1991).

Amendment of Information as to Form — Addition of Witnesses — Arraignment Not Necessary: An original information charged defendant with sexual assault and incest over a continuous period of time. Three months before trial, the state amended the information to add witnesses and to exclude the period of time the victim lived outside defendant's home. The amendment was one of form and not substance, and expanding the witness list did not prejudice the substantial rights of defendant. St. v. Sor-Lokken, 247 M 343, 805 P2d 1367, 48 St. Rep. 142 (1991).

Prosecution's Duty Only to Make Material Available: The defendant argued that the state intentionally suppressed evidence until trial. The Supreme Court affirmed the lower court's finding that the material was always available to the defense but that the right to examine the evidence had not been exercised. St. v. Matt, 245 M 208, 799 P2d 1085, 47 St. Rep. 1988 (1990), followed in Missoula v. Lesko, 2003 MT 177, 316 M 401, 73 P3d 166 (2003).

Refusal to Allow Discovery in Criminal Case — Due Process and Standard of Proof — Contempt Upheld: Petitioner, a Yellowstone County Deputy Attorney, was ordered by the District Court in an omnibus hearing to allow discovery of the state witnesses and any written statements they had made. At the time of the hearing, petitioner knew of the existence of a 70-page statement by a drug informant but did not disclose it to the court or to the defendant in a criminal case because petitioner believed it to be "intelligence information" since the affidavit did not mention the defendant in the criminal case by name. Petitioner was held in contempt for failing to turn over the affidavit and petitioned the Supreme Court for a writ of certiorari. The Supreme Court noted that at the District Court hearing on the contempt charge, while the petitioner's supervisors testified that they believed the decision of whether the affidavit was relevant and should therefore be turned over to defense counsel should be made by the District Court, petitioner testified that that decision was for her to make. The Supreme Court also held that petitioner received due process in the form of a show cause hearing and that the standard of proof applicable to the District Court's finding of contempt required the affirmance of that finding unless it was not supported by substantial evidence. Because the Supreme Court found substantial evidence in the transcripts that petitioner refused to recognize the District Court's authority, the Supreme Court affirmed the findings and conclusions and refused to issue the writ. State ex rel. O'Connor v. District Court, 245 M 88, 799 P2d 1056, 47 St. Rep. 1844 (1990), discussed in St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Destruction of Exculpatory Evidence to Prejudice of Defendant — No Bull: Defendant was charged with felony theft and illegal branding of a bull. At an omnibus hearing, he was granted discovery of all the state's written and recorded statements, names of state witnesses, copies of any statements, inspection of all physical and documentary evidence in the state's possession, and discovery of all special or additional evidence coming thereafter into the state's possession. Several months later, defendant requested inspection of the bull to allow his expert to inspect the brands; however, by that time the bull had been sold and slaughtered. The District Court dismissed the charges because the state was negligent in preserving necessary evidence. The Supreme Court affirmed after finding that: (1) the evidence destroyed had an exculpatory value to defendant; (2) the exculpatory value of the evidence was apparent prior to its destruction; (3) comparable evidence was not within defendant's ability to obtain by other reasonably available means; and (4) there was an expectation that the lost evidence would play a significant role in the defense. Further, the lower court was correct in determining that an evidentiary hearing to determine the exculpatory value of the evidence was not necessary because that which could develop from an actual inspection of the bull by experts was never developed because of the slaughter. At that point, the state had nothing to rebut in an evidentiary hearing. St. v. Halter, 238 M 408, 777 P2d 1313, 46 St. Rep. 1375 (1989), distinguishing St. v. Heth, 230 M 268, 750 P2d 103, 45 St. Rep. 194 (1988); St. v. Amaya, 227 M 390, 739 P2d 955, 44 St. Rep. 1173 (1987); St. v. Palmer, 207 M 152, 673 P2d 1234 (1983); and St. v. Craig, 169 M 150, 545 P2d 649 (1976). Halter followed in St. v. Gollehon, 262 M 293, 864 P2d 1257, 50 St. Rep. 1564 (1993). See also St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994).

Raising Issue of Nondisclosure — Objection Must Be Made at Trial: The defendant's attorney made a general objection, stating no grounds to a line of questioning pursued by the prosecutor.

The judge overruled the objection but cautioned the prosecutor to limit his questions to a certain area. An exchange of questions and answers followed without the defense attorney objecting that the answers given by the defendant included a prior nondisclosed statement of his client. The Supreme Court ruled that no objection had been made at trial, and therefore the issue could not be raised on appeal. St. v. Rudolph, 238 M 135, 777 P2d 296, 46 St. Rep. 1150 (1989).

Statutes Ineffective Until Exculpatory Knowledge Gathered: Although this section and 46-15-327 require the state to disclose all pertinent information it may gather, and the duty to disclose is continuing, the statutes have no effect until the state actually develops the knowledge of a specific act, fact, or information that exculpates the defendant. St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988), clarified in St. v. Licht, 266 M 123, 879 P2d 670, 51 St. Rep. 686 (1994).

No Affirmative Duty of Police to Gather Exculpatory Evidence: Police officers may not frustrate or hamper a defendant's right to obtain exculpatory evidence, but they have no affirmative duty to gather such evidence absent express statutory mandate. St. v. Heth, 230 M 268, 750 P2d 103, 45 St. Rep. 194 (1988).

Introduction Into Evidence of Article of Controversy Rather Than Photographs of Article — No Prejudice or Surprise: Defendant was not prejudiced or unduly surprised by the introduction of the item of controversy in an attempted theft trial, despite the state's failure to list the item. Defendant knew of the item, and the state notified him that photographs of the item would be introduced into evidence and later informed him that the item itself would be introduced. St. v. Waters, 228 M 490, 743 P2d 617, 44 St. Rep. 1705 (1987).

Listing of New Witnesses Ten Days Before Trial — Defense Acquiescence in Noncontinuance: The state gave notice 10 days prior to trial of intent to possibly call 12 additional witnesses. After defense objection, the state agreed not to call five of those witnesses, whereupon the defense appeared to acquiesce in the decision not to continue the trial date. The trial court did not abuse its discretion in allowing the new witnesses. St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987).

Suppression of Stolen Truck Not Due Process Violation: Defendant appealed his conviction for theft, contending that the failure to provide a jury view of the allegedly stolen truck and the state's subsequent disposition of the truck constituted an illegal suppression of physical evidence prejudicing his defense and violating his due process rights. The court affirmed the conviction, ruling that the defendant failed to show the suppressed evidence was exculpatory. Negligent suppression requires a reversal of conviction where the result would have been different had the evidence been disclosed. St. v. Amaya, 227 M 390, 739 P2d 955, 44 St. Rep. 1173 (1987).

Prosecution's Duty to Provide Names of Rebuttal Witnesses Contingent on Defendant's Notice of Intent to Interpose Affirmative Defense: Defendant was charged with deliberate homicide and convicted of mitigated deliberate homicide. On appeal, he claimed that the prosecution had failed to comply with 46-15-301(3), repealed by sec. 11, Ch. 202, L. 1985, and replaced by 46-15-322(6). The prosecution had offered testimony of witnesses for the purpose of rebutting defendant's contention that he did not have the necessary state of mind required for the offense of deliberate homicide but had not given the defendant prior notice of this testimony. The Supreme Court ruled that this was not error because the defendant had not notified the prosecutor prior to trial of intention to use the state of mind affirmative defense. The prosecution's burden of providing statutory notice of rebuttal witnesses does not arise until the defendant has given notice that he intends to interpose an affirmative defense. St. v. Sage, 221 M 192, 717 P2d 1096, 43 St. Rep. 738 (1986).

Collateral References

Failure of state prosecutor to disclose pretrial statement made by crime victim as violating due process. 102 ALR 5th 327.

Failure of state prosecutor to disclose exculpatory medical reports and tests as violating due process. 101 ALR 5th 187.

Failure of state prosecutor to disclose fingerprint evidence as violating due process. 94 ALR 5th 393.

Failure of state prosecutor to disclose exculpatory photographic evidence as violating due process. 93 ALR 5th 527.

46-15-323. Disclosure by defendant.

Commission Comments

1991 Comment: This statute is chiefly a restatement of 1987 MCA 46-15-323 and requires a defendant to submit to certain tests and disclose other information to the prosecution.

Subsection (1) requires the defendant, upon request and upon the court's approval, to submit to the taking of certain samples or other tests for the purpose of obtaining evidence. The requirement of "showing good cause" was replaced with "approval of the court" in recognition of the varying burdens of proof required before the sample may be obtained. The defendant's right to counsel has not been expressly retained (1987 MCA 46-15-323(2)), but the right is preserved. See 46-8-101. The list of samples or tests to which the defendant may be required to submit is not all inclusive.

Subsections (2) through (5) preserve 1987 MCA 46-15-323(3). In general, except for new time limitations, the statute should not change established procedure.

Subsection (2) retains the first sentence of 1987 MCA 46-15-323(3) and requires the disclosure of the intent to rely on certain affirmative defenses. The statute requires notice within 10 days after the omnibus hearing but preserves the court's discretion to allow notice at a later time.

Subsection (3) requires the defendant, within 10 days after receiving a report of a psychiatric or psychological examination, to give written notice of the intent to introduce such evidence at trial. The statute allows the court discretion to permit notice at a later time. The difference between this subsection and subsection (2) is that the latter recognizes affirmative defenses that are distinct from a defense based on lack of mental state.

Subsection (4) includes a restatement of the second sentence of 1987 MCA 46-15-323(3). In addition, the subsection requires the defendant to disclose to the prosecution all written reports or statements made by certain witnesses.

Subsection (5) is a restatement of the 1987 code and allows amendments to the witness list that is required under this statute. To obtain the right to amend, the defendant must move the court and show good cause for the amendment.

Subsection (6) retains and clarifies the disclosure requirement contained in 1987 MCA 46-15-323(4). Rather than requiring such disclosure 30 days from arraignment, the code has been amended to require disclosure 10 days after the omnibus hearing. The Commission recognized that the disclosure of such evidence may occur at any time before the omnibus hearing upon agreement between the parties.

Subsection (7) is essentially a restatement of 1987 MCA 46-15-323(5). The subsection limits the code designation of "agent" to defense counsel's staff or investigators.

Subsection (8) preserves the 1987 code practice allowing the prosecution to obtain from the defendant things that could not otherwise be obtained. In accordance with 46-13-101, all motions should be written unless otherwise required.

Source: See source note under 46-15-322.

Compiler's Comments

2001 Amendment: Chapter 303 in (3) near beginning after "psychologist" inserted "or advanced practice registered nurse"; and made minor changes in style. Amendment effective April 20, 2001.

1993 Amendments: Chapter 182 in (2) and (6) substituted "Within 30 days after the arraignment" for "Within 10 days after the omnibus hearing in district court"; and made minor changes in style.

Chapter 262 near beginning of (2) and near beginning of (6), before "court", deleted "district"; near middle of (4), after "made by them", inserted "including all reports and statements"; and made minor changes in style.

1991 Amendment: Throughout section substituted references to defendant for references to accused; in (1), at end, substituted "approval of the court" for "for good cause shown"; deleted former (2) that read: "(2) The accused is entitled to the presence of counsel at the taking of any evidence pursuant to subsection (1). Subsection (1) supplements and does not limit any other procedures established by law"; in (2) reduced time from "30 days after arraignment" to "10 days after the omnibus hearing"; at beginning of (3) inserted "Within 10 days after receiving a report of the defendant's mental condition from a psychiatrist or psychologist or at a later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of the defendant's intention to introduce evidence at trial of the defense that due to a mental disease or defect"; in (4), after "persons", inserted "other than the defendant" and after "defense" inserted "together with all written reports or statements made by them concerning the results of physical examinations, scientific tests, experiments, or comparisons, except that the defendant need not include a privileged report or statement unless he intends to use the privileged report or statement, or the witness who made it, at trial"; in (5), at end of first sentence, inserted "and disclose their reports or statements as required by this section", in second sentence, after "list", inserted "and the witness's report or statement has been disclosed as required by this section",

and deleted former last sentence that read: "Any evidence that reasonably becomes available after the initial 30 days shall be admitted if 46-15-327 is complied with"; at beginning of (6) substituted "Within 10 days after the omnibus hearing in district court or at a later time as the court may for good cause permit" for "Simultaneously with the notice of defenses submitted under subsection (3)"; in (6)(a), after "witnesses", substituted "in the defense case-in-chief" for "at trial" and at end deleted "made by them in connection with the particular case"; at end of (7) substituted "defense counsel, and defense counsel's staff or investigators" for "or his attorneys and agents"; in (8) inserted last sentence concerning preparation and disclosure of summaries of witness testimony; and made minor changes in style.

Case Notes

Nonrecord-Based Assertion of Ineffective Counsel for Failure to Raise Parental Discipline Defense at Trial for Partner or Family Member Assault Appropriate for Postconviction Proceedings, Not Direct Appeal: At her trial for partner or family member assault, Fender's counsel did not raise a parental discipline defense. Fender asserted that she was entitled to a new trial because failure of counsel to raise the defense constituted ineffective assistance of counsel, but the District Court denied the motion for a new trial. On appeal, the Supreme Court was unable to determine from the record whether counsel's action was strategic, but because the alleged error was nonrecord-based, the question of whether there was merit to the parental discipline defense was more appropriate for postconviction proceedings, so the denial of a new trial was affirmed. St. v. Fender, 2007 MT 268, 339 M 395, 170 P3d 971 (2007).

Failure to Show Good Cause for Endorsing Expert Witness Five Days Before Trial — No Prejudice — Sanction Proper: Only 5 days before trial and more than 1 year after arraignment on criminal charges, DeMary moved to endorse an expert witness to rebut the state's expert. DeMary was aware of the state's expert at least 4 months before trial but failed to provide any explanation for waiting until 5 days before trial to seek endorsement. Although this section allows a defendant to add witnesses more than 30 days after arraignment if good cause is shown, DeMary failed to demonstrate good cause for the tardiness of the motion, nor did he show that the state was prepared to address the expert's testimony. DeMary also failed to demonstrate prejudice in the disallowance of his expert's testimony because the state never called the witness that DeMary's proposed expert was to refute. The District Court did not abuse its discretion in sanctioning DeMary for failure to comply with this section by disallowing the expert. St. v. DeMary, 2003 MT 307, 318 M 200, 79 P3d 817 (2003).

No Error in Denial of Continuance When Expert Testimony Properly Denied: DeMary sought to endorse an expert witness 5 days before trial, but the motion was properly denied because DeMary failed to comply with 46-15-323. DeMary then moved for a continuance in an effort to convince the trial court to reverse its decision, but the continuance motion was also denied, and DeMary appealed. The Supreme Court affirmed. Because the trial court did not abuse its discretion or prejudice DeMary by denying the expert's testimony, there was little reason to continue the trial date, so the continuance was properly denied. St. v. DeMary, 2003 MT 307, 318 M 200, 79 P3d 817 (2003).

Nonprejudicial Preclusion of Expert Witness Not Violative of Right to Fair Trial or Effective Counsel: DeMary contended that the District Court's denial of a motion to endorse an expert witness 5 days before trial constituted ineffective assistance of counsel and denied DeMary's right to a fair trial. Under the Strickland test, a defendant must show that counsel's performance was deficient and that the performance prejudiced the defendant and deprived the defendant of a fair trial. However, DeMary failed to comply with this section and failed to demonstrate prejudice in the disallowance of his expert's testimony because the state never called the witness that DeMary's proposed expert was to refute. Absent a showing of sufficient prejudice, DeMary could not show that the trial was unfair, and the assertion of ineffective assistance of counsel failed. St. v. DeMary, 2003 MT 307, 318 M 200, 79 P3d 817 (2003).

Record Devoid of Reasons for Counsel's Conduct During Voir Dire — Ineffective Assistance Claim Improperly Raised on Direct Appeal: Defendant's claims of ineffective assistance of counsel during voir dire could not be addressed without considering matters outside the record and were therefore inappropriate for direct appeal. The claims were thus dismissed without prejudice to defendant's pursuit of the claims in postconviction proceedings. St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003), following St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003).

Counsel Decision to Forego Certain Defense Considered Trial Strategy — Insufficient Record to Determine Effective Assistance of Counsel on Direct Appeal: On direct appeal, Hendricks contended that he was provided ineffective assistance of counsel in his assault trial because his attorney failed to raise the affirmative defense of justifiable use of force. However, in a disclosure

statement filed prior to the omnibus hearing, Hendricks's counsel specifically noted that the defense of justifiable use of force would not be asserted. On the morning of trial, counsel stated that no jury instructions on the defense of justifiable use of force would be offered. Thus, the decision not to raise the defense was made consciously and was not the result of ignorance or neglect and was presumed to be sound trial strategy falling within the realm of reasonable professional conduct absent evidence to the contrary. Absent a sufficient record to address the issue of ineffective assistance, the direct appeal was dismissed, requiring Hendricks to raise the issue by a postconviction relief proceeding, if at all. The Supreme Court clarified that it will no longer use the approach in St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001), to determine effective assistance of counsel, but rather the procedure set out in St. v. Herrmann, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003). St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003), followed in St. v. Webster, 2005 MT 38, 326 M 112, 107 P3d 500 (2005).

Record Devoid of Pretrial Tactical Decisions — Evidentiary Hearing Required on Ineffective Assistance Claim: In St. v. Soraich, 1999 MT 87, 294 M 175, 979 P2d 206 (1999), the Supreme Court held that the prosecutor in Soraich's murder trial was entitled to comment on a theory suggested by defense counsel because the theory lacked evidentiary support and because the comments were plainly in response to defense counsel's opening statements. Soraich then filed a petition for postconviction relief, claiming that defense counsel rendered ineffective assistance by stating that counsel would prove that the state's key witness gave inconsistent statements, without first determining whether an investigator's statement could be introduced as impeachment evidence. The District Court denied the petition, holding that Soraich should have raised the ineffective assistance claim on direct appeal because the claim was based on facts of record in the underlying case, so the claim was procedurally barred from postconviction review. To determine whether the ineffective assistance claim should have been raised on direct appeal or in a postconviction hearing, the Supreme Court cited the two-part process in Strickland v. Wash., 466 US 668 (1984). First, the trial record must adequately document a challenged act or omission of defense counsel for the defendant to raise an ineffective assistance claim on direct appeal. Second, the record on appeal must afford sufficient understanding of the reason for counsel's act or omission to answer the threshold question of whether the alleged error expresses a trial strategy or tactical decision, and if the record does not supply the reason for counsel's act or omission, the claim must be raised by postconviction relief. The record here did not contain any information about why defense counsel promised the jury that the investigator's testimony would prove Soraich's defense, but then failed to call the investigator as a witness. Without an evidentiary hearing and direct questioning of defense counsel, any guesses on what led to the failure to call the investigator as a witness were purely speculative. Because the record was devoid of counsel's pretrial tactical decisions, Soraich could not satisfy the second prong of the Strickland test, so 46-21-105 did not bar Soraich's postconviction assertion of ineffective assistance at trial. An evidentiary hearing was necessary to address the second prong of the Strickland test, and the District Court improperly dismissed Soraich's petition for postconviction relief. Therefore, the case was remanded for an evidentiary hearing on the ineffective assistance claim. Soraich v. St., 2002 MT 187, 311 M 90, 53 P3d 878 (2002). On remand, the District Court again denied relief, holding that under the second prong of the Strickland test, any allegedly deficient performance of counsel did not prejudice Soraich. Soraich appealed again, asserting that counsel's failure to call a witness to impeach a state witness resulted in prejudice. The Supreme Court disagreed. The witness had already been impeached through the testimony of another defense witness and by cross-examination concerning all of the inconsistencies in the questionable testimony. Failure to call another witness to establish the same point did not create a reasonable probability that the trial result would have been different and did not constitute ineffective assistance of counsel. The District Court was affirmed. Soraich v. St., 2004 MT 215, 322 M 375, 97 P3d 529 (2004). See also St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001).

Exclusion of Witnesses Constituting Abuse of Discretion — Harmless Error: Berg's counsel failed to previously disclose witnesses by timely filing a witness list with the District Court pursuant to this section. The court imposed the harshest sanction available by excluding Berg's witnesses, and Berg contended that he was entitled to a new trial because the court erred by excluding his witnesses. Berg's failure to disclose was not willful, nor would the state have been unduly prejudiced or surprised by Berg's noncompliance because the witnesses were known to the state, being among the same witnesses that the state intended to call. Thus, the District Court abused its discretion in imposing such a harsh sanction, and a less severe sanction should have been imposed. However, the exclusion of Berg's witnesses was not so prejudicial that Berg was deprived of a fair trial. The jury was provided with the essence of the witnesses' testimony

through the cross-examination of one of the state's witnesses, so the exclusion of Berg's witnesses was harmless error. St. v. Berg, 1999 MT 282, 296 M 546, 991 P2d 428, 56 St. Rep. 1138 (1999), followed in St. v. Dezeeuw, 1999 MT 331, 297 M 379, 992 P2d 1276, 56 St. Rep. 1323 (1999).

Failure to Notify of Intent to Introduce Character Evidence — Testimony Precluded: After indicating in an omnibus hearing memorandum that he did not intend to introduce character evidence at his criminal trial, Root nevertheless sought to allow a witness to testify regarding his good character and reputation for nonviolence. The trial court may exercise its discretion to preclude certain testimony if the defendant fails to disclose the intent to introduce character evidence. Because Root failed to disclose that the witness would provide character evidence, as required in this section, the trial court did not abuse its discretion in prohibiting it. St. v. Root, 1999 MT 203, 296 M 1, 987 P2d 1140, 56 St. Rep. 792 (1999). See also St. v. Kaczmarek, 243 M 456, 795 P2d 439 (1990).

Error in Requiring Summaries of Defense Witnesses' Testimony — Due Process Violated — No Prejudicial Error Found: When Huerta was tried on charges of felony assault (now assault with a weapon) of a juvenile, he attempted to introduce testimony of 26 witnesses who would testify that the child's mother had the habit of severely punishing the child. In an effort to reduce delay caused by redundant testimony, the District Court required Huerta to summarize the testimony of all of the witnesses by affidavits. Huerta claimed that the required affidavits were ordered in violation of 46-15-328 and in violation of his due process rights because a similar burden was not placed upon the prosecution. The Supreme Court held that the District Court's order was in violation of subsection (8) of this section, which specifically prohibits summaries of defense testimony, and in violation of Huerta's right of due process because Wardius v. Oreg., 412 US 470 (1973), and State ex rel. Carkulis v. District Court, 229 M 265, 746 P2d 604 (1987), require reciprocal discovery. However, the Supreme Court also held that Huerta did not establish that the violation of his rights was reversible error pursuant to 46-20-701 because he failed to show how the violations of statute and due process affected the outcome of the trial. St. v. Huerta, 285 M 245, 947 P2d 483, 54 St. Rep. 1133 (1997).

Allowing Prosecution to Depose Nontestifying Expert Witness Deficient Representation — No Prejudice: The defendant alleged that his counsel was ineffective because he allowed the prosecution to depose the defendant's nontestifying expert witness. The Supreme Court held that allowing the deposition constituted deficient representation but that the defendant suffered no prejudice as a result of the error. Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Admissibility of Booking Photograph Not Part of Reciprocal Discovery Package: McKeon contended that a booking photograph taken 2 days after commission of a robbery unfairly surprised him, allowing the prosecution an unfair advantage and prejudicing his case because the photograph was not part of the reciprocal discovery package and was produced only the day before trial. The Iowa state trooper who had arrested McKeon brought the photograph when he came to Montana to testify, and as soon as the prosecution became aware of the photograph, McKeon was notified. McKeon had based his mistaken identity defense on the fact that the witness description of a robbery suspect did not match his appearance at trial, but the booking photograph showed that the description was accurate at the time of the robbery. Absent a showing that the prosecution had intentionally withheld the photograph until immediately before trial, the Supreme Court held that the prosecution had complied with the spirit of the discovery rules. McKeon's decision to alter his appearance at trial from his described appearance at the time of the robbery was a strategic decision that failed, and admission of the booking photograph did not result in unfair prejudice. St. v. McKeon, 282 M 397, 938 P2d 643, 54 St. Rep. 404 (1997).

Failure to Comply With Disclosure Requirements of Disclosure Order — Sanctions Appropriate: Under this section, a defendant is required to provide the prosecution written notice of certain defenses within 30 days after arraignment and to simultaneously make available to the state the names and addresses of experts whom defendant intends to call at trial, together with reports and statements generated by those experts in connection with the case. Because of defendant's late notice of the intention to call an expert and to provide any written report or resume from the witness, the state was precluded from effectively meeting the proposed expert testimony. It was within the discretion and flexibility of the District Court to sanction defendant under 46-15-329 by prohibiting the expert from testifying. St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994).

Constitutionality of Disclosure Statutes — Failure to Provide Psychiatric Reports — Defense of Mental Disease or Defect Precluded: Defendant was examined by a psychiatrist, and the trial court ordered submission of the medical report to the court. Following additional examination by

three more psychiatrists or psychologists, defendant gave notice of the intention to rely on mental disease or defect as a defense, but the notice did not specify the names and addresses of persons defendant intended to call as witnesses to support his defense. The state moved for discovery of the names, addresses, and any statements or reports required to be disclosed under this section. Defense counsel refused to provide the information because disclosure could not be done without disclosing privileged or incriminating information. The trial court advised counsel that 46-15-328 provides for protective orders and for excising privileged or incriminating information and ordered disclosure. The trial court ruled that nondisclosure precluded defendant's use of the mental disease or defect defense. Defense counsel appealed to the Supreme Court, arguing that the disclosure requirements were an unconstitutional violation of the right against self-incrimination under the federal and state constitutions. The Supreme Court previously affirmed Montana's reciprocal discovery provisions against attack on the same constitutional grounds in State ex rel. Carkulis v. District Court, 229 M 265, 746 P2d 604 (1987). In this case, the court noted that the discovery provisions allow a defendant to be examined by as many psychiatrists as desired and that only statements of those that are to be called as witnesses at trial need be disclosed. Further, as set out in Smith v. McCormick, 914 F2d 1153 (9th Cir. 1990), the attorney-client privilege extends only to the point of testimonial use of that communication. Defendant was advised but refused to avail himself of the protective order provisions of 46-15-328, and in doing so, the refusal to comply with constitutional statutory discovery provisions precluded the use of the mental disease or defect defense. St. v. Davidson, 266 M 404, 880 P2d 1331, 51 St. Rep. 867 (1994).

Authority to Compel Evaluation When Defense Based on Battered Woman Syndrome: Defendant Hess contended that the District Court had no authority to compel a psychiatric and psychological evaluation of a defendant who asserts the affirmative defense of justifiable use of force based on battered woman syndrome. Defendant asserted that statutes governing the procedure for mental evaluation when mental state is an issue do not expressly provide for battered woman syndrome or place the defendant's mental state at issue when the syndrome is a factor. The Supreme Court noted that the defendant put her own mental state at issue by relying on that defense and then calling an expert to testify in support of that defense; therefore, 46-14-205 authorizes the state to request an evaluation for the limited purposes of rebuttal once mental state becomes an issue, despite the lack of a specific statutory reference to the defense of justifiable use of force based on battered woman syndrome. St. v. Hess, 252 M 205, 828 P2d 382, 49 St. Rep. 217 (1992), followed, with respect to a psychological defense not based upon mental disease or defect, in Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Defendant Precluded From Calling Nondisclosed Witness: The defendant was not allowed to call a former probation officer in order to impeach the testimony of a codefendant. The Supreme Court held that the lower court properly excluded the testimony because defendant knew before the trial that the codefendant was going to testify against him and had a duty to disclose any witness he intended to call to impeach the codefendant's testimony. St. v. Kaczmarek, 243 M 456, 795 P2d 439, 47 St. Rep. 1319 (1990), followed in St. v. Root, 1999 MT 203, 296 M 1, 987 P2d 1140, 56 St. Rep. 792 (1999).

No Prejudice Through Order in Companion Case: In a companion case involving defendant's brother, the trial court, over the brother's objection, ordered the production of statements made by individuals whom the brother intended to call as witnesses, pursuant to this section. Pursuant to an order in his own case, defendant was required to produce the same information. Defendant did not object to the order in his own case and was precluded from raising the issue on appeal. Further, defendant lacked standing to assert the privilege that was alleged by his brother; the defendant did not demonstrate any prejudice to him as a result of the order in the companion case. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Statements Taken by Defendant From State's Witnesses Discoverable: The defendant argued that the lower court erred in ordering him to turn over to the prosecution statements taken from the state's witnesses. The Supreme Court ruled that the discovery of those statements was not unconstitutional, that the defendant had not shown he was prejudiced by their discovery, and that he also had listed all of the state's witnesses on his own list of witnesses, thereby making their statements discoverable. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Reasonable Restrictions on Confrontation of Child Witness: Defendant in an incest case contended his attorney could not conduct an effective interview unless defendant was present for consultation during the interview. The state argued that defendant's presence would harm the mental well-being of the minor victim. The Supreme Court held that the accused does not have a

constitutional right to interview witnesses personally and that reasonable restrictions on the accused's access to the witness comports with the guarantees of the confrontation clause. A witness unwilling to be interviewed may be deposed, but an interview under circumstances directed by the witness would reflect unwillingness only if the attached conditions make it untenable for defense counsel to discover needed material. St. v. Smith, 235 M 99, 765 P2d 742, 45 St. Rep. 2190 (1988). See also St. v. Pecora, 190 M 115, 619 P2d 173, 37 St. Rep. 1742 (1980).

Work Product Doctrine Not to Encompass Substantial Evidence — Investigator's Report Subject to Discovery: In anticipation of a codefendant's testimony, a private investigator was hired to prepare a report for impeachment purposes. Defendant's counsel failed to provide the state with the report, claiming exemption under the work product doctrine of 46-15-324. Counsel's election to use the report constituted waiver of the product privilege, and his attempt to label the report "impeachment material" was not sufficient for the report to escape discovery. The privilege is not inviolate nor is the scope of the doctrine so broad as to encompass substantial evidence. St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988).

Reciprocal Pretrial Discovery Statutes Constitutional: In criminal cases, statutes requiring defendant to reveal to prosecutor a list of witnesses and exhibits expected to be used at trial does not violate the state or federal constitution. State ex rel. Carculis v. District Court, 229 M 265, 746 P2d 604, 44 St. Rep. 1954 (1987).

Exhibit Not Linked to Event in Dispute — Notice Period Not Met — Exhibit Properly Excludable: Defendant attempted to introduce BB pellets as physical evidence that he did not fire in the direction of another person. The pellets were properly excluded as lacking probative value since no ballistics tests were conducted that would tie the pellets to the alleged weapon or the alleged time and place of the incident. Further, defendant attempted to introduce the exhibit as tangible evidence after the 30-day notice period set out in this section and was unable to vouch for the exhibit to the trial court's satisfaction. St. v. Keup, 228 M 194, 741 P2d 1330, 44 St. Rep. 1451 (1987).

Collateral References

What is accused's "statement" subject to state court criminal discovery. 57 ALR 4th 827, §§6[b], 8[a].

46-15-324. Materials not subject to disclosure.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-15-324. The statute protects both the work product and superseded notes from discovery unless otherwise provided in this statute. The expansion to include protection of superseded notes is a logical extension of the work product rule. The Commission decided that an express statement of this protection was required because a strict definition of work product would not include such materials.

The statute continues express recognition of the principle that exculpatory information should always be presented to the defense. Of course, that requirement is not reciprocal. The 1987 code's procedure for disclosing the existence of any informants has not been retained.

Source: See source note under 46-15-322.

Compiler's Comments

1993 Amendment: Chapter 262 inserted (3) establishing circumstances when disclosure of the identity of an informant who will not be called to testify is not required.

1991 Amendment: In (1) and (2), before "work product", inserted "superseded notes or"; deleted (3) that read: "(3) Disclosure of the existence of an informant or of the identity of an informant who will not be called to testify is not required if:

(a) disclosure would result in substantial risk to the informant or to his operational effectiveness; and

(b) the failure to disclose will not infringe the constitutional rights of the accused"; and made minor changes in style.

Case Notes

No Error in Failing to Disclose Evidence With No Exculpatory or Impeachment Value: Fish contended on appeal that the prosecution in a sexual intercourse without consent trial improperly withheld evidence until trial that the victim had admitted being intoxicated about a week before the crime. However, the Supreme Court found no error. The evidence had neither exculpatory nor impeachment value in the case, and defense counsel extensively cross-examined the victim on that issue at trial. Fish's argument that the evidence was improperly withheld failed. St. v. Fish, 2009 MT 47, 349 M 286, 204 P3d 681 (2009).

Discovery of Identity of Confidential Informant Properly Denied: DuBray contended that the identity of a confidential informant should have been disclosed in discovery. Applying the balancing test in Roviaro v. U.S., 353 US 53 (1957), the Supreme Court found nothing to persuade that disclosure of the informant's identity was warranted. The informant did not testify at trial, and DuBray offered nothing concrete or substantive to establish that disclosure was necessary to properly prepare for trial, that the informant might possess exculpatory information, or that the informant may have been involved in the crime. Mere speculation about possible relevancy of the informant's testimony was insufficient to warrant disclosure of the informant's identity. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003). See also St. v. McLeod, 227 M 482, 740 P2d 672 (1987).

Failure to Disclose Drug Crime Informant Upheld: The possibility that a confidential police informant might have been an exculpatory witness was an insufficient basis for requiring disclosure of the informant's identity to the person charged with possession of marijuana with intent to sell. Moreover, the state had a strong interest in protecting the flow of information regarding the drug trade in the county and showed that the flow could be impaired without the future services of the informant and that the informant might be placed in danger by disclosure. Disclosure was properly denied. St. v. Sarbaum, 270 M 176, 890 P2d 1284, 52 St. Rep. 133 (1995).

Test for Disclosure of Identity of Informer: There is no fixed rule as to when an informant's identity must by disclosed. It depends on a balancing of the public interest in protecting the flow of information against the charged person's right to prepare a defense and on the circumstances of the case, taking into account the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. St. v. Sarbaum, 270 M 176, 890 P2d 1284, 52 St. Rep. 133 (1995).

Motion to Disclose Informant's Identity Denied:

Defendant alleged that disclosure of the identity of the police informants was necessary to his defense because the informants had provided false information to the authorities regarding methamphetamine production and marijuana growing operations that were never found and because further examination would show the informants to be patently unreliable. However, the court properly refused to disclose the identities because: (1) although methamphetamine production articles described in the warrant application were not found, other articles consistent with methamphetamine production were found; (2) the warrant application stated the that informant *believed* marijuana was being grown, not that the informant had seen the marijuana; and (3) it was in the public interest not to disclose the identity of another informant who was still being used in a separate police investigation. Mere speculation or conjecture about the relevance of the informants' testimony was inadequate. Because defendant failed to demonstrate the falsity of the information, refusal to disclose their identities was proper. (See 1993 amendment.) St. v. Crowder, 248 M 169, 810 P2d 299, 48 St. Rep. 376 (1991).

Defendant's motion to disclose the identity of the state's confidential informants was properly denied because, under the applicable test that balances the public's interest against the defendant's right to prepare her defense and to confront and examine her accusers, she did not demonstrate that the need for disclosure outweighs the government's interest. Defendant's contention that the state must first disclose the relevance of the informants' testimony misconstrues the balancing test under which the burden is on the defendant to show the need for disclosure. The record is bare regarding defendant's basis for making the motion for disclosure. (See 1993 amendment.) St. v. Babella, 237 M 311, 772 P2d 875, 46 St. Rep. 827 (1989).

Defendant's motion to disclose the identity of the state's confidential informant was properly denied when the informant's information was not used as a basis for probable cause to arrest and the informant took no active part in the alleged crime but simply supplied information. There was no evidence that disclosure outweighed the public interest in protecting the flow of information or that the informant's testimony would be relevant to any issue in the case. Further, defendant failed to substantiate the claim that his constitutional rights were infringed by nondisclosure or that the informant would be exposed to no risk upon disclosure. (See 1993 amendment.) St. v. Coates, 233 M 303, 759 P2d 999, 45 St. Rep. 1508 (1988).

Work Product Doctrine Not to Encompass Substantial Evidence — Investigator's Report Subject to Discovery: In anticipation of a codefendant's testimony, a private investigator was hired to prepare a report for impeachment purposes. Defendant's counsel failed to provide the state with the report, claiming exemption under the work product doctrine of this section. Counsel's election to use the report constituted waiver of the product privilege, and his attempt to label the report "impeachment material" was not sufficient for the report to escape discovery. The privilege is not inviolate nor is the scope of the doctrine so broad as to encompass substantial evidence. St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988).

Nondisclosure of Witness Proper: Defendant appeals from his conviction for criminal sale of dangerous drugs (now criminal distribution of dangerous drugs), asserting that nondisclosure of the identity of a confidential informant was prejudicial. The court held that defendant did not meet the burden of showing that the informant would have been a material witness whose testimony might result in exoneration or that failure to disclose the identity of the informant would infringe defendant's constitutional rights. St. v. McLeod, 227 M 482, 740 P2d 672, 44 St. Rep. 1251 (1987).

46-15-325. Failure to call a witness or raise a defense.

Commission Comments

Source: See source note under 46-15-322.

Compiler's Comments

1991 Amendment: Near beginning, after "pursuant to", substituted "this part but the witness does not testify" for "46-15-321 through 46-15-329"; and made minor changes in style.

46-15-326. Use of materials.

Commission Comments

Source: See source note under 46-15-322.

Compiler's Comments

1991 Amendment: Substituted "46-15-322" for "46-15-321".

46-15-327. Continuing duty to disclose.

Commission Comments

Source: See source note under 46-15-322.

Compiler's Comments

1991 Amendment: Made minor change in style.

Case Notes

Defendant Aware of Exculpatory Statement Prior to Trial — No Different Result Had Prosecutor Disclosed Evidence: The state interviewed a child abuse victim a few days before Thompson's trial for sexual assault. At the interview, the victim made several contradictory statements about who abused her, including an exculpatory statement that Thompson did not abuse her. Thompson's wife was present at the interview and reported the statement to Thompson and his attorney, who decided to use the information at trial for cross-examination and impeachment purposes. Following Thompson's conviction, he claimed entitlement to relief because the state failed to disclose the exculpatory evidence, arguing that even if he knew about the statement, the state had an independent duty to notify him. The state contended that it was not required to notify Thompson of evidence about which he already knew. Citing Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422 (2000), the Supreme Court concluded that there was no reasonable probability that the result would have been different had the prosecution informed Thompson of the victim's comments and declined to set aside the conviction based on the state's failure to disclose. St. v. Thompson, 2001 MT 119, 305 M 342, 28 P3d 1068 (2001).

Failure to Disclose Inculpatory Evidence Violative of Continuing Duty to Disclose: Stewart was charged with attempting to fraudulently obtain dangerous drugs by altering a prescription from his doctor. Stewart was given prescriptions for three drugs and attempted to fill two at a local pharmacy. The pharmacist believed that one of the two prescriptions had been altered by changing the number of pills from "30" to "80" and refused to return it to Stewart, despite Stewart's request. In the opening statement, Stewart's defense was that someone else in his house had altered the prescription without his knowledge and that, believing the problem was with the doctor's handwriting, he had requested return of the prescription so that he could take it to another pharmacist with whom he had previously dealt and who could better read the handwriting. After hearing this argument and realizing that the third prescription might be at the other pharmacy, the prosecutor dispatched an officer to retrieve it and, upon inspection, discovered that it was altered in an identical manner. On cross-examination after Stewart presented his defense, the prosecutor placed the third prescription in front of Stewart and asked him to identify it. Stewart's attorney objected on grounds that she had never seen it or been notified of its existence. The trial court overruled the objection and allowed the third prescription into evidence, effectively destroying Stewart's defense and changing the entire tenor of the case. During closing, the prosecutor referred to the third prescription 12 times, even though Stewart had never been charged with any crime in connection with it. Stewart argued on appeal that if the third prescription had been revealed when it was discovered, he would have had time to reconsider his decision to testify or exercise his right to remain silent. The Supreme Court found

that withholding discoverable inculpatory evidence until a defendant asserts a defense based on the apparent nonexistence of that evidence amounts to trial by ambush that forecloses other possibly viable defenses. Montana's statutory disclosure requirements do not hinge on whether evidence is inculpatory or exculpatory, but simply mandate that the state disclose all additional information or material in its possession, and the penalty for intentional failure to do so may include holding counsel in contempt or declaring a mistrial. The state should have disclosed the third prescription to the defense as part of its continuing duty of disclosure, and the District Court erred in admitting the prescription as evidence. The case was reversed and remanded for a new trial. St. v. Stewart, 2000 MT 379, 303 M 507, 16 P3d 391, 57 St. Rep. 1615 (2000).

Negligent, Not Intentional, Failure to Provide Defendant With Witness Interview Transcript — No Showing of Materiality of Evidence in Light of Defendant's Confession of Crime: Three taped interviews were conducted with a sexual assault victim. The first two related to Baker's alleged assault of the victim, while the third related to separate allegations that the victim had also been abused by a family member, although Baker's name was also mentioned. Baker was not provided with a copy or transcript of the third interview prior to trial. When that information came out at trial, Baker was provided a copy and viewed it during a recess. Following the break and Baker's review of the transcript, Baker moved for a mistrial on grounds that the prosecution's failure to provide a transcript had denied him exculpatory evidence and impaired his ability to cross-examine witnesses, violating his right to due process and a fair trial. The motion was denied, and Baker appealed. Citing St. v. Brown, 1999 MT 133, 294 M 509, 982 P2d 468 (1999), the Supreme Court noted that an intentional suppression of exculpatory evidence by the prosecution is a per se violation of due process. However, in this case, the state's failure to provide Baker with a transcript of the third interview was negligent rather than intentional, so it did not amount to a due process violation unless the evidence was material, of substantial use, vital to the defense, and exculpatory. In light of the fact that Baker had admitted during one interview that he assaulted the victim and related details of the incident, there was no reasonable probability that the outcome of the trial would have been different had the state disclosed the third interview prior to trial. Baker failed to meet the burden of establishing materiality, so his due process right was not violated, nor did the court err in denying his motion for a mistrial. St. v. Baker, 2000 MT 235, 301 M 323, 8 P3d 817, 57 St. Rep. 976 (2000). See also St. v. Buckles, 1999 MT 79, 294 M 95, 979 P2d 177 (1999).

No Brady Violation When Petitioner Could Have Obtained Evidence by Other Available Means: Ellenburg asserted that the state committed a Brady violation (see Brady v. Md., 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963)) and violated his due process rights by the state's loss or destruction of potentially exculpatory documents seized from his office without a warrant while Ellenburg was in prerelease status in the intensive supervision program following his imprisonment at the state prison. Applying Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395 (1999), the Supreme Court noted that one element of proving a Brady violation is that the petitioner did not possess the evidence and could not have obtained it with reasonable diligence. In this case, the court affirmed, finding no Brady violation because Ellenburg did not demonstrate that he was unable to obtain comparable evidence by other reasonably available means. St. v. Ellenburg, 2000 MT 232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000).

Criteria Necessary to Establish Brady Violation: The suppression by the prosecution of material evidence favorable to the accused violates the due process rights of the accused, pursuant to Brady v. Md., 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963), including failing to disclose an agreement with a prosecution witness in exchange for testimony if the agreement provides tangible benefits. When there is no agreement, there is no duty to disclose. To establish a Brady violation, the petitioner must establish that: (1) the state possessed evidence, including impeachment evidence, favorable to the defense; (2) the petitioner did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. Here, Gollehon asserted that pretrial and posttrial agreements by the state with a prosecution witness prejudiced Gollehon's due process rights because if the jury had known of the agreements, the credibility of the witness would have been in doubt. However, aside from a guarantee of the witness's safety, which was disclosed to the jury at trial, Gollehon could not establish a Brady violation through the existence of an undisclosed pretrial agreement. Further, in order for posttrial assistance to be relevant, there must have been an agreement for parole before trial in order to support a Brady violation. In the absence of evidence of a pretrial agreement, there can be no Brady violation because no evidence was suppressed from the jury. Gollehon's claim for relief was denied. Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395, 56 St. Rep. 811 (1999), followed in St. v. Ellenburg, 2000 MT

232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000), and St. v. Johnson, 2005 MT 318, 329 M 497, 125 P3d 1096 (2005). See also Giglio v. U.S., 405 US 150, 766 L Ed 2d 104, 92 S Ct 763 (1972), Alderson v. Zant, 22 F3d 1541 (11th Cir. 1994), and Mills v. Singletary, 63 F3d 999 (11th Cir. 1995).

Admissibility of Booking Photograph Not Part of Reciprocal Discovery Package: McKeon contended that a booking photograph taken 2 days after commission of a robbery unfairly surprised him, allowing the prosecution an unfair advantage and prejudicing his case because the photograph was not part of the reciprocal discovery package and was produced only the day before trial. The Iowa state trooper who had arrested McKeon brought the photograph when he came to Montana to testify, and as soon as the prosecution became aware of the photograph, McKeon was notified. McKeon had based his mistaken identity defense on the fact that the witness description of a robbery suspect did not match his appearance at trial, but the booking photograph showed that the description was accurate at the time of the robbery. Absent a showing that the prosecution had intentionally withheld the photograph until immediately before trial, the Supreme Court held that the prosecution had complied with the spirit of the discovery rules. McKeon's decision to alter his appearance at trial from his described appearance at the time of the robbery was a strategic decision that failed, and admission of the booking photograph did not result in unfair prejudice. St. v. McKeon, 282 M 397, 938 P2d 643, 54 St. Rep. 404 (1997).

Mandatory Disclosure Required: The state failed to turn over evidence of prior contact with defendant prior to trial but maintained that under St. v. Shaver, 233 M 438, 760 P2d 1230 (1988), there was no duty to disclose the types of information set out in 46-15-322 until the state actually developed exculpatory information. Clarifying Shaver, the Supreme Court found that while 46-15-322(1)(e) imposes a mandatory duty on the prosecution to disclose all material that might be generically referred to as exculpatory, subsections (1)(a) through (1)(d) and (2) contain no such limiting language. Under the plain language of those subsections, the prosecution is obligated to fully disclose all material and information listed that is within the prosecution's possession and control, whether inculpatory or exculpatory. It is not up to the state or its agents to decide the inculpatory or exculpatory nature of the material or information. That decision lies with the defendant. St. v. Licht, 266 M 123, 879 P2d 670, 51 St. Rep. 686 (1994).

Testimony Allowed Despite Failure to Disclose Diagnosis Before Trial — Sanctions Appropriate: A medical expert examined defendant before trial in order to determine defendant's mental state but neglected to include a diagnosis. The trial court correctly concluded that the state breached its duty to disclose as required by this section. Under 46-15-329, the court allowed the expert to testify but did not allow testimony as to the diagnosis. Defendant contended that he was effectively prevented from cross-examining the expert for fear of inadvertently bringing up the diagnosis and that cross-examination prohibited his right to address the discovery violation. The sanctions applied against the state were within the court's discretion because the actual testimony was no different from what was contemplated and defendant could point to no damage caused by the testimony. The court did not abuse its discretion by allowing the expert to testify after it was established that the state had failed to disclose the diagnosis before trial. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Reasonable Means by Defense Counsel to Obtain Comparable Evidence — No Prejudice in Allowing Testimony: On the morning of the trial, defendant filed a motion in limine to exclude the testimony of two witnesses because the prosecution failed to produce a copy of the written statement of one of the witnesses that was given to the Sheriff's office on the night of the incident. The witness stated that she had thrown away her copy, and no statement was ever produced. Defendant argued that allowing the testimony constituted prejudicial error. Following the standard for lost or destroyed evidence set out in St. v. Halter, 238 M 408, 777 P2d 1313 (1989), the Supreme Court affirmed the denial of the motion in limine because defense counsel had other reasonable means to obtain comparable evidence during the 9 months prior to trial and had failed to allege the exculpatory value of the evidence or to show how the introduction of the written statement could have changed the outcome of the trial. St. v. West, 252 M 83, 826 P2d 940, 49 St. Rep. 170 (1992), followed in St. v. Sweet, 1998 MT 30, 287 M 336, 954 P2d 1133, 55 St. Rep. 110 (1998). See also St. v. Brown, 1999 MT 133, 294 M 509, 982 P2d 468, 56 St. Rep. 536 (1999).

Revised Transcript Provided on Day of Trial but Tape Accessible — No Prejudice: An audio tape of a drug transaction was admitted into evidence, but the written transcript of the tape contained errors in the identification of speakers, so neither that transcript nor a subsequently revised version, introduced on the day of trial, was admitted. Defendant maintained that

changing the names on the transcript and not disclosing it until the day of trial violated the rules of discovery, resulting in prejudice. However, the Supreme Court found no prejudice because neither transcript was admitted as evidence and defendant's access to the best evidence, the tape itself, ruled out the possibility that defendant's case was substantially impaired. St. v. Moreno, 248 M 91, 809 P2d 574, 48 St. Rep. 339 (1991).

Statutes Ineffective Until Exculpatory Knowledge Gathered: Although 46-15-322 and this section require the state to disclose all pertinent information it may gather, and the duty to disclose is continuing, the statutes have no effect until the state actually develops the knowledge of a specific act, fact, or information that exculpates the defendant. St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988), clarified in St. v. Licht, 266 M 123, 879 P2d 670, 51 St. Rep. 686 (1994).

46-15-328. Excision and protective orders.

Commission Comments

1991 Comment: This statute is modeled after 1987 MCA 46-15-328. Subsection (1) amends the 1987 code and treats the protection of witness identities in the same manner as all other evidence. The statute does not retain the 1987 code's requirement that the identity of the witnesses be disclosed at least 5 days prior to trial. Under the statute, the protection and the extent of protection from disclosure is a matter fully within a court's discretion. The Commission felt it was unwise to continue the time restraints on this discretion that were present in the 1987 code. Compare subsection (1) and 1987 MCA 46-15-328(1). The remainder of the statute preserves the 1987 code with minor changes to conform to the revised statutory format.

Source: See source note under 46-15-322.

Compiler's Comments

1991 Amendment: In (1), before "disclosure", inserted "any" and after "disclosure" deleted "of the identity of any witness be deferred for any reasonable period of time, not to extend beyond 5 days prior to the date set for trial, or that any other disclosures required by 46-15-321 through 46-15-329 be denied"; in (1)(a), before "disclosure", inserted "unrestricted"; in (2) and (4), after "discoverable", deleted "under 46-15-321 through 46-15-329"; and made minor changes in style.

Case Notes

Constitutionality of Disclosure Statutes — Failure to Provide Psychiatric Reports — Defense of Mental Disease or Defect Precluded: Defendant was examined by a psychiatrist, and the trial court ordered submission of the medical report to the court. Following additional examination by three more psychiatrists or psychologists, defendant gave notice of the intention to rely on mental disease or defect as a defense, but the notice did not specify the names and addresses of persons defendant intended to call as witnesses to support his defense. The state moved for discovery of the names, addresses, and any statements or reports required to be disclosed under 46-15-323. Defense counsel refused to provide the information because disclosure could not be done without disclosing privileged or incriminating information. The trial court advised counsel that this section provides for protective orders and for excising privileged or incriminating information and ordered disclosure. The trial court ruled that nondisclosure precluded defendant's use of the mental disease or defect defense. Defense counsel appealed to the Supreme Court, arguing that the disclosure requirements were an unconstitutional violation of the right against self-incrimination under the federal and state constitutions. The Supreme Court previously affirmed Montana's reciprocal discovery provisions against attack on the same constitutional grounds in State ex rel. Carkulis v. District Court, 229 M 265, 746 P2d 604 (1987). In this case, the court noted that the discovery provisions allow a defendant to be examined by as many psychiatrists as desired and that only statements of those that are to be called as witnesses at trial need be disclosed. Further, as set out in Smith v. McCormick, 914 F2d 1153 (9th Cir. 1990), the attorney-client privilege extends only to the point of testimonial use of that communication. Defendant was advised but refused to avail himself of the protective order provisions of this section, and in doing so, the refusal to comply with constitutional statutory discovery provisions precluded the use of the mental disease or defect defense. St. v. Davidson, 266 M 404, 880 P2d 1331, 51 St. Rep. 867 (1994).

Defendant's Motion for Protective Order Denied: The defendant's counsel moved for a protective order to conceal the contents of a witness's testimony. The denial of the motion was affirmed on appeal on the basis that the defendant's attorney failed to show that the disclosure of the witness's identity would result in a risk of harm to the witness outweighing the usefulness of the testimony to either party. St. v. Rudolph, 238 M 135, 777 P2d 296, 46 St. Rep. 1150 (1989).

In Camera Ex Parte Inspection Constitutional: An in camera inspection of information conducted ex parte in the presence of opposing counsel does not violate defendant's right against

self-incrimination. State ex rel. Carculis v. District Court, 229 M 265, 746 P2d 604, 44 St. Rep. 1954 (1987).

46-15-329. Sanctions.

Commission Comments

1991 Comment: This statute is chiefly a restatement of 1987 MCA 46-15-329, which describes the sanctions a court may impose for noncompliance with discovery. Subsection (3) provides that before a witness, party, or counsel may be held in contempt, an intentional violation must be shown.

Source: See source note under 46-15-322.

Compiler's Comments

1991 Amendment: In introductory clause, in two places, substituted "this part" for "46-15-321 through 46-15-329"; and at end of (3) inserted "for an intentional violation".

Case Notes

Failure to Show Good Cause for Endorsing Expert Witness Five Days Before Trial — No Prejudice — Sanction Proper: Only 5 days before trial and more than 1 year after arraignment on criminal charges, DeMary moved to endorse an expert witness to rebut the state's expert. DeMary was aware of the state's expert at least 4 months before trial but failed to provide any explanation for waiting until 5 days before trial to seek endorsement. Although 46-15-323 allows a defendant to add witnesses more than 30 days after arraignment if good cause is shown, DeMary failed to demonstrate good cause for the tardiness of the motion, nor did he show that the state was prepared to address the expert's testimony. DeMary also failed to demonstrate prejudice in the disallowance of his expert's testimony because the state never called the witness that DeMary's proposed expert was to refute. The District Court did not abuse its discretion in sanctioning DeMary for failure to comply with 46-15-323 by disallowing the expert. St. v. DeMary, 2003 MT 307, 318 M 200, 79 P3d 817 (2003).

Nonprejudicial Preclusion of Expert Witness Not Violative of Right to Fair Trial or Effective Counsel: DeMary contended that the District Court's denial of a motion to endorse an expert witness 5 days before trial constituted ineffective assistance of counsel and denied DeMary's right to a fair trial. Under the Strickland test, a defendant must show that counsel's performance was deficient and that the performance prejudiced the defendant and deprived the defendant of a fair trial. However, DeMary failed to comply with 46-15-323 and failed to demonstrate prejudice in the disallowance of his expert's testimony because the state never called the witness that DeMary's proposed expert was to refute. Absent a showing of sufficient prejudice, DeMary could not show that the trial was unfair, and the assertion of ineffective assistance of counsel failed. St. v. DeMary, 2003 MT 307, 318 M 200, 79 P3d 817 (2003).

Refusal to Impose Sanctions for Discovery Violations Affirmed Absent Prejudice or Surprise: Golder argued in a motion in limine and in briefs that the timing of the state's formal disclosure of two witnesses and the nature of their testimony constituted unfair surprise and jeopardized his right to a fair trial. The District Court held that Golder had sufficient notice and denied any sanctions for discovery abuse. The court had ordered disclosure of the materials requested, and that order was ultimately complied with. The refusal to impose sanctions for discovery violations is within the court's discretion. The Supreme Court examined the record and affirmed, finding that any noncompliance with discovery orders was not willful and that no prejudice resulted. St. v. Golder, 2000 MT 239, 301 M 368, 9 P3d 635, 57 St. Rep. 999 (2000), following St. v. Waters, 228 M 490, 743 P2d 617 (1987).

Constitutional Right to Present Witnesses to Be Considered in Applying Sanction for Untimely Disclosure of Witnesses: Dezeeuw was charged by information with aggravated assault. His counsel failed to timely disclose witnesses and, as a result, was sanctioned by the District Court when the court refused to allow the testimony of one of Dezeeuw's witnesses who was an eye witness to the assault. The Supreme Court held that in determining whether the District Court abused its discretion in applying the severest of sanctions, Dezeeuw's right under Art. II, sec. 24, Mont. Const., to present witnesses in his behalf must be taken into consideration. The Supreme Court held that the District Court abused its discretion in applying the severest sanction, that Dezeeuw was prejudiced by the exclusion of his witness's testimony, and that Dezeeuw should therefore be given a new trial. St. v. Dezeeuw, 1999 MT 331, 297 M 379, 992 P2d 1276, 56 St. Rep. 1323 (1999).

Exclusion of Witnesses Constituting Abuse of Discretion — Harmless Error: Berg's counsel failed to previously disclose witnesses by timely filing a witness list with the District Court pursuant to 46-15-323. The court imposed the harshest sanction available by excluding Berg's witnesses, and Berg contended that he was entitled to a new trial because the court erred by

excluding his witnesses. Berg's failure to disclose was not willful, nor would the state have been unduly prejudiced or surprised by Berg's noncompliance because the witnesses were known to the state, being among the same witnesses that the state intended to call. Thus, the District Court abused its discretion in imposing such a harsh sanction, and a less severe sanction should have been imposed. However, the exclusion of Berg's witnesses was not so prejudicial that Berg was deprived of a fair trial. The jury was provided with the essence of the witnesses' testimony through the cross-examination of one of the state's witnesses, so the exclusion of Berg's witnesses was harmless error. St. v. Berg, 1999 MT 282, 296 M 546, 991 P2d 428, 56 St. Rep. 1138 (1999), followed in St. v. Dezeeuw, 1999 MT 331, 297 M 379, 992 P2d 1276, 56 St. Rep. 1323 (1999).

Failure to Notify of Intent to Introduce Character Evidence — Testimony Precluded: After indicating in an omnibus hearing memorandum that he did not intend to introduce character evidence at his criminal trial, Root nevertheless sought to allow a witness to testify regarding his good character and reputation for nonviolence. The trial court may exercise its discretion to preclude certain testimony if the defendant fails to disclose the intent to introduce character evidence. Because Root failed to disclose that the witness would provide character evidence, as required in 46-15-323, the trial court did not abuse its discretion in prohibiting it. St. v. Root, 1999 MT 203, 296 M 1, 987 P2d 1140, 56 St. Rep. 792 (1999). See also St. v. Kaczmarek, 243 M 456, 795 P2d 439 (1990).

Mistrial Correctly Denied for Alleged Coaching of Witness: Rendon was convicted of felony assault (now assault with a weapon) of Melanie's son. Rendon alleged that at trial, during the son's testimony, the son was coached by a person in the audience to answer "yes" or "no" to questions from the prosecution. The Supreme Court held that the District Court properly denied a motion for mistrial because the District Court was in the best position to determine whether coaching of the witness had occurred. St. v. Rendon, 273 M 303, 903 P2d 183, 52 St. Rep. 985 (1995).

Failure to Comply With Disclosure Requirements of Disclosure Order — Sanctions Appropriate: Under 46-15-323, a defendant is required to provide the prosecution written notice of certain defenses within 30 days after arraignment and to simultaneously make available to the state the names and addresses of experts whom defendant intends to call at trial, together with reports and statements generated by those experts in connection with the case. Because of defendant's late notice of the intention to call an expert and to provide any written report or resume from the witness, the state was precluded from effectively meeting the proposed expert testimony. It was within the discretion and flexibility of the District Court to sanction defendant under this section by prohibiting the expert from testifying. St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994).

Constitutionality of Disclosure Statutes — Failure to Provide Psychiatric Reports — Defense of Mental Disease or Defect Precluded: Defendant was examined by a psychiatrist, and the trial court ordered submission of the medical report to the court. Following additional examination by three more psychiatrists or psychologists, defendant gave notice of the intention to rely on mental disease or defect as a defense, but the notice did not specify the names and addresses of persons defendant intended to call as witnesses to support his defense. The state moved for discovery of the names, addresses, and any statements or reports required to be disclosed under 46-15-323. Defense counsel refused to provide the information because disclosure could not be done without disclosing privileged or incriminating information. The trial court advised counsel that 46-15-328 provides for protective orders and for excising privileged or incriminating information and ordered disclosure. The trial court ruled that nondisclosure precluded defendant's use of the mental disease or defect defense. Defense counsel appealed to the Supreme Court, arguing that the disclosure requirements were an unconstitutional violation of the right against self-incrimination under the federal and state constitutions. The Supreme Court previously affirmed Montana's reciprocal discovery provisions against attack on the same constitutional grounds in State ex rel. Carkulis v. District Court, 229 M 265, 746 P2d 604 (1987). In this case, the court noted that the discovery provisions allow a defendant to be examined by as many psychiatrists as desired and that only statements of those that are to be called as witnesses at trial need be disclosed. Further, as set out in Smith v. McCormick, 914 F2d 1153 (9th Cir. 1990), the attorney-client privilege extends only to the point of testimonial use of that communication. Defendant was advised but refused to avail himself of the protective order provisions of 46-15-328, and in doing so, the refusal to comply with constitutional statutory discovery provisions precluded the use of the mental disease or defect defense. St. v. Davidson, 266 M 404, 880 P2d 1331, 51 St. Rep. 867 (1994).

Constitutionality of Sanction Provisions: This section is consistent with the goal of reciprocal discovery to enhance the search for truth. Once it is determined that reciprocal pretrial disclosures subject to constitutional or statutory limitations are permissible, the District Court may exercise its discretion in enforcing those permissible disclosures. St. v. Davidson, 266 M 404, 880 P2d 1331, 51 St. Rep. 867 (1994), following State ex rel. Carkulis v. District Court, 229 M 265, 746 P2d 604 (1987).

Violation of Protective Order by Use of Term "Victim" — Voir Dire — Mistrial Not Warranted: Dixon was charged with rape of H.D. During voir dire of the jury, the prosecutor commented on a question asked by the defense counsel, saying that the question was very inappropriate for the defense to ask. Later, after the District Court had granted a defense motion in limine to prohibit the prosecution from using the word "victim", the prosecutor referred to H.D. as a "female rape victim". The Supreme Court held that the District Court properly refused the defense request for a mistrial in both instances, saying that the prosecutor's comments were insignificant when viewed in the context of the entire record. The District Court had instructed the jury to consider only the evidence and not to use the prosecutor's comments as evidence. St. v. Dixon, 264 M 38, 869 P2d 779, 51 St. Rep. 135 (1994).

Standard for Review of Denial of Mistrial: The standard for review of denial of a motion for a mistrial is whether there is clear and convincing evidence that the trial judge's ruling was erroneous, whether there is a manifest necessity to declare a mistrial, and whether defendant was denied a fair trial. St. v. Greytak, 262 M 401, 865 P2d 1096, 50 St. Rep. 1610 (1993), followed in St. v. Rendon, 273 M 303, 903 P2d 183, 52 St. Rep. 985 (1995), and St. v. Flores, 1998 MT 328, 292 M 255, 974 P2d 124, 55 St. Rep. 1329 (1998). See also St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005).

Testimony Allowed Despite Failure to Disclose Diagnosis Before Trial — Sanctions Appropriate: A medical expert examined defendant before trial in order to determine defendant's mental state but neglected to include a diagnosis. The trial court correctly concluded that the state breached its duty to disclose as required by 46-15-327. Under this section, the court allowed the expert to testify but did not allow testimony as to the diagnosis. Defendant contended that he was effectively prevented from cross-examining the expert for fear of inadvertently bringing up the diagnosis and that cross-examination prohibited his right to address the discovery violation. The sanctions applied against the state were within the court's discretion because the actual testimony was no different from what was contemplated and defendant could point to no damage caused by the testimony. The court did not abuse its discretion by allowing the expert to testify after it was established that the state had failed to disclose the diagnosis before trial. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Refusal to Allow Discovery in Criminal Case — Due Process and Standard of Proof — Contempt Upheld: Petitioner, a Yellowstone County Deputy Attorney, was ordered by the District Court in an omnibus hearing to allow discovery of the state witnesses and any written statements they had made. At the time of the hearing, petitioner knew of the existence of a 70-page statement by a drug informant but did not disclose it to the court or to the defendant in a criminal case because petitioner believed it to be "intelligence information" since the affidavit did not mention the defendant in the criminal case by name. Petitioner was held in contempt for failing to turn over the affidavit and petitioned the Supreme Court for a writ of certiorari. The Supreme Court noted that at the District Court hearing on the contempt charge, while the petitioner's supervisors testified that they believed the decision of whether the affidavit was relevant and should therefore be turned over to defense counsel should be made by the District Court, petitioner testified that that decision was for her to make. The Supreme Court also held that petitioner received due process in the form of a show cause hearing and that the standard of proof applicable to the District Court's finding of contempt required the affirmance of that finding unless it was not supported by substantial evidence. Because the Supreme Court found substantial evidence in the transcripts that petitioner refused to recognize the District Court's authority, the Supreme Court affirmed the findings and conclusions and refused to issue the writ. State ex rel. O'Connor v. District Court, 245 M 88, 799 P2d 1056, 47 St. Rep. 1844 (1990).

Claim of Bias Against Defense Counsel — Right to Fair Trial Not Affected: Defendant claimed he was denied a fair trial because of judicial bias against defense counsel. However, his right to a fair trial was not adversely affected when: (1) the trial court acted within its statutory power under this section; (2) comments made by the judge were done outside the presence of the jury; and (3) adverse rulings against defense counsel were simply proper compliance with Montana law. St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Sanctions Discretionary: This section provides a means of enforcing discovery orders by endowing the District Court with flexibility to impose sanctions commensurate with failure to comply with discovery orders. The section does not mandate automatic exclusion for noncompliance. Imposition of sanctions is left to the sound discretion of the District Court, allowing the court to consider why disclosure was not made, whether the noncompliance was willful, the amount of prejudice to the opposing party, and any other relevant circumstances. Absent abuse of this discretion, the court's decision must be upheld. St. v. Waters, 228 M 490, 743 P2d 617, 44 St. Rep. 1705 (1987), followed in St. v. Van Voast, 247 M 194, 805 P2d 1380, 48 St. Rep. 160 (1991), and St. v. Golder, 2000 MT 239, 301 M 368, 9 P3d 635, 57 St. Rep. 999 (2000). See also St. v. Dezeeuw, 1999 MT 331, 297 M 379, 992 P2d 1276, 56 St. Rep. 1323 (1999).

Collateral References

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to statements made by defendants or other nonexpert witnesses—modern cases. 33 ALR 4th 301.

46-15-330. Investigation not to be impeded.

Commission Comments

1991 Comment: This statute adopts a provision from the uniform rules that expressly states the understanding that a party may not interfere with another's investigation of a case. See Rule 412, Unif. R. Crim. P. (1974). The statute is adopted as a clear statement of a previously unwritten rule.

46-15-331. Compelling testimony or production of evidence — immunity.

Commission Comments

1991 Comment: This statute is modeled after 1987 MCA 46-15-331. The statute governs the practice of compelling testimony and provides for immunity associated with such testimony.

The 1987 code's allowance that a Supreme Court Justice may order testimony or grant immunity has not been continued. The Commission felt that such discretion should remain with the court in which the trial is pending. The statute has been reworded and amended to clarify that testimony of incriminating information may not be compelled without a grant of, at a minimum, use immunity.

Compiler's Comments

1991 Amendment: In (1), near beginning, substituted "judge of the district or municipal court" for "justice of the supreme court or judge of the district court" and at end inserted "following a grant of immunity"; and made minor changes in style.

1983 Amendment: In second sentence, after "proceeding", substituted "no compelled testimony or evidence or any information directly or indirectly derived from such testimony or evidence may be used against the witness in any criminal prosecution. Nothing in this section prohibits a prosecutor from granting immunity from prosecution for or on account of any transaction, matter, or thing concerning which a witness is compelled to testify if the prosecutor determines, in his sole discretion, that the ends of justice would be served thereby. Immunity may not extend to prosecution or punishment for false statements given in any testimony required under this section" for "he cannot be prosecuted or subjected to any penalty or forfeiture, other than a prosecution or action for perjury or contempt, for or on account of any transaction, matter, or thing concerning which he testified or produced evidence".

Type of Immunity Changed in 1983: The 1983 amendment changed "transactional immunity", under which the person testifying cannot be prosecuted for any transaction or matter that he testified about, to "use and derivative use immunity" (the federal courts' rule), under which neither the compelled testimony or evidence, nor any information derived from it, may be used against the person in any criminal prosecution. The critical result is that the person may now be prosecuted for an offense he was compelled to testify about, but the testimony and information derived from it may not be used against him.

Case Notes

Information Gained Through State Transactional Immunity Deal Usable in Federal Sentencing: Information revealed by defendants to the state under a grant of transactional immunity, in connection with an incident unrelated to the instant federal convictions, could be used by the federal court at sentencing. The immunity agreement did not compel self-incrimination. Statements were not given pursuant to a subpoena or other compulsory process, defendants were not constrained to accept the state's offer of immunity, and no evidence indicated that defendants' invocation of privilege would have resulted in negative consequences. U.S. v. Camp, 72 F3d 759 (1995).

Limited Agreement Not to Prosecute for Deviate Sexual Conduct — Not Grant of Statutory Immunity — Independently Derived Evidence Applicable: The Jefferson County Attorney contractually agreed not to prosecute Myrhow for criminal acts related to an investigation of deviate sexual conduct by Marks, of which Myrhow had knowledge. However, until other incidents came to light as part of a separate investigation, Myrhow at no time related that he was involved in other unrelated incidents of deviate sexual conduct, including an incident committed prior to the contractual agreement. Myrhow contended that the immunity granted for his information regarding Marks's conduct also extended to his own conduct. The District Court properly found that Myrhow had been granted de facto immunity from prosecution for acts directly related to the Marks investigation, but that immunity was a limited, contractual, transactional immunity arising solely from the agreement not to prosecute, rather than from this section. The statutory immunity provided by this section did not apply because that immunity is granted only when a witness is compelled to testify by court order, a circumstance inapplicable to this case. Because the evidence used to convict Myrhow was derived independently of the Marks investigation and independently of any immunized evidence Myrhow provided through his agreement with the County Attorney, the District Court correctly convicted Myrhow for deviate sexual conduct committed prior to the immunity agreement. St. v. Myrhow, 262 M 229, 865 P2d 231, 50 St. Rep. 1528 (1993).

Grant of Immunity Within Discretion of Court: It is within the discretion of the District Court whether to grant immunity to witnesses. When almost no information was given to the court regarding witnesses' testimony, the court did not abuse its discretion by stating that it would not compel incriminating testimony rather than grant immunity. St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992).

Denial of Request for Continuance Upon Grant of Witness Immunity: On the third day of trial, a prosecution witness was granted immunity in exchange for testimony at trial. Defense counsel sought but was denied a continuance to prepare for cross-examination of the witness, later alleging prejudice because the continuance was denied. The trial court did provide a pause in the proceedings to allow for examination of the immunity agreements. If anything, the grant of immunity was an aid to the defense because defense counsel was subsequently able to fully examine the witness on cross-examination. St. v. Briner, 253 M 158, 831 P2d 1365, 49 St. Rep. 402 (1992).

Refusal of Immunity to Witness Invoking Fifth Amendment Privilege — Violation of Right of Confrontation: Defendant appealed his conviction of aggravated assault, contending that the District Court violated his right of confrontation by refusing to grant immunity to a witness to the assault who, following interrogation, invoked his fifth amendment privilege against self-incrimination before the defense counsel had completed full cross-examination. In reversing the conviction and remanding for a new trial, the Supreme Court held that because evidence relating to the assault, including statements about who instigated the fight and who fired the rifle, were in conflict, full examination was a critical aspect of the defendant's right of confrontation. St. v. Young, 249 M 257, 815 P2d 590, 48 St. Rep. 696 (1991).

Pretrial Depositions of Accomplices Properly Denied: The grant of an order pursuant to this section is discretionary with the court. In line with most jurisdictions, Montana law does not specifically authorize pretrial discovery depositions in criminal cases. The rationale is that the prior recorded statements of prosecution witnesses afford an alternative discovery source. Absent any showing of prejudice to defendant, the Supreme Court affirmed the trial court's denial of a motion for pretrial depositions of accomplices. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Misrepresentation of Statute by Prosecutor — Not Prosecutorial Misconduct or Suppression of Evidence: Defendant claimed that the prosecution misrepresented the immunity statute to the court in an effort to prevent testimony by a witness, which amounted to a suppression of evidence. The Supreme Court found the prosecutor was incorrect in his interpretation, due to a statutory amendment, but that neither the court nor defense counsel was aware of the amendment either; therefore, the innocent misstatement of the law did not rise to the level of a knowing, bad faith scheme or action constituting misconduct. St. v. Dannels, 226 M 80, 734 P2d 188, 44 St. Rep. 472 (1987).

Fundamental Fairness Required: Defendant was charged with sale of dangerous drugs (now criminal distribution of dangerous drugs). Defendant contended he had been entrapped because a paid informer had used persistent and harassing techniques over a period of a month and a half to induce defendant to obtain drugs for him. Defendant wished to present the testimony of Worley to show the informant's techniques. Worley claimed his United States Constitution fifth amendment right against self-incrimination and refused to answer questions regarding his

connection with the informant. The trial court refused to grant Worley immunity and ruled his testimony irrelevant and immaterial. Defendant also attempted to use the testimony of Surman to show that the informant had used similar techniques before. The trial court ruled the testimony immaterial and irrelevant to the defense of entrapment. On appeal, the Supreme Court held that the testimony was relevant and admissible. The case was remanded for a new trial because defendant was denied his right to present a full and meaningful defense. The court analogized to Rule 404, Montana Rules of Evidence, which allows the introduction of evidence of other crimes in certain circumstances. The court held that fundamental fairness requires that the principle behind the rule must be equally available to show a plan or method of operation by a state informant. St. v. Chapman, 209 M 57, 679 P2d 1210, 41 St. Rep. 550 (1984).

Production of Evidence Not Requested in District Court — No Supreme Court Review: Defendant pleaded guilty to two counts of sale of dangerous drugs (now criminal distribution of dangerous drugs). In a sentence appeal, he claimed that the State had failed to produce an exculpatory tape recording allegedly made of a conversation which took place in a motel during a drug transaction. The Supreme Court found that the record indicated that there was no such tape recording. The court further stated that since there was no indication that the defendant had made a written motion pursuant to 46-15-302 (repealed in 1985 and replaced with 46-15-321 [now repealed] through 46-15-329) or 46-15-311 (renumbered 46-15-331 in 1985) to require production of the tape, the issue was not properly before the appellate court. St. v. Baker, 205 M 244, 667 P2d 416, 40 St. Rep. 1244 (1983).

Immunity Agreement Versus Plea Bargain: The Supreme Court held that there was sufficient evidence of record to support the finding of the District Court that there existed no oral immunity agreement between the appellant and the State and that the agreement made was actually a plea bargain, which was fully honored. St. v. Evans, 178 M 96, 582 P2d 1211 (1978).

Remedy for State's Failure to Comply With Discovery Motions: The defendant waived the right to challenge an alleged failure of the prosecution to comply with the defendant's discovery motions by not objecting to the introduction of statements but rather moving to strike them only after completing cross-examination of the prosecution's last witness. St. v. Cripps, 177 M 410, 582 P2d 312 (1978).

What Constitutes Judicial Proceeding:

Transactional immunity from prosecution provisions of 46-15-311 (renumbered 46-15-331 in 1985) apply to proceedings before grand juries because the grand jury is a judicial inquisitorial body. Kelly v. Grand Jury, 170 M 284, 552 P2d 1399 (1976). [See compiler's comment under this section on 1983 immunity change.]

A person refusing to testify as required by this section is subject to contempt notwithstanding the fact that the question was asked for investigatory purposes. The term "judicial proceeding" encompasses every proceeding before a competent court. St. v. Lambert, 167 M 406, 538 P2d 1351 (1975).

Pretrial Interview of State's Witness: No obligation exists on the part of a State's witness to allow the defense counsel to interview her prior to trial when the defense counsel did not take her deposition, cross-examine her at trial, or call her as a witness in their case. St. v. Caryl, 168 M 414, 543 P2d 389 (1975).

Proof of Unwillingness of Witness: An affidavit showing that a witness had not answered the defendant's mailed request to contact his attorney to arrange for an interview did not sufficiently establish the witness's unwillingness to provide information so as to require a court-ordered deposition. St. v. Dunn, 155 M 319, 472 P2d 288 (1970).

Accused's Rights — State Requiring Witness's Statement: The accused's rights were not violated on the theory that a witness was intimidated into giving damaging testimony by the County Attorney's threat of holding the witness unless she gave a statement. Petition of Gallagher, 150 M 476, 436 P2d 530 (1968).

Collateral References

Enforceability of agreement by law enforcement officials not to prosecute if accused would help in criminal investigation or would become witness against others. 32 ALR 4th 990.

46-15-332. Privileged matters.

Case Notes

Records of Hospital Medical Staff Committee Held Privileged — No Waiver Found in Administrator's Affidavit: Plaintiff sought to discover documents from a hospital medical staff committee supporting his theory that because of conditions placed upon the staff privileges of a physician previously suspended for performing his hospital duties while intoxicated, the relationship between the hospital and the physician changed from independent contractor to

principal and agent. On appeal from a District Court order quashing a deposition subpoena and giving summary judgment to the defendant, the Supreme Court affirmed that the members of the hospital's medical staff committee were immune from subpoena. The Supreme Court held that 50-16-203 applies to all members of the hospital's committee, to the hospital itself, and to patients whose files are reviewed by a committee and that even if the hospital had waived its privilege, it could not waive the privilege personal to the members of the committee. The Supreme Court also held that there was no issue as to the discoverable nature of the hospital administrator's files because there was no evidence in the record of any attempt to subpoena his files. Sistok v. Kalispell Regional Hosp., 251 M 38, 823 P2d 251, 48 St. Rep. 1151 (1991), distinguished in Huether v. District Court, 2000 MT 158, 300 M 212, 4 P3d 1193, 57 St. Rep. 647 (2000), and overruled to the extent that Sistok may not be read to apply to a hospital patient seeking disclosure of information concerning that patient's care or treatment.

Part 4
Evidence in Cases Involving Sexual Offenses

Part Case Notes

Videotape — "Best Evidence" of Transcript: Defendant was charged with felony assault (now assault with a weapon) and sexual intercourse without consent. The alleged victim was a 4-year-old who had been left in his care for several days. The child was determined to be competent and allowed to testify. A police officer who had interviewed and videotaped the child recounted portions of the videotaped interview. In an effort to refresh the officer's memory, defense counsel read from the transcript of the interview. Later, in an apparent effort to discredit the child's testimony, defense counsel again read from the transcript. Over objection by the prosecution, defense counsel entered the transcript into evidence. Subsequently, the prosecution offered the videotape as the best evidence of the transcript. The videotape was admitted and shown to the jury. Defense counsel contended this was error as he was not present to confront and cross-examine the child at the taping. The court held that 46-15-401 (now repealed) and 46-15-402 apply only when videotaped testimony will be used in lieu of testimony by the witness at trial. Here, the child testified at trial. Once the transcript was admitted, it was within the province of the trial court to admit what it considered a more accurate version of the same thing under the "best evidence" rule. St. v. Rogers, 213 M 302, 692 P2d 2, 41 St. Rep. 2131 (1984).

Admissibility of Evidence of Prior Crimes or Acts: The trial court did not commit error in admitting prosecutrix's uncorroborated testimony of prior uncharged sexual assaults by prosecutrix's stepfather for the limited purpose of showing plan, scheme, or design, as there was no showing of substantial prejudice to the defendant by admitting such evidence. St. v. Just, 184 M 262, 602 P2d 957 (1979), following St. v. Jensen, 153 M 233, 455 P2d 631 (1969), and clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999).

Part Law Review Articles

The Child Victim as a Witness in Sexual Abuse Cases, McGrath & Clemens, 46 Mont. L. Rev. 229 (1985).

Part Collateral References

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor. 43 ALR 4th 395.

46-15-411. Payment for medical evidence — alleged sexual offenses.

Compiler's Comments

2005 Amendment: Chapter 504 inserted (2) requiring the office of restorative justice to pay for the medical examination of a victim of an alleged incident of sexual intercourse without consent, sexual assault, or incest if the cost is not the responsibility of a local law enforcement agency and funds are available; in (3) after "agency" inserted "or the state"; and made minor changes in style. Amendment effective July 1, 2005.

1997 Amendment: Chapter 186 in (1), near beginning after "consent", inserted "sexual assault, or incest", near middle, after "alleged", substituted "offense" for "sexual intercourse without consent", after "agency" substituted "or" for "and", and near end, after "prosecution", inserted "or resolution"; and made minor changes in style. Amendment effective July 1, 1997.

Administrative Rules

Title 23, chapter 15, subchapter 4, ARM Forensic rape examination payment program.

Attorney General's Opinions

Clarification of What Entity Responsible for Costs: The county is to bear the expenses of the medical examination if the alleged crime occurred within the county's jurisdiction and the examination is directed by the county. By contrast, if a city law enforcement agency directs that the examination be conducted and the alleged crime occurred within the city's jurisdiction, the city is to bear the costs of the examination. Although general costs associated with prosecution of felonies are to be paid by counties, this section concerns a special area of criminal law and represents an exception to the conclusion in 38 A.G. Op. 77 (1980), concerning general costs. 40 A.G. Op. 66 (1984).

CHAPTER 16
TRIAL

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

Chapter Case Notes

Prosecutor Not Required to Stipulate to Defendant's Admissions: An admission by a defendant does not prevent the State from presenting separate and independent proof of the fact admitted. St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982).

Intimidation of Witnesses: When protection was immediately provided for two witnesses upon the discovery that they were being intimidated and the jury had all the facts before it to weigh those witnesses' credibility, the District Court sufficiently guarded the defendant's rights and a mistrial was not warranted. St. v. Booke, 178 M 225, 583 P2d 405 (1978), followed in St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Chapter Attorney General's Opinions

Criminal Trial on Sundays: Montana law does not permit criminal trials to be conducted on Sundays except to conclude a trial already initiated, as specified in 3-1-302. 43 A.G. Op. 27 (1989).

Chapter Law Review Articles

Criminal Procedure, Everly & Mullowney, 42 Mont. L. Rev. 371, 394 (1981).

Chapter Collateral References

Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecution. 41 ALR 6th 295.

Exclusion of public from state criminal trial to preserve safety or confidentiality of undercover police officer witness. 100 ALR 5th 171.

Requirement that court advise accused of, and make inquiry with respect to, waiver of right to testify. 72 ALR 5th 403.

Propriety of using anonymous juries in state criminal cases. 60 ALR 5th 39.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case. 74 ALR 4th 705.

Exclusion of public from state criminal trial by conducting trial or part thereof at other than regular place or time. 70 ALR 4th 632.

Part 1
General Provisions

Part Commission Comments

1991 Part Comments: This part embodies the statutes concerning jury selection for criminal cases. The statutes are generally a restatement of the 1987 code and are intended to govern practice in both District Court and lower courts. See 1987 MCA Title 46, ch. 16, part 3. Minor amendments have been made to reflect case law and to maintain conformity with the statute format.

A defendant's right to be present at criminal proceedings is derived from the constitutional right to confront adverse witnesses in criminal cases. See Art. II, sec. 24, Mont. Const. Several 1987 code sections addressed the defendant's right to be present at various phases of a criminal prosecution. See 1987 MCA 46-12-103 and 46-16-502. These generally stated provisions have been condensed into a single statute.

The statutes are modeled after the California Rules of Criminal Procedure (1986)—chiefly, Rules 977 and 1043. The rules are compatible with the federal rules. See Rule 43, Fed. R. Crim. P. (1986).

Part Case Notes

Shackling of Defendant at Trial to Ensure Security of Courtroom — No Due Process Violation: At Herrick's attempted deliberate homicide trial, the trial court agreed to provide additional security measures, including leg shackles, reasoning that the jury was not likely to see the shackles while Herrick was seated. Following conviction, Herrick appealed on grounds that the use of shackles violated his due process right to a fair trial. The Supreme Court noted that the due process clause of the U.S. Constitution entitles a criminal defendant to appear before a jury free of shackles and other physical restraints and concluded that the Montana Constitution does not provide more protection with regard to shackling than the U.S. Constitution. However, that right is not absolute, and a trial judge's decision to shackle a defendant is not unconstitutional per se (see Morgan v. Bunnell, 24 F3d 49 (9th Cir. 1994)). The Supreme Court adopted the two-part test in Morgan for determining whether a trial court has abused its discretion in restraining a defendant at trial. Under that test, the trial court must be persuaded by compelling circumstances that some measure is needed to maintain the security of the courtroom and must pursue less restrictive alternatives before imposing physical restraints. In this case, the trial court satisfied both parts of the test. The facts presented compelling circumstances to support the court's exercise of its broad discretion in determining that additional security was necessary, and the court took great care to prevent the jury from being aware that Herrick's ankles were shackled. Nothing indicated that the jury saw the leg restraints at any time, so Herrick's rights to individual dignity, a fair trial, and due process were not violated. St. v. Herrick, 2004 MT 323, 324 M 76, 101 P3d 755 (2004), distinguishing St. v. Finch, 975 P2d 967 (Wash. 1999). See also Ill. v. Allen, 397 US 337 (1970), followed in St. v. Merrill, 2008 MT 143, 343 M 130, 183 P3d 56 (2008), to the extent that keeping a defendant shackled during trial without establishing compelling circumstances for security measures constitutes a violation of the defendant's constitutional due process rights.

Conclusive Presumption: Under 46-16-107 (now repealed) there is a conclusive presumption that the defendant was present at all stages of the proceedings unless the record affirmatively shows the contrary. Petition of Eldiwitw, 153 M 468, 457 P2d 909 (1969).

Extent of Right to Be Present: A defendant's constitutional and statutory right to be present at his trial does not encompass proceedings before the court involving matters of law. The right is violated only if the defendant is prevented from being personally present when the jury is hearing his cause or if he is prevented from attending such other proceedings where his presence is essential to a fair and just determination of a substantial issue. St. v. Peters, 146 M 188, 405 P2d 642 (1965).

What Is Not Considered Part of Trial:

A section (now repealed) required the personal presence of the defendant at the trial in felony cases. After the jury had retired to the jury room for deliberation of its verdict, the jury members requested that certain exhibits, consisting of a gun, a pair of shoes, and other articles found in the defendant's room, be sent to them. While the defendant was not present in the courtroom, his

counsel gave his consent. The court held that the proceeding did not constitute a part of the trial and therefore the defendant's presence was not required. St. v. Olson, 87 M 389, 287 P 938 (1930).

Since the settlement of instructions was not part of the "trial" within the meaning of a former section (now repealed), the absence of one charged with a felony during such settlement does not constitute reversible error. St. v. Hall, 55 M 182, 175 P 267 (1918).

No Waiver: One charged with crime cannot waive his right to be present at his trial. St. v. Reed, 65 M 51, 210 P 756 (1922).

Court's Power: The District Court was vested with the power of appointment of some attorney in any criminal case when the emergency contemplated by a former section (now repealed) arose, and the power of removal when a disqualification of the attorney appointed appeared appropriate. While the court would usually choose someone from among the local attorneys, it was not required to do so. State ex rel. McGrade v. District Court, 52 M 371, 157 P 1157 (1916).

Part Law Review Articles

Criminal Law: Extensive Publicity May Prevent a Fair Trial, Petersen, 27 Mont. L. Rev. 205 (1966).

Affidavit for Disqualification of a District Judge for Imputed Bias in a Criminal Case Not Timely After Verdict: This note summarizes St. v. District Court, 144 M 486, 393 P2d 39 (1964). Sverdrup, 26 Mont. L. Rev. 128 (1964).

46-16-101. Who given precedence on calendar.

Commission Comments

Source: R.C.M. 1947, section 94-7007.

The purpose of this provision is to provide a general format for proceeding. It is intended to avoid the felony-misdemeanor confusion in the District Court. This section is applicable to the trial de novo of misdemeanor cases that have been appealed to the District Court.

The clerk should keep a calendar of all criminal actions pending in the court, enumerating them according to the date of the filing of the indictment or information, specifying opposite the title of each action whether it is for a felony or a misdemeanor, and whether the defendant is in custody or on bail.

Case Notes

Prejudicial Delay of Trial: The rights of an accused convict, who was held in maximum security without counsel for a period of 4 months and whose trial was held 7 months after his motion for a speedy trial (during which time many of his witnesses disappeared), were severely prejudiced, and upon appeal the conviction and sentence were vacated with prejudice. Fitzpatrick v. Crist, 165 M 382, 528 P2d 1322 (1974).

Collateral References

Criminal Law *key* 573, 632.

22A C.J.S. Criminal Law §827.

46-16-103. Who decides questions of law and fact.

Commission Comments

Source: See commission comments to 46-16-110.

Compiler's Comments

1999 Amendment: Chapter 395 in (1) inserted "or nolo contendere". Amendment effective October 1, 1999.

1991 Amendment: At end changed subsection reference to 46-16-110.

Case Notes

Additional Instruction to Jury: It was not error for the trial judge to send an additional instruction to the jury after it had been unable to reach a verdict because the judge did not direct the jury to enter a finding of guilty or not guilty. St. v. Bell, 225 M 83, 731 P2d 336, 44 St. Rep. 56 (1987).

Expert — Duty to Determine Qualifications — Relevance of Degree of Qualifications: Whether a witness is an expert is largely within the discretion of the trial judge. Defendant objected that a witness was not qualified. The trial judge said: "The court is going to permit her to testify. If the jury doesn't believe she is qualified—well, that will be up to the jury to decide". The judge did not leave to the jury the decision whether the witness was qualified. He made that decision when he permitted the testimony and then stated that the jury could determine the degree of the qualifications. The degree of qualification affects the weight, not the admissibility, of the

testimony. St. v. Berg, 215 M 431, 697 P2d 1365, 42 St. Rep. 518 (1985), followed in St. v. Martin, 226 M 463, 736 P2d 477, 44 St. Rep. 804 (1987).

Any Evidence Consistent With Theory of Innocence — Jury Not Bound to Acquit: Because of the presumption of innocence, the defendant contended that the jury must accept his interpretation of facts in a criminal trial when testimony at trial could reasonably be interpreted to support either the State's or defendant's view. A jury is not bound to accept defendant's view and reject State's view simply because the defendant would be found not guilty under the former and guilty under the latter. It is the duty of the jury to resolve conflicts of evidence. St. v. Greenwell, 206 M 233, 670 P2d 79, 40 St. Rep. 1616 (1983).

Criminal Mental State — Jury Question: Whether a defendant acted with the requisite mental state is a question for the jury, and because a state of mind is rarely susceptible of direct or positive proof, it must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence. St. v. Greenwell, 206 M 233, 670 P2d 79, 40 St. Rep. 1616 (1983).

Credibility of Witnesses — Jury Issue: Defendant was convicted, after a jury trial, of felony theft. The District Judge denied defendant's motion for a new trial, ruling that although the judge himself had some personal doubts about the case, the jury had apparently determined that there was sufficient credible evidence to convict the defendant. The Supreme Court affirmed, stating that the trial court was correct in its interpretation of the rule of a judge in a criminal jury trial. St. v. Hall, 203 M 528, 662 P2d 1306, 40 St. Rep. 621 (1983).

Determination of Questions of Law: At the close of evidence in a misdemeanor assault nonjury trial, the court raised the defense of justifiable use of force sua sponte. Although 46-15-301 (repealed in 1985 and replaced with 46-15-321 [now repealed] through 46-15-329) requires that defendant give notice of his intent to rely on such a defense, the trial court also has the authority to raise the defense. The power of the trial court to resolve questions of law necessarily includes the power to determine what the questions of law are. St. v. Nicholls, 200 M 144, 649 P2d 1346, 39 St. Rep. 1635 (1982).

Oral Statement by Judge Not a Finding of Fact: At the close of evidence in a misdemeanor assault nonjury trial, the court made an oral statement that the defendant could have and did hit the victim. The court then requested briefs on the issue of justification. A month later the court vacated its factual finding and dismissed the charge. Because the court was still in the process of its judicial determination of facts and law when it made the oral statement, it could properly vacate its statement. St. v. Nicholls, 200 M 144, 649 P2d 1346, 39 St. Rep. 1635 (1982).

Waiver of Jury Trial When Only Questions of Law Raised: Where defendant raised only legal questions in his challenge to the constitutionality of 61-3-301, his waiver of jury trial was effective regardless of whether or not the judge told him that only legal questions were involved and that the judge alone decided legal questions, since only the court can decide questions of law. St. v. Turk, 197 M 311, 643 P2d 224, 39 St. Rep. 584 (1982).

Jury to Determine Intent: Under former law, a defendant charged with larceny by a bailee who had created a fiduciary obligation when he acted on behalf of his clients was estopped from asserting as a defense that he harbored the felonious intent prior to the creation of the fiduciary relationship, thereby arguing that the State had failed to prove the element of intent set out in the statute. Furthermore, intent is a question for the jury, which was resolved against the defendant. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Instructions When Facts Weak: The trial court was bound to instruct the jury on manslaughter, despite the fact that the court may have considered the evidence in support of manslaughter weak and inconclusive, since the weight to be given the evidence was a question for the jury. St. v. Taylor, 163 M 106, 515 P2d 695 (1973).

Erroneous Directed Verdict — Conflicting Evidence: In a prosecution for unlawfully driving a truck with an overload, which is a misdemeanor, it was error for the court to instruct and direct the jury to return a verdict of guilty when the evidence as to the true weight of the truck was in conflict as shown by two different state police scales. St. v. Baillargeron, 126 M 310, 249 P2d 799 (1952).

Jury Disregarding Law: The jury has the power to disregard the law as declared and acquit the defendant, however convincing the evidence may be, and the court has no power to punish it for such conduct. St. v. Koch, 33 M 490, 85 P 272 (1906).

Collateral References

Criminal Law *key* 734, 737(1); Libel and Slander *key* 158.

23A C.J.S. Criminal Law §1730.

75A Am. Jur. 2d Trial §596, et seq.

46-16-104. Plea of not guilty.

Case Notes

Testimony by Accused: The defendant, who voluntarily testified that he had shot the victim (but only in self-defense), could not on appeal argue that he had been compelled to testify in order to correct errors presented by the prosecution. St. v. Grady, 166 M 168, 531 P2d 681 (1975).

Issue of Prior Convictions:

The bar to a prosecution for misdemeanor where defendant is not brought to trial within time allowed may properly be raised by a plea of not guilty. St. v. Porter, 130 M 299, 300 P2d 952 (1956).

The plea of not guilty of the offense charged in the information puts in issue allegations of prior convictions, as well the other allegations therein contained, and there is no merit in the contention that, since the defendant never pleaded to the charge of prior convictions, no issue was raised as to that allegation. St. v. Gordon, 35 M 458, 90 P 173 (1907).

Plea Applied to Information as a Whole: When the defendant was charged with liquor violations in four counts and entered a plea of not guilty "to the offense charged", he was held to have pleaded to the information as a whole. St. v. Grasswick, 77 M 326, 250 P 613 (1926).

Collateral References

Criminal Law *key* 300.

22 C.J.S. Criminal Law §§499, 500.

21 Am. Jur. 2d Criminal Law §§565 through 570.

46-16-105. Plea of guilty — use of two-way electronic audio-video communication.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38 section 115-2. Kentucky Rules of Criminal Procedure, 8.10; R.C.M. 1947, section 94-6803.

Subsection [(1)](a) is consistent with the present law, which provides that a plea of guilty by the defendant must be entered in open court.

Subsection [(1)](b) is designed to prevent the defendant from pleading guilty without knowledge of the consequences of such a plea.

Subsection [(2)] is similar to the present law. The only change from the present law is that a plea of guilty may be allowed to be withdrawn before or after judgment. The present law provides for withdrawal before judgment only. In State ex rel. Foot v. District Court (81 Mont. 495), the Montana Supreme Court held that even though R.C.M. 1947, section 94-6803 [repealed], expressly states that the motion to withdraw a guilty plea shall be made before judgment, a court may consider the motion after judgment.

The burden is placed on the defendant to show by affidavits or by oral testimony that withdrawal of his plea should be allowed (State v. McAllister, 96 Mont. [348]). As was stated in State v. Nance (120 Mont. 152), no hard and fast rule can be laid down as to what showing the defendant must make to move the court but each case must depend on its own facts and circumstances.

A change of plea should ordinarily be permitted if it fairly appears that the defendant was in ignorance of his rights and of the consequences of his act, if influenced unduly and improperly either by hope or by fear in making it, or if it appears that the plea was entered under some mistake or misapprehension (See State v. Nichols, 46 Mont. 470, 128 P. 543; State ex rel. Foot, 81 Mont. 495, 263 P. 979). In determining if sufficient showing has been made, a factor that should be given substantial consideration is whether the defendant appeared without counsel at the time of the plea.

Compiler's Comments

2005 Amendment: Chapter 222 in (3) in first sentence near beginning after "section" deleted "in cases in which the defendant is charged with a misdemeanor offense", near middle after "to be" deleted "observed and", and after "present" inserted "and allowing the party speaking to be seen" and in second sentence at end inserted "and has informed the defendant that the defendant has the right to object to its use"; and made minor changes in style. Amendment effective July 1, 2005.

2003 Amendments — Composite Section: Chapter 96 in (1) near beginning after "nolo contendere" substituted "must" for "may". Amendment effective March 24, 2003.

Chapter 346 in (2) near beginning of introductory clause after "before" deleted "or after", after "judgment" inserted "or, except when a claim of innocence is supported by evidence of a fundamental miscarriage of justice, within 1 year after judgment becomes final", and inserted

last sentence and (2)(a) through (2)(c) concerning when a judgment becomes final for purposes of subsection (2). Amendment effective July 1, 2003.

Preamble: The preamble attached to Ch. 96, L. 2003, provided: "WHEREAS, in State v. Peplow, 2001 MT 253, 307 Mont. 172, 36 P.3d 922 (2001), the Montana Supreme Court held that in section 46-16-105, MCA, when the term "may" is used to confer power on an officer, court, or tribunal and the public or a third person has an interest in the exercise of the power, then the exercise of the power becomes imperative."

Applicability: Section 3, Ch. 346, L. 2003, provided: "[This act] applies to all offenders who plead guilty on or after [the effective date of this act]." Effective July 1, 2003.

1999 Amendment: Chapter 395 throughout section after "plea of guilty" inserted "or nolo contendere". Amendment effective October 1, 1999.

1997 Amendment: Chapter 163 in (1)(a), at beginning, inserted "subject to the provisions of subsection (3)"; inserted (3) regarding the acceptability of a guilty plea disclosed through audio-video communications; and made minor changes in style. Amendment effective March 26, 1997.

Applicability: Section 6, Ch. 163, L. 1997, provided: "[This act] [46-12-211, 46-16-105, 46-17-203, 46-18-102, and 46-18-115] applies to guilty pleas entered and sentences pronounced after [the effective date of this act]." Effective March 26, 1997.

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GENERAL

Plea Colloquy Sufficient — Motion to Withdraw Plea Properly Denied: Robinson pleaded guilty to DUI fourth offense in 2006. Pursuant to a plea agreement, sentencing was deferred for 1 year, provided Robinson paid child support during that year. Just prior to sentencing, Robinson moved to withdraw the guilty plea on grounds that the plea colloquy was inadequate, but the motion was denied. On appeal, the Supreme Court affirmed. When accepting a plea, it is sufficient that the District Court ensure that defendant admits committing the acts that constitute the crime charged. In this case, the plea colloquy was sufficient. The District Court was affirmed. St. v. Robinson, 2009 MT 170, 350 M 493, 208 P3d 851 (2009).

Competence of Counsel — No Grounds to Withdraw Guilty Plea: Voluntariness of a plea depends upon whether counsel's advice was within the range of competence demanded of attorneys in a criminal case. When defense counsel rendered effective representation of defendant leading up to guilty pleas, a request to withdraw a guilty plea on the basis of ineffective assistance of counsel was rejected. Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Defendant's Misunderstanding as to Release on Own Recognizance Not Grounds for Setting Aside Guilty Plea — Basis for Withdrawal of Plea to Be Raised at Trial Level: Nelson argued that he should have been allowed to withdraw his guilty plea to assault charges because he believed that part of the plea bargain was release on his own recognizance pending sentencing. He also argued that he had not been adequately advised that he could be designated a dangerous offender, thus restricting his eligibility for parole. The Supreme Court stated that Nelson had not, at the trial level, moved to have his guilty plea set aside on the grounds that he had not been adequately advised that he could be designated a dangerous offender. Therefore, he could not raise the issue for the first time on appeal. The Supreme Court held that Nelson's argument that he believed that his plea agreement included release pending sentencing was not related to the voluntary nature of his guilty plea and therefore was not grounds for withdrawal of the plea. St. v. Nelson, 274 M 11, 906 P2d 663, 52 St. Rep. 1069 (1995).

Defendant Need Not Be Apprised of Parole Eligibility Limits: This section requires the District Court to advise a defendant of the consequences of a guilty plea and of the maximum sentence that may be imposed, and 46-12-202 (renumbered 46-12-210) and 46-12-204 outline other specific items of which a defendant must be advised by the court. However, these statutes do not require the court to advise a defendant of any possibility of limitations on his parole eligibility. St. v. Buckman, 236 M 37, 768 P2d 1361, 46 St. Rep. 163 (1989), followed in St. v. Wilson, 1999 MT 52, 293 M 429, 976 P2d 962, 56 St. Rep. 220 (1999).

Waiver of Jury Trial: The entering of a plea of guilty by a defendant waives his right to a jury trial. St. v. Peters, 140 M 162, 369 P2d 418 (1962).

ACCEPTANCE OR REFUSAL OF GUILTY PLEA

Statutory Right to Plead Guilty to DUI and Related Misdemeanor Citations Not Violated by City Court's Refusal to Accept Pleas: There was no prejudice and any error was harmless when the state dismissed DUI charges prior to the District Court trial on one felony count and two misdemeanor charges of negligent vehicular assault. St. v. Milligan, 2008 MT 375, 346 M 491, 197 P3d 956 (2008).

No Error in Refusal to Allow Withdrawal of Voluntary Guilty Plea: McFarlane contended that his guilty plea was entered both involuntarily and unintelligently because trial counsel provided ineffective assistance in explaining a guilty plea and because he did not understand what acts amount to being guilty of burglary. The Supreme Court declined to address the ineffective assistance claims because they were raised for the first time on appeal. Regarding the voluntariness issue, the court applied the Brady standard to determine whether McFarlane was fully aware of the direct consequences of a guilty plea. The court noted that during the plea colloquy, McFarlane expressed understanding of the charges, the maximum penalties, and the waiver of the right to a trial and stated that he had discussed the consequences of a guilty plea with counsel and was satisfied with counsel's services. McFarlane's argument that he misunderstood or was confused about the meaning of a guilty plea was further belied by the fact that McFarlane fled the jurisdiction for more than 2 years to avoid imposition of a sentence and by the fact that McFarlane had a criminal history of 13 counts of burglary in six separate proceedings spanning nearly 40 years and was thus well acquainted with the criminal justice system and burglary charges in particular. Denial of the motion to withdraw the guilty plea was affirmed. St. v. McFarlane, 2008 MT 18, 341 M 166, 176 P3d 1057 (2008).

No Ineffective Assistance in Counsel's Failure to Cite Proper Standard for Plea Withdrawal and to Challenge Plea Colloquy: McFarlane contended that he received ineffective assistance of counsel for his motion to withdraw a guilty plea when counsel cited the test in St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), rather than the more lenient test in Brady v. U.S., 397 US 742 (1970), which replaced the Huttinger test (see St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005)). The Supreme Court held that despite counsel's improper reliance on Huttinger, the outcome would have been the same if counsel had relied on Brady, so McFarlane's challenge failed because he did not show that but for counsel's deficient performance, he would not have entered a guilty plea. McFarlane also contended that he received ineffective assistance because counsel failed to challenge the adequacy of the plea colloquy when the colloquy was flawed by the District Court's failure to enumerate lesser included offenses of which McFarlane might have been convicted had he proceeded to trial. The Supreme Court noted that although the District Court did not enumerate lesser included offenses, McFarlane was clearly informed that by pleading guilty, the opportunity to be convicted of a lesser offense would be lost. Additionally, pursuant to St. v. Thee, 2001 MT 294, 307 M 450, 37 P3d 741 (2001), the court had no duty to inform McFarlane about the possibility of lesser included offenses if none existed, and McFarlane failed to demonstrate any lesser included offenses to burglary that would have been applicable under the circumstances of his charge. Thus, McFarlane's ineffective assistance claim was without merit, and denial of the motion to withdraw the guilty plea was affirmed. St. v. McFarlane, 2008 MT 18, 341 M 166, 176 P3d 1057 (2008).

Motion to Correct Sentence Not Considered Motion to Withdraw Guilty Plea — Plain Error Review of Nolo Contendere Plea Inappropriate: Attorney Holt pleaded not guilty to five counts of felony theft of clients' funds. Pursuant to a subsequent plea agreement, Holt pleaded nolo contendere to the contested counts, but reserved the right to withdraw the plea if the agreed sentences were not imposed. Following conviction, Holt asked the Supreme Court to exercise plain error review, find that the plea agreement was violated, and allow Holt to withdraw the nolo contendere guilty plea. The court declined. Holt made no motion in trial court to review the guilty plea, so that issue was not properly before the Supreme Court. Holt's speculation that he would not have entered the plea agreement had he considered the possibility of good time did not implicate Holt's fundamental constitutional rights, and failure to apply plain error review did not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. The Supreme Court refused to consider Holt's District Court motion to correct the sentence as a motion to withdraw the guilty plea and thus declined to consider Holt's argument that he be allowed to withdraw the nolo contendere plea based on plain error review. St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006), distinguishing St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

Voluntary Nolo Contendere Guilty Plea — No Good Cause to Withdraw Plea: Although maintaining innocence to sexual assault charges, Leitheiser sought to avoid trial and possible

sex offender treatment, so Leitheiser entered plea negotiations, and the state agreed to amend the information to consist of charges of felony assault on a minor and to remain silent regarding sex offender treatment in exchange for Leitheiser's guilty plea. At the change of plea hearing, Leitheiser entered a voluntary guilty plea to the amended charges. The trial court did not accept the guilty plea at that time, but ordered Leitheiser to undergo a presentence interview. The probation officer recommended sexual offender treatment, and Leitheiser moved to withdraw the nolo contendere guilty plea. The motion was denied, and Leitheiser appealed, contending that the plea to nonsexual charges combined with the bargain that the prosecution would not recommend sexual offender treatment induced the guilty plea. The Supreme Court disagreed. Leitheiser's guilty plea was voluntary, and the state kept its part of the plea bargain. Leitheiser's grievance was with the probation officer, who was not a party to the plea bargain, rather than with the prosecution. Denial of Leitheiser's motion to withdraw the guilty plea was affirmed. St. v. Leitheiser, 2006 MT 70, 331 M 464, 133 P3d 185 (2006). See also St. v. Bowley, 282 M 298, 938 P2d 592 (1997).

Lack of Participation in Sexual Offender Programs Warranting Revocation of Suspended Sentence: Van Haele contended that because he was not adequately advised by the District Court that one consequence of a guilty plea was that failure to complete a sexual offender program would be denial of probation status, he should be allowed to withdraw the guilty plea and that the District Court erroneously denied his motion to withdraw the plea. Reviewing the case to determine whether the District Court's findings were erroneous, the Supreme Court disagreed with the factual predicate of Van Haele's argument. It was not Van Haele's failure to complete the prison sex offender program that resulted in Van Haele's denial of admission to an outpatient treatment program, but rather it was Van Haele's recantation of his admission of guilt and his various behavioral problems that placed insurmountable obstacles in the way of acceptance into an outpatient program, although Van Haele's refusal to participate in the prison program contributed to the problem. The District Court had adequate evidence at Van Haele's revocation hearing to determine that the lack of participation in sexual offender programs was adequate to warrant revocation of Van Haele's suspended sentence. St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005).

Failure of Trial Court to Inquire About Satisfaction of Counsel at Hearing on Change of Plea Not Error — No Bearing Between Satisfaction With Counsel and Voluntariness of Plea: A court may permit withdrawal of a guilty plea upon a showing of good cause, including involuntariness of the plea or other criteria. In this case, defendant contended that good cause existed because the trial court failed to inquire regarding defendant's satisfaction with counsel and with counsel's advice when defendant had expressed dissatisfaction with counsel shortly before a change of plea hearing. The Supreme Court held that defendant's dissatisfaction with counsel had no bearing on whether defendant understood the consequences of the plea or whether the plea was induced by threats, misrepresentations, or an improper promise. Finding no other factors to bear upon voluntariness or implicate good cause, the trial court's denial of defendant's motion to withdraw the guilty plea was affirmed. St. v. Warclub, 2005 MT 149, 327 M 352, 114 P3d 254 (2005), distinguishing St. v. Bowley, 282 M 298, 938 P2d 592 (1997).

Adoption of Federal Test for Voluntariness of Guilty Pleas — Huttinger Overruled — Standard of Review: Since St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), the Supreme Court has applied a good cause test in determining whether to permit a plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted. The good cause test involved a balancing of three conflicting factors: (1) the adequacy of the interrogation by the District Court of the defendant at the entry of the guilty plea as to the defendant's understanding of the consequences of the plea; (2) the promptness with which the defendant attempted to withdraw the prior plea; and (3) the fact that the defendant's plea was apparently the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge. None of the factors required a court to consider the voluntariness, knowledge, or intelligence of a defendant's plea, although a defendant has been allowed to withdraw a guilty plea upon a showing that the plea was made unknowingly or involuntarily. Citing Bousley v. U.S., 523 US 614 (1998), the Supreme Court concluded that the ultimate test for withdrawal of a plea is voluntariness, which subsumes the relevant elements of the Huttinger test, so Huttinger was overruled. Therefore, a guilty plea may be withdrawn only upon a showing that the plea was made involuntarily, and the Supreme Court will review questions of voluntariness in pleas and plea agreements de novo. St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), overruling St. v. Miller, 248 M 194, 810 P2d 308 (1991), and overruling St. v. Martin, 2004 MT 288, 323 M 320, 100 P3d 146 (2004), and other cases that have applied the abuse of discretion standard, and followed in Duffy v. St., 2005 MT 228, 328 M 369, 120 P3d 398 (2005), and St. v. McFarlane, 2008 MT 18, 341 M 166, 176 P3d 1057

(2008). See also St. v. Warclub, 2005 MT 149, 327 M 352, 114 P3d 254 (2005), in which the Supreme Court clarified Lone Elk and held that, with respect to appeals of denials of motions to withdraw guilty pleas, the court will review the findings of fact to determine if they are clearly erroneous and the conclusions of law to determine if they are correct. When voluntariness of the plea is at issue, the court will review that ultimate mixed question of law and fact de novo to determine if the trial court was correct in holding that the plea was voluntary. Warclub was followed in St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005), and Maldonado v. St., 2008 MT 253, 345 M 69, 190 P3d 1043 (2008). Warclub and Lone Elk were followed in St. v. Leitheiser, 2006 MT 70, 331 M 464, 133 P3d 185 (2006). In St. v. Deserly, 2008 MT 242, 344 M 468, 188 P3d 1057 (2008), the Supreme Court noted that the standard for reviewing the voluntariness of a guilty plea adopted in St. v. Miller, 248 M 194, 810 P2d 308 (1991) (overruled in St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005)), under which a plea would be considered involuntary when it appeared that defendant was laboring under such a strong inducement, fundamental mistake, or serious mental condition that the possibility existed that defendant may have pleaded guilty to a crime for which he was innocent, had been followed in other cases. To avoid confusion, the court overruled the following cases to the extent that they may be read as supporting the Miller standard: St. v. Pelke, 143 M 262, 389 P2d 154 (1964), St. v. LeMay, 144 M 315, 396 P2d 83 (1964), St. v. Griffin, 167 M 11, 535 P2d 498 (1975), State ex rel. Gladue v. District Court, 175 M 509, 575 P2d 65 (1978), St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), St. v. Campbell, 182 M 521, 597 P2d 1146 (1979), St. v. Hilton, 183 M 13, 597 P2d 1171 (1979), St. v. Nelson, 184 M 491, 603 P2d 1050 (1979), Benjamin v. McCormick, 243 M 252, 792 P2d 7 (1990), St. v. Milinovich, 248 M 373, 812 P2d 338 (1991), St. v. Cameron, 253 M 95, 830 P2d 1284 (1992), St. v. Barker, 257 M 31, 847 P2d 300 (1993), St. v. Skroch, 267 M 349, 883 P2d 1256 (1994), St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682 (1998), St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26 (1998), St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015 (1999), St. v. Kellames, 2002 MT 41, 308 M 347, 43 P3d 293 (2002), St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002), St. v. Chase, 2006 MT 13, 331 M 1, 127 P3d 1038 (2006), and St. v. Milligan, 2008 MT 36, 341 M 316, 177 P3d 500 (2008). Lone Elk and Deserly were overruled in St. v. Brinson, 2009 MT 200, 351 M 136, 210 P3d 164 (2009), to the extent that application of the "however slightly" language in the analysis of the voluntariness of a plea is disapproved.

Effects of Fear and Medication Not Affecting Voluntariness of Guilty Plea — Denial of Motion to Withdraw Plea Proper: Lone Elk contended that he should have been allowed to withdraw a guilty plea because: (1) he was unduly influenced by hope and fear and pleaded guilty to a burglary charge because he was afraid that if he went to trial and was convicted of sexual intercourse without consent he would be required to complete sex offender treatment; and (2) the guilty plea was involuntary because he was not stabilized on his antidepressant medication at the time that the plea was entered. The Supreme Court held that the effect of neither fear nor medication affected the voluntariness of Lone Elk's guilty plea, so the trial court did not err in denying the motion to withdraw the plea. St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), followed in Duffy v. St., 2005 MT 228, 328 M 369, 120 P3d 398 (2005), and St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005). See also Brady v. U.S., 397 US 742 (1970), and St. v. Allen, 265 M 293, 876 P2d 639 (1994).

Right of Defendant to Plead Guilty Over State's Objection — Erroneous Refusal to Accept Guilty Plea: Peplow was charged with and convicted of DUI, driving with a suspended or revoked license, driving without insurance, failing to report an accident, and tampering with evidence. Prior to trial, Peplow tried to enter guilty pleas to the driving with a suspended or revoked license and driving without insurance counts, but the trial court ruled that it was not required to accept the pleas because Peplow's actions giving rise to the counts were part of the res gestae and probative of the issue of impairment; the trial court proceeded to trial on all counts. Peplow appealed on grounds that the trial court erred in refusing the guilty pleas. In a case of first impression, the Supreme Court considered a defendant's right to plead guilty over the state's objection. The court noted the numerous statutory procedural safeguards in place to ensure that: (1) a guilty plea is made knowingly, voluntarily, and intelligently; (2) there is a factual basis for the plea; (3) the court is not bound by any plea agreements; and (4) a defendant may not withdraw a guilty plea if the plea agreement is not accepted. The Supreme Court cited Lamb v. Missoula Imports, 230 M 183, 748 P2d 965 (1988), for the proposition that when the word "may" is used to confer power upon an officer, court, or tribunal and the public or a third person has an interest in the exercise of power, then the exercise of power becomes imperative. Under this section, a plea of guilty "may" be accepted before or during trial. The Supreme Court construed this language to mandate the acceptance of a guilty plea as long as the statutory requirements are met. Further, under this section, a defendant may plead guilty or not guilty

without limitation on the right to plead. (See 2003 amendment.) St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

Court Misstatement of Maximum Possible Penalty at Change of Plea Hearing — Error in Refusal to Allow Withdrawal of Noncompliant Plea: Roach requested a hearing to change his plea to guilty on burglary and theft charges. Roach was questioned regarding his understanding of his constitutional rights, and a discussion was held concerning possible penalties. The District Court Judge erroneously informed Roach that the maximum penalty for both crimes was 10 years and $50,000. Neither Roach's counsel nor the County Attorney, who were both present, responded or objected in any way to the court's misstatement of the maximum possible penalty. Roach was sentenced 2 months later to consecutive sentences of 20 years suspended for burglary and 10 years with no time suspended for theft, plus restitution. Roach later asserted that he was misled by the District Court, that his change of plea was coerced and based on misinformation, and that he should have been granted postconviction relief allowing him to either withdraw the guilty plea or be sentenced in conformity with the penalty that he was advised of at the change of plea hearing. The Supreme Court agreed. Because Roach was misinformed about the maximum possible sentence, his plea was neither knowing nor in compliance with statutory requirements. The District Court erred in refusing to allow withdrawal of the guilty plea; the Supreme Court remanded with instructions to allow withdrawal. St. v. Roach, 1999 MT 38, 293 M 311, 975 P2d 817, 56 St. Rep. 161 (1999), following St. v. Brown, 262 M 499, 865 P2d 282, 50 St. Rep. 1658 (1993).

Plea Entered Voluntarily and With Full Knowledge: Defendant's guilty plea, entered voluntarily and with full knowledge, was upheld absent anything in the record to suggest that he was unable to hear or understand what the court asked or that he was not in full control of his faculties. St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990).

Discussion of Defense Strategy Beyond Duty of Trial Court: Defendant argued that the trial court did not adequately inform him of his alternatives to a guilty plea and therefore prevented him from making a voluntary and intelligent choice. The Supreme Court, citing St. v. Day, 195 M 151, 635 P2d 568 (1981), held that the responsibility to discuss potential defenses, potential constitutional challenges, and affirmative defenses is vested in the defense counsel, not in the trial judge. St. v. Martz, 233 M 136, 760 P2d 65, 45 St. Rep. 1370 (1988).

Adequacy of Interrogation Related to Guilty Plea:

The court's interrogation of defendant prior to entry of a guilty plea was sufficient when: (1) defendant had signed an acknowledgment of waiver of rights by plea of guilty, which contained a recitation of the charge against him and its penalty, an enumeration of the constitutional rights waived when one pleads guilty, an acknowledgment of defendant's satisfaction with his counsel, a denial that defendant was under the influence of drugs or alcohol, and an admission of guilt; and (2) the trial judge had reviewed the acknowledgment of waiver, discussed with defendant the constitutional rights he would be foregoing by pleading guilty, and ascertained that defendant was aware of the maximum penalties involved. St. v. Laverdure, 212 M 31, 685 P2d 375, 41 St. Rep. 1570 (1984).

Under the circumstances, the failure to specify the name of the victim, the date, or the place of the alleged offense or the particular crime or to determine if the defendant was satisfied with his appointed counsel caused the District Court's interrogation concerning a guilty plea to be inadequate. St. v. Huttinger, 182 M 50, 595 P2d 363 (1979).

Plea Agreement Not Followed — Prospective Application of ABA Standard: The American Bar Association standards, requiring the sentencing court to inform a defendant if it is not going to accept the entire plea bargain and then give the defendant an opportunity to affirm or withdraw the guilty plea, adopted in St. v. Cavanaugh, 207 M 237, 673 P2d 482, 40 St. Rep. 2007 (1983), applies prospectively only. The defendant was sentenced prior to the Cavanaugh decision and is not entitled to its benefit. St. v. Wilkinson, 208 M 446, 679 P2d 767, 41 St. Rep. 456 (1984).

Failure to Inform of Defense — Knowledge of Defense Not Shown: Courts should be especially cautious in applying penal sanctions to estranged parents who are struggling over the custody of their children, since such situations are better regulated by custody orders enforced through contempt proceedings. Husband took child from wife in violation of a custody order, and the police arrested husband at a shopping center at which he told wife he would be. Husband had not left the state and had not attempted to hide the child. Police arrested the husband, apparently did not give him an opportunity to return the child voluntarily to the child's mother, and returned the child themselves. Defendant pleaded guilty to custodial interference, and the record did not indicate that husband was aware of the defense that a person who has not left the state does not commit the offense if he voluntarily returns the child. Twenty-six months after his pleading guilty and being sentenced, defendant's motion to withdraw his plea was denied on the

ground of undue delay. It was reversible error to accept the plea without fully informing husband of the available defense, though defendant had stated he voluntarily entered the plea and an attorney appointed for defendant, who was present even though defendant refused to accept him as counsel, stated he believed husband voluntarily entered the plea with full understanding of what was involved. The plea was not an intelligent choice when there was a defense available. Denial of the motion to withdraw the guilty plea was reversed and the cause remanded with directions to allow withdrawal of the plea. St. v. Lance, 201 M 30, 651 P2d 1003, 39 St. Rep. 1932 (1982).

In-Depth Examination When Record Requires: The standard by which the validity of a guilty plea is judged is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to defendant as affirmatively disclosed by the record, and while it is clear that courts are not required to articulate specific rights when accepting a guilty plea, an in-depth examination by the court is desirable and mandatory in cases where the record requires it. St. v. Lance, 201 M 30, 651 P2d 1003, 39 St. Rep. 1932 (1982).

Refusal to Accept Guilty Plea Where Defendant Denies Guilt: The trial court properly refused to accept a burglary defendant's guilty plea because the defendant stated several times during extensive questioning that it was not his intent to commit a theft. Although a court may accept a guilty plea under these circumstances, it is not required to so accept. See N.C. v. Alford, 400 US 25, 27 L Ed 2d 162, 91 S Ct 160 (1970). St. v. Welling, 199 M 135, 647 P2d 852, 39 St. Rep. 1215 (1982).

Pleading Guilty to Get Out of Jail — Accepting Plea — Issue of Voluntariness: The defendant asserted trial court error in the failure to inquire into the voluntariness of the defendant's pleas when he stated his guilty pleas were made to get out of jail and out of the county. The defendant's objection to his confinement in maximum security quarters was stated, but there was no suggestion that conditions in the jail were substandard or in any way abusive. There is nothing in the record to suggest that the jail conditions coerced the defendant into entering his plea. In any case, a prisoner's dislike of the security quarters is not per se a factor in determining the voluntariness of his plea. Under these circumstances, there was no error committed by the District Court in accepting defendant's guilty plea without further inquiry. In re Brown, 185 M 200, 605 P2d 185 (1980).

Understanding Charge and Consequences — Knowledge of Possibility of Mitigating Charge: Defendant was charged with and pleaded guilty to various crimes, including felony theft. The argument that the trial court had a duty to inform him that he might mitigate the charge and reduce his sentence was rejected because the arraignment record showed that defendant had been informed by counsel that the acts he had committed might constitute only a misdemeanor. The Supreme Court held that the trial court's repetition of this explanation to the defendant would not have added to his understanding of the charge and was not required. Defendant's argument that the record fails to establish that he understood the consequences of a guilty plea to deliberate homicide and that the trial court had a duty to inform him that he might mitigate this charge was also rejected. Defendant had been charged with both willful and deliberate murder and felony murder. The affidavit of probable cause stated that the defendant confessed to entering a service station with the intent to rob and had shot the deceased in the course of the robbery. Thus, it was clearly on the record that the State had a case on the charge of felony murder. In re Brown, 185 M 200, 605 P2d 185 (1980).

Retroactive Application of Criminal Procedure Rule: The decision made in St. v. Azure, 175 M 189, 573 P2d 179 (1977), requires that the trial court must advise a defendant of matters relating to lesser included offenses before accepting a guilty plea. This is a new procedural requirement that will not be applied retroactively. To apply it retroactively would seriously hamper the administration of justice by requiring conformity to as yet unannounced requirements. St. v. Campbell, 182 M 521, 597 P2d 1146 (1979).

Voluntariness of Guilty Plea — Knowledge of Lesser Included Offenses: Defendant contends that his guilty plea was not voluntary because he did not understand the difference between aggravated assault and the lesser included offense of misdemeanor assault. The Supreme Court said that this argument only applies where there is a fundamental mistake such as where the defendant pleads guilty to nighttime burglary, a felony, when the burglary was committed in the daytime, a lesser offense. There is no fundamental mistake in this case where the defendant was informed of all the elements of aggravated assault. St. v. Campbell, 182 M 521, 597 P2d 1146 (1979).

Standard to Judge Validity of Guilty Plea: The standard by which the validity of a guilty plea is judged is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant as affirmatively disclosed by the record. While it is clear

that courts are not required to articulate specific rights when accepting a guilty plea, an in-depth examination by the trial court is desirable and mandatory in cases in which the record requires it. Yother v. St., 182 M 351, 597 P2d 79 (1979).

Change of Plea to Guilty: When a court has done all that it can to determine that the proposed plea of guilty is voluntarily made and that the defendant understands what he is doing and is advised of the consequences of his plea, including the nature and extent of his punishment, has been adequately advised by counsel, and has been treated fairly at all stages of the prosecution against him, and in fact the defendant states he is guilty of the charges made, then this court has a duty to support the District Court when it allows a plea of guilty to be entered in place of a plea of not guilty. St. v. Lewis, 177 M 474, 582 P2d 346 (1978), followed in St. v. Reynolds, 253 M 386, 833 P2d 153, 49 St. Rep. 463 (1992).

Improper Acceptance of Guilty Plea: Because the court did not determine whether the defendant understood the different elements and effects of deliberate homicide and mitigated deliberate homicide, acceptance of his guilty plea was improper. The court should have granted the defendant's motion for leave to withdraw the guilty plea. St. v. Azure, 175 M 189, 573 P2d 179 (1977), distinguished in St. v. Milinovich, 269 M 68, 887 P2d 214, 51 St. Rep. 1433 (1994).

Voluntariness of Guilty Plea — Examination of Defendant: Although examination by the court as to the voluntariness of a guilty plea is desirable and in some cases mandatory, when the record indicated that the defendant's guilty plea was entered voluntarily with full understanding of the charge and with full appreciation of his constitutional rights and the possible penalty, the fact that the trial court did not specifically question the defendant at the time of the plea change did not amount to reversible error. St. v. Griffin, 167 M 11, 535 P2d 498 (1975).

WITHDRAWAL OF GUILTY PLEA

Voluntary Guilty Plea — Withdrawal of Plea Properly Denied: Usrey pleaded guilty through a plea agreement to sexual intercourse without consent with a 6-year-old girl but later sought to withdraw the plea on grounds that it was involuntary because Usrey did not understand the plea agreement and because the District Court did not explain the rights Usrey was waiving. The Supreme Court examined the plea bargain language and affirmed. Although the written plea agreement did not state the specific maximum penalty upon conviction of sexual intercourse without consent and the District Court did not state the penalty when Usrey pleaded guilty, the court did ask Usrey if he was mindful of the maximum penalty, which was clearly stated in the information, and Usrey replied affirmatively. Also, the plea bargain called for a sentence far less than the maximum penalty, and the sentence that Usrey bargained for and that was imposed was far less than the maximum. Additionally, Usrey was not misled to his detriment simply because the District Court did not use the exact words of 46-12-210(1)(d) in telling Usrey that he might not be allowed to withdraw the guilty plea if the plea bargain was rejected. The record contained substantial evidence supporting the District Court's conclusions that Usrey understood the proceedings and was mentally competent to enter a voluntary guilty plea, and the District Court did not err in denying the motion to withdraw the plea on grounds of involuntariness. St. v. Usrey, 2009 MT 227, 351 M 341, 212 P3d 279 (2009).

Failure of Defendant to Present Evidence of Constitutionally Infirm Prior DUI Conviction — Motion to Withdraw Guilty Plea Properly Denied: Robinson pleaded guilty to a fourth DUI and later moved to withdraw the plea, but the motion was denied. On appeal, Robinson contended that the plea was not voluntary and that the District Court improperly accepted the plea because one of the prior convictions was unconstitutionally infirm. However, when the plea was offered, Robinson voluntarily admitted to three prior DUIs and that he was pleading guilty to a felony. The District Court was not required to extract an admission regarding every element of the crime. It was sufficient that the court ensured that Robinson admitted the acts that constituted the offense. It was Robinson's obligation to present the District Court with any evidence regarding irregularities in prior convictions. Since he did not do so, there was nothing in the record to support that argument, and the District Court was affirmed. St. v. Robinson, 2009 MT 170, 350 M 493, 208 P3d 851 (2009). See also St. v. Frazier, 2007 MT 40, 336 M 81, 153 P3d 18 (2007).

Alleged Assault Victim's Recanted Allegations Not Considered New Evidence Warranting Withdrawal of Voluntary Guilty Plea: Tyler was charged with assaulting his partner Williams. Williams subsequently recanted the allegations to Tyler's investigator. Nevertheless, Tyler pleaded guilty. At the sentencing hearing, Williams appeared and again recanted the assault allegations. Tyler moved to withdraw the guilty plea on grounds that Williams' testimony constituted newly discovered evidence. The District Court disagreed and disallowed the motion. Tyler appealed, but the Supreme Court affirmed. Even if Tyler was unaware that Williams

recanted, which appeared unlikely from the record, Williams' evidence could have been discovered with any amount of due diligence. Thus, Williams' recantation could not be considered newly discovered evidence constituting good cause to allow Tyler to withdraw the guilty plea, which was voluntarily given. St. v. Tyler, 2009 MT 75, 349 M 461, 204 P3d 685 (2009).

No Possibility of Lesser Plea Instruction — No Error in Denial of Motion to Withdraw Guilty Plea: As part of a plea agreement, Swensen pleaded guilty to felony assault and signed a waiver of rights, including the right to a jury instruction on a lesser included offense. Swensen subsequently moved to withdraw the guilty plea on grounds that the District Court failed to specifically advise him about the lesser included offense of misdemeanor assault during the change of plea hearing. The District Court denied the motion and Swensen was sentenced pursuant to the terms of the plea agreement. Swensen appealed, but the Supreme Court affirmed. A court may at any time before judgment and within 1 year after final judgment allow a defendant to withdraw a guilty plea upon a showing of good cause, which includes the minimal constitutional requirement that a guilty plea be voluntary and intelligent and may include additional criteria such as the discovery of new exculpatory evidence. In this case, Swensen's guilty plea to aggravated assault was voluntary, and the District Court's interrogation during the change of plea hearing was adequate. Additionally, Swensen's admissions on the record about the nature of the injuries inflicted on the victim effectively eliminated the possibility that Swensen was entitled to a lesser included offense instruction. Absent good cause, the District Court did not err in denying Swensen's motion to withdraw the guilty plea. St. v. Swensen, 2009 MT 42, 349 M 268, 203 P3d 786 (2009). See also St. v. Martinez, 1998 MT 265, 291 M 265, 968 P2d 705 (1998).

Criminal Mischief Guilty Plea Based on Quality of Construction Work — Lack of Factual Basis for Plea Casting Doubt on Voluntariness — Remand: Wise was charged with elder abuse by exploitation and criminal mischief for allegedly performing shoddy construction work on an elderly woman's property. Wise agreed to plead guilty to criminal mischief in exchange for dismissal of the elder abuse charge. At the change of plea hearing, Wise acknowledged performing shoddy construction work but did not admit guilt sufficient to be convicted of criminal mischief. Nevertheless, the trial court did not allow Wise to withdraw the guilty plea and Wise was convicted. On appeal, the Supreme Court reversed. Although a court need not extract an admission from a defendant of every element of a crime in order to establish a factual basis for a guilty plea, the court must ascertain from the defendant's admissions that the defendant's acts generally satisfy the elements of the crime to which the defendant is pleading guilty. In this case, shoddy construction work, without more, did not constitute criminal mischief, and the trial court incorrectly concluded that there was a factual basis for Wise's plea, which cast doubt on the voluntariness of the plea, warranting reversal and remand for further proceedings. St. v. Wise, 2009 MT 32, 349 M 187, 203 P3d 741 (2009), following St. v. Frazier, 2007 MT 40, 336 M 81, 153 P3d 18 (2007).

Alford Plea Entered Voluntarily — Motion to Withdraw Plea Properly Denied: Locke moved to withdraw his Alford plea to felony robbery, but the motion was denied. On appeal, Locke argued that the District Court failed to establish a factual basis for the Alford plea when it reviewed only the information and affidavit and that failure to establish a factual basis provided good cause to withdraw the plea. The statutory procedure in 46-12-212 allows a defendant to plead guilty without actually admitting the charge if the defendant has reviewed the evidence and is capable of making a voluntary, knowing, and intelligent choice and if the record contains strong evidence of guilt. In this case, the statutory factors were met. Locke was fully aware of the direct consequences of the plea, and nothing in the record indicated that Locke was incapable of making a voluntary, knowing, and intelligent choice. Because Locke failed to establish that the plea was involuntary, the Supreme Court affirmed denial of Locke's motion to withdraw the plea. St. v. Locke, 2008 MT 423, 347 M 387, 198 P3d 316 (2008), distinguishing St. v. Frazier, 2007 MT 40, 336 M 81, 153 P3d 18 (2007).

Error in Denial of Motion to Withdraw Admissions to Allegations in Revocation Petition: Defendant's admissions to a petition to revoke were held to be involuntary in the county that declined to follow a global plea bargain negotiated in another county where defendant had earlier entered a plea of guilty to a new felony because the Supreme Court held he had done so on the basis of an unenforceable and eventually unfilled promise. St. v. Jones, 2008 MT 331, 346 M 173, 194 P3d 86 (2008).

Inability of District Court to Impose Sentence in Plea Agreement — Withdrawal of Guilty Plea Allowed: Deserly negotiated a plea agreement on a felony assault with a weapon charge wherein the state would recommend a 10-year sentence with the Department of Corrections and Deserly

would be designated a persistent felony offender. However, after the plea was entered, the District Court and Deserly discovered that under 46-18-201, all but the first 5 years of a department commitment must be suspended, so the sentence in the plea agreement was not one that could be legally imposed. Deserly then moved to withdraw the guilty plea on grounds of good cause, but the District Court denied the motion, and Deserly appealed. The Supreme Court reversed. Under St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), a defendant's plea is not voluntary if the court, the prosecutor, defense counsel, or some other party induced the plea, however slightly, by misrepresentation, including unfulfilled or unfulfillable promises. At the time Deserly entered the plea, it was reasonable for him to expect that the District Court could at least consider, if not actually impose, the recommended sentence, and Deserly was induced, at least in part, by the prospect of being able to receive the sentence that he and the prosecutor had negotiated and agreed to recommend. Because Deserly was induced by an unfulfillable promise of an illegal sentence, albeit unintentionally, his plea was not voluntary, and the case was remanded for further proceedings to allow Deserly to withdraw the guilty plea. St. v. Deserly, 2008 MT 242, 344 M 468, 188 P3d 1057 (2008).

Court's Sua Sponte Withdrawal of Defendant's Guilty Plea Following Judgment Considered Mistake of Law: Friedt pleaded guilty to a stop sign violation and to a charge of failing to carry proof of insurance in the vehicle and was sentenced in Municipal Court. During sentencing, the County Attorney failed to raise any issues of restitution. After judgment was entered, the court was advised by a victim of a claim of damages associated with Friedt's offenses. The court, sua sponte, withdrew Friedt's guilty pleas, appointed counsel, and set an omnibus hearing. Friedt then petitioned the Supreme Court for supervisory control, asserting that the Municipal Court lacked jurisdiction to vacate or modify the sentence once a valid sentence was pronounced and thus proceeded under a mistake of law in withdrawing the guilty pleas, which would result in a gross injustice and unnecessary expense if Friedt was required to stand trial on charges to which she knowingly and voluntarily pleaded guilty and on which she had been sentenced. The County Attorney argued that the Municipal Court retained jurisdiction under 46-16-702 and that the interests of justice to the victim and the mandatory restitution provision in 46-18-201 required the Municipal Court to remedy the situation sua sponte. The Supreme Court noted that 46-16-702 allows a new trial, following judgment, for a defendant in the interests of justice, but that the statute does not authorize a new proceeding to benefit a victim or a prosecutor who fails to timely raise a sentencing matter. Further, although 46-16-105 allows a court for good cause to allow withdrawal of a guilty plea within 1 year after judgment if evidence supports a fundamental miscarriage of justice, nothing in the statute allows a court to forcibly withdraw a defendant's guilty plea sua sponte under any circumstances. Therefore, the Supreme Court agreed that the Municipal Court's action constituted a mistake of law. Friedt's petition for supervisory control was granted, and the Municipal Court was instructed to vacate the order withdrawing Friedt's guilty pleas. Friedt v. Billings Municipal Court, 2008 MT 174, 343 M 386, 184 P3d 1032 (2008).

Objection to Release of Tribal Court Juvenile Record Not Good Cause for Withdrawal of Guilty Plea: Phillips contended that intervening causes, including release of Phillips' tribal court juvenile record and the consequential failure of the Department of Corrections to recommend placement in the intensive supervision program as recommended in a plea agreement, constituted good cause to allow withdrawal of his guilty plea. The Supreme Court disagreed. The argument was premised on Phillips' expectations in the sentencing process, but the conditions of the plea agreement were recommendations only and were not assured, and there was no promise of placement in the program. Once Phillips was sentenced to the Department, placement was in the hands of the Department, not the sentencing court. Thus, Phillips' objection to the release of his juvenile record did not establish good cause for withdrawal of the guilty plea, and denial of the motion to do so was not error. St. v. Phillips, 2007 MT 117, 337 M 248, 159 P3d 1078 (2007).

No Right to Be Informed of Possibility of Lesser Included Offense When No Such Possibility Exists: Defendant was charged with felony attempted sexual assault, but ultimately pleaded nolo contendere to a charge of felony attempted kidnapping. After being sentenced to 10 years in prison, defendant appealed the conviction on grounds that the trial court erred by failing to inform defendant that he could have been convicted on a lesser charge of unlawful restraint and by failing to allow withdrawal of the guilty plea. However, only those lesser included offenses applicable to the charge of felony attempted sexual assault were relevant to defendant's decision to plead nolo contendere. The court and the state could not be faulted for failing to inform defendant of any lesser included offense that was not relevant to defendant's decision, and defendant had no right to be informed of the possibility of submitting a lesser included offense instruction to the jury when no such possibility existed. Absent anything in the record that an

omission, misinformation, or mental incapacity hindered defendant's ability to enter knowingly and intelligently into a plea agreement, the trial court did not err in holding that defendant failed to establish good cause to withdraw the plea, and the Supreme Court affirmed. St. v. Iafornaro, 2007 MT 77, 336 M 489, 155 P3d 1238 (2007).

Error in Refusal to Allow Withdrawal of Involuntary Guilty Plea — Remand: Chase entered a guilty plea after being told by the trial court that his defense to a DUI charge would probably have failed and after Chase's counsel unilaterally withdrew the defense without notifying Chase. There was a legitimate basis for Chase's belief that his defense had not been adequately pursued, giving rise to uncertainty regarding Chase's guilt, and the colloquy conducted by the trial court appeared to have unintentionally prompted a guilty plea from Chase that was not knowing and intelligent. Chase's fundamental misunderstanding concerning the availability of his defense, coupled with the questionable voluntariness of the plea, was sufficient to allow withdrawal of the plea, and the trial court committed reversible error in denying Chase's motion to withdraw the plea. St. v. Chase, 2006 MT 13, 331 M 1, 127 P3d 1038 (2006), following St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26 (1998).

No Showing of Good Cause to Withdraw Guilty Plea After Four and One-Half Years: About 4 1/2 years after Favi's guilty plea on drug charges, Favi moved to withdraw the guilty plea. During that time, multiple warrants were issued for Favi's arrest for violating sentencing conditions, but ultimately Favi successfully completed the sentence. At no time did Favi raise the issue of the validity of the sentence. The District Court found no good cause to withdraw the guilty plea, and the Supreme Court affirmed. Favi's plea was voluntary, knowing, and intelligent, and Favi was sufficiently apprised of his rights and of the consequences of the plea. Absent a showing of good cause, denial of the motion to withdraw the plea was proper. St. v. Favi, 2005 MT 288, 329 M 273, 124 P3d 164 (2005), distinguishing St. v. Jones, 278 M 121, 923 P2d 560 (1996). See also St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005).

Denial of Motion to Withdraw Voluntary Guilty Plea Proper: Pursuant to a plea agreement, defendant pleaded guilty to sexual intercourse without consent. Some 4 years after entering the plea, defendant moved to withdraw the guilty plea, but the motion was denied. On appeal, the Supreme Court held that the District Court's plea colloquy adequately addressed the elements of the offense and laid the factual basis for acceptance of the plea and that defendant's guilty plea, which was entered after defendant signed an acknowledgment of waiver of rights and after engaging in a proper colloquy with counsel and the court, was voluntary. Thus, denial of the motion to withdraw the plea was proper. St. v. Muhammad, 2005 MT 234, 328 M 397, 121 P3d 521 (2005).

Withdrawal of Plea Based on Evidence That, After Guilty Plea, Assault Victim Told Public Defender That Defendant Wasn't the Assailant: Martin was charged with assault with a weapon and criminal possession of dangerous drugs. In exchange for the drug charge being dropped, he pleaded guilty to the assault charge. Two days before the sentencing date, a woman claiming to be the victim told the public defender's office that Martin was not her assailant. Martin moved for withdrawal of his guilty plea. Martin's motion was denied. Because Martin conceded in the lower court that his plea was in exchange for dropping the drug charge, he could not claim on appeal that it was not and that it was therefore error to refuse to allow withdrawal of the guilty plea. Martin obtained a benefit the moment that the plea agreement was entered into, and it did not matter that the drug charge had not been dropped and that he had not been sentenced at the time that he moved for withdrawal of the plea. Moreover, the defendant did not receive ineffective assistance of counsel. Because the woman did not testify at the hearing, her identity as the victim was not confirmed, the woman gave an incorrect birth date, and a witness told the police that Martin told the witness that Martin had stabbed the victim. The court did not abuse its discretion when it refused to allow withdrawal of the guilty plea based on what a woman had told the public defender's office. St. v. Martin, 2004 MT 288, 323 M 320, 100 P3d 146 (2004).

Criteria of Effective Assistance of Defense Counsel — Prejudice From Ineffective Counsel Warranting Withdrawal of Alford Plea: In a petition for postconviction relief from a drug conviction, Henderson contended that he received ineffective assistance of counsel and should be allowed to withdraw his Alford plea, but the District Court denied the petition. On appeal, the Supreme Court applied the Strickland test to determine whether Henderson's counsel was ineffective. The first part of the test requires that defendant show that counsel's performance was deficient. The overarching duty of a criminal defense counsel is to advocate on behalf of the defendant and to meet, test, and refute the prosecution's case. Henderson met the first Strickland requirement by showing that counsel performed no investigation, research, or analysis, filed no pretrial motions, and spent only 4 hours on the case, which included clerical work, appearing in court with Henderson on two occasions, and an hour persuading Henderson

to plead guilty. The sum of counsel's actual legal work was asking the County Attorney to propose a plea bargain and then signing the prosecution's first offer. Counsel's utter failure to advocate for Henderson in a meaningful way constituted deficient performance. The second Strickland requirement is a showing by defendant of a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Henderson also met this test by showing that the decision to enter the Alford plea was clearly influenced by counsel's lack of effective assistance and that, but for the ineffective assistance, he would not have entered the plea. Thus, the lack of effective assistance in this case constituted sufficient good cause to authorize Henderson to withdraw the Alford plea and proceed to trial. The Supreme Court granted the petition for postconviction relief and remanded for trial. St. v. Henderson, 2004 MT 173, 322 M 69, 93 P3d 1231 (2004).

No Error in Denial of Motion to Withdraw Nolo Contendere Pleas Made Knowingly: White asserted that the District Court erred in denying a motion to withdraw nolo contendere pleas, arguing that he could not have made a knowing waiver of his rights because he was not in possession of all evidence that might have influenced his decision, including inconsistent statements by a witness. The Supreme Court held that even if White did not know of the statement, the lack of knowledge was irrelevant to the criteria in 46-12-210 regarding whether the pleas were made knowingly. White was clearly informed of the nature of the charges, the mandatory minimum penalty, the maximum penalty, and the possibility of the imposition of restitution. Under the good cause factors in St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812 (1999), White's nolo contendere pleas were made knowingly, and the District Court did not err in disallowing withdrawal of the pleas. St. v. White, 2004 MT 103, 321 M 45, 88 P3d 1258 (2004). See also St. v. Bowley, 282 M 298, 938 P2d 592 (1997).

No Good Cause Established for Withdrawal of Knowing, Voluntary Guilty Plea: Morgan entered a plea agreement that dismissed four felony charges in exchange for Morgan's guilty plea to three counts of attempted deliberate homicide and one count of assault, which was a significant benefit. Morgan's guilty plea was knowing and voluntary, and absent good cause for withdrawing the plea, the District Court did not abuse its discretion in refusing to allow Morgan to withdraw the guilty plea. St. v. Morgan, 2003 MT 193, 316 M 509, 74 P3d 1047 (2003). See also St. v. Knox, 2001 MT 232, 307 M 1, 36 P3d 383 (2001).

Failure of District Court Judge to Abide by Plea Agreement Entered With Previous District Court Judge — Doubt Regarding Plea Resolved in Favor of New Trial: At a change of plea hearing in December 2000, Tweed pleaded guilty to two counts of sexual intercourse without consent pursuant to a plea agreement in which the state agreed to drop two counts of felony sexual assault and recommended 30-year concurrent sentences on each count with 20 years suspended. In March 2001, Tweed appeared for sentencing before a new District Court Judge. The new judge called the probation officer who conducted the presentence investigation, and pursuant to the probation officer's recommendations, the new judge rejected the terms of the plea agreement and sentenced Tweed to concurrent 30-year sentences with only 10 years suspended. Tweed moved to withdraw the guilty pleas, but the motion was denied, and Tweed appealed. The Supreme Court held that the District Court's contradictory statements gave credence to Tweed's claim that he held a mistaken understanding of the binding effect upon the court of the pretrial agreement's sentencing recommendations. In view of the irregularities in the interrogation at the change of plea hearing, any doubt about whether Tweed was precluded from entering a knowing, voluntary, and intelligent plea should be resolved in favor of a trial on the merits. The denial of Tweed's motion to withdraw the guilty pleas was an abuse of discretion, and the case was reversed and remanded for a new trial. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

Postconviction Relief Based on Claims of Newly Discovered Evidence Consisting of Defendant's Own Exculpatory Statements Properly Denied: Almost 2 years after pleading guilty to drug charges, Graham sought postconviction relief, contending that at the time that he pleaded guilty, he believed that he was admitting possessing only two drugs, not four, and that he was thus innocent of possessing the four drugs mentioned in the information. Graham also asserted that he received ineffective assistance of counsel because his attorney did not advise him that he was pleading guilty to possession of all four drugs, and that his plea was thus not made knowingly and voluntarily. Despite the untimely filing of the petition, the District Court considered the petition because the issues were significant and should be disposed of on the merits. Nevertheless, the petition was dismissed and Graham appealed. The Supreme Court noted that in order to waive the 1-year statute of limitations on petitions for postconviction relief, the petitioner must provide newly discovered evidence that demonstrates actual innocence, which must be a showing that no reasonable juror would have found the defendant guilty rather

than a mere showing that reasonable doubt exists. Graham did not show a clear miscarriage of justice because his own exculpatory statements did not qualify as newly discovered evidence and were insufficient to establish Graham's actual innocence. Additionally, Graham's allegations that he received ineffective assistance of counsel were record-based and did not qualify as new evidence of actual innocence. Last, Graham's request to withdraw the guilty plea because it was not made knowingly or voluntarily was considered. The Supreme Court applied the factors in this section and found that the trial court's interrogation was adequate, the motion to withdraw was not timely, and the plea bargain provided Graham a considerable benefit in exchange for dismissal of other charges. Therefore, the plea was knowing and voluntary and did not provide grounds for postconviction relief. The denial of Graham's petition for postconviction relief was affirmed. St. v. Graham, 2002 MT 237, 311 M 500, 57 P3d 54 (2002).

Contrary Instructions Regarding Appeal Process From Justice's Court — Appeal to District Court Considered Petition for Postconviction Relief: Boucher pleaded guilty to DUI in Justice's Court, signing a form stating that the plea was voluntary and constituted waiver of the right to appeal to District Court. Despite the waiver, the written judgment stated that Boucher could appeal to the District Court within 10 days. Boucher subsequently learned that his driving privileges would be revoked in Washington as a result of the guilty plea, so he moved to withdraw the guilty plea following conviction. The motion was denied, and Boucher appealed to District Court, but that court held that the guilty plea was voluntary and dismissed the appeal for lack of subject matter jurisdiction because under 46-17-203, entry of a guilty plea in Justice's Court waives a defendant's right to a trial de novo in District Court. Further, 46-17-311 procedurally requires adjudication of a matter by trial in a Justice's Court or City Court as a prerequisite to an appeal in District Court. Boucher then appealed to the Supreme Court, which exercised subject matter jurisdiction by considering Boucher's appeal to District Court as a petition for postconviction relief. Under 46-21-101, a defendant who asserts the illegality of a sentence and has exhausted all appeal remedies provided by law may petition for postconviction relief with the District Court in the county where the court of limited jurisdiction is located. A petition for postconviction relief is not another form of appeal from a criminal case, but a separate civil proceeding aimed at vacating, setting aside, or correcting a sentence, and is available to a defendant whose sentence is imposed by a court of limited jurisdiction. Here, the District Court correctly determined that Boucher had no right to appeal the Justice's Court's denial of the motion to withdraw the guilty plea. However, given the contrary instructions concerning the appeals process issued by the Justice of the Peace, the fact that the Justice's Court is not a court of record, and the nature of Boucher's constitutional challenge to the validity of his plea, the District Court held an evidentiary hearing to establish a factual basis for ruling on the issues, and those proceedings constituted the functional equivalent of a postconviction hearing. Boucher was eligible to pursue postconviction relief given the absence of an appellate remedy and the constitutional claims asserted, and the District Court erred in finding that it had a lack of subject matter jurisdiction. St. v. Boucher, 2002 MT 114, 309 M 514, 48 P3d 21 (2002), following St. v. Christensen, 265 M 374, 877 P2d 468 (1994), and St. v. Liefert, 2002 MT 48, 309 M 19, 43 P3d 329 (2002).

Question of Adequacy of Advisement Regarding Waiver of Appeal Rights Resolved in Favor of Defendant: The first factor in determining whether good cause existed in allowing the withdrawal of a guilty plea and whether a court abused its discretion in denying a motion to withdraw the guilty plea, as set out in St. v. Bowley, 282 M 298, 938 P2d 592 (1997), is the adequacy of the court's interrogation at the time that the plea was entered regarding the defendant's understanding of the consequences of the plea. The plea must be a voluntary, knowing, and intelligent choice among the alternative courses of action open to the defendant. In the present case, Boucher was charged with DUI, and at his initial appearance, the Justice's Court had Boucher acknowledge in writing that he understood the waivers that he would make if he pleaded guilty. Boucher pleaded not guilty and waived no rights. Five months later, the state amended the complaint, and Boucher changed his plea to guilty, but at the time that the plea was entered, the Justice's Court did not reiterate the information provided at the initial appearance and failed to question Boucher regarding his understanding of the waiver of his constitutional rights. The Supreme Court concluded that the court's colloquy was inadequate and that good cause existed to permit Boucher to withdraw his guilty plea. Any doubt about the voluntariness of Boucher's plea was resolved in his favor, and the Supreme Court remanded to Justice's Court for further proceedings. St. v. Boucher, 2002 MT 114, 309 M 514, 48 P3d 21 (2002).

No Requirement That Defendant Be Informed of Federal Firearms Prohibitions Resulting From State Conviction of Partner Assault — Direct Versus Collateral Consequences of Plea — Denial of Motion to Withdraw Guilty Plea Affirmed: Liefert pleaded guilty in Justice's Court to

charges of partner assault and was subsequently charged under federal law 18 U.S.C. 922 with unlawfully possessing a firearm, following a hunting investigation. After federal charges were filed, Liefert moved to withdraw the guilty plea, contending that good cause existed because the Justice's Court did not inform him of the federal prohibition on possessing a firearm as a result of the plea under Montana law. The motion was denied in Justice's Court and in District Court, which cited St. v. Reynolds, 253 M 386, 833 P2d 153 (1992), and held that Liefert did not need to be informed of the federal prohibition because it was a collateral consequence of Liefert's sentence. Liefert appealed to the Supreme Court, which affirmed. Although the Supreme Court has previously held that there is no appeal to District Court from the denial of a motion to withdraw a guilty plea in Justice's Court, in this case, Liefert's appeal was treated as a motion for postconviction relief, and the Supreme Court proceeded to determine whether Liefert had good cause to withdraw the plea. The court determined whether the District Court erred in disallowing withdrawal of the plea by applying the factors in St. v. Bowley, 282 M 298, 938 P2d 592 (1997). The only applicable Bowley factor was the adequacy of the plea colloquy. Liefert did not assert that a judge must inform every defendant of the effect of a guilty plea on gun possession, but presented only the issue of whether a defendant must be informed when charged with partner assault and contended that state sentencing statutes require a judge to inform a defendant of the punishment that can result from a violation. Although never explicitly adopted, the Supreme Court has previously applied the prevailing rule in Torrey v. Estelle, 842 F2d 234 (9th Cir. 1988), that because it is impossible for a judge to inform a defendant of every possible consequence of a guilty plea, judges are required to inform defendants of direct consequences, but are not required to inform of collateral consequences. A consequence is considered direct if it has a definite, immediate, and largely automatic effect and is considered collateral if a defendant has control over whether or not the consequence occurs, if it is not under the control of the sentencing judge, or if it is a procedure under the control of a different sovereign or agency. Notwithstanding Liefert's due process, federal preemption, and negative implication arguments, Liefert had discretionary control over whether he would be in violation of federal law upon entry of a guilty plea for partner assault, and the consequence in this case was under the control of the federal government and thus collateral. Further, the guilty plea was not involuntary simply because it may have been entered to avoid the possibility of a greater punishment at trial or because Liefert may have viewed punishment under the guilty plea as lesser than his immediate personal consequences. Therefore, the District Court did not err in denying Liefert's motion to withdraw the plea. St. v. Liefert, 2002 MT 48, 309 M 19, 43 P3d 329 (2002), followed in Duffy v. St., 2005 MT 228, 328 M 369, 120 P3d 398 (2005).

Defendant's Failure to Show Doubt as to Voluntariness of Plea — Denial of Motion to Withdraw Guilty Plea Affirmed: Kellames contended that the District Court erred in denying a motion to withdraw a guilty plea. Kellames maintained that the plea was involuntary because of his mother's influence over him, and because he suffered from a bipolar disorder that required medication, which his attorney failed to mention to the sentencing court. However, Kellames conceded that in response to questioning at the sentencing hearing, he denied that he was suffering from a disability, stated that he felt no threat or coercion to plead guilty, and admitted that the decision to plead guilty was his alone. Thus, Kellames failed to state a claim of pressure from his mother that rose to the level of coercion sufficient to render his subsequent responses to questioning in open court involuntary, and raised no doubt about whether his guilty plea was voluntarily or intelligently made. The Supreme Court found no abuse of discretion by the District Court in denying Kellames's motion to withdraw the guilty plea. St. v. Kellames, 2002 MT 41, 308 M 347, 43 P3d 293 (2002). See also St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812 (1999).

Extraordinary Circumstances Constituting Good Cause to Permit Withdrawal of Guilty Pleas: In 1982, Mallak entered the United States from Iraq as a refugee. In 1989, Mallak entered guilty pleas to two felony counts of sale of dangerous drugs (now criminal distribution of dangerous drugs); however, the record of the proceedings was destroyed. Mallak served a 5-year suspended sentence, and 5 years later applied for U.S. citizenship. When federal immigration officials discovered the drug conviction, deportation proceedings were instituted against Mallak, who resisted deportation by filing for asylum and by filing a petition for postconviction relief requesting that he be allowed to withdraw his guilty pleas. Without a hearing, the District Court denied Mallak's petition on grounds that it was time-barred, and Mallak appealed. The Supreme Court reversed. There is no bright-line rule on the timeliness of a motion to withdraw a guilty plea, and each case must be considered in light of its unique record. Rather, under this section, a guilty plea may be withdrawn at any time for good cause. In St. v. Koepplin, 213 M 55, 689 P2d 921 (1984), the Supreme Court set out the factors to be considered when determining whether

good cause exists to withdraw a guilty plea: (1) the adequacy of the District Court's interrogation as to the defendant's understanding of the plea; (2) the promptness of the motion to withdraw the prior plea; and (3) whether the defendant's plea was apparently the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge. The circumstances in Mallak's case were extraordinary, including his documented mental incapacity, his unfamiliarity with the English language at the time of the change of plea, and the absence of a record of the plea proceedings, all of which raised serious doubts about the voluntariness of Mallak's guilty pleas. Further, it was not until 1991 that the Legislature passed 46-12-210 requiring that foreign defendants be told during plea proceedings that a guilty plea could result in deportation. Given the unique combination of factors, the Supreme Court concluded that the District Court abused its discretion in denying Mallak's petition for leave to withdraw his guilty pleas, so the case was remanded to allow Mallak to withdraw his prior pleas. Mallak v. St., 2002 MT 35, 308 M 314, 42 P3d 794 (2002).

No Error in Refusal to Allow Withdrawal of Guilty Plea — Parents of Sexual Assault Victim Not Parties to Plea Agreement: Following a guilty plea and conviction of sexual assault, Knox moved to withdraw the guilty plea, arguing that the County Attorney violated the terms of a plea agreement, which had recommended a 30-year suspended sentence and dropping a second sexual assault charge in exchange for the guilty plea, and indicated that the parents of the 5-year-old victim would not recommend incarceration in the victim impact statement of the presentence investigation. During the colloquy required by 46-12-210, the District Court informed Knox that, like the court itself, the parents were not bound by the plea agreement and could change their minds at any time as far as recommending future imprisonment, adding that if the parents did change their minds, that fact would not suffice as grounds for withdrawal of a guilty plea. Nevertheless, Knox voluntarily accepted the possible consequences of the plea and pleaded guilty. The parents then recommended imprisonment, and Knox was sentenced to 40 years with 18 suspended. A District Court may permit the withdrawal of a guilty plea upon a showing of good cause, but the determination of good cause is discretionary, and each case is considered on its merits. Here, the District Court subsequently denied the withdrawal motion pursuant to the colloquy, and Knox appealed, but the Supreme Court affirmed. After applying the factors in St. v. Bowley, 282 M 298, 938 P2d 592 (1997), the Supreme Court found that there was no abuse of discretion in the denial of the motion to withdraw and that Knox's guilty plea thus met the constitutional standard of a voluntary, intelligent, and knowing choice among options. The District Court acted according to statutory requirements when it made clear that the parents could make known their opinion and change their minds regarding Knox's incarceration because they were not parties to the plea agreement, pursuant to the court's duties in 46-18-115. Further, other evidence in a psychological evaluation indicated that Knox had violent tendencies that presented complications to successful treatment, had high-risk factors for violent recidivism, and had resisted treatment for chemical dependency in the past, so the parents' incarceration request was not a determinative basis for the sentence. St. v. Knox, 2001 MT 232, 307 M 1, 36 P3d 383 (2001).

No Error in Denial of Motion to Withdraw Guilty Plea Made Four Years After Plea Entered—Bowley Factors Applied: In determining whether the District Court erred in denying Garner's motion to withdraw guilty pleas, the Supreme Court applied the factors in St. v. Bowley, 282 M 298, 938 P2d 592 (1997): (1) the adequacy of the court's interrogation when the plea was entered as to defendant's understanding of the plea; (2) the promptness of the motion to withdraw; and (3) the fact that the plea resulted from plea bargaining. Garner was adequately questioned regarding the desire to plead guilty, fully informed of the right to continue with a plea of not guilty, informed of the ramifications of a guilty plea, and admitted the facts of the charged offenses. Although Garner's wait of almost 4 years before attempting to withdraw the guilty pleas was not per se a bar to plea withdrawal, the District Court did not err in determining that the delay, together with Garner's ample opportunity to raise the withdrawal issue while raising other claims during that 4 years when represented by counsel, could only lead to the conclusion that Garner's motion to withdraw the guilty pleas did not satisfy the requirement of promptness. Last, there was no plea bargain, so that factor was not relevant. St. v. Garner, 2001 MT 222, 306 M 462, 36 P3d 346 (2001).

Pro Se Motion to Withdraw Guilty Plea Not Considered Critical Stage of Proceedings to Which Right to Counsel Attaches: Garner moved pro se to withdraw his guilty plea nearly 4 years after entering the plea and nearly 3 years after filing a petition for postconviction relief, arguing that a motion to withdraw a guilty plea constitutes a critical stage of the proceedings at which the right to counsel attaches, and that that right must be expressly waived, which was not done. Garner cited numerous non-Montana cases in which the right to counsel was found to attach to a motion

to withdraw a guilty plea, but the Supreme Court noted that it had not established any bright line as to when in the sequence of proceedings the right to counsel attaches. The court noted the holding in Ranta v. St., 1998 MT 95, 288 M 391, 958 P2d 670 (1998), that a critical stage is defined as any step of the proceedings in which there is potential for substantial prejudice to the defendant. Here, Garner was represented by three different counsel during the course of the proceedings. Given the length of time since trial and the ample opportunities of representation that Garner enjoyed, the pro se motion did not raise the potential for substantial prejudice to Garner; thus, the motion did not constitute a critical stage of the proceedings, and the right to counsel did not attach. St. v. Garner, 2001 MT 222, 306 M 462, 36 P3d 346 (2001).

No Authority to Appeal Justice's Court Order Denying Motion to Withdraw Guilty Plea: The Feights got into a fight with a highway patrol officer at a high school basketball game and were charged with misdemeanor assault. They were informed of their rights in Justice's Court, waived their right to counsel, and pleaded guilty. More than a month later, they moved through counsel to withdraw their guilty pleas, claiming good cause under this section. The Justice's Court denied the motion, holding that the Feights had been given due process and had voluntarily, knowingly, and willingly entered guilty pleas. The Feights appealed the denial of their motion to withdraw their guilty pleas to District Court. The state moved to dismiss the appeal, contending that the District Court lacked jurisdiction to review denial of the motion to withdraw a plea. The District Court dismissed the appeal but remanded to Justice's Court with a recommendation that the Feights be allowed to withdraw their pleas. Instead, the Justice's Court reinstated judgment, and the Feights appealed to the Supreme Court. The Supreme Court affirmed. The statutes that provide for and determine the jurisdiction of a District Court to entertain an appeal from a Justice's Court include 3-5-303, 46-12-204, 46-17-203, and 46-17-311. However, none of these statutes provide authority for appeal to the District Court from the denial of a motion to withdraw a guilty plea. Further, the specific language of these sections prevails over the general language in 46-20-104 defining the scope of appeal by a criminal defendant. The Legislature has not created a statutory right of appeal from a Justice's Court denial of a motion to withdraw a guilty plea, and the Supreme Court refrained from creating one. St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), distinguishing St. v. Rogers, 267 M 190, 883 P2d 115 (1994), and followed in St. v. Fox, 2001 MT 209, 306 M 353, 34 P3d 484 (2001).

Breach of Plea Agreement by State — Defendant's Right to Choose Remedy: The state conceded that it breached a plea agreement that had been offered to Munoz, so the order of the District Court denying Munoz's motion to withdraw his guilty plea was erroneous. The question then became whether the sentencing court or Munoz should have the right to choose the remedy. Generally, when the state breaches a plea agreement, one of two equitable remedies is available to safeguard the defendant's due process rights. The notion of an equitable remedy for a breach is guided by the general principles of contract law. The first remedy is specific performance by the government, requiring the state to uphold its end of the bargain and, before a new sentencing judge, comply with the terms of the plea agreement by recommending a specific sentence, moving for dismissal of other charges, or simply not opposing the defendant's requested sentence. When specific performance is imposed, a defendant enjoys no contractual right or entitlement to a specific sentence. The second equitable remedy is rescission, requiring that a defendant be allowed to withdraw the guilty plea and then face trial on the original charge as if the plea agreement had never been entered. In cases of rescission, a defendant's constitutional rights that were waived by the guilty plea are reinstated. However, the seminal federal case that established these remedies, Santobello v. N.Y., 404 US 257 (1971), never reached the question of choice of remedies, leaving to the discretion of the state court the decision as to which remedy would be appropriate under the circumstances. Federal circuit courts and various state courts have also split on the question of choice of remedies. Until now, the Montana Supreme Court has also applied two lines of reasoning—in some cases leaving the choice of remedies to the discretion of the sentencing court and in other cases providing instructions that a defendant be allowed to choose the remedy. In light of the underlying principles of contract law, a nonbreaching defendant must be afforded the initial right to choose from available remedies when the state breaches a plea agreement. As the breaching party, the state bears the substantial burden of demonstrating through clear and convincing evidence that a defendant's choice of remedy would result in a miscarriage of justice, and only upon such a showing may a District Court disallow a defendant's choice. St. v. Munoz, 2001 MT 85, 305 M 139, 23 P3d 922 (2001), following St. v. Bowley, 282 M 298, 938 P2d 592 (1997), and St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015 (1999), overruling St. v. Persak, 256 M 404, 847 P2d 280 (1993), and St. v. Rardon, 1999 MT 220, 296 M 19, 986 P2d 424 (1999), and followed in St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002).

Failure to Present Motion to Withdraw Voluntary Guilty Plea, Based on Hope or Fear, Not Considered Ineffective Assistance of Counsel: Osterloth contended that he was denied effective assistance of counsel when his attorney failed to premise a motion to withdraw a guilty plea on Osterloth's having entered the plea out of hope of avoiding the mandatory minimum sentence for sexual assault by being admitted to a community-based sex offender treatment program and on Osterloth's fear of incarceration. Osterloth was relying on St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682 (1998), for the proposition that an assertion that a guilty plea was influenced by hope or fear is a proper basis for withdrawing a guilty plea. Under the two-prong Strickland test for evaluating effectiveness of counsel, a defendant must establish that counsel's performance was deficient and that the deficient performance prejudiced the defendant. A guilty plea is not involuntary simply because it was entered to avoid a greater punishment, nor is counsel's performance deficient for failure to raise an issue that lacks merit. Thus, because Osterloth's plea was not involuntary, his counsel's performance was not deficient in failing to raise the issue of Osterloth's hope or fear in the motion to withdraw. Having failed to establish the first prong of the Strickland test, the Supreme Court did not address the second prong in finding that Osterloth was not denied the right to effective assistance of counsel. St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000).

Failure to Adequately Inform Defendant of Maximum Possible Penalty — Reversible Error in Failing to Allow Withdrawal of Guilty Plea: After offering an Alford plea but prior to a change of plea hearing, Melone signed an acknowledgment of waiver of rights, stating that he understood the maximum possible penalty for felony assault and that his sentence could be enhanced for using a deadly weapon and because of his prior criminal record. At the change of plea hearing, the court informed Melone that the weapon enhancement penalty would not apply and that the maximum penalty for felony assault was "ten years in the Montana State Prison or a $50,000 fine". The court then allowed Melone to withdraw his guilty plea and enter the Alford plea. The court later sentenced Melone to 10 years in prison, plus 10 years to be served consecutively as a persistent offender. Melone moved for a hearing on the persistent offender enhancement and requested that he be allowed to withdraw his plea. The court rejected the motion to withdraw the plea, but vacated the sentence and granted a new sentencing hearing to allow Melone to present evidence regarding applicability of the persistent offender enhancement. Following the hearing, the court affirmed its original sentence. Melone appealed, contending that he was never informed that he could receive up to 100 years because of his potential status as a persistent offender and that, as a consequence, his plea was not knowing and voluntary. The Supreme Court agreed. Under 46-12-210 and this section, a defendant must be informed of the maximum penalty, including the effect of any penalty enhancement provision. The fact that the *prosecutor* informed Melone of a possible persistent offender penalty immediately prior to questioning did not satisfy the statutory requirement that the *court* inform the defendant of the maximum penalty. Melone's statements in the written acknowledgment were insufficient to satisfy the doubts of the Supreme Court that Melone was aware that his sentence could be enhanced by up to 100 years as a result of his plea. Rather, it appeared that Melone was under the mistaken belief that he risked sentence enhancement only if he proceeded to trial. Resolving their doubt that the plea was voluntary in favor of Melone, the Supreme Court reversed and remanded the case to District Court to allow Melone to withdraw the plea. St. v. Melone, 2000 MT 118, 299 M 442, 2 P3d 233, 57 St. Rep. 493 (2000).

Nonspecific Colloquy Regarding Lesser Included Offenses as Insufficient Notice of Defendant's Options — Reversible Error: When interrogating Sanders regarding his understanding of the consequences of a guilty plea, the District Court informed Sanders that there might be lesser included offenses but did not specifically inform him that there were in fact lesser included offenses, so Sanders' subsequent guilty plea was not made intelligently. To make an intelligent choice as to whether to plead guilty, a defendant is entitled to know the precise nature of the alternatives. If a defendant does not know about lesser included offenses, it is not possible to evaluate whether a jury could be convinced that the defendant was guilty of those offenses. The court's interrogation, which comprised a nonspecific colloquy regarding lesser included offenses, was insufficient and, coupled with the prosecutor's breach of a plea agreement, constituted reversible error. The Supreme Court remanded with instructions either to allow Sanders' withdrawal of the guilty plea or to sentence Sanders in accordance with the plea agreement. St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015, 56 St. Rep. 551 (1999), following St. v. Bowley, 282 M 298, 938 P2d 592, 54 St. Rep. 353 (1997). See also Benjamin v. McCormick, 243 M 252, 792 P2d 7, 47 St. Rep. 887 (1990).

Change of Plea Agreement Properly Denied — Application of Contract Law Standards — Agreement Not to Prosecute Father — Benefit Derived by Defendant: Keys agreed to accept a motorcycle as collateral for a loan, but the motorcycle, which Keys subsequently sold, turned out to belong to the father of the individual to whom Keys made the loan. Both Keys and his father were charged with theft, but through his attorney, Keys negotiated an Alford plea with the prosecutor whereby the charges against Keys' father would be dropped and the prosecutor would recommend to the court that Keys' sentence be deferred for 4 years. At the hearing on the plea agreement, Keys, who could not read, had difficulty understanding that the District Court was not bound by and did not have to accept the agreement. However, after a lengthy colloquy with the District Court Judge, Keys eventually did state that he understood the agreement. The District Court then ordered that Keys' sentence be deferred for 6 years, and Keys requested that his plea be withdrawn, based upon his lack of understanding and a lack of consideration for his guilty plea. The District Court refused to allow the withdrawal, and the Supreme Court affirmed that refusal. The Supreme Court held that Keys did benefit from the agreement, that the benefits included the dismissal of charges against his father, and that in dismissing those charges, the state suffered the deprivation of a right (to pursue the conviction of Keys' father) that the law did not require. The Supreme Court also held that even though there was some confusion in Keys' mind over the role of the District Court in the agreement, the record showed by Keys' responses to questions by the District Court that Keys understood, at least at one point in time, that the court was not bound by the agreement. St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812, 56 St. Rep. 44 (1999), followed in St. v. D'Amico, 2000 MT 63, 299 M 57, 997 P2d 773, 57 St. Rep. 297 (2000), St. v. White, 2004 MT 103, 321 M 45, 88 P3d 1258 (2004), and Lout v. St., 2005 MT 93, 326 M 485, 111 P3d 199 (2005).

Role of Repressed Memory Therapy in Voluntariness of Alford Plea — Withdrawal of Plea: Ereth was charged with three counts of sexual intercourse without consent and two counts of sexual assault. Ereth claimed that she could not recall committing the crimes but was willing to undergo psychotherapy to determine whether she was repressing memories of the offenses. The public defender stated that Ereth was not capable of admitting guilt, despite the facts of the case, and that the only defense that could be brought forward was an Alford plea, which was entered. Following unsuccessful memory recall therapy and testimony of another therapist regarding the questionable science of repressed memory therapy, Ereth sought to withdraw her guilty pleas, alleging that she had been coerced into the pleas by the public defender and stating that had she known of the controversy surrounding the validity of the therapy, she would not have entered the pleas. Her motion to withdraw the pleas was denied. On appeal, the Supreme Court held that, given the role that repressed memory therapy played in Ereth's decisionmaking process and the air of uncertainty regarding the validity of the therapy, there was doubt as to whether the Alford pleas had been made voluntarily, knowingly, and intelligently and held that the trial court erred in refusing to allow withdrawal of the pleas. The case was reversed and remanded. St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26, 55 St. Rep. 831 (1998).

What Constitutes "Good Cause" Allowing Withdrawal of Guilty Plea — Doubt Resolved in Favor of Defendant: A District Court may permit a defendant to withdraw a guilty plea at any time, before or after judgment, for good cause shown. Although the determination of good cause is discretionary, the guiding principle is that a change of plea will be permitted if it fairly appears that: (1) defendant was ignorant of the defendant's rights and the consequences of the act; (2) defendant was influenced unduly and improperly either by hope or by fear in making the plea; or (3) the plea was entered under some mistake or misapprehension. If there is any doubt that a plea was involuntary, the doubt should be resolved in favor of defendant. St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682, 55 St. Rep. 396 (1998), clarifying St. v. McAllister, 96 M 348, 30 P2d 821 (1934), St. v. Haynie, 186 M 374, 607 P2d 1128 (1980), St. v. Mesler, 210 M 92, 682 P2d 714 (1984), Benjamin v. McCormick, 243 M 252, 792 P2d 7 (1990), St. v. Miller, 248 M 194, 810 P2d 308 (1991), and St. v. Cameron, 253 M 95, 830 P2d 1284 (1992), and followed in St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000). See also St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812, 56 St. Rep. 44 (1999). The good cause standard was replaced by the federal voluntariness standard in St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005).

"Motion to Vacate Conviction" Construed as Motion for Postconviction Relief and Not Motion to Withdraw Guilty Plea — Attorney Conflict of Interests — Petition Previously Denied: Howard filed a motion for postconviction relief in 1993, asserting that his attorney in his 1981 trial for felony theft had a conflict of interests because the attorney also represented a codefendant. The Supreme Court denied his petition as time-barred under 46-21-102. Howard then filed with the District Court a "Motion to Vacate Conviction", which the District Court construed as another petition for postconviction relief and also denied as time-barred. The Supreme Court held that it

was proper for the District Court to construe the "Motion to Vacate Conviction" as another motion for postconviction relief. Despite Howard's argument that his motion did not meet the formal prerequisites for a motion for postconviction relief and that motions to withdraw a guilty plea are allowed after judgment by virtue of this section, the Supreme Court held: (1) that it had not always strictly enforced the requirements for a motion for postconviction relief, especially for persons appearing pro se; (2) that the content of Howard's motion was of the type usually made in motions for postconviction relief; and (3) that although other means of review of a sentence other than postconviction relief may sometimes be necessary because of exigent circumstances, the circumstances of Howard's situation, in which he waited over 10 years to challenge his conviction the first time, did not demonstrate those exigent circumstances. The Supreme Court held that this petition, like Howard's first petition for postconviction relief, was time-barred by 46-21-101. St. v. Howard, 282 M 522, 938 P2d 710, 54 St. Rep. 464 (1997).

Failure to Adequately Inform Defendant of Rights Prior to Eliciting Factual Basis for Change of Plea and Breach of Plea Agreement by Prosecutor — Reversible Error: The District Court summarily denied Bowley's timely oral motion to withdraw a guilty plea three times. On appeal, the Supreme Court found that the trial court erred in failing to inform Bowley of his constitutional rights, in neglecting to inquire as to the competency of counsel, and in not investigating whether Bowley was under the influence of alcohol or drugs before eliciting from Bowley the factual basis of his guilty plea at a change of plea hearing. Further, the record showed that the prosecutor, although following the recommendation of the probation officer, breached the plea agreement by suggesting a sentence different from that contained in the pretrial agreement. The motion to withdraw the guilty plea was timely. Having applied the three factors in St. v. Enoch, 269 M 8, 887 P2d 175 (1994), the Supreme Court found that good cause existed to permit withdrawal of the guilty plea and reversed and remanded with instructions to allow Bowley to withdraw the plea if desired or, alternatively, to sentence Bowley in accordance with the pretrial agreement. St. v. Bowley, 282 M 298, 938 P2d 592, 54 St. Rep. 353 (1997), followed in St. v. Schoonover, 1999 MT 7, 293 M 54, 973 P2d 230, 56 St. Rep. 30 (1999), and St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015, 56 St. Rep. 551 (1999).

Denial of Motion to Withdraw Guilty Plea — No Abuse of Discretion: After Moddison filed pro se motions with the Supreme Court that amounted to a request to withdraw his guilty plea, the case was remanded to District Court for a hearing on the request. Following the hearing, the request was denied. Moddison appealed, contending that the District Court abused its discretion in denying the motion to withdraw the guilty plea: (1) by conducting an inadequate interrogation of Moddison regarding his understanding of the consequences of pleading guilty; (2) by not dealing promptly with Moddison's efforts to withdraw the plea; (3) because the plea was the result of an Alford plea bargain in which the guilty plea was given in exchange for dismissal of another charge; and (4) because Moddison's guilty plea was based on the mistaken advice of his attorneys. The Supreme Court found that Moddison did not establish good cause for withdrawal of the plea and affirmed, holding that: (1) the fact that Moddison's attorney, rather than the court, conducted the plea interrogation was not reversible error when the interrogation achieved its fundamental purpose and consisted of essentially the same questions that the Supreme Court held to be adequate in St. v. Allen, 265 M 293, 876 P2d 639 (1994); (2) an 8-month delay between entry of the plea and the motion to withdraw was within the allowable timeframe; (3) Moddison's plea was based in large part on the overwhelming evidence against him and was ultimately not part of a "package deal" with the other defendants or conditioned on their pleas; and (4) despite the fact that some advice Moddison received from his attorneys was not accurate and merely explained what they thought potential remedies were for one sentence out of many that Moddison could have received, Moddison nevertheless clearly understood that the sentencing court had unfettered discretion to impose any sentence within the statutory range, could restrict his eligibility for parole, and could order him to undergo sexual offender treatment. St. v. Moddison, 278 M 384, 926 P2d 253, 53 St. Rep. 961 (1996).

Refusal to Consider Motion to Withdraw Guilty Plea Held Abuse of Discretion: Weaver entered a guilty plea to charges of misdemeanor assault, issuing bad checks, and domestic abuse. Weaver subsequently filed a pro se motion to change his plea and a "motion to relieve counsel". At a sentencing hearing, the District Court Judge stated that she had reviewed "most of the motions that have been filed in these matters" but did not "see where they will have anything to do with the sentencing in this matter". The state argued as if the motion to withdraw the guilty plea had been denied, but the Supreme Court interpreted the District Court's comment to mean that the District Court would not consider the motion. The Supreme Court noted that the withdrawal of a guilty plea rests in the sound discretion of the District Court but that this rule depends upon the District Court exercising that discretion. The Supreme Court held that the

District Court failed to exercise its discretion in this case and that a failure of the District Court to exercise its discretion was an abuse of discretion. St. v. Weaver, 276 M 505, 917 P2d 437, 53 St. Rep. 495 (1996).

Denial of Motion to Withdraw Guilty Plea — No Error: The defendant was charged with five counts of criminal sale of dangerous drugs (now criminal distribution of dangerous drugs) and pleaded guilty to all five counts. The defendant was sentenced and then made a motion to withdraw the guilty pleas. The motion was denied. The Supreme Court stated that the standard in reviewing a denial of a motion to withdraw a guilty plea is whether the District Court abused its discretion. Applying three factors, the Supreme Court found that the District Court had not abused its discretion by denying the motion. St. v. Johnson, 274 M 124, 907 P2d 150, 52 St. Rep. 1186 (1995).

Lower Court Error in Not Allowing Withdrawal of Alford Guilty Plea: Enoch argued that the lower court erred in not allowing him to withdraw his Alford plea of guilty. The Supreme Court held that the lower court should have allowed the plea withdrawal based on the facts that: (1) the court's interrogation at the time that the plea was entered was inadequate; (2) Enoch's request to withdraw the plea within 2 months of entering the plea was timely; and (3) the court did not give enough weight to the fact that the plea was not the result of a plea bargain in which the guilty plea was given in exchange for the dismissal of another charge. St. v. Enoch, 269 M 8, 887 P2d 175, 51 St. Rep. 1306 (1994), following St. v. Radi, 250 M 155, 818 P2d 1203 (1991), as to factors to be weighed in determining whether to allow withdrawal of a guilty plea, followed in St. v. Johnson, 274 M 124, 907 P2d 150, 52 St. Rep. 1186 (1995), St. v. Gruendemann, 282 M 128, 935 P2d 1110, 54 St. Rep. 275 (1997), St. v. Bowley, 282 M 298, 938 P2d 592, 54 St. Rep. 353 (1997), and St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26, 55 St. Rep. 831 (1998). Bowley was followed in St. v. Schoonover, 1999 MT 7, 293 M 54, 973 P2d 230, 56 St. Rep. 30 (1999).

Adequate Interrogation as to Consequences of Plea — No Mistake or Misunderstanding — Proper Guilty Plea as Waiver of Factual Defenses: Defendant contended that denial of a motion to withdraw a guilty plea was improper because the court's interrogation at an omnibus hearing was insufficient, because he was induced to enter the guilty plea, and because statements made by the victim after the plea was entered amounted to a recantation that required the court to allow withdrawal of the plea. However, denial of the motion was affirmed on appeal when the Supreme Court's examination of the record showed that: (1) the trial court's interrogation was adequate pursuant to St. v. Mahoney, 264 M 89, 870 P2d 65 (1994), despite the occurrence of some harmless error in the court's failure to inform defendant of the maximum and mandatory sentences for the crime; (2) evidence demonstrated that the guilty plea was timely and voluntary and entered without mistake or misunderstanding; and (3) the victim's statements were not exculpatory as to the crime to which defendant pleaded guilty. The Supreme Court cited St. v. Hilton, 183 M 13, 597 P2d 1171 (1979), in holding that by properly pleading guilty, defendant waived all factual defenses that occurred prior to the plea. St. v. Skroch, 267 M 349, 883 P2d 1256, 51 St. Rep. 1092 (1994), distinguishing State ex rel. Gladue v. District Court, 175 M 509, 575 P2d 65 (1978).

Lack of Knowledge of Consecutive Sentence Not Proved — No Basis for Withdrawal of Guilty Plea: Allen pleaded guilty to one count of homicide during a prison riot. After being sentenced to a 25-year consecutive term, he moved to withdraw his plea on the basis that he did not know that the law required a consecutive term in his case. The Supreme Court held that the evidence indicated that he was aware of consequences of his plea. The Supreme Court advises District Courts to avoid this issue in the future by specifically referring to the consecutive sentence requirement in 46-18-401 when interrogating a defendant with respect to entering a guilty plea. St. v. Allen, 265 M 293, 876 P2d 639, 51 St. Rep. 519 (1994).

Amending Information Not Prosecutorial Vindictiveness: Mahoney moved to withdraw his guilty plea on the basis that the prosecution's amendment of the information (under the former statute) to charge him with attempted rape and attempted homicide rather than aggravated assault constituted prosecutorial vindictiveness. The Supreme Court noted that the prosecution had moved to amend the information well before the trial date and that the defendant had not objected at that time and had subsequently pleaded guilty. The Supreme Court held that amending the information when the facts of the case supported more than one crime was a matter of prosecutorial discretion and further that Mahoney was limited to objecting to the voluntariness of his plea. St. v. Mahoney, 264 M 89, 870 P2d 65, 51 St. Rep. 160 (1994).

Guilty Plea Voluntary and Motion to Withdraw Plea Untimely but Supreme Court Chooses to Hear Case Due to Question of First Impression: Mahoney moved to have his guilty plea for attempted homicide and attempted rape withdrawn. The Supreme Court held that the motion was not timely because it came more than a year after the conviction and that the defendant had

been properly questioned regarding his knowledge of the consequences of a guilty plea. However, the Supreme Court decided to hear the case because it presented a question of first impression with respect to whether or not Mahoney could raise the defense that he had abandoned his attempt to commit homicide and rape. St. v. Mahoney, 264 M 89, 870 P2d 65, 51 St. Rep. 160 (1994).

Guilty Plea Involving Dangerous Drugs — Mistake in Affidavit Insufficient Basis for Withdrawal of Plea: Barker agreed to plead guilty to an offense involving methamphetamine, a Schedule II drug. The affidavit accompanying the information erroneously identified the drug as a Schedule I drug. Baker sought to withdraw the plea, claiming that he was under a misunderstanding as to the proper schedule of the drug at the time he entered the plea. The Supreme Court held that because the statute under which Barker was charged and the information itself charged Barker only with felony possession of a dangerous drug and because the misidentification of the schedule appeared only in the affidavit, the proper schedule of the drug was not a dispositive factor in the plea agreement and that the mistake did not affect the voluntary nature of the plea. The District Court did not abuse its discretion in refusing to allow a change in plea. St. v. Barker, 257 M 31, 847 P2d 300, 50 St. Rep. 147 (1993).

Proper Denial of Motion to Withdraw:

When defendant did not challenge the sufficiency of the evidence or the adequacy of the court's interrogation when moving for withdrawal of a guilty plea, defendant cannot raise the claims for the first time on appeal. The fact that the bench trial was expected to take only 2 or 3 hours and that the court had agreed to allow defendant to leave the state to visit his sick mother regardless of the outcome of the trial negated defendant's claim that stress induced a guilty plea. Defendant's motion to withdraw his plea was not prompt when made after defendant had spent some time in Oregon and 1 month in alcohol treatment between entry of the plea and sentencing, and there was no indication that defendant was unable to contact his attorney during those periods. St. v. Coggins, 257 M 440, 849 P2d 1033, 50 St. Rep. 347 (1993), followed in St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000).

The District Court properly denied defendant's motion to withdraw his guilty plea when there was nothing in the record to: (1) establish that the plea was based on a fundamental mistake or misunderstanding as to its consequences; (2) indicate defendant was ignorant of his rights and the consequences of his act; (3) show defendant was unduly influenced by hope or by fear; or (4) indicate the plea was entered under some mistake or misapprehension. St. v. Cameron, 253 M 95, 830 P2d 1284, 49 St. Rep. 150 (1992), followed in St. v. Barker, 257 M 31, 847 P2d 300, 50 St. Rep. 147 (1993).

Defendant's misunderstanding of relatively minor points regarding the terms of probation under a deferred sentence did not constitute evidence of a fundamental mistake or strong inducement sufficient to reverse the denial of a motion to withdraw a guilty plea. St. v. Miller, 248 M 194, 810 P2d 308, 48 St. Rep. 389 (1991), followed in St. v. Ries, 257 M 324, 489 P2d 184, 50 St. Rep. 290 (1993), and overruled in St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), to the extent that the Miller standard is less protective of individual rights than the federal voluntariness standard.

Denial of motion to withdraw a guilty plea was proper where: (1) the plea was entered against the defense counsel's advice, but defendant indicated he was satisfied with his attorney; (2) defendant voluntarily entered the plea and was aware of his waiver of rights in doing so; (3) there was no evidence that the plea was prompted by threats; and (4) there was not the slightest doubt in the record that defendant committed the crimes with which he was charged. St. v. Arledge, 228 M 225, 741 P2d 781, 44 St. Rep. 1475 (1987).

The denial of a motion to withdraw a plea of guilty was upheld when the chief contention was that the defendant was misled by the erroneous advice of counsel as to his guilt under the law and when from the record there was evidence that would have justified a finding of guilty, regardless of the correctness of the counsel's interpretation of the law. St. v. Nance, 120 M 152, 184 P2d 554 (1947), distinguished in St. v. Holt, 121 M 459, 194 P2d 651 (1948).

When the defendant pleaded guilty to two charges of murder, was sentenced to life imprisonment on each, and 3 years later filed motions for leave to withdraw his pleas of guilty and substitute pleas of not guilty by reason of insanity caused by alcoholism, alleging in his affidavit that he pleaded on the advice of his attorney and was unaware of the effect of a former section requiring consecutive terms if a person had been convicted of two or more offenses before sentence had been pronounced for either, it was held that the evidence was sufficient to deny the motions, that the court did not abuse its discretion in finding him sane when he pleaded, that he was faithfully represented, and that he was aware that he couldn't escape a jury trial and a possible death sentence if he had done otherwise. St. v. Hukoveh, 115 M 125, 139 P2d 538 (1943).

Request to Withdraw Guilty Plea Based on Recanted Testimony — Trial Court Determination of Veracity: Following Miller's conviction for felony assault (now assault with a weapon) and felony sexual assault of his stepchildren, he moved to withdraw his guilty plea based on letters that his sons wrote to the court recanting portions of their previous statements, letters, and interviews describing the abuse. Miller contended that it was error to refuse his motion to withdraw his plea on the basis of undisputed new evidence that the sons exaggerated the charges. The Supreme Court applied the same rationale as is used in dealing with a motion for a new trial based on recanting of trial testimony, namely that: (1) recanting testimony should be viewed with extreme suspicion; (2) the weight to be given recanted testimony is for the District Court to determine; and (3) withdrawal of a guilty plea is required only when the court is satisfied that the recantation is true. Having specifically concluded that the recantation was false, denial of the motion to withdraw the guilty plea was not an abuse of discretion. St. v. Miller, 253 M 395, 833 P2d 1040, 49 St. Rep. 481 (1992).

Three-Year Delay in Filing Petition to Withdraw Plea — Untimeliness: Defendant waited almost 3 years before filing a petition for postconviction relief and offered no explanation for the delay. This suggests that the petition was not the result of a bona fide claim that defendant misunderstood the plea agreement, but rather merely a desire to alter the agreement. Because the interrogation as to defendant's understanding of her plea was adequate and the test of promptness of the attempt to withdraw the plea was not met, it was not error for the District Court to dismiss the petition. St. v. Bull Coming, 253 M 71, 831 P2d 578, 49 St. Rep. 376 (1992).

Denial of Withdrawal of Guilty Plea Proper — No Showing of Ineffective Counsel: The Supreme Court held that there is no abuse of discretion by a lower court in denying a motion to withdraw a guilty plea if the motion is based on lack of effective counsel and the lower court finds counsel was adequate. St. v. Aills, 250 M 533, 822 P2d 87, 48 St. Rep. 960 (1991).

Denial of Motion to Withdraw Guilty Plea Based on Ineffective Counsel: As set out in Hill v. Lockhart, 474 US 52, 88 L Ed 2d 203, 106 S Ct 366 (1985), when a guilty plea rather than the result of a trial is at issue in determining effectiveness of counsel, the defendant must demonstrate that but for counsel's deficient performance, defendant would not have pleaded guilty and would have insisted on going to trial. Failure to present such evidence, coupled with a lack of evidence showing that counsel's performance fell below the range of competence reasonably demanded of attorneys in criminal cases, was adequate to substantiate denial of defendant's petition for postconviction relief based on ineffective representation. St. v. Senn, 244 M 56, 795 P2d 973, 47 St. Rep. 1389 (1990), followed in St. v. Jungers, 245 M 519, 802 P2d 615, 47 St. Rep. 2229 (1990), St. v. Mason, 253 M 419, 833 P2d 1058, 49 St. Rep. 506 (1992), St. v. Bradley, 262 M 194, 864 P2d 787, 50 St. Rep. 1511 (1993), St. v. Duff, 262 M 288, 865 P2d 238, 50 St. Rep. 1561 (1993), and In re Petition of Hinman, 271 M 167, 895 P2d 609, 52 St. Rep. 351 (1995).

Withdrawal of Guilty Plea Inappropriate Remedy: The defendant pleaded guilty to a sexual offense after being told he would be eligible for parole in 1 year. The prosecutor and the judge were unaware that the prison's sexual offender program was a 2-year program. Due to the length of the program, the defendant was denied parole. The Supreme Court held that granting the writ of habeas corpus was proper because the guilty plea had been based upon a fundamental misunderstanding as to its consequences. The court also held that the lower court was correct in granting the defendant parole rather than allowing him to withdraw his plea, which would lead to further proceedings. Benjamin v. McCormick, 243 M 252, 792 P2d 7, 47 St. Rep. 887 (1990). See also St. v. Brown, 262 M 499, 865 P2d 282, 50 St. Rep. 1658 (1993).

Untimely Request for Withdrawal of Bargained Guilty Plea Based on Ineffective Assistance of Counsel: The Supreme Court applied the rule for allowing withdrawal of a guilty plea as set forth in St. v. Laverdure, 212 M 31, 685 P2d 375, 41 St. Rep. 1570 (1984), and held that defendant's motion was properly refused by the trial court. The trial judge's interrogation at the time he took defendant's plea was adequate. Defendant's request was not timely. It was made more than a year after entering the plea. Defendant's plea was clearly the result of a plea bargain. Furthermore, defendant's reasons for wanting to withdraw his guilty plea centered around his ineffective assistance of counsel claim, which the Supreme Court rejected. St. v. LaTray, 220 M 358, 715 P2d 52, 43 St. Rep. 429 (1986), followed in St. v. Reynolds, 253 M 386, 833 P2d 153, 49 St. Rep. 463 (1992).

Adequate Interrogation Based on Written Acknowledgment and Oral Questions: The defendant entered a guilty plea pursuant to a plea bargain. At his sentencing hearing, he moved to withdraw the plea. The District Court denied his motion, and on appeal he contended abuse of discretion by the District Court in not allowing him to withdraw his guilty plea. In St. v. Mesler, 210 M 92, 682 P2d 714, 41 St. Rep. 939 (1984), the Supreme Court outlined three factors in

reviewing a motion to withdraw a guilty plea. The second and third factors were not in dispute in this case. As to the adequacy of interrogation factor, the Supreme Court found that at his change of plea hearing, defendant submitted a written "acknowledgement of waiver of rights by plea of guilty". That document also contained the defendant's handwritten statement of the facts which were the basis for his guilty plea. Before accepting the guilty plea, the District Court questioned him as to the authenticity and contents of the acknowledgment. The Supreme Court held, in St. v. Laverdure, 212 M 31, 685 P2d 375, 41 St. Rep. 1570 (1984), that a written acknowledgment combined with oral questioning constituted adequate interrogation. Therefore, concluding that the District Court adequately interrogated defendant as to the consequences of his plea and finding no abuse of discretion, the Supreme Court affirmed the District Court order. St. v. Walker, 220 M 70, 712 P2d 1348, 43 St. Rep. 182 (1986), followed in St. v. Duff, 262 M 288, 865 P2d 238, 50 St. Rep. 1561 (1993). Duff was followed in St. v. Wilson, 1999 MT 52, 293 M 429, 976 P2d 962, 56 St. Rep. 220 (1999).

Motion to Withdraw Competent, Voluntary Guilty Plea Denied: The defendant entered into a plea agreement, pleaded guilty to mitigated deliberate homicide and aggravated assault, and then sought to withdraw his guilty plea. The District Court held a hearing on defendant's motion and found that at the time of his guilty plea he was not acting under the influence of drugs or alcohol, admitted that his counsel were competent and kept him well-advised, and admitted in open court the facts upon which his guilt was based. The court also found, through questioning of the defendant and his counsel, that he was competent, acting voluntarily, and understood the charges and possible punishment. The District Court acted correctly in denying defendant's motion to withdraw his guilty plea. St. v. Peterson, 211 M 231, 683 P2d 490, 41 St. Rep. 1328 (1984).

Factors:

The defendant entered into a plea agreement, pleaded guilty to mitigated deliberate homicide and aggravated assault, and then sought to withdraw his guilty plea. The District Court held a hearing on defendant's motion and found that at the time of his guilty plea he was not acting under the influence of drugs or alcohol, admitted that his counsel were competent and kept him well-advised, and admitted in open court the facts upon which his guilt was based. The court also found, through questioning of the defendant and his counsel, that he was competent, acting voluntarily, and that he understood the charges and possible punishment. The District Court acted correctly in denying defendant's motion to withdraw guilty plea. St. v. Peterson, 211 M 231, 683 P2d 490, 41 St. Rep. 1328 (1984).

There are three important factors to be considered when a defendant attempts to withdraw a bargained plea: (1) adequacy of the court's interrogation when the plea was entered as to defendant's understanding of the plea; (2) that the plea resulted from plea bargaining; and (3) the promptness of the motion to withdraw. A plea change will be permitted only if it fairly appears that defendant was ignorant of his rights and the consequences of his act or was unduly and improperly influenced by hope or fear in making the plea or that the plea was entered under some mistake or misapprehension. St. v. Mesler, 210 M 92, 682 P2d 714, 41 St. Rep. 939 (1984). These factors were applied in St. v. Reynolds, 253 M 386, 833 P2d 153, 49 St. Rep. 463 (1992). However, see St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), in which the factors were replaced by the federal voluntariness standard. See also St. v. Radi, 250 M 155, 818 P2d 1203, 48 St. Rep. 903 (1991), St. v. Johnson, 274 M 124, 907 P2d 150, 52 St. Rep. 1186 (1995), and St. v. Bowley, 282 M 298, 938 P2d 592, 54 St. Rep. 353 (1997). Bowley was followed in St. v. Schoonover, 1999 MT 7, 293 M 54, 973 P2d 230, 56 St. Rep. 30 (1999), and St. v. Garner, 2001 MT 222, 306 M 462, 36 P3d 346 (2001).

An appeal of a court's refusal to permit a defendant to withdraw a guilty plea involved a balancing of three conflicting factors: (1) the adequacy of the interrogation by the District Court of the defendant at the entry of the guilty plea as to the defendant's understanding of the consequences of his plea; (2) the promptness with which the defendant attempted to withdraw the prior plea; and (3) the fact that the defendant's plea was apparently the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge. St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), followed in St. v. Long, 227 M 199, 738 P2d 487, 44 St. Rep. 1008 (1987), St. v. Radi, 250 M 155, 818 P2d 1203, 48 St. Rep. 903 (1991), and St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682, 55 St. Rep. 396 (1998), and overruled in St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), which replaced the Huttinger factors and adopted the federal voluntariness test as the ultimate test for withdrawal of a plea. These factors were applied in St. v. Miller, 248 M 194, 810 P2d 308 (1991), St. v. Mason, 253 M 419, 833 P2d 1058, 49 St. Rep. 506 (1992), St. v. Milinovich, 269 M 68, 887 P2d 214, 51 St. Rep. 1433 (1994), and St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000). See also St. v. Coggins, 257

M 440, 849 P2d 1033, 50 St. Rep. 347 (1993), St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812, 56 St. Rep. 44 (1999), and St. v. Kellames, 2002 MT 41, 308 M 347, 43 P3d 293 (2002).

Prison's Custody Classification as Alleged Violation of Plea Bargaining Agreement — Withdrawal of Plea Denied: Under a plea bargain agreement, defendant was sentenced to 10 years as a nondangerous offender (see 1995 repeal of 46-18-404) without parole. Upon entering prison, he was held in close custody for 24 months under prison rules calling for dangerous offenders and those sentenced without parole to serve 24 months in close custody prior to being considered for transfer to lower, more amenable custody levels. The prosecution, defense counsel, defendant, and judge were all unaware of those rules. Defendant was not entitled to withdraw his plea on the ground he was kept in close custody for 24 months in violation of his plea agreement. There was no violation of the agreement, nor was he entitled to the additional good time credits he would have received had he not been held so long in close custody. Prison officials take many factors into account in making custody reclassifications, and there was no guarantee he would have been held in close custody only for the time he claimed he should have been upon entry to the prison. St. v. Mesler, 210 M 92, 682 P2d 714, 41 St. Rep. 939 (1984).

Federal Habeas Corpus Proceeding — State Denial of Withdrawal of Guilty Plea Upheld — Defendant's Right to Be Informed of Maximum Sentence: Where the defendant pleaded guilty in 1975 to one count of rape in exchange for the dismissal of other charges by the state and the Montana Supreme Court refused to grant a request in 1979 that the guilty plea be withdrawn, the defendant's request for federal habeas corpus relief would not be granted because the defendant was aware that his plea obviated a trial and because defendant's counsel was properly supplied with the names of the defendant's victims. The Montana Supreme Court also properly found that the defendant had actual knowledge of the maximum sentence that could be imposed against him and that there was no legal requirement in effect at the time of defendant's sentencing that he be informed on the record of the potential maximum sentence. In accordance with St. v. Griffin, 167 M 11, 535 P2d 498 (1975), each case must be determined on its own facts, and since there was, under the rationale of Marshall v. Lonberger, 459 US 422, 74 L Ed 2d 646, 103 S Ct 843 (1983), at least "fair support" in the record for the findings of the Montana Supreme Court, the Writ of Habeas Corpus relief was denied. Haynie v. Crist, 40 St. Rep. 923 (D.C. Mont. 1983) (apparently not reported in Federal Supplement).

Withdrawal of Guilty Plea — Competence of Defendant to Plead Not in Issue: The competence of the defendant to plead guilty was not at issue even though the defendant withdrew his notice of intent to rely on mental defect as a defense, requested to confer with the County Attorney without his counsel, and pleaded guilty against the advice of his counsel. Because the defendant outlined the facts of the crimes at the time of entry of his plea and 5 months later gave the same testimony at another trial, he was in full possession of his mental faculties. St. v. Wilson, 198 M 305, 645 P2d 958, 39 St. Rep. 1000 (1982).

Withdrawal of Guilty Plea — Failure of Court to Explain Differences Among Counts: After pleading guilty to multiple counts arising from a homicide, the defendant made a voluntary statement to the court clearly showing he was guilty on two counts of deliberate homicide. Failure of the District Court to explain the differences between deliberate homicide, mitigated homicide, and aggravated assault did not provide grounds for withdrawal of the guilty plea. St. v. Wilson, 198 M 305, 645 P2d 958, 39 St. Rep. 1000 (1982).

Voluntariness of Withdrawal of Guilty Plea Against Advice of Counsel: The defendant persisted in pleading guilty in spite of his counsel's advice to plead not guilty. The defendant could not later request a withdrawal of the plea, claiming he had not made a voluntary and intelligent choice. St. v. Wilson, 198 M 305, 645 P2d 958, 39 St. Rep. 1000 (1982).

Voluntary, Understanding, Explained Guilty Plea — Denial of Withdrawal: Defendant and three friends had been drinking and taking LSD. Defendant planned to get valuable coins from one friend and not pay for them. The friend found out about defendant's plan. Defendant stabbed him to death and sank the body through a hole in the ice on the Tongue River. Defendant was arrested and arraigned. He pleaded not guilty to deliberate homicide. He underwent psychiatric evaluation and was found competent to stand trial. Defendant then requested that he be allowed to change his plea to guilty. The District Court questioned him at length on the voluntariness of his decision and his understanding of the consequences accompanying the changed plea. On appeal, defendant contended it was error not to later allow him to withdraw the guilty plea. Defendant was advised of the elements of deliberate homicide and mitigated deliberate homicide. He was also advised of the required mental state for the offense charged. The Supreme Court held that the combination of the District Judge's examination and the explanation by defendant's attorney was sufficient to show that defendant had "real notice" of all that was required to make a voluntary and understanding plea of guilty to deliberate homicide. It was not

error to later deny the request to withdraw the plea. St. v. White, 194 M 421, 632 P2d 1118, 38 St. Rep. 1417 (1981).

Withdrawal of Guilty Plea — Discretion of Court:

It is the sole province of the trial court to determine whether a motion to withdraw a guilty plea should be granted. The abuse of discretion required to reverse the lower court is not present in this case in light of petitioner's continual insistence on a guilty plea, the evidence against him, and the careful and explicit explanation given the petitioner by the court. In re Hardy, 188 M 506, 614 P2d 528 (1980).

The granting or refusal of permission to withdraw a plea of guilty and substitute a plea of not guilty rests in the discretion of the trial court and is subject to review only when an abuse of discretion is shown. St. v. Nance, 120 M 152, 184 P2d 554 (1947), distinguished in St. v. Holt, 121 M 459, 194 P2d 651 (1948).

Denial of Motion to Withdraw Guilty Plea — 5 ½ Years After Plea: The District Court did not err in refusing to grant defendant's motion to withdraw a plea of guilty to one charge of rape, which was arrived at after extensive plea bargaining, accompanied by a dismissal of 10 remaining counts. Though the court's interrogation of defendant at time he entered the plea of guilty was inadequate, the defendant waited 5 ½ years before he expressed dissatisfaction with his plea, and he may not, after this length of time, escape the obligations of a plea bargain and accept its benefits. St. v. Haynie, 186 M 374, 607 P2d 1128 (1980).

Accepting Guilty Plea When Innocence Claimed: A defendant's claim that it was error to accept his guilty plea because he professed innocence on some charges and could not recall whether he committed another crime charged was rejected. The Supreme Court held that there is no constitutional prohibition against accepting the guilty plea of a defendant who denied his actual guilt. Since there is no set standard to be applied by a court in handling motions to withdraw a guilty plea, the trial court's decision is subject to review only upon a showing of abuse of discretion. When the trial court record included a substantial factual basis for the plea and further showed the defendant's almost obstinate insistence that he be allowed to plead guilty to all five counts, there was no abuse of discretion. The State's affidavit of probable cause to support its motion for leave to file an information and the arraignment transcript established an adequate basis for the defendant's plea. In re Brown, 185 M 200, 605 P2d 185 (1980), followed in St. v. Cameron, 253 M 95, 830 P2d 1284, 49 St. Rep. 150 (1992).

Withdrawal of Plea Which Should Not Have Been Accepted — Incapacitated Defendant Unaware of Elements of Offense: The defendant was not made aware of the differing elements of assault as set forth in 45-5-201 and 45-5-202, and the District Court had before it evidence indicating that defendant was under the influence of a combination of drugs and alcohol and was possibly suffering from mental distress or instability at the time of the alleged assault. Under these circumstances the judge should not have accepted defendant's guilty plea, and defendant should be allowed to withdraw the plea. St. v. Nelson, 184 M 491, 603 P2d 1050, 36 St. Rep. 2228 (1979).

Mental Incompetence at Time of Crime: Since there was no contention that the guilty plea was involuntarily or unintelligently entered and since the Supreme Court found no new evidence showing defendant to be mentally incompetent at the time of the alleged crime, as defendant asserted, the defendant's motion to withdraw his guilty plea was properly denied. St. v. Hilton, 183 M 13, 597 P2d 1171 (1979). See also St. v. Walker, 220 M 70, 712 P2d 1348, 43 St. Rep. 182 (1986), and In re Petition of Hinman, 271 M 167, 895 P2d 609, 52 St. Rep. 351 (1995).

Improper Refusal to Permit Withdrawal of Plea:

Because there was evidence that the petitioner had always maintained his innocence, pleaded guilty only after being induced to do so by his attorney of record, and feared he had no chance of proving his innocence in a jury trial, the District Court abused its discretion in not allowing a withdrawal of the guilty plea and ordering a trial on the merits. State ex rel. Gladue v. District Court, 175 M 509, 575 P2d 65 (1978), followed in St. v. Ereth, 1998 MT 197, 290 M 294, 964 P2d 26, 55 St. Rep. 831 (1998).

The court held, on the facts of the particular case, that when the defendant at the time of entering his plea of guilty thought that he had an understanding as to what his sentence would be and no direct commitment was made to him by any of the officers, but the officers had made statements to others who were in contact with the defendant and upon whose advice he relied, the ends of justice would be best served by permitting the defendant to change his plea. St. v. Morgan, 131 M 58, 307 P2d 244 (1957), distinguished in St. v. Mack, 134 M 301, 330 P2d 968 (1958).

When the evidence discloses that there was a grave doubt that the defendant had the mental capacity to appreciate and understand what he was doing and the consequences thereof and

when, without benefit of counsel, he pleaded guilty to the charge of murder, the defendant should have been allowed to withdraw his plea of guilty and enter a plea of not guilty. St. v. Dryman, 125 M 500, 241 P2d 821 (1952), distinguished in St. v. Bischert, 131 M 152, 308 P2d 969 (1957).

The defendant, a Mexican without education and unfamiliar with court procedure, stood charged with murder in the first degree. When he asked for a jury trial, his first attorney asked to be relieved of his assignment; the second advised the defendant to plead guilty and take a life sentence because, if he were tried by jury, the sentence would be one of death. The defendant's plea was guilty, and the trial court imposed the death sentence. The court held that the trial court abused its discretion in refusing to grant the defendant's motion for permission to change his plea to one of not guilty. St. v. Casaras, 104 M 404, 66 P2d 774 (1937).

Doubt Resolved in Favor of Trial on Merits — Supervisory Control: The District Court did not err in reversing an order of the Justice's Court denying a motion for the withdrawal of a guilty plea made inadvisedly without an understanding of the consequences, since doubts should be resolved in favor of a trial on the merits. There was no impropriety sufficient to invoke the supervisory control of the Supreme Court, even though it would have been a proper form of review. St. v. Doty, 173 M 233, 566 P2d 1388 (1977), distinguished in St. v. Fox, 2001 MT 209, 306 M 353, 34 P3d 484 (2001).

Denial of Motion to Withdraw: When, after originally pleading not guilty, the defendant, on advice of counsel, pleaded guilty to a charge of burglary as part of a plea bargaining arrangement, after which time evidence of the burglary was returned to its owner, he could not change his plea back to not guilty upon recapture after his escape from jail. St. v. Sattler, 170 M 35, 549 P2d 1080 (1976).

Renewed Charge After Withdrawal of Guilty Plea: A defendant who pleaded guilty to a lesser offense after the jury was seated, but prior to the calling of any witnesses, and then 2 months later withdrew his guilty plea was properly recharged with the original greater offense without violation of his protection against double jeopardy. St. v. Cunningham, 166 M 530, 535 P2d 186 (1975).

Motion to Withdraw — Time for Filing:

The District Court did not abuse its discretion in entering an order denying the defendant's motion to withdraw his plea of guilty when the record disclosed that the defendant entered his plea of "guilty" on December 30, 1960; sentence was pronounced on January 23, 1961; and the motion was not filed in the District Court until July 24, 1961, 6 months after imposition of the sentence and 6 months and 24 days after entry of the plea. St. v. Peters, 140 M 162, 369 P2d 418 (1962).

In order to receive favorable consideration, an application to withdraw a plea of guilty should be made within a reasonable time. St. v. Nance, 120 M 152, 184 P2d 554 (1947), distinguished in St. v. Holt, 121 M 459, 194 P2d 651 (1948).

Doubt That Guilty Plea Voluntary: On the hearing of an application of the defendant for permission to change his plea of guilty to not guilty, any doubt that the first plea was not voluntary should be resolved in his favor and in favor of a trial on the merits. The plea should be entirely voluntary by one competent to know the consequences and should not be induced by fear, persuasion, promise, or ignorance. St. v. Casaras, 104 M 404, 66 P2d 774 (1937).

PLEA BARGAIN

(See 1985 amendment note.)

Plea Not Considered Involuntary Based on Defendant's Belief in Designation as Low-Level Sexual Offender: Brinson entered a plea agreement stating that he would be sentenced to 20 years suspended if he completed a sexual offender evaluation with an evaluator certified by the Montana Sex Offender Treatment Association (MSOTA) and if the evaluator concluded that Brinson was a low risk to reoffend. However, if Brinson was not found to be a low risk, the parties would be free to argue for an appropriate sentence. Brinson received two evaluations. A non-MSOTA evaluator found Brinson to be a level 1 low-risk offender, but an MSOTA evaluator concluded that Brinson was a level 2 moderate-risk offender. The sentencing court held that because Brinson was not found to be a low risk by an MSOTA evaluator, the suspended sentence provisions of the plea agreement did not apply. The court subsequently adopted the recommendation in the presentence investigation report and sentenced Brinson to 20 years in prison with 10 years suspended. Brinson appealed on grounds that he was misled by the plea bargain, however slightly, so withdrawal of the guilty plea was warranted. The Supreme Court disagreed. The court disapproved the "however slightly" language in the analysis of the voluntariness of a plea. Even though Brinson's expectations were bolstered by the low-level evaluation 3 months after his plea, those subsequent expectations were irrelevant to whether

the plea was voluntary when entered. Even though Brinson may have had a good faith belief that he would ultimately be designated a low-risk offender, he presented no objective proof that he was assured of receiving that designation. In fact, the plea agreement was clear that a low-risk designation might not be forthcoming, so Brinson's argument that the plea was involuntary because it was induced by a misrepresentation or an unfulfillable promise was unpersuasive. The sentencing court did not err in denying Brinson's motion to withdraw the plea. St. v. Brinson, 2009 MT 200, 351 M 136, 210 P3d 164 (2009), overruling St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), and St. v. Deserly, 2008 MT 242, 344 M 468, 188 P3d 1057 (2008), regarding applicability of the "however slightly" language in the analysis of the voluntariness of a plea.

Plea Agreement as Contract: The state charged Smietanka with the felony offense of sexual intercourse without consent. Smietanka and the state subsequently entered into a plea agreement pursuant to which the state agreed to amend the information to charge misdemeanor offenses of assault and negligent endangerment and eliminate the sexual intercourse without consent offense. The state further agreed to recommend that the District Court sentence Smietanka to a 6-month suspended sentence on each count, with the sentences to run concurrently, and with credit for 200 days for time served in jail. In return, Smietanka agreed to plead guilty to the two misdemeanor offenses and to pay a fine, public defender fees, and costs as determined by the court. Smietanka appeared in District Court and pleaded guilty to the two misdemeanor offenses. The court accepted the guilty pleas and proceeded directly to sentencing. The state then recommended a 6-month suspended sentence on the assault offense and a concurrent 12-month suspended sentence on the negligent endangerment offense, with 200 days credit for time served. The state also requested the court impose restitution payable to the Montana Department of Justice's crime victims compensation program. A plea agreement is a contract between the state and a defendant. Prosecutors are required to meet strict and meticulous standards in both promise and performance when fulfilling the state's obligations pursuant to a plea agreement. A prosecutor's violation of a plea agreement is unacceptable, even when made inadvertently in a good faith pursuit of a just outcome. The case was reversed and remanded to the District Court for resentencing. St. v. Smietanka, 2008 MT 357, 346 M 353, 195 P3d 797, (2008).

Sentence Based on Recommendation of Sexual Offender Evaluator — State Breach of Plea Agreement by Presenting Conflicting Testimony of Different Evaluator: In a plea agreement, the state agreed to recommend one sentence if Rahn was designated by a sexual offender evaluator as a level 2 or lower offender and a harsher sentence if Rahn was designated as a level 3 offender. An evaluator who personally evaluated Rahn opined that Rahn should be designated as a level 2 offender. At the sentencing hearing, the state presented testimony by a different evaluator, who had not evaluated Rahn, attacking the level 2 designation and arguing that Rahn should be designated as a level 3 offender. Rahn objected on grounds that the state witness's testimony breached the plea agreement, but the sentencing court overruled the objection and subsequently designated Rahn as a level 3 offender and imposed the harsher sentence. Rahn appealed, and the Supreme Court reversed. Rahn complied with the plea agreement, but the state's conduct in presenting alternate testimony and recommending a level 3 designation was not what was agreed upon in the plea bargain; therefore, the state breached the plea agreement. The state was obligated to make the recommendation as agreed upon in the plea bargain, and the Supreme Court remanded for resentencing with a different judge pursuant to the terms of the plea agreement. St. v. Rahn, 2008 MT 201, 344 M 110, 187 P3d 622 (2008).

State Breach of Plea Agreement — Remand for Resentencing in Conformity With Sentencing Stipulation: Pursuant to a plea bargain, a youth was placed on probation until age 18 with a sentencing stipulation that if the youth did not follow treatment plans or meet other requirements, the matter would be transferred to District Court and adult supervision. The youth subsequently violated probation and was sent to the Pine Hills correctional facility. The youth reoffended at Pine Hills, and the state moved to transfer the case to District Youth Court. Despite the sentencing stipulation, the state moved for a custodial sentence, and the Youth Court concurred with the state's recommendation and sentenced the youth to the Department of Corrections until age 25, with the last 3 years suspended. The youth appealed. The Supreme Court reversed. Both parties were bound by the terms of the plea agreement, and although the case was transferred to District Court as per the agreement, the state failed to follow the terms of the agreement when it sought a custodial sentence rather than adult supervision for the youth. Upon resentencing following the subsequent revocation for violation of sentencing conditions, the youth was entitled to receive the sentence that was presented to and approved by the Youth Court, and the Youth Court abused its discretion by failing to hold the state to the terms of the

sentencing stipulation and by ordering the custodial sentence. On remand, the Youth Court was ordered to resentence the youth in accordance with the terms of the sentencing stipulation. In re H.C.R., 2007 MT 64, 336 M 369, 155 P3d 1221 (2007), following St. v. Rardon, 1999 MT 220, 296 M 19, 986 P2d 424 (1999), and St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002).

State Allowed to Present Evidence Regarding Veracity of Information Defendant Raises in Arguing for Sentence Without Breaching Plea Agreement: At a sentencing hearing, Bartosh testified regarding information in the presentence investigation report, asserting that he had complied with his treatment plan and that certain transcripts of telephone conversations attached to the report should be stricken because they undermined the plea agreement. The District Court declined to strike the transcripts and allowed the probation officer who prepared the report to testify in response to Bartosh's testimony. On appeal, Bartosh contended that it was error to allow the probation officer to testify because the testimony undermined the plea agreement. The Supreme Court held that the telephone transcripts were relevant and properly allowed as indicative of Bartosh's acts. The court also affirmed the sentencing court's decision to allow the probation officer's testimony. Once Bartosh testified as to his conduct concerning compliance with the treatment plan, the state was justified in presenting the probation officer who had conflicting information. If a defendant chooses to present information in support of a sentence, the state may counter with testimony to the effect that the information is misleading or untrue without breaching a plea agreement. St. v. Bartosh, 2007 MT 59, 336 M 212, 154 P3d 58 (2007).

No Prejudice From Counsel's Failure to Notify Defendant of Minimum Sentence — Claim of Ineffective Assistance of Counsel Not Justifying Postconviction Relief — Petition Properly Denied as Matter of Law: In a petition for postconviction relief, Cobell asserted that he received ineffective assistance of counsel because his attorney did not inform him of the minimum 5-year imprisonment penalty for possession of a deadly weapon by a prisoner when Cobell entered a plea agreement wherein the state would recommend the minimum sentence in exchange for Cobell's guilty plea. The District Court summarily dismissed the petition, and the Supreme Court affirmed. The information charging Cobell informed him of the penalty, and Cobell accepted the plea agreement understanding that the sentencing court was free to reject the agreement and impose any appropriate sentence. Given the uncertainty in the agreement and the fact that Cobell received the benefit of the plea bargain, Cobell failed to show that he was prejudiced by counsel's alleged error. Absent a showing of prejudice, the District Court did not err in dismissing Cobell's petition for postconviction relief as a matter of law. St. v. Cobell, 2004 MT 46, 320 M 122, 86 P3d 20 (2004), followed in Lout v. St., 2005 MT 93, 326 M 485, 111 P3d 199 (2005).

Improper Prosecutorial Solicitation of Testimony Intended to Undermine Plea Agreement — Choice of Remedies on Remand: The prosecutor in Rardon's sexual assault trial gave lip service to the letter of a plea agreement by recommending the sentence suggested in the presentence investigation, but then went on to solicit inflammatory testimony from the victims that would almost undoubtedly cause the court to question the appropriateness of the recommended sentence, which effectively undercut the plea agreement. Although it is appropriate for a prosecutor to questions victims and solicit their testimony at a sentencing hearing and for victims to express their fears and feelings, it is not acceptable for a prosecutor to aggressively solicit testimony that is clearly intended to undermine a plea agreement and to convince the sentencing court that a bargained sentence agreement should not be accepted. A plea agreement is subject to contract law standards, and prosecutors must meet strict and meticulous standards of both promise and performance. A guilty plea resting on an unfulfilled promise in a plea bargain is involuntary, and prosecutorial violations, even if made inadvertently or in good faith to obtain a just and mutually desired end, are unacceptable. When the prosecution breaches a plea agreement, the sentencing judge may determine the appropriate remedy, which may include withdrawal of the guilty plea or specific performance of the plea agreement in a new sentencing hearing with a different prosecutor and judge. St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002). On remand, the prosecutor's presentation of the state's case did not undermine the plea bargained sentence recommendation or violate the contract law standards of the plea agreement. The sentencing judge was entitled to consider evidence of Rardon's abusive history and violent tendencies, as well as Rardon's daughter's opinion that Rardon should receive a lengthy sentence. None of the prosecutorial improprieties identified in previous hearings were present in the third sentencing hearing, nor did Rardon demonstrate any other kind of prosecutorial impropriety, so Rardon's third sentence was affirmed. St. v. Rardon, 2005 MT 129, 327 M 228, 115 P3d 182 (2005). The 2005 Rardon decision was followed in St. v. Bartosh, 2007 MT 59, 336 M 212, 154 P3d 58 (2007), and St. v. Rahn, 2008 MT 201, 344 M 110, 187 P3d

622 (2008). See also St. v. Lamere, 272 M 355, 900 P2d 926 (1995), St. v. Bowley, 282 M 298, 938 P2d 592 (1997), and St. v. Munoz, 2001 MT 85, 305 M 139, 23 P3d 922 (2001).

Possible Failure to Inform Defendant of Options and Rights Concerning Advisability of Plea — Remand for Evidentiary Hearing on Issue of Potential Ineffective Assistance of Counsel: Lawrence agreed to plead guilty pursuant to a plea agreement under which the state would recommend a 3-year suspended sentence for felony common scheme issuing a bad check. After informing Lawrence that the agreement was not binding, the sentencing court rejected the plea agreement and sentenced Lawrence to 5 years with 2 years suspended. Lawrence filed a pro se petition for postconviction relief, alleging ineffective assistance of counsel. The District Court, without holding an evidentiary hearing, denied the petition and found that Lawrence suffered no harm from anything that counsel did or did not do, because the judge who took the change of plea specifically advised Lawrence that a more severe sentence could be imposed. Lawrence appealed, arguing that counsel's failure to fully inform Lawrence that the judge intended to reject the plea agreement and sentence above the agreement amounted to deficient performance. The Supreme Court noted that a defendant is entitled to withdraw a guilty plea for good cause, including ineffective assistance of counsel. The court cited Hans v. St., 283 M 379, 942 P2d 674 (1997), for the proposition that failure to fully inform a defendant of the consequences of the options and rights concerning the advisability of a plea may constitute ineffective assistance of counsel. If counsel knew that the judge intended to reject the plea agreement and did not inform Lawrence of that fact, Lawrence might have a valid claim of ineffective assistance. However, because no hearing was held on the matter, the Supreme Court had no record to consult other than the allegations in Lawrence's petition. The case was remanded for an evidentiary hearing to resolve these factual issues. St. v. Lawrence, 2001 MT 299, 307 M 487, 38 P3d 809 (2001).

Claim That Guilty Plea to Deliberate Homicide Influenced by Alleged Ineffective Assistance of Counsel — Conviction Affirmed: Thee was convicted of deliberate homicide and sentenced to 100 years in prison. In a petition for postconviction relief, Thee contended that he was denied effective assistance of counsel prior to and during a change of plea hearing when defense counsel: (1) induced Thee to plead guilty by threatening Thee that he was going to die unless he pleaded guilty; (2) failed to address the alleged violent treatment that Thee received from inmates and guards during Thee's incarceration in the county jail; (3) failed to seek suppression of statements that Thee made during police interrogation that allegedly violated Thee's Miranda rights; (4) failed to have Thee's mental or emotional stress at the time of the homicide evaluated by a qualified mental health examiner to prove circumstances that could be used to mitigate the deliberate homicide charge; and (5) failed to inform Thee of a possibility of seeking conviction on a lesser included offense. The Supreme Court examined each claim in light of the Strickland test for ineffective assistance of counsel. First, defense counsel has a duty to inform a client of the elements of an offense, the possible punishment, and the advisability of a plea agreement. Discussion of a death penalty between an attorney and client in a capital case may well invoke extreme anxiety, but nevertheless relates directly, albeit painfully, to the genuine circumstances of the client. Counsel's reported statements to Thee regarding the possibility of a death sentence were within the wide range of reasonable and sound professional assistance of a competent attorney counseling a client facing capital punishment. Second, counsel investigated Thee's allegations of violence in the county jail, prepared a report of the findings, discussed the findings with Thee, and brought the matter to the attention of the appropriate authorities. Counsel's actions stemmed from informed professional deliberation rather than neglect or ignorance, and precluded a finding of deficient performance for failure to investigate Thee's allegations of physical assault. Third, counsel investigated all statements made by Thee to police investigators, conferred with Thee, and researched the legal bases for possible suppression of certain statements. Counsel's strategic choices made after thorough investigation of the law and facts relevant to plausible options were virtually unchallengable, and the fact that counsel reached a legal conclusion on an evidentiary challenge contrary to Thee's hopes provided no ground for finding deficient attorney performance. Fourth, despite Thee's claim to the contrary, counsel did seek and obtain a court-ordered mental health evaluation for Thee, and took the unequivocal findings from the evaluation into account when advising Thee to accept the plea agreement. Finally, counsel had no duty to inform Thee about the possibility of a lesser included offense, because neither mitigated deliberate homicide nor negligent homicide is an included offense of deliberate homicide, so the possibility of conviction on a lesser included offense did not legally exist. The trial court's denial of Thee's petition for postconviction relief was affirmed. St. v. Thee, 2001 MT 294, 307 M 450, 37 P3d 741 (2001).

Failure of State to Honor Plea Bargain — Remand: Owens was charged in two informations, alleging theft and forgery, both felonies. A plea bargain stated that the County Attorney would

recommend a 15-year sentence for both charges and not seek a persistent offender designation. The state did not contest Owens' understanding of the agreement that Owens would receive a total of 15 years for the two charges, with the sentences running concurrently. At the state's suggestion and over objection, Owens was subsequently sentenced to 15 years with 5 suspended for forgery and 10 years with 5 suspended for theft, a total of 25 years with 10 suspended, with the sentences to run consecutively. Owens' decision to plead guilty based on the promise of concurrent sentencing, coupled with the differences in the restraints of freedom that often accompany suspended sentences, amounted to a prosecutorial violation of the plea bargain agreement warranting remand and resentencing consistent with the plea agreement. St. v. Owens, 254 M 224, 836 P2d 595, 49 St. Rep. 744 (1992). See also Santobello v. New York, 404 US 257, 30 L Ed 2d 427, 92 S Ct 495 (1971), and Correale v. U.S., 479 F2d 944 (1st Cir. 1973).

No Court Assistance in Escaping Plea Bargain Obligations: As a condition of defendant's plea bargain, it was required that he remain a law-abiding citizen, but it was not specifically advised that he could not possess a firearm. When found to be in possession of a firearm, defendant's suspended sentence was revoked, which defendant appealed. It is impossible for a District Court to inform a defendant of every illegal action that could affect defendant upon entering a guilty plea, nor will the Supreme Court assist an accused criminal in escaping the obligations of a plea bargain after accepting its benefits. St. v. Reynolds, 253 M 386, 833 P2d 153, 49 St. Rep. 463 (1992), followed in St. v. Barker, 257 M 31, 847 P2d 300, 50 St. Rep. 147 (1993), and St. v. Milinovich, 269 M 68, 887 P2d 214, 51 St. Rep. 1433 (1994). See also St. v. Koepplin, 213 M 55, 689 P2d 921 (1984), and St. v. Radi, 250 M 155, 818 P2d 1203, 48 St. Rep. 903 (1991).

Court Not Bound by Plea Agreement: The express purpose of the 1985 amendment to 46-12-204 was to overturn St. v. Cavanaugh, 207 M 237, 673 P2d 482 (1983), and to make it clear that a plea bargain is an agreement between the prosecutor and the accused only. The District Court is not bound by the agreement. If the court chooses not to follow the prosecutor's recommendation pursuant to the plea bargain, it is not required to allow the defendant to withdraw his plea of guilty. St. v. Buckman, 236 M 37, 768 P2d 1361, 46 St. Rep. 163 (1989).

Motion to Withdraw Guilty Plea Denied — Plea Bargain Statute Constitutional: Defendant alleged that because the trial judge would not allow him to withdraw his guilty plea after rejecting the sentence recommended as part of a plea bargain, defendant was deprived of his constitutional rights, and therefore 46-12-204 was unconstitutional. In affirming the constitutionality of 46-12-204, the Supreme Court noted that when a defendant makes a voluntary and intelligent plea, he knowingly waives certain constitutional rights, regardless of whether or not the judge accepts the recommended sentence. If there has been a proper colloquy regarding the defendant's rights and the liabilities of a guilty plea, he has been informed of his constitutional rights, he is aware that he is giving up those rights, and the plea bargain agreement is clear as to its limitations, then the judge does not have to accept a guilty plea withdrawal attempt. St. v. Martz, 233 M 136, 760 P2d 65, 45 St. Rep. 1370 (1988), followed in St. v. Yother, 253 M 128, 831 P2d 1347, 49 St. Rep. 387 (1992).

Rejection of Part of Bargain — Right to Withdraw Plea and Plead Not Guilty: Petitioner for postconviction relief had engaged in plea bargaining and pled guilty to aggravated kidnapping and aggravated assault. No one told him that the judge might impose a restriction that petitioner be ineligible for parole or the supervised release program, which the judge did on sentencing. The petitioner was not fully informed of the consequences of his plea, and he should have been permitted to withdraw it upon petitioning for postconviction relief. A judge accepting a plea and rejecting any other part of a plea bargain must afford defendant the opportunity to withdraw his plea and plead not guilty. In this case, the decision was applied prospectively only, beginning with petitioner. Since more than 6 years had elapsed since sentencing and crucial witnesses might not be available, the State would be allowed on remand to elect either to have petitioner withdraw his plea with the State having the right to revive its dismissed charges or to have petitioner sentenced in accordance with the plea bargain. St. v. Cavanaugh, 207 M 237, 673 P2d 482, 40 St. Rep. 2007 (1983), followed in St. v. Hendricks, 213 M 507, 691 P2d 1333, 41 St. Rep. 315 (1984), and impliedly overruled in St. v. Buckman, 236 M 37, 768 P2d 1361, 46 St. Rep. 163 (1989).

Plea Agreement — Not Recorded in Conformance With Court Rules — Defendant to Replead: Defendant pleaded guilty on the assumption that an agreement had been reached that in return for the guilty plea the prosecution would make no recommendation to the court on sentencing. On the plea of guilty, the prosecutor recommended 10 years and the defendant was so sentenced. On the motion to withdraw the guilty plea, it was error for the judge to determine that there was no agreement solely because court rules require that such an agreement must be made on the

record by a court reporter and in this case no such record was made. St. v. Dinndorf, 202 M 308, 658 P2d 372, 40 St. Rep. 106 (1983).

Plea Bargain Refused by Judge — Sentence Imposed Larger Than Plea Bargain: A judge participated in a plea bargain involving a proposed agreement for a 5-year sentence but ultimately refused to accept the proposal. After the trial the judge sentenced the defendant to 13 years. When a plea bargain is not completed, the participating judge must state for the record the reasons supporting a sentence greater than that offered by the defendant prior to trial. St. v. Welling, 199 M 135, 647 P2d 852, 39 St. Rep. 1215 (1982).

Plea Bargain Agreement Asserted After Sentence Imposed: A criminal defendant was sentenced to 20 years in prison. Two months later, his defense counsel alleged a plea bargain agreement in which the County Attorney promised to recommend a suspended sentence. The purported agreement was contained in a letter from defense counsel to the County Attorney. The case was appealed and remanded for an evidentiary hearing on the terms of the plea bargaining agreement and to determine whether the prosecutor violated the agreement in St. v. Allen, 197 M 64, 645 P2d 380, 38 St. Rep. 2192 (1981). Because the defendant failed to assert the plea bargain agreement until 2 months after sentencing and because there was evidence of plea bargain negotiations subsequent to the letter, the original sentence was upheld. A plea bargain will be enforced only if it is based upon expectations reasonably formed in reliance upon a promise of the County Attorney. St. v. Allen, 685 P2d 333, 39 St. Rep. 899 (1982) (first decision erroneously reproduced at 199 M 204 (1982)).

Misuse of Plea Bargaining Process and Habitual Criminal Statute: Without declaring the plea bargaining process constitutionally infirm or the habitual criminal statute unconstitutional on its face, the Supreme Court held that the defendant was denied due process under federal and state provisions when he realistically was sentenced to 10 years for attempted burglary and 40 years for refusing to plead guilty and insisting upon a jury trial. St. v. Sather, 172 M 428, 564 P2d 1306 (1977).

Enforceability of Plea Bargaining Agreement: A plea bargain was held to be unenforceable under the particular fact situation. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Guilty Plea Under Agreement With Prosecutor: While the Supreme Court will not encourage the making of bargains with persons charged with crime, when a defendant has changed his plea of not guilty to a plea of guilty on an agreement with the prosecuting attorney as to the recommendation for sentences, which was carried out, the Supreme Court will not, after the defendant obtained the benefits of the agreement, aid him in escaping its obligations by ordering a withdrawal of the guilty plea. St. v. Nance, 120 M 152, 184 P2d 554 (1947), distinguished in St. v. Holt, 121 M 459, 194 P2d 651 (1948), and followed in St. v. Keys, 1999 MT 10, 293 M 81, 973 P2d 812, 56 St. Rep. 44 (1999).

PLEA OTHER THAN "GUILTY" OR "NOT GUILTY"

Written "Special Plea in Bar" Not Authorized: The Justice of the Peace was acting within his jurisdiction and in accordance with the law in overruling the defendant's written special plea in bar and ordering the defendant to answer to the complaint. State ex rel. Borberg v. District Court, 125 M 481, 240 P2d 854 (1952).

Law Review Articles

State v. Cameron: Making the Alford Plea an Effective Tool in Sex Offense Cases, Hinshaw, 55 Mont. L. Rev. 281 (1994).

Collateral References

Criminal Law *key* 173, 274, 300.

22 C.J.S. Criminal Law §§505 through 511.

21 Am. Jur. 2d Criminal Law §598, et seq.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law—newly discovered or available evidence, and possible defense. 14 ALR 6th 517.

Propriety of sentencing judge's imposition of harsher sentence than offered in connection with plea bargain rejected or withdrawn plea by defendant—state cases. 11 ALR 6th 237.

Power or duty of state court, which has accepted guilty plea, to set aside such plea on its own initiative prior to sentencing or entry of judgment. 31 ALR 4th 504.

Waiver of right to jury trial: sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea. 23 ALR 4th 251.

Stipulations: guilty plea safeguards as applicable to stipulation allegedly amounting to guilty plea in state criminal trial. 17 ALR 4th 61.

Entry of plea: right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 ALR 4th 1089.

Judge's participation in plea bargaining negotiations as rendering accused's guilty plea involuntary. 10 ALR 4th 689.

Adequacy of defense counsel's representation of criminal client regarding plea bargaining. 8 ALR 4th 660.

Sentencing: accused's right to sentencing by same judge who accepted guilty plea entered pursuant to plea bargain. 3 ALR 4th 1181.

Waiver of right to appeal: validity and effect of criminal defendant's express waiver of right to appeal as part of negotiated plea agreement. 89 ALR 3d 864.

Appeal: defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal. 86 ALR 3d 1262.

Withdrawal of guilty plea: right to withdraw guilty plea in state criminal proceeding where court refuses to grant concession contemplated by plea bargain. 66 ALR 3d 902.

Admissibility of defense communications made in connection with plea bargaining. 59 ALR 3d 441.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes. 43 ALR 3d 281.

Self-incrimination: plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question. 9 ALR 3d 990.

46-16-106. Time to prepare for trial.

Commission Comments

Source: R.C.M. 1947, section 94-7008.

This section leaves to the discretion of the judge the determination of what is "a reasonable time to prepare for trial."

Case Notes

No Error in Allowing Statement Not Disclosed by State Prior to Trial and in Refusing Request for Continuance: On the first day of Strauss's negligent homicide trial, the prosecution disclosed to the District Court that an acquaintance of Strauss, a state witness, had indicated that Strauss had made a statement that was relevant to the shooting. Strauss's counsel argued in chambers that if the witness was allowed to testify about the statement, Strauss would move for mistrial. The District Court held that because the acquaintance was a listed witness and had been available to be interviewed by Strauss, no discovery violation occurred. The court also noted that the witness was not scheduled to testify until the following day, so Strauss could interview the witness that evening or be granted a brief continuance following cross-examination of the witness; however, Strauss chose instead to request a mistrial or 2-week continuance the next morning. The request was denied, and on appeal, Strauss contended that a fair trial was denied because there had been insufficient time to prepare to impeach the witness. The Supreme Court disagreed. Because Strauss turned down additional time to prepare further impeachment and offered no evidence to indicate that the defense was prejudiced, the District Court did not err in allowing the witness to testify or in disallowing Strauss's request for a 2-week continuance. St. v. Strauss, 2003 MT 195, 317 M 1, 74 P3d 1052 (2003).

Cost of Jury Selection and Prosecution Improperly Charged to Indigent Defendant: It was determined that Winterrowd was indigent, so counsel was appointed for him from the public defender's office. After being informed that Winterrowd had received a social security settlement and would no longer be considered indigent, the public defender moved to withdraw. Trial was continued to allow Winterrowd to obtain counsel. About 1 week before the scheduled hearing, Winterrowd moved for another continuance because the settlement had not arrived and he had not yet retained counsel. The state objected, arguing that Winterrowd had not demonstrated due diligence and that his claim that he would receive a settlement was unsupported by documentation. The trial court did not rule on the continuance motion. At the start of trial, Winterrowd again moved for a continuance, but the motion was denied. The trial proceeded through voir dire, with Winterrowd acting pro se. Following a break, the court granted the motion to continue and excused the jurors but ordered Winterrowd to pay the costs incurred in summoning the jurors and in prosecuting him. After granting the public defender's motion to withdraw, it was error for the court to charge Winterrowd with the costs when he was unable to obtain counsel. St. v. Winterrowd, 1998 MT 74, 288 M 208, 957 P2d 522, 55 St. Rep. 307 (1998).

Denial of Motion for Continuance — Trial Court Discretion: In a prosecution for attempted deliberate homicide, the court did not err in denying defendant's motion for a continuance, in which defendant argued he was deprived of his right to effective counsel, due process, and time to prepare his case. Motions for continuance are directed to the sound discretion of the trial court,

and the trial court will not be reversed absent a showing of prejudice to the movant, citing St. v. Paulson, 167 M 310, 538 P2d 339 (1975). As more than 2 months elapsed between the entry of defendant's plea and his motion for continuance, and because he failed to show any prejudice, the motion was properly denied. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Sufficient Time Allowed:

The trial judge did not abuse his discretion in denying the defendant's application for a continuance over the term when the trial was set for May 7, 1956, after the defendant had entered a plea of guilty on April 24, 1956. St. v. McLeod, 131 M 478, 311 P2d 400 (1957).

Under a former section, the defendant was entitled to at least 2 days to prepare for trial. Therefore, when he had 7 months from the day of the entry of his plea to the day of trial for preparation, he had no cause for complaint in this regard. St. v. Showen, 60 M 474, 199 P 917 (1921).

Effect of Unnecessary Amendment of Information and Rearraignment Under Notice: When the original information on attempt to commit arson was sufficient and the defendant pleaded not guilty but the County Attorney, after giving the defendant 10 days' notice of a proposed amendment, was permitted on the day of trial to amend to show the manner and means of the attempt, whereupon the defendant was unnecessarily rearraigned, the fact that he was not given 2 days in which to prepare for trial after the rearraignment under the former statute could not have affected him prejudicially since he had notice and the amendment was unnecessary. St. v. Gaffney, 106 M 310, 77 P2d 398 (1938).

Collateral References

Criminal Law *key* 577.

46-16-110. Right to jury trial — waiver.

Commission Comments

1991 Comment: This statute establishes the defendant's right to a jury in both felony and misdemeanor criminal cases. The statute is compatible with the right to a jury trial established in the Montana Constitution. See Art. II, sec. 26, Mont. Const. The statute is intended to supersede the generally stated law that requires a 12-person jury in felony criminal cases. See 1987 MCA 3-15-106. The rule that retains the right to a 12-person jury but that allows agreements to any number less than 12 has been adopted.

Commission Comment Not Divided: This section is a recodification of part of section 95-1901, R.C.M. 1947. Sections 46-16-103 and 46-16-104 are also derived from section 95-1901. The commission comments to section 95-1901 are printed in their entirety under 46-16-102 (renumbered 46-16-110).

Source: R.C.M. 1947, section[s] 94-7002, 94-7235, 94-7236 and 94-6804. [1889] Montana Constitution, Article III, section 10 [revised by Art. II, sec. 7, 1972 Mont. Const.].

[Section 46-16-103(1)] is an implementation of Article III, section 23 of the [1889] Montana Constitution [revised by Art. II, sec. 26, 1972 Mont. Const.] which does not allow the defendant to waive his right to trial by jury in felony cases (State v. Scalise, 131 Mont. 238, 309 P.2d 1010), and attempts to avoid the felony-misdemeanor confusion.

[Section 46-16-103(2)] is required to implement Article III, section 10 of the [1889] Montana Constitution [revised by Art. II, sec. 7, 1972 Mont. Const.] and is substantially the same as the present law.

[Section 46-16-110] is an attempt to change the present Montana law. Article III, section 23, of the [1889] Montana Constitution has been interpreted as requiring that a defendant in a felony case be tried by a jury of twelve men. A trial of such a case before a jury of less than twelve men was declared to be a nullity in Territory v. Ah Wah[,] (1881)[,] 4 Mont. 149, 1 P. 732. Also in interpreting Article III, Section 23, the Montana Supreme Court has stated that the defendant cannot waive a jury trial in felony cases. State v. Scalise, 131 Mont. 268, 309 P.2d 1010.

[Section 46-16-110] permits either a stipulation before trial that the case be tried by a jury composed of less then twelve, or a stipulation during trial but before verdict is reached that the case be submitted to less than twelve jurors. This can be a useful provision in the event it becomes necessary during the trial to excuse a juror (due to illness or any other cause) and no alternate juror is available. The U.S. Supreme Court stated that the constitutional right to a jury of twelve persons may be waived, by consenting to a trial by a less number. Patton v. U.S., 281 U.S. 276, 309 (1929).

A number of cases have taken the position that there is a valid distinction between the right to waive trial by jury and the right to waive a full jury, but in Patton v. U.S. the position is taken that there is no difference, that a constitutional jury means twelve men, as though that number had been specifically named. The Supreme Court in Patton allowed a waiver of a full jury on the

grounds that under U.S. Constitution, Article III, section 2, a jury trial may be waived in any felony case.

Compiler's Comments

1995 Amendment: Chapter 7 at beginning of (1) substituted "The parties" for "Defendants"; in (3) substituted "parties" for "defendant"; and made minor changes in style.

1991 Amendment: In (1), before "cases", substituted "felony" for "criminal" and at end substituted "of 12 persons" for "not to exceed 12 in number"; in (2), at end, substituted "that to which they are entitled" for "12"; in (3) substituted "defendant" for "parties"; and made minor change in style.

Case Notes

Reversal of Conviction for Accepting Oral, Rather Than Written, Waiver of Right to Jury Trial: The constitutional right to a jury trial was violated, requiring reversal, when defendant did not file the statutorily required written consent to waive a jury trial and his attorney stated to the court at the beginning of the trial that defendant waived his right to a jury trial. The court would not examine the totality of the circumstances to determine whether the waiver was knowing and voluntary. St. v. Dahlin, 1998 MT 113, 289 M 182, 961 P2d 1247, 55 St. Rep. 446 (1998), overruling St. v. McCartney 179 M 49, 585 P2d 1321 (1978).

Constitutionality of Defendant's Waiver of Jury Trial in Criminal Case Over Objection of State: Hill waived his right to a jury trial on charges of felony assault (now assault with a weapon), resisting arrest, and obstructing a peace officer. The state objected and demanded a jury trial on all factual issues, contending that Art. II, sec. 26, Mont. Const., requires that before a jury trial can be waived, both parties must consent and that therefore a jury trial cannot be waived over the objection of the state. Pursuant to the 1972 change in Art. II, sec. 26, Mont. Const., a jury trial is no longer required as a matter of constitutional law in all felony criminal cases, and nothing in the intent of the framers of the constitution indicated that approval of the state was required to allow waiver of the right. In fact, the constitutional revision was implemented expressly for the benefit of the accused. The Legislature has provided a statutory procedure for waiver of the right to jury trial through the 1991 amendment to this section, which provides that a trial by jury in a criminal case may be waived, without approval of the state, upon written consent of the defendant. The procedure is consistent with the constitutional intent and is therefore not violative of Art. II, sec. 26, Mont. Const. (See 1995 amendment.) State ex rel. Nelson v. District Court, 262 M 70, 863 P2d 1027, 50 St. Rep. 1447 (1993), distinguishing Patton v. U.S., 281 US 276, 74 L Ed 854, 50 S Ct 253 (1930), and Singer v. U.S., 380 US 24, 13 L Ed 2d 630, 85 S Ct 783 (1965), and overruled in State ex rel. Long v. Justice's Court, 2007 MT 3, 335 M 219, 156 P3d 5 (2007).

Waiver of Jury Trial in Justice Court — Right to Jury Trial on Appeal: Defendant waived the right to jury trial in Justice Court and was convicted in a bench trial. It was his right, after making a timely request, to a trial by jury on appeal to the District Court. St. v. Bender, 232 M 424, 756 P2d 1157, 45 St. Rep. 1165 (1988).

Waiver of Jury Trial: The entering of a plea of guilty by a defendant waives his right to a jury trial. St. v. Peters, 140 M 162, 369 P2d 418 (1962).

Law Review Articles

Criminal Procedure—Montana Law and the Federal Impact: Paragraph IV.C. discusses speedy trial and the distinction in application based upon the severity of the crime. Elison, 38 Mont. L. Rev. 54 (1977).

Collateral References

Jury *key* 4.

50A C.J.S. Juries §§4 through 16.

Jury trial waiver as binding on later state civil trial. 48 ALR 4th 747.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury. 37 ALR 4th 304.

Waiver, after not guilty plea, of jury trial in felony case. 9 ALR 4th 695.

46-16-111. Formation of trial jury.

Commission Comments

1991 Comment: This statute preserves 1987 MCA 46-16-301, concerning formation of the jury. It requires that unless otherwise provided in these statutes, the criminal trial jury must be selected in the same manner as juries in civil cases.

Source: New. [See commission comments to 46-16-114 for partial source, but this section is mostly new.]

The intent of this section is to provide that the trial jury be selected in the same manner as juries in civil cases and that in the area of trial jury formation the sections in civil actions be applicable. This will avoid confusion and achieve consistency in the formation of juries. The number of peremptory challenges shall be determined by the number of parties involved. It must be noted that when several defendants are joined they can sever their challenges. See [46-16-115].

Compiler's Comments

1991 Amendment: In (1), in two places, substituted "cases" for "actions" and at end deleted "except that the total number of jurors drawn shall be at least the number of jurors needed plus the total number of peremptory challenges"; and made minor change in style.

1989 Amendment: In (1), after "shall be at least", substituted "the number of jurors needed" for "12".

1981 Amendment: Substituted "excuses" for "exemptions" in (2).

Case Notes

Juror's Fitness to Serve at Discretion of Trial Court: The Supreme Court will not reverse a District Court's decision regarding a juror's fitness to serve absent an abuse of discretion and a showing of prejudice. The trial court has significant latitude when ruling on allegations of juror misconduct because that court is best able to observe jurors and to decide the potential for prejudice, and its determination will be given considerable weight and deference. St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939, 56 St. Rep. 1198 (1999), followed in St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

Absence of Prospective Juror: The failure of a properly notified juror to be present when the jury was impaneled did not invalidate the trial as the defendant had the right only to reject jurors and not to select any particular juror. St. v. Moran, 142 M 423, 384 P2d 777 (1963).

Showing Necessary for New Trial: After the verdict, the accused must make it appear affirmatively that he is entitled to a new trial because he has been deprived of his constitutional right to an impartial jury, and the probability that one juror was incompetent is not sufficient to set aside the verdict. St. v. Mott, 29 M 292, 74 P 728 (1903).

Extent of Conformity Required: Under former law, it was held that a jury panel in a criminal case must be drawn in substantial conformity with the requirements of the statutes relating to trial juries in civil actions and that those requirements in their essential particulars are mandatory. St. v. Landry, 29 M 218, 74 P 418 (1903).

Collateral References

Disqualification or exemption of juror for conviction of, or prosecution for, criminal offense. 75 ALR 5th 295.

Exclusion of women from grand or trial jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction—state cases. 70 ALR 5th 587.

Propriety of order forbidding news media from publishing names and addresses of jurors in criminal cases. 36 ALR 4th 1126.

Former law enforcement officers as qualified jurors in criminal cases. 72 ALR 3d 958.

Law enforcement officers as qualified jurors in criminal cases. 72 ALR 3d 895.

Religious belief as ground for exemption or excuse from jury service. 2 ALR 3d 1392.

46-16-112. Motion to discharge jury panel.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 114-3.

This section outlines the procedure for challenges to the panel of jurors. The objection is directed toward the panel and will generally require an affidavit in order to support the facts which show the improper selection.

The section is substantially the same as the present Montana law as to the challenge of the panel.

A challenge to the panel can be founded only on a material departure from the law in respect to the drawings and return of the jury.

Compiler's Comments

1991 Amendment: In (1), at beginning of second sentence, inserted exception clause and deleted former last sentence that read: "For good cause shown, the court may entertain the motion at any time thereafter"; and made minor changes in style.

Case Notes

Failure to Summon Jurors in Statutory Manner — Lamere Per Se Rule Retroactively Applied — Rule of Law Inapplicable Considering Substantial Change in Law: In St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359 (1998), Robbins moved to quash the jury panel because prospective jurors had been summoned by telephone instead of by mail or personal service, as required in 3-15-505. The motion was denied because Robbins failed to introduce any evidence that he was prejudiced, rendering the error harmless. The Supreme Court subsequently decided St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), holding that improper jury summons constituted denial of the fundamental right to a fair trial and thus was per se prejudicial. Robbins then petitioned for postconviction relief on grounds that Lamere should be retroactively applied. The District Court denied the petition, concluding that under the law of the case doctrine, Lamere was not retroactively applicable. The Supreme Court disagreed and reversed. The law of the case doctrine provides that when a decision is rendered by the Supreme Court, the decision is binding and cannot be relitigated in the trial court or on a subsequent appeal. However, a court may reconsider the issue in postconviction proceedings when there has been a substantial change in applicable law. Lamere specifically overruled the opinion in Robbins' 1998 direct appeal to the extent that a violation of 3-15-505 could be harmless error, which constituted a substantial change in the law, so the law of the case doctrine did not preclude the application of Lamere to Robbins' 2002 postconviction proceedings. Robbins was entitled to retroactive application of Lamere because the state's action in procuring the jury denied Robbins of a right that goes to the very integrity of the justice system, and is implicit in the concept of ordered liberty for purposes of coming within the exception to the retroactivity analysis in Teague v. Lane, 489 US 288 (1989). Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002).

Improper Telephonic Notification of Jury Selection — Harmless Error: Rather than the statutory method of summoning jurors, the District Court Clerk sought to notify available jurors by telephone. If the juror was unavailable by telephone, the Clerk moved to the next name on the list. Robbins objected to the procedure, asserting that the 5-day mandate of this section was not applicable to his motion to strike the venire and that the trial court erred by concluding that the challenge to the summoning process was untimely. The District Court found that the Clerk had substantially complied with the relevant statutes, but the Supreme Court disagreed, holding that the Clerk failed to comply with 3-15-505. However, because Robbins failed to adduce any actual prejudice in the summoning procedure, the error was held to be harmless. St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998), followed, with regard to improper use of telephonic summoning of jurors, but overruled, with regard to applicability of the harmless error standard in 46-20-701 and the requirement of an actual showing of prejudice to sustain a challenge to the jury panel under the substantial compliance standard, in St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000).

Jury Composition — No Evidence of Systematic Effort to Exclude Indians: Defendant claimed to be 5/32 Flathead Indian and then objected to the exclusion of Native Americans from the jury list. The court found no evidence that there was a systematic effort to exclude people of Native American descent from the jury list. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

Retention of Panel Upheld:

The jury was selected in substantial compliance with the law, and the defendant's claim that he was denied a fair and impartial jury must fail. Having more numbers in the jury box than names on the jury list does not destroy the validity of the panel drawn; notifying jurors by telephone is permissible; and having fewer jurors appear than were drawn does not invalidate a trial as a defendant has no right to select a particular juror. St. v. Coleman, 177 M 1, 579 P2d 732 (1978).

When two jurors did not appear and were not excused when the jury was impaneled but the defendant could not show affirmatively that the panel had not been served, there was not prejudicial error. St. v. Moran, 142 M 423, 384 P2d 777 (1963).

When the defendant's offer to submit a challenge to the panel on the testimony taken at a prior term of court was withdrawn and no evidence whatever was offered, the defendant's request to discharge the jury was properly denied. St. v. Jones, 32 M 442, 80 P 1095 (1905).

Jury Selection — Constitutionality: A variation between the percentage of Air Force personnel in the county and the percentage of their representation on the jury panel, as taken from the assessment roll, does not reflect a constitutional infirmity in the selection method. St. v. Stewart, 175 M 286, 573 P2d 1138 (1977).

First Objection on Appeal: Absent a showing of good cause by affidavit to substantiate their motion, the defendants cannot challenge the jury panel for the first time on appeal on the ground

that the court failed to select and draw the jury panel in accordance with applicable law. (Annotator's note: The Supreme Court proceeded to discuss the objection for future guidelines and concluded by way of dictum that the statutory scheme for selecting and drawing a jury was completely circumvented.) St. v. Fitzpatrick, 174 M 174, 569 P2d 383 (1977).

No Presumption That Jury Commissioners Performed Their Duty:

If a challenge to the panel alleges facts which, if true, would show a material variation from the statutory procedure in making up the jury list, the court could not, on the basis of a presumption that the jury commissioners had done their duty, summarily deny the challenge, particularly in the absence of an exception by the adverse party. St. v. Chapman, 139 M 98, 360 P2d 703 (1961).

When the defendant filed a verified, specific, and detailed challenge to a jury panel and the County Attorney did not deny the sufficiency of the facts alleged and the defendant also filed a timely motion for the issuance of a subpoena to the jury commissioners to appear, the trial court could not presume the jury commissioners had performed their duty in selecting the panel. St. v. Deeds, 130 M 503, 305 P2d 321 (1957).

Question of Fact: When all parties treat a challenge to the panel as raising an issue of fact, the Supreme Court will treat the matter as though an issue had been raised by a denial of the challenge. St. v. Groom, 49 M 354, 141 P 858 (1914).

Retention of Panel Error: When the accused interposed a challenge to the jury panel because the Sheriff had intentionally omitted to summon some of the jurors drawn by the jury commission, to which the State took an exception, the court erred in overruling the challenge. St. v. Groom, 49 M 354, 141 P 858 (1914).

Substantial Compliance Required: A substantial compliance with the law is required in the work of procuring a jury. Anything less will vitiate such work. St. v. Groom, 49 M 354, 141 P 858 (1914); St. v. Landry, 29 M 218, 74 P 418 (1903).

Who May Testify: Under former law, it was held that a Judge of the District Court may be called as a witness when the regularity of the drawing of a jury in a criminal prosecution is questioned by a challenge to the panel, inasmuch as he orders such drawing and directs the clerk during its progress, and that both judicial and ministerial officers whose irregularity is complained of may be called upon to testify. State ex rel. Breen v. District Court, 34 M 107, 85 P 870 (1906).

Collateral References

Criminal Law *key* 867; Jury *key* 115, 119, 121, 125.

23A C.J.S. Criminal Law §§1872 through 1874; 50A C.J.S. Juries §§357 through 364.

47 Am. Jur. 2d Jury §§228 through 275; 75B Am. Jur. 2d Trial §1469, et seq.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case. 33 ALR 4th 429.

Disclosure: right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors. 86 ALR 3d 571.

46-16-114. Examination of prospective jurors.

Commission Comments

1991 Comment: This statute preserves 1987 MCA 46-16-303, concerning the examination of potential jurors. Some wording has been changed to maintain compatibility with the statute format. For instance, the term "prosecutor" replaces the term "county attorney".

Source: Illinois Code of Criminal Procedure, [Chapter] 38 section[s] 115-4, 115-4(f), 115-4(d), 115-4(e), 115-4(g), 115-4(j) and 115-4(l). R.C.M. 1947, section[s] 94-7121, 94-7120 and 94-7112. Colorado Rule 24(a)(1). M.R.Civ.P., Rule 47(c).

The provision [in 46-16-114] for address if known is for the convenience of both parties.

[Section 46-16-114] establishes the procedure for and gives the court authority to expedite the selection of a competent jury. The proposed rule follows current Montana practice and is consistent with Montana Rules of Civil Procedure, Rule 47(a).

[Section 46-16-115] is intended to permit flexibility in the selection of the jury.

[Section 46-16-115] states that every party in a criminal proceeding has the right to challenge jurors for cause. This provision is consistent with the Montana Rules of Civil Procedure (Rule 47(b)). However, it changes the present criminal law which provides that when several defendants are tried together, they cannot sever their challenges. (See R.C.M. 1947, section 94-7102 [repealed]).

[Section 46-16-116] is basically the same as existing law in the number of peremptory challenges to be allowed. It provides only two categories as to the number of peremptory

challenges rather than four and explicitly provides the state with the same number of peremptory challenges as the defendant.

[Section 46-16-118] specifically provides for alternate jurors as is now permitted in civil and criminal cases (See Montana Rules of Civil Procedure 47(c); R.C.M. 1947, section 94-7232 [repealed]).

[Section 46-16-403] allows the court to affect the result of a proceeding without precluding an appeal by the state as could occur by allowing the court to advise the jury to acquit.

Compiler's Comments

1991 Amendment: In (1), after "their", substituted "questionnaires" for "addresses"; in (2), at beginning of first sentence, substituted "prosecutor" for "county attorney" and near beginning of second and third sentences substituted "judge" for "court"; and made minor changes in style.

Applicability of Commission Comments: Applicability of commission comments should be evaluated with reference to subsequent amendments. This section is a recodification of part of section 95-1909, R.C.M. 1947. Sections 46-16-301 (renumbered 46-16-111), 46-16-303 through 46-16-307 (renumbered 46-16-114 through 46-16-118), 46-16-403, and 46-16-603 are also derived from section 95-1909.

Case Notes

Improper Denial of Challenge for Cause of Juror Who Could Not Act Without Bias Regarding Presumption of Innocence and Defendant's Right to Refrain From Testifying: During voir dire in Braunreiter's burglary trial, a juror expressed the opinion that because Braunreiter had been charged with the crime, Braunreiter should testify and prove that he didn't commit the crime. Defense counsel moved to dismiss the juror for cause, but after the trial court further questioned the juror regarding the presumption of innocence and the juror's willingness to follow the law, the court denied the motion to dismiss for cause. Defense counsel used a peremptory challenge to dismiss the juror and subsequently exhausted peremptory challenges. Braunreiter was convicted and appealed on grounds that the trial court improperly denied the challenge for cause. The Supreme Court agreed and reversed. The juror's spontaneous response raised serious questions regarding the juror's ability to act without prejudice to Braunreiter's right to the presumption of innocence and to Braunreiter's right to refrain from testifying, and the juror's response to followup questions failed to alleviate those concerns. Therefore, the trial court could not reasonably conclude that the juror had a state of mind that would allow performance free from prejudice, and the court abused its discretion in denying the challenge for cause. St. v. Braunreiter, 2008 MT 197, 344 M 59, 185 P3d 1024 (2008), following St. v. Robinson, 2008 MT 34, 341 M 300, 177 P3d 488 (2008).

No Error in Imposition of Time Limit for Voir Dire: Prior to voir dire in Michaud's misdemeanor DUI trial, the District Court imposed a 15-minute limit on each counsel's voir dire questioning. Prior to counsels' questioning, the court engaged in its own comprehensive voir dire of the panel, addressing in advance many areas of inquiry that counsel would normally explore. Counsel then had the opportunity to engage in a colloquy with jurors regarding potential bias and prejudice, as well as the jurors' understanding of the concepts of reasonable doubt, innocence until proved guilty, and burden of proof. Michaud's counsel's time expired, and following two additional questions, counsel passed the panel for cause. Following conviction, Michaud appealed on grounds that the time limit on voir dire interfered with his right to a fair trial. The Supreme Court noted that time limits on voir dire in the name of expedience are not encouraged, but that under these circumstances, the District Court's imposition of a time limit, coupled with the court's own extensive voir dire, was not an abuse of discretion. St. v. Michaud, 2008 MT 88, 342 M 244, 180 P3d 636 (2008).

Comments by Prospective Juror Not So Egregious as to Be Incurable — Denial of New Trial Proper: Wright was charged with felony possession of and intent to sell drugs. Wright's attorney had been granted a motion in limine excluding all references regarding the defendant's criminal history. A prospective juror, in response to a question by the judge, responded that he knew the defendant and was aware of a past trial involving the defendant and based on the same kind of charges as the present case. The judge dismissed the prospective juror but refused to dismiss the entire panel. The defendant was convicted on three counts, and the trial judge refused to grant a new trial based on the possible prejudicial effect of the comments by the proposed juror. The Supreme Court held that the lower court had properly denied a new trial because the comments by the prospective juror were not so egregious as to be incurable by the District Court's admonishment to the jury to decide the case based only on the evidence presented during trial. St. v. Wright, 2002 MT 275, 312 M 352, 59 P3d 432 (2002).

Defendant's Exclusion From In-Chambers Individual Voir Dire Proceedings Violative of Right to Be Present at Critical Stages of Trial: Bird was accused of felony partner or family member assault. Prior to trial, the District Court conducted in-chambers voir dire specifically to elicit prospective jurors' personal feelings and experiences regarding domestic violence. Both the prosecutor and defense counsel were present, but Bird was not. Once the jury panel was passed for cause, the court recessed and met with counsel in chambers to allow the exercise of peremptory challenges, but again Bird was not included in the meeting. At the close of the meeting, the prosecutor noticed that Bird was not present and questioned whether the defendant's presence was necessary. The judge said that it was assumed that defense counsel wished to waive Bird's presence, and defense counsel stated that Bird had expressed no feelings about it one way or another. Bird was convicted and appealed on several grounds, including whether: (1) certain jurors should have been removed for cause; (2) defense counsel rendered deficient performance; (3) Bird should have been present during the individual voir dire; (4) Bird was prejudiced by certain testimony; and (5) the burden of proof was improperly shifted to Bird. The Supreme Court found the third issue to be dispositive. The court disagreed with the state's contention that Bird's presence at voir dire had been waived. The right of a defendant to be present at all critical stages of trial, including in-chambers individual voir dire, is a fundamental right that can be waived only if the trial court obtains an on-the-record personal waiver by the defendant, acknowledging that the defendant voluntarily, intelligently and knowingly waives that right. There can be no waiver by a person who does not know the person's rights or what is being waived. Bird was not informed of the constitutional right to be present during voir dire and was not given the opportunity to choose whether to participate, so not only did Bird not waive the constitutional right, he was never afforded the opportunity to waive it. Bird's exclusion from voir dire was a structural error that undermined the integrity of the entire trial, and constituted reversible error. St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), following St. v. Reed, 65 M 51, 210 P 756 (1922), and St. v. Allison, 116 M 352, 153 P2d 141 (1944), and distinguishing U.S. v. Gagnon, 470 US 522 (1985). See also St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000).

Juror's Fitness to Serve at Discretion of Trial Court: The Supreme Court will not reverse a District Court's decision regarding a juror's fitness to serve absent an abuse of discretion and a showing of prejudice. The trial court has significant latitude when ruling on allegations of juror misconduct because that court is best able to observe jurors and to decide the potential for prejudice, and its determination will be given considerable weight and deference. St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939, 56 St. Rep. 1198 (1999), followed in St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

Cost of Jury Selection and Prosecution Improperly Charged to Indigent Defendant: It was determined that Winterrowd was indigent, so counsel was appointed for him from the public defender's office. After being informed that Winterrowd had received a social security settlement and would no longer be considered indigent, the public defender moved to withdraw. Trial was continued to allow Winterrowd to obtain counsel. About 1 week before the scheduled hearing, Winterrowd moved for another continuance because the settlement had not arrived and he had not yet retained counsel. The state objected, arguing that Winterrowd had not demonstrated due diligence and that his claim that he would receive a settlement was unsupported by documentation. The trial court did not rule on the continuance motion. At the start of trial, Winterrowd again moved for a continuance, but the motion was denied. The trial proceeded through voir dire, with Winterrowd acting pro se. Following a break, the court granted the motion to continue and excused the jurors but ordered Winterrowd to pay the costs incurred in summoning the jurors and in prosecuting him. After granting the public defender's motion to withdraw, it was error for the court to charge Winterrowd with the costs when he was unable to obtain counsel. St. v. Winterrowd, 1998 MT 74, 288 M 208, 957 P2d 522, 55 St. Rep. 307 (1998).

Voir Dire Question Unrelated to Defense Properly Disallowed: Sattler contended that his right to voir dire on his defense of self-defense was infringed by the District Court's refusal to allow inquiry as to whether there must be a cause or reason to commit a homicide in jail. Generally, when notice of a defense is given, the refusal to allow defendant's voir dire on the defense constitutes prejudicial error. However, in this instance, Sattler was allowed to ask two questions directly related to jurors' opinions regarding self-defense, but a third question, regarding the cause or reason to commit a homicide in jail, was properly disallowed because it went beyond the self-defense theory in suggesting to prospective jurors that the state was required to prove motive, which was not the case. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998), distinguishing St. v. Olson, 156 M 339, 480 P2d 822 (1971), and St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Ineffective Assistance Claims Denied — No Prejudice Shown Under Strickland Test: Applying the *Strickland* test for determining effectiveness of counsel, the Supreme Court dismissed defendant's claims that he was ineffectively represented at trial, during the penalty phase proceedings, and during the course of direct appeal, including claims based on: (1) failure to object to prosecutor's statements that defendant was intoxicated at the time of the crime, when that was in fact true, and to object to an intoxication instruction that was based on statutory language; (2) failure to object to closing arguments during which the prosecutor portrayed himself as the victim and narrated in the first person (following U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)); (3) failure to object to the lack of corroborating evidence regarding a witness's testimony when the objection lacked merit and would have been properly overruled (following St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993)); (4) failure to investigate and pursue a mental defect defense after defendant's own psychologist of choice found him capable of going to trial (see Harris v. Vasquez, 949 F2d 1497 (9th Cir. 1990)); (5) failure to move for a substitute judge when there was no reasonable probability that the outcome of the trial would have differed with another judge presiding; (6) failure to request a change of venue absent evidence of juror bias and failure to adequately voir dire the jury when there was no reasonable probability that the outcome of the trial would have differed had voir dire been conducted more thoroughly; (7) ineffectiveness in investigating a witness's background when counsel's investigation fell within the wide range of competent assistance; (8) failure to investigate defendant's suicide attempt; (9) failure to object to certain jury instructions allowing inference of the existence of the requisite mental state from the acts of the accused (following St. v. Cowan, 260 M 510, 861 P2d 884 (1993)); (10) failure to object to instructions setting out the elements of aggravated kidnapping when defendant did not specify which of the alternatives in the instruction were objectionable (following Schad v. Ariz., 501 US 624, 115 L Ed 2d 555, 111 S Ct 2491 (1991)); (11) failure to object to the absence of Native Americans on the jury when, given recent census data, counsel could not have demonstrated that Native Americans were underrepresented on the panel; and (12) failure to object to the presence of armed officers in the courtroom (following Holbrook v. Flynn, 475 US 560, 89 L Ed 2d 525, 106 S Ct 1340 (1986)). Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Improper Comments by Prospective Jurors During Voir Dire — Prejudicial Effect Warranting Reversal: Comments made in the presence of the entire jury panel indicating that certain potential jurors not only knew the defendant but also were aware of the defendant's high propensity for violence were prejudicial, thereby poisoning the perspective of the entire jury panel in such a way that the court could not rectify the problem through admonishment or curative jury instructions and constituting reversible error. This opinion was narrowly drawn and reserved only for the most egregious and prejudicial juror comments—comments that indicate a bias that the juror cannot lay aside or comments that, when made in the presence of other prospective jurors, amount to inadmissible opinions about the defendant's character or propensities. The Supreme Court suggested that District Courts advise prospective jurors, before voir dire commences, not to volunteer the substance of any comments or opinions that they may have about the parties but rather to notify the court that they have information or an opinion about a party. The trial judge can then explore the substance of that information in camera and avoid any taint to the entire jury panel. St. v. McMahon, 271 M 75, 894 P2d 313, 52 St. Rep. 353 (1995), following principles established in Putro v. Baker, 147 M 139, 410 P2d 717 (1966), and followed in St. v. Hardaway, 1998 MT 224, 290 M 516, 966 P2d 125, 55 St. Rep. 936 (1998).

Voir Dire Questions Referencing Statistical Probability Not Offer of Testimony — Admonishment Curative of Taint: During voir dire, the prosecuting attorney referred to the statistical probability of the molestation of minors. Defendant objected that this was an offer of testimony and an attempt to personalize information in the form of statistics for which there was no testimony at trial, resulting in a taint of the entire jury panel. The Supreme Court was not convinced that the statistical statements were necessary or appropriate, but found that any taint was remedied by the trial court's admonishment to the jury that the statements were not evidence and that only sworn testimony and tangible evidence could be considered. St. v. Gilpin, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988).

Limiting Defense Time and Inquiry Into Preconceived Notions of Guilt: It was improper and inexcusable for judge, at voir dire, to repeatedly admonish defense counsel that a jury would be selected that day and to infer that defense counsel was an obstacle to that end. In a case such as this, which has a great amount of publicity, it is especially essential that voir dire ensures that defendant is adjudged by fair and impartial jurors. The court should strive for that objective, not expeditious selection of the jury. Defense counsel's examination of the potential jurors'

preconceived notions of defendant's guilt should not have been repeatedly met with sustained objections. It was erroneous to deny defense counsel permission to ask a potential juror whether, if he were a defendant, he would want someone with that potential juror's frame of mind sitting on the jury. Defense counsel was also repeatedly admonished to limit inquiry to whether the potential juror could set aside his impressions of the case and reach a verdict based solely on the evidence; however, such a question cannot be asked and answered in a vacuum, and the defense must be allowed to fully examine the extent of the juror's pretrial convictions and determine what would be required to eradicate those convictions. One exchange during voir dire resulted in a juror who might have required defendant to prove his own innocence. However, the improperly conducted voir dire resulted in harmless error because given defendant's testimony at trial, any juror would have had to convict him of the charges. St. v. Nichols, 225 M 438, 734 P2d 170, 44 St. Rep. 382 (1987).

Failure of Juror to Disclose Relationship: Defendant was charged with and convicted of sexual intercourse without consent. During voir dire, members of the jury panel were asked whether any of them knew any of the employees at the Butte-Silver Bow law enforcement agency and whether any of them were related to or knew closely anyone else employed by a law enforcement agency. Defendant contended he was prejudiced when a juror failed to disclose her brother-in-law was a civilian jailer at the jail. On appeal, the Supreme Court said other jurisdictions have held that nondisclosure of information is not grounds for reversal unless the nondisclosure amounts to "intentional concealment". There was nothing in the record to show intentional concealment or any misconduct by the juror. The omission appeared inadvertent and unintentional. There was no error in denying defendant's motion for a new trial. St. v. Bauer, 210 M 298, 683 P2d 946, 41 St. Rep. 1066 (1984), followed in St. v. Woods, 221 M 17, 716 P2d 624, 43 St. Rep. 601 (1986), St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939, 56 St. Rep. 1198 (1999), and St. v. Dunfee, 2005 MT 147, 327 M 335, 114 P3d 217 (2005). Hatten was followed in St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

Judge's Discussion of Trial Process and Length of Service With Jurors Outside Presence of Prosecution, Defense, or Defendant: Prior to trial, the judge brought the 55 prospective jurors into court, explained the trial process, asked them if they could serve 2 weeks, and discharged two of them after the discussion. The prosecutors, defendant, and defense counsel were not present, and no record was kept of the proceeding. There was no prejudice to defendant, but the Supreme Court stated that a record should have been kept and that it was not suggesting that such an examination should be adopted by other judges or that the method of examination was the best one. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Change of Venue Determination Prior to Voir Dire: Voir dire is not the solution to every venue case in which it must be determined whether prejudice still exists and whether by reason of it there is a reasonable apprehension that accused cannot receive a fair and impartial trial. Although that issue is usually determined by voir dire, each case must turn on its own merits, and a motion for a change of venue may be decided prior to voir dire if the circumstances of the case indicate inherent prejudice. Judicial economy and effective administration of justice are not served by the use of voir dire to decide the issue when it is apparent that it should be decided before voir dire, and there is the inherent problem of an atmosphere that may exert pressure on the jury selected. State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982).

Absence of Defendant During Peremptory Challenges Not Violative of Constitutional Rights — Pro Forma Challenge in Purely Legal Matters: In a prosecution for theft by accountability, the defendant was not denied due process of law by her absence from the courtroom during peremptory challenges of jurors. Although the defendant's presence may be crucial during the voir dire questioning of the jury, the Supreme Court has previously held that a defendant's rights are not violated when the matters handled in his absence are purely legal and the peremptory challenge of jurors is only a pro forma execution of the decisions formulated during voir dire. Her absence was therefore not injurious to either her right of due process or her right of confrontation. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981).

No Evidence That Exclusion of Particular Line of Questioning During Voir Dire Was Prejudicial: The defendant's right to a fair trial may have been prejudiced by not being allowed to ask each juror whether relatives or friends had ever been victims of an assault. However, no evidence was presented to the Supreme Court that the defendant was prejudiced by the judge's restrictions; therefore, it was not reversible error. St. v. Lamere, 190 M 332, 621 P2d 462, 37 St. Rep. 1936 (1980).

Proper Limitation on Voir Dire — Questions to Jury: The judge interrupted defense counsel during her opening and closing statements and during voir dire. Although a judge should not interrupt the opening so as to prevent defendant from outlining his defense, the trial judge can

stop counsel from giving instructions or arguing the case as was done here. Admonishing counsel's use of "law school questions" during voir dire is within the judge's latitude in controlling voir dire. The judge's conduct of the trial was meant to expedite and facilitate the trial, and the defendant is not entitled to a new trial. St. v. Lamere, 190 M 332, 621 P2d 462, 37 St. Rep. 1936 (1980).

Proper Limitation on Voir Dire — Religious Beliefs: In a prosecution for failure to file proper tax returns, it was within the trial judge's discretion to restrict defendant from inquiring into the religious beliefs of the prospective jurors. Given the wide discretion allowed a trial judge, the lack of relevancy of religion to the issues at bar, and the permitted inquiry into the jurors' general belief in God, the limitation was proper. St. v. Poncelet, 187 M 528, 610 P2d 698 (1980).

Individual Voir Dire Based on Pretrial Publicity: A motion for individual voir dire of prospective jury members based on the prejudicial effect of pretrial publicity must be adequately supported by evidence of the prejudicial effect of the publicity on the prospective jurors. In this case, defendant failed to do so and did not even exercise his right to challenge any of the potential jurors for cause due to bias or prejudice. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Proper Limitation on Voir Dire — Charge and Punishment: The defendant was not prejudiced by a restriction of the voir dire examination regarding homicide charges and capital punishment. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

Failure to File Notice of Defense — Effect on Voir Dire: The defendant refused to give notice as required by the statute. He claimed prejudice because he was not allowed to voir dire on the subject of mental disease and defect. However, at the time he wished to voir dire he had not complied with the notice and the issue could not at that time be presented to the jury. The court was correct in refusing to allow the voir dire. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Collateral References

Exclusion of public and media from voir dire examination of prospective jurors in state criminal case. 16 ALR 5th 152.

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt. 50 ALR 4th 969.

Necessity for presence of judge during voir dire examination of prospective jurors in state criminal case. 39 ALR 4th 465.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 ALR 3d 172.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR 3d 15.

Jury: Membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge. 63 ALR 3d 1052.

46-16-115. Challenges for cause.

Commission Comments

1991 Comment: This statute addresses the challenge of a potential juror for cause. The statute is principally a restatement of 1987 MCA 46-16-304. Subsection (2)(e) has been amended to allow a challenge for cause to a potential juror who has served on a trial jury for a case involving a related offense. This amendment slightly expands the extent of this challenge but should not significantly affect established procedure. The subsection also adopts some terminology changes, but these changes are only intended to clarify the subsection.

Source: See commission comments to 46-16-114.

Compiler's Comments

1991 Amendment: At end of (2)(e) inserted "or a related offense"; in (2)(h), after "opinions", inserted "concerning the punishment"; and made minor changes in style.

1981 Amendment: Substituted "excuse" for "exemption" and "excused" for "exempted" in (3).

Case Notes

General 626
Consanguinity or Relationship 627
Prior Jury Service 627
Service on Coroner's Jury 628
Death Penalty 628
Severity of Punishment 628
State of Mind Depriving Impartiality 628

GENERAL

Failure to Ask Jurors Followup Questions Regarding Impartiality During Voir Dire Not Considered Deficient Counsel Performance: Whitlow contended that he received ineffective assistance of counsel because, during voir dire, the defense attorney failed to ask followup questions of two jurors regarding impartiality. Whitlow's assertion was based primarily on an affidavit and testimony provided by defense counsel years later, stating that although counsel did not recall any partiality problems during voir dire, in hindsight, counsel probably should have asked additional questions of the jurors. The Supreme Court examined the trial transcript and defense counsel's voir dire notes and concluded that Whitlow failed to demonstrate that counsel's performance was deficient and failed to overcome the presumption that the challenged acts and omissions fell within the wide range of reasonable assistance measured under prevailing professional norms and in light of the surrounding circumstances. Whitlow's ineffective assistance claim failed. Whitlow v. St., 2008 MT 140, 343 M 90, 183 P3d 861 (2008), overruling St. v. Morigeau, 202 M 36, 656 P2d 185 (1982), and its progeny to the extent that the Morigeau "ignorance or neglect" test for ineffective assistance of counsel conflicts with the correct approach, which is the "objective standard of reasonableness" test set out in Strickland v. Wash., 466 US 668 (1984), and followed in St. v. Rose, 2009 MT 4, 348 M 291, 202 P3d 749 (2009).

Defense Counsel's Conduct During Voir Dire Not Considered Ineffective Assistance: Notti asserted that defense counsel's failure to elicit information from or to challenge two jurors for cause during voir dire amounted to ineffective assistance. The District Court found that counsel did not challenge the jurors because counsel believed that there was no basis for a challenge for cause and because counsel believed that the jurors would be fair. On appeal, the Supreme Court examined counsel's conduct toward each juror during voir dire and affirmed. Counsel made informed strategic decisions not to challenge the jurors, and counsel's failure to challenge the jurors did not fall below the range of competence expected of attorneys in criminal cases. Notti's claim of ineffective counsel failed. Notti v. St., 2008 MT 20, 341 M 183, 176 P3d 1040 (2008).

No Error in Removing Prospective Juror Who Would Have Trouble Applying Law: In a felony-murder trial, the District Court did not commit error by removing a prospective juror for cause when the juror stated that he might have trouble applying a law that he found disagreeable and mentioned a series of such laws, including seat belt, gun, and forfeiture laws. This attitude reflected a bias related to an issue critical to the outcome of the case—whether he could follow the law as given in light of the evidence. The District Court did not abuse its discretion in dismissing the juror for cause. St. v. Burkhart, 2004 MT 372, 325 M 27, 103 P3d 1037 (2004).

Error in Excusing Juror for Cause Before Voir Dire — Error Harmless Absent Showing of Prejudice: Prior to voir dire in defendant's trial for sexual intercourse without consent and incest, the prosecutor requested that juror no. 43 be excused. The juror had recently worked in the County Attorney's office and had access to a wide range of information relating to issues that defendant had been involved in, and the prosecutor had recently fired the juror for unsatisfactory performance. The trial judge dismissed the juror because of concerns that the juror might have feelings or predilections for one side or the other and because of the possibility of the juror communicating with other prospective jurors. Following conviction, defendant appealed the decision to excuse the juror for cause prior to voir dire. The Supreme Court concluded that the trial court erred in excusing the juror without an in-court examination to determine actual bias; however, the error was not a material failure to substantially comply with statutes governing procurement of a trial jury, so the dismissal was subject to harmless error review. Defendant could not demonstrate prejudice because even if juror no. 43 had not been dismissed, the juror would not have been on the jury because the last juror empaneled was juror no. 36. The Supreme Court affirmed. St. v. Bearchild, 2004 MT 355, 324 M 435, 103 P3d 1006 (2004), distinguishing St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), and St. v. Blem, 610 NW 2d 803 (S. Dak. 2000).

Test for Structural Error During Voir Dire — Automatic Reversal Warranted for Structural Error in Improper Denial of Challenge for Cause to Prospective Juror: Structural error exists when there is a material failure to substantially comply with statutes governing the procurement of a jury trial. Jury selection is critically important in ensuring an accused's right to an impartial jury and a fair trial, and errors involving jury selection indelibly affect the fairness of the trial because the errors precede the trial. After reviewing St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), and St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), the Supreme Court held that structural error occurs if: (1) a District Court abuses its discretion by denying a challenge for cause to a prospective juror; (2) the defendant uses one or more peremptory challenges to remove disputed jurors; and (3) the defendant exhausts all peremptory

challenges. If the test is met, the error is structural and automatic reversal is required. St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002), overruling St. v. Williams, 262 M 530, 866 P2d 1099 (1993), and St. v. DeVore, 1998 MT 340, 292 M 325, 972 P2d 816 (1998), to the extent that Williams and DeVore required a defendant to establish that the District Court error contributed to defendant's conviction by showing that the jury was charged with the determination of a factual issue important to the charges against defendant.

No Presumption of Prejudice: Where the trial court mistakenly granted challenges for cause to the prosecution but denied a similar challenge by defendant, the Supreme Court held that prejudice will not be presumed where the record shows that the trial court's error affected neither constitutional nor jurisdictional rights of the defendant, and defendant on appeal has failed to demonstrate prejudice to his substantial rights resulting from the error. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982).

Individual Voir Dire Based on Pretrial Publicity: A motion for individual voir dire of prospective jury members based on the prejudicial effect of pretrial publicity must be adequately supported by evidence of the prejudicial effect of the publicity on the prospective jurors. In this case, defendant failed to do so and did not even exercise his right to challenge any of the potential jurors for cause due to bias or prejudice. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Mental Defect or Disease — Notice of Defense — Right to Voir Dire on the Subject: The defendant was properly denied the right to voir dire the jury on the subject of mental disease or defect because he did not give any notice of intent to use the defense. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Independent Knowledge of Juror — Failure to Object: The fact that a juror had acted as a special prosecutor in a disbarment action against an attorney under a workers' compensation indictment and had used the defendant's disbarment, which dealt at length with the facts involved in the defendant's criminal case, as a model in drafting his pleadings did not require a reversal of the defendant's conviction when, at the conclusion of the trial, the juror met with the judge and counsel and told them what he knew and the defendant made no objection. The defense failed to meet its responsibility by its failure to properly object and thereby give the court an opportunity to remedy any alleged defects. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Nature of Right to Challenge: The right to challenge is the right to reject, not to select, a juror, and no person can acquire a vested right to have any particular member of a panel sit upon his case until such member has been accepted and sworn. St. v. Huffman, 89 M 194, 296 P 789 (1931), followed in St. v. Barnes, 232 M 405, 758 P2d 264, 45 St. Rep. 1150 (1988).

CONSANGUINITY OR RELATIONSHIP

Failure of Counsel to Rely on Statutory Definition of Guardian-Ward Relationship in Challenging Juror Employed by Law Enforcement Not Ineffective Assistance of Counsel: A potential juror was employed as a guard at Richeson's detention center. Defense counsel challenged the juror for cause, but the motion was denied, and Richeson had to use his last peremptory challenge instead. On appeal, Richeson claimed ineffective assistance of counsel because the attorney did not reference this section, which defines the guardian-ward relationship between a jailer and an inmate, asserting that the statutorily defined bias would have required removal of the juror for cause. The Supreme Court disagreed. Although the law requires certain standards from correctional facilities and individual guards and detention officers, those standards do not meet the requirements of a guardian-ward relationship or create an implied guardian-ward relationship between prisoners and individual guards. Thus, Richeson's counsel did not fall below an objective standard of reasonableness in failing to argue the guardian-ward relationship, and Richeson's ineffective assistance claim failed. St. v. Richeson, 2004 MT 113, 321 M 126, 89 P3d 958 (2004).

Who Removed for Cause: A juror will not be removed for cause unless he falls under one of the classes of this section or is partial. When the record did not support a claim that a juror (who was the trial judge's brother-in-law) was partial, the defendant was not deprived of a fair trial. St. v. Hendricks, 171 M 7, 555 P2d 743 (1976).

Prosecutor's Brother-in-Law Not Disqualified: A juror who, upon examination, has shown no bias, either implied or actual, is not disqualified by reason of being a brother-in-law of the prosecuting attorney. St. v. Cadotte, 17 M 315, 42 P 857 (1895).

PRIOR JURY SERVICE

Use of Peremptory Challenge Rather Than Challenge for Cause to Remove Juror Not Considered Ineffective Assistance of Counsel: Deschon contended that he was deprived of a fair trial through defense counsel's failure to exercise challenges for cause to remove a juror who previously served on a jury that convicted a defendant on the same charge that Deschon was

facing and another juror with a long involvement in law enforcement whose impartiality could be questioned. However, evidence in a voir dire reconstruction hearing revealed why counsel used peremptory challenges to remove the jurors instead. Counsel was prohibited from challenging the first juror for cause under St. v. Russell, 73 M 240, 235 P 712 (1925), because the juror would have had to serve on a jury trying a related offense to the offense that Deschon was charged with. Regarding the second juror, the mere fact that the juror was connected with law enforcement did not necessitate a finding of impartiality, and because the juror maintained that he could be impartial, a peremptory challenge was the only available method of removing the juror from the panel. Deschon did not meet the first prong of the *Strickland* test for ineffective assistance of counsel, and the conviction was affirmed. St. v. Deschon, 2004 MT 32, 320 M 1, 85 P3d 756 (2004).

Juror Not Disqualified: When one had served as a juror in a prosecution for rape, he was not disqualified, as for actual bias, from serving in the same capacity in a later case of the same character against another defendant in which the prosecutrix was the same as in the first, by the fact that on the former trial evidence of the guilt of the latter defendant had been introduced. St. v. Russell, 73 M 240, 235 P 712 (1925).

SERVICE ON CORONER'S JURY

Duty of Attorneys to Advise Court That Coroner's Juror Serving as Trial Juror: When the voir dire examination of a trial juror in a murder case failed to reveal that he had served on the Coroner's jury that had investigated the occurrence, which was known to the County Attorney, who directed the proceedings at the inquest, and discovered by the defense counsel after the trial jury had been sworn, it was the duty of both to advise the trial court at the earliest opportunity to prevent a mistrial. St. v. Allison, 116 M 352, 153 P2d 141 (1944).

DEATH PENALTY

Constitutionality of "Death Qualified" Jury — Mention of Possibility of Death Sentence Not Prejudicial Per Se: Prior to voir dire, Gollehon requested the trial court to prohibit the state from asking jury panel members to declare their beliefs concerning the death penalty, arguing that: (1) questioning the members about a possible sentence was inappropriate because Montana juries do not participate in the sentencing portion of a trial; (2) social science evidence proves that when a jury is "death qualified", it is more prone to convict the defendant; and (3) if a jury knows that the death penalty could be imposed upon conviction, the error is prejudicial per se. In analyzing the death qualification of juries under this section, the Supreme Court cited Witherspoon v. Ill., 391 US 510, 20 L Ed 2d 776, 88 S Ct 1770 (1968), for the holding that excusing jurors simply because they voice general objections to the death penalty is insufficient and that only in instances when that belief prohibits the juror from applying the law that the judge has provided may a juror be excused for cause. Addressing the question of social science evidence seeming to indicate prejudice to a defendant when a jury is death qualified, the Supreme Court rejected the studies, noting that in Lockhart v. McCree, 476 US 162, 90 L Ed 2d 137, 106 S Ct 1758 (1986), the U.S. Supreme Court had seriously questioned the validity of similar studies, ruling that even if the studies were valid, it did not prove that death qualification was unconstitutional. Further, death qualification is a procedure to ensure that a jury is committed to its task and is therefore not per se an unconstitutional due process violation. St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993).

Prospective Juror's View of Death Penalty: Two prospective jurors were properly excluded under the exception to the general rule of Witherspoon v. Illinois, 391 US 510, 20 L Ed 2d 776, 88 S Ct 1770 (1968), because they were irrevocably committed to voting against conviction because of the possibility of a death penalty. St. v. Coleman, 177 M 1, 579 P2d 732 (1978).

SEVERITY OF PUNISHMENT

Statute Not Violated When Defendant Prohibited From Informing Jury of Penalty: Where, in a prosecution for aggravated assault, the defendant's counsel was prohibited from informing the jurors of the penalty for robbery and then inquiring whether they felt the penalty was too severe, the District Court did not err and no violation of 46-16-304 (renumbered 46-16-115) occurred. The court allowed counsel to inquire if any juror was aware of the penalty, and none of the jurors responded affirmatively. Moreover, the defendant could not show that the restriction resulted in prejudice to him. St. v. Ritchson, 193 M 112, 630 P2d 234, 38 St. Rep. 1015 (1981).

STATE OF MIND DEPRIVING IMPARTIALITY

No Showing of Juror Bias — Denial of Challenge for Cause Proper: Hart contended that a challenge for cause of a prospective juror should have been granted. The Supreme Court

reviewed the colloquy on the record and affirmed. The juror's responses did not reveal actual bias; they made it clear that the juror's personal opinions would not govern his decision in the case and that the juror understood that the law was superior and must govern the process. The challenge for cause was properly denied. St. v. Hart, 2009 MT 268, 352 M 92, 214 P3d 1273 (2009).

Dismissal for Cause Based on Juror's Work in Law Enforcement Properly Denied: A potential juror stated that she worked in law enforcement as a 9-1-1 dispatcher but could not recall if she was on duty the night of the incident in question. She also had a relationship with a police officer and recalled the case being discussed among her coworkers. For these reasons Dewitz moved that the juror be dismissed for cause, but the motion was denied. Dewitz appealed on grounds that the trial court erred by not dismissing the juror for cause. The Supreme Court disagreed. The juror stated that she could be impartial and had not formed an opinion regarding Dewitz's innocence or guilt. The juror's involvement in law enforcement was not, in itself, sufficient to grant dismissal for cause, nor did discussing the case with coworkers and remembering a brief generalization of what occurred prove that the juror was exposed to information that was inadmissible at trial. The trial court did not abuse its discretion by denying the motion to dismiss for cause and was therefore affirmed on the issue. St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009).

Juror's Ability to Make Decision Based on Evidence Despite Friendship With Crime Victim — No Error in Denial of Challenge for Cause: Taylor moved to remove a juror for cause based on the juror's friendship with the victim and the fact that the victim had told the juror that Taylor had perjured himself. The motion was denied, and on appeal the Supreme Court affirmed. Although the juror heard from the victim that Taylor had perjured himself, the juror did not state that he had formed an opinion that the victim was correct, and the juror consistently stated that he would make an independent, unbiased decision based on what the evidence showed at trial. Considering the juror's responses as a whole, the District Court did not abuse its discretion in denying Taylor's challenge for cause. St. v. Taylor, 2009 MT 161, 350 M 447, 208 P3d 422 (2009).

Potential Juror's Belief in Credibility of Witness Not Considered Prejudice Toward Defendant — Dismissal for Cause Properly Denied: A potential juror who was acquainted with a prosecution witness expressed the opinion that the witness was a very credible person and that the juror would believe the witness's testimony. The trial court declined to dismiss the juror for cause. On appeal, the Supreme Court affirmed. Although the juror stated that the prosecution witness's testimony would be more believable than testimony from a witness the juror did not know, the juror never said that he could not be fair or impartial to the defendant. Further, the trial court did not improperly rehabilitate the juror, but rather attempted to clarify the juror's answers to a series of questions from counsel regarding whether the juror would be willing to consider opposing testimony and surrounding circumstances for consistency, so the court's questioning could not be considered a coaxed recantation of bias. Denial of the motion to remove the juror for cause was not an abuse of discretion. St. v. Crosley, 2009 MT 126, 350 M 223, 206 P3d 932 (2009). See also St. v. Robinson, 2008 MT 34, 341 M 300, 177 P3d 488 (2008).

County Commissioner's Knowledge of and Opinion on Case Precluding Impartiality — Dismissal for Cause Warranted — Reversed: A County Commissioner who was called for jury duty had discussed the case numerous times with the County Attorney, raising serious doubts about the Commissioner's ability to be fair and impartial, and the record showed that the Commissioner possessed a state of mind that prevented him from acting with entire impartiality and without prejudicing defendant's substantial rights. A motion to remove the Commissioner for cause should have been granted, but instead defendant had to use a peremptory challenge to remove the Commissioner and exhausted all peremptory challenges, requiring reversal and remand for a new trial. St. v. Herman, 2009 MT 101, 350 M 109, 204 P3d 1254 (2009).

Juror Bias Against Crime, Not Defendant — Challenge for Cause Properly Denied: During voir dire in Normandy's trial for partner or family member assault, a prospective juror expressed a bias against domestic violence because it had affected his wife during her first marriage. Normandy moved to dismiss the juror for cause, but the motion was denied. On appeal, the Supreme Court affirmed. Although the juror expressed a bias against the crime, the juror did not voice a predisposition regarding Normandy's guilt or innocence, stating that he thought he could be fair and impartial. If voir dire raises serious doubts about a juror's ability to be fair and impartial or if a juror has a fixed opinion of the defendant's guilt, the juror should be excused. However if, as here, a juror merely expresses concern about impartiality but believes he can fairly weigh the evidence, the court is not required to remove the juror. St. v. Normandy, 2008 MT 437, 347 M 505, 198 P3d 834 (2008), following St. v. Robinson, 2008 MT 34, 341 M 300, 177 P3d 488 (2008), distinguishing St. v. Golie, 2006 MT 91, 332 M 69, 134 P3d 95 (2006).

Improper Denial of Challenge for Cause of Juror Who Could Not Act Without Bias Regarding Presumption of Innocence and Defendant's Right to Refrain From Testifying: During voir dire in Braunreiter's burglary trial, a juror expressed the opinion that because Braunreiter had been charged with the crime, Braunreiter should testify and prove that he didn't commit the crime. Defense counsel moved to dismiss the juror for cause, but after the trial court further questioned the juror regarding the presumption of innocence and the juror's willingness to follow the law, the court denied the motion to dismiss for cause. Defense counsel used a peremptory challenge to dismiss the juror and subsequently exhausted peremptory challenges. Braunreiter was convicted and appealed on grounds that the trial court improperly denied the challenge for cause. The Supreme Court agreed and reversed. The juror's spontaneous response raised serious questions regarding the juror's ability to act without prejudice to Braunreiter's right to the presumption of innocence and to Braunreiter's right to refrain from testifying, and the juror's response to followup questions failed to alleviate those concerns. Therefore, the trial court could not reasonably conclude that the juror had a state of mind that would allow performance free from prejudice, and the court abused its discretion in denying the challenge for cause. St. v. Braunreiter, 2008 MT 197, 344 M 59, 185 P3d 1024 (2008), following St. v. Robinson, 2008 MT 34, 341 M 300, 177 P3d 488 (2008).

Juror Concerned About Defendant's Innocence but Able to Set Concern Aside — Denial of Challenge for Cause Not Abuse of Discretion: Robinson contended that the trial court erred by not excusing a juror for cause when the juror expressed concern about Robinson's innocence based on the fact that Robinson was on trial. However, despite the concern, the juror repeatedly stated that she understood that Robinson was presumed innocent and that she could and would set aside her concern and be impartial. The Supreme Court noted that a juror need not be excused for cause simply by raising some concerns about a defendant's innocence as long as the trial court reasonably concludes that the juror is able to be impartial. The decision to grant a challenge for cause is within the discretion of the trial court, and in this case, the Supreme Court found no abuse of that discretion. St. v. Robinson, 2008 MT 34, 341 M 300, 177 P3d 488 (2008), following St. v. Falls Down, 2003 MT 300, 318 M 219, 79 P3d 797 (2003).

Failure to Dismiss Partial Juror for Cause — Structural Error Warranting New Trial: On voir dire, a juror revealed a belief that defendant would not be on trial unless there was something tying defendant to the crime and that only if there was evidence presented that proved defendant's innocence would the juror be convinced that the defendant was not guilty. The trial court declined to grant defendant's motion to dismiss the juror for cause, and following conviction, defendant appealed. The Supreme Court reversed, reiterating the preference for dismissal for cause when voir dire reveals a serious question about a juror's ability to afford a defendant a presumption of innocence. The trial court's refusal to dismiss the juror was an abuse of discretion that resulted in structural error warranting a new trial. St. v. Hausauer, 2006 MT 336, 335 M 137, 149 P3d 895 (2006).

Commonly Held Belief Not Grounds for Removal of Juror for Cause: Harville punched an elderly woman in a laundromat during a dispute over a washing machine and went to trial for misdemeanor assault. During voir dire, two jurors indicated that it was their belief that a man should not hit a woman and that they were not sure they could set aside their belief. Harville moved to dismiss the jurors for cause, but the Municipal Court denied the motion, and Harville used two peremptory challenges to remove the jurors. On appeal, Harville contended that the Municipal Court erred by denying the challenges for cause. The District Court reasoned that the jurors' beliefs were consistent with beliefs held by society in general. Harville did not meet the burden of establishing error regarding the commonly held belief rationale and failed to present any argument or advance any authority under which a commonly held belief may be the basis for a successful challenge for cause. Denial of the motion to dismiss for cause was affirmed. St. v. Harville, 2006 MT 292, 334 M 380, 147 P3d 222 (2006), distinguishing St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002).

Potential Juror's Responses Raising Questions Regarding Impartiality — Use of Peremptory Challenge to Remove Juror — Structural Error Warranting Remand: Voir dire responses by a potential juror who had been injured by a drunk driver established a state of mind in reference to Golie's DUI case that would prevent the juror from acting with entire impartiality and without prejudice to Golie's substantial rights. The trial court abused its discretion by declining to allow the juror to be excused for cause, so defense counsel had to use a peremptory challenge to remove the juror and exhausted all peremptory challenges. As established in St. v. Heath, 2004 MT 58, 320 M 211, 89 P3d 947 (2004), such abuse of discretion constitutes a structural error requiring automatic reversal, and the Supreme Court remanded for further proceedings. St. v. Golie, 2006

MT 91, 332 M 69, 134 P3d 95 (2006), followed in St. v. Harville, 2006 MT 292, 334 M 380, 147 P3d 222 (2006).

Denial of Motion to Remove Juror for Cause Not Error Absent Showing of Juror Bias: During voir dire in Marble's trial for sexual intercourse without consent, defense counsel asked the panel whether the act of anal intercourse between two males would be considered so abhorrent as to affect their ability to view and weigh the evidence fairly. One juror responded that his religious convictions made the idea of such an act morally repugnant. Defense counsel moved to remove the juror for cause, but the motion was denied. After further questioning, counsel again moved to remove the juror for cause, but the motion was again denied. Counsel ultimately used a peremptory challenge to remove the juror. On appeal, Marble asserted that the trial court abused its discretion in denying the motions to remove the juror for cause. Analyzing the juror challenges in light of the statutory language and the totality of the circumstances, the Supreme Court held that the juror did not exhibit an actual bias during voir dire that would have prohibited the juror from acting with impartiality and without prejudice. Absent a showing of bias, denial of the motion to remove the juror for cause was not an abuse of discretion, and the Supreme Court affirmed. St. v. Marble, 2005 MT 208, 328 M 223, 119 P3d 88 (2005), following St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002).

Denial of Challenge for Cause of Potential Juror Connected With Law Enforcement — No Error Absent Showing of Bias: During jury selection in Richeson's criminal trial, one of the potential jurors was identified as a guard at Richeson's detention center. Richeson challenged the juror for cause, but after questioning the juror, the District Court denied the challenge, and Richeson used the last peremptory challenge to strike the juror. On appeal, the Supreme Court affirmed. The bare fact that a juror is connected with law enforcement does not in itself necessitate a finding of bias resulting in dismissal for cause. Rather, challenges for cause are granted or denied pursuant to both statutory language and the totality of the circumstances, and abuse of discretion occurs if a court fails to dismiss a juror if actual bias is discovered during voir dire. The widest possible examination should be allowed a potential juror connected with law enforcement, and if there is any doubt in the event of a challenge for cause, the trial court should allow the challenge. However, in this case, the juror was questioned extensively, and the juror's testimony did not reveal a state of mind in reference to Richeson that would prevent the juror from acting impartially and without prejudice to Richeson's substantial rights, that demonstrated that the juror had formed an assumption of innocence or guilt based on employment in law enforcement, or that the employment would cause the juror to harbor any actual bias. Although bias is sometimes revealed by circumstantial evidence, nothing in the record reflected circumstantial bias in this case, but the record did reflect a person who expressed an honest belief in the ability to be a fair juror to both the state and the defendant. Thus, no prejudice was shown, but there was sufficient information for counsel to decide to use a peremptory challenge. The District Court did not abuse its discretion in refusing to remove the juror for cause. St. v. Richeson, 2004 MT 113, 321 M 126, 89 P3d 958 (2004), following St. v. Thompson, 169 M 158, 545 P2d 1070 (1976), St. v. Radi, 176 M 451, 578 P2d 1169 (1978), St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002), and St. v. Heath, 2004 MT 58, 320 M 211, 89 P3d 947 (2004), and distinguishing St. v. DeVore, 1998 MT 340, 292 M 325, 972 P2d 816 (1998).

No Error in Denying Challenges for Cause for Two Jurors With Sex Crime Counseling or Evaluation Experience Absent Clearly Stated Bias or Coaxed Recantation — Fixed Opinion of Guilt Rule: During voir dire in Heath's trial for sexual intercourse without consent, Heath moved to dismiss for cause one juror who had been a victim of a sex crime and had counseled other sex crime victims and another juror with education and desire to become a sex offender evaluator. The motions were denied. On appeal, the Supreme Court noted that jurors may be challenged for cause based on a state of mind depriving impartiality but also on a fixed opinion of guilt or innocence depriving impartiality and took the opportunity to clarify the "fixed opinion of guilt" rule, holding that it is but one argument that can be asserted under the statutory state of mind basis for a challenge for cause. Further, challenges for cause must be determined pursuant to both the statutory language of this section and the totality of the circumstances presented. In this case, both jurors indicated that they could look at the facts and not allow their experiences to affect their judgment. Despite Heath's argument that the jurors' responses were coaxed, their initial and spontaneous responses did not raise a serious question of bias, and Heath's allegations that the jurors would identify with the victim were purely speculative. The jurors' experience and training did not establish a state of mind that would prevent them from acting with impartiality and without affecting Heath's substantial rights; thus, the District Court was affirmed. St. v. Heath, 2004 MT 58, 320 M 211, 89 P3d 947 (2004), following St. v. DeVore, 1998

MT 340, 292 M 325, 972 P2d 816 (1998), St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002), and St. v. Falls Down, 2003 MT 300, 318 M 219, 79 P3d 797 (2003), and followed in St. v. Rogers, 2007 MT 227, 339 M 132, 168 P3d 669 (2007).

Use of Peremptory Challenge Rather Than Challenge for Cause to Remove Juror Not Considered Ineffective Assistance of Counsel: Deschon contended that he was deprived of a fair trial through defense counsel's failure to exercise challenges for cause to remove a juror who previously served on a jury that convicted a defendant on the same charge that Deschon was facing and another juror with a long involvement in law enforcement whose impartiality could be questioned. However, evidence in a voir dire reconstruction hearing revealed why counsel used peremptory challenges to remove the jurors instead. Counsel was prohibited from challenging the first juror for cause under St. v. Russell, 73 M 240, 235 P 712 (1925), because the juror would have had to serve on a jury trying a related offense to the offense that Deschon was charged with. Regarding the second juror, the mere fact that the juror was connected with law enforcement did not necessitate a finding of impartiality, and because the juror maintained that he could be impartial, a peremptory challenge was the only available method of removing the juror from the panel. Deschon did not meet the first prong of the *Strickland* test for ineffective assistance of counsel, and the conviction was affirmed. St. v. Deschon, 2004 MT 32, 320 M 1, 85 P3d 756 (2004).

No Abuse of Discretion in Denying Defendant's Challenges for Cause Based on Alleged Bias: Defendant challenged four different jurors for cause, and each challenge was denied. On appeal, defendant asserted that even though the potential jurors indicated that they could be fair and impartial, that did not cure their bias. The Supreme Court examined the voir dire record for each juror. Three were biased by media reports, and one was not sure how he would feel about defendant's guilt if defendant did not take the stand or present evidence, but each juror stated that the juror could set aside any personal opinions and make a fair and impartial decision based on the evidence. The District Court was affirmed. St. v. Falls Down, 2003 MT 300, 318 M 219, 79 P3d 797 (2003). See also St. v. Heath, 2004 MT 58, 320 M 211, 89 P3d 947 (2004).

When Juror Should Be Disqualified for Prejudice: A juror should be disqualified based on prejudice only when the juror has formed fixed opinions of the guilt or innocence of the defendant that the juror would not be able to lay aside and render a verdict based solely on the evidence. A District Court should not attempt to rehabilitate a juror whose spontaneous responses on voir dire expose a serious question about the ability to be fair and impartial. St. v. Falls Down, 2003 MT 300, 318 M 219, 79 P3d 797 (2003), following St. v. DeVore, 1998 MT 340, 292 M 325, 972 P2d 816 (1998). See also St. v. Heath, 2004 MT 58, 320 M 211, 89 P3d 947 (2004).

Claim of Ineffective Assistance of Counsel During Voir Dire Dismissed on Direct Appeal — Chastain Overruled: Following a felony DUI conviction, Herrman appealed, claiming ineffective assistance of counsel during voir dire. Counsel failed to remove several jurors for cause, but later removed the jurors by peremptory challenge, effectively causing the loss of peremptory challenges to which Herrman was entitled. The Supreme Court noted that jury impartiality goes to the very integrity of the justice system and that the presence of even one juror who cannot fairly assess the credibility of witnesses must be presumed prejudicial and result in reversal. Herrman cited St. v. Chastain, 285 M 61, 947 P2d 57 (1997), for the proposition that ineffective assistance occurred because counsel failed to develop information in the record demonstrating an individual juror's bias and to exercise challenges for cause against those jurors expressing bias. However, the Supreme Court overruled Chastain because it was a mistake to determine that counsel was ineffective during voir dire based on the lack of a reason apparent on the record. Although lawyers will state their reasons on the record for challenging a juror for cause, they do not state their reasons for not challenging a juror. Herrman's lawyer might have had tactical reasons for not challenging certain jurors for cause, but those reasons were not on the record, so the Supreme Court could not address Herrman's ineffective assistance claims without considering matters outside the record. Contentions based on matters outside the record are more appropriately raised in a petition for postconviction relief. Thus, Herrman's direct appeal was dismissed to allow a petition for postconviction relief that could address why counsel did not challenge certain jurors for cause. St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), followed in St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003), and, with regard to lack of a record regarding defense counsel's trial tactics as necessitating a postconviction hearing in lieu of direct appeal, in St. v. Henderson, 2003 MT 285, 318 M 31, 78 P3d 848 (2003). Herrman was also followed in St. v. Olsen, 2004 MT 158, 322 M 1, 92 P3d 1204 (2004). See also St. v. Whitlow, 2001 MT 208, 306 M 339, 33 P3d 877 (2001), and St. v. Racz, 2007 MT 244, 339 M 218, 168 P3d 685 (2007).

Juror Statements of Actual Bias Against Defense That Sex Crime Victim Was Old Enough to Consent — Reversal Warranted for Failure to Grant Challenge for Cause: Freshment's defense to charges of sexual intercourse without consent with a victim under age 16 was that he believed that the victim was old enough to give consent. During voir dire, two prospective jurors gave straightforward, consistent statements of actual bias against Freshment's legal defense. Following trial counsel's attempts to rehabilitate the jurors, the District Court denied Freshment's challenges for cause, so Freshment was required to use peremptory challenges to remove the jurors from the panel, ultimately exhausting all of his peremptory challenges. Under St. v. DeVore, 1998 MT 340, 292 M 325, 972 P2d 816 (1998), abuse of discretion occurs if a court fails to excuse a prospective juror when actual bias is discovered during voir dire, so both jurors should have been dismissed for cause. Under the rule in St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002), the District Court's error was conclusively prejudicial and automatic reversal was required. St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002).

Juror's Belief That Sexual Abuse Victim Would Not Lie as Demonstration of Questionable Partiality — Defendant Entitled to Have Juror Excused for Cause — Court's Abuse of Discretion in Ignoring Juror's Spontaneous Statements of Impartiality: During voir dire at Good's trial for felony sexual abuse of children and felony sexual assault, two jurors expressed reservations about their ability to give the benefit of any doubt to Good in light of their predisposition to favor the testimony of a teenaged complaining witness under the circumstances. Good challenged the jurors for cause. The trial judge attempted to rehabilitate the jurors through a colloquy on civics and the presumption of innocence and ultimately declined to remove the jurors for cause. Good appealed on grounds that he was wrongfully denied two of his six peremptory challenges when he had to use them to remove the jurors in question. The Supreme Court agreed. Although neither juror expressed an unequivocal opinion that Good was guilty, they did express a form of bias based on their opinion that a young sexual abuse victim would not lie, which demonstrated a serious question regarding their ability to act with impartiality and to afford Good the presumption of innocence to which he was entitled. The denial of Good's challenges for cause constituted structural error, warranting automatic reversal. The Supreme Court went on to admonish trial judges to refrain from attempting to rehabilitate jurors by putting them in a position in which they will not disagree with the trial court. St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002), following St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672 (1999). See also St. v. DeVore, 1998 MT 340, 292 M 325, 972 P2d 816 (1998).

Potential for Emotional Involvement as Juror Bias — Omissions by Counsel During and as Result of Voir Dire as Ineffective Assistance Warranting Reversal: Two prospective jurors expressed reservations about their ability to judge a case fairly, yet counsel failed either to follow up with additional questions about whether the prospective jurors could set aside their feelings and render a fair verdict or to exclude the jurors by challenge for cause or peremptorily. When counsel, for no apparent reason, abandons a client's right to challenge a juror, error is attributed to counsel. The presence on a jury of even one juror who cannot fairly assess the credibility of witnesses is considered prejudicial. Counsel's failure to take steps to prevent the presence on the jury of two such jurors constituted ineffective assistance of counsel and reversible error. St. v. Chastain, 285 M 61, 947 P2d 57, 54 St. Rep. 1044 (1997), following U.S. v. Eubanks, 591 F2d 513 (9th Cir. 1979), and overruled in St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003), to the extent that a claim of ineffective assistance of counsel for failure to challenge prospective jurors in voir dire can be determined from a record that is silent as to counsel's reasoning.

Conflicting Juror Statements at Trial: Juror said she was sympathetic toward her pupil, who was the child of deliberate homicide victim. Juror told defense counsel she could not be sure she could give defendant a fair trial. She told the prosecutor she could render a fair verdict on the evidence. The judge questioned her, and her responses supported her statement to the prosecutor. A challenge to the juror for cause was properly denied. Bashor v. Risley, 730 F2d 1228 (9th Cir. 1984).

Effect of Pretrial Publicity on Jurors — Review in Federal Habeas Corpus Proceeding: Because of the pervasiveness of news coverage, it is impossible to obtain prospective jurors who have heard nothing of a serious crime committed in their area. Only where prospective jurors have formed fixed opinions on the guilt or innocence of a defendant that they would not be able to lay aside should they be disqualified as jurors. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Alleged Juror Prejudice — Confusion in Voir Dire Record: When defendant contended that the presence of an allegedly prejudiced juror deprived him of his right to trial by a fair and impartial jury, the existence of some confusion in voir dire as evidenced by the record was good

reason (in conjunction with authorities relating to scope of review of juror challenge rulings) to rely on the trial court's decision to deny defendant's challenge for cause based on implied bias. St. v. Williams, 185 M 140, 604 P2d 1224 (1979).

County Officer as Prospective Juror: This statute does not permit an automatic challenge for cause solely for the reason that a prospective juror in a criminal case is also a county officer. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

Law Enforcement Officer as Potential Juror:

In declaring that one's status as a law enforcement officer does not ipso facto disqualify him from sitting as a juror in a criminal case, the court was mindful of the natural inclinations of one whose life is committed to law enforcement. For this reason, the court stated that the widest possible examination should be allowed of such a person as a potential juror and, should there be any doubt in the event of a challenge for cause, the trial court should resolve the doubt in favor of allowing the challenge. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

The bare fact that a juror is connected with law enforcement does not, without a showing of bias, necessitate a finding that he would not be an impartial juror. St. v. Thomson, 169 M 158, 545 P2d 1070 (1976), followed in St. v. Sullivan, 266 M 313, 880 P2d 829, 51 St. Rep. 827 (1994).

Juror's Impartiality — Effect on Change of Venue Request: The trial court did not abuse its discretion in denying a motion for change of place of trial based on the mere existence of any preconceived notion as to the guilt or innocence of an accused as sufficient impartiality is established if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. St. v. Lewis, 169 M 290, 546 P2d 518 (1976), followed in St. v. Sullivan, 266 M 313, 880 P2d 829, 51 St. Rep. 827 (1994).

Juror's Opinion: When a juror on his voir dire in a burglary case stated that he had formed an opinion based on what he had heard on the radio and television and read in the newspapers but had not discussed the case with anyone purporting to know any of the facts about it and declared under oath that he could lay aside his opinion and judge the case solely on the evidence presented, it was not error to deny the defendant's challenge. St. v. Moran, 142 M 423, 384 P2d 777 (1963).

Challenges for Cause Upheld: When the State challenged three jurors for cause and the evidence showed that one of the jurors was nearly deaf and the other two had formed opinions, the court was correct in excusing the jurors for cause. St. v. Gates, 131 M 78, 307 P2d 248 (1957).

Challenge Overruled: When the court relied on answers to the last two questions and on the assumption that there was a misunderstanding as to the earlier questions in examining a prospective juror for prejudice, the overruling of the challenge was not disturbed, especially when the defendant had three peremptory challenges left at the time and exercised one to discharge such juror; the fact that the defendant regarded other jurors as undesirable, on which he might have exercised his challenges, gave him no right to have such juror excused for bias when there was no showing that the other jurors were disqualified. St. v. Allison, 122 M 120, 199 P2d 279 (1948).

New Trial — Juror Bias: The court set aside a conviction of first degree burglary and remanded the case for a new trial for error committed by the trial court, confessed by the Attorney General and shown by the record, in refusing the defendant's motion for retrial based on the ground that a juror was biased and prejudiced. St. v. Summers, 107 M 34, 79 P2d 560 (1938).

Newspaperman's Bias: After conviction of first degree murder, the defendant moved for a new trial on the ground, among others, that a juror had been guilty of misconduct in concealing from the court, while under examination on his voir dire, the fact that after the arrest of the defendant he, as correspondent for the newspaper published at the county seat, had furnished it articles, which were published, in effect complimenting the officers for their quick action in apprehending the "murderer", whose "worthless carcass will lie to rot deeply buried when the wheels of justice cease to grind", etc. The motion was denied. The court held, in answer to the contention that the trial court abused its discretion in denying the motion, that in view of the explanation of his conduct by the juror on the hearing of the motion that the articles were not intended to be personal as applied to the defendant, whom he did not know, but applicable to anyone who committed homicide, and the advantageous position of the trial judge in passing upon the sincerity and truth of the statements of the juror on his examination touching his competency as well as on the hearing of the motion, the court did not err in its ruling. St. v. Hoffman, 94 M 573, 23 P2d 972 (1933). See also St. v. Huffman, 89 M 194, 296 P 789 (1931).

Challenge to Juror: In a prosecution for receiving stolen property, a juror answered voir dire questions propounded by the State by admitting that he was a close friend of the defendant but could try him as if he were a stranger but that he would like to be excused. He then stated that he

would not convict the defendant even if he believed him guilty beyond a reasonable doubt. Thereafter, however, on examination by the defendant's counsel, he again asserted that he would vote for conviction regardless of his friendship for the defendant if proper under the law and the evidence. The court's ruling excusing the juror may not be held reversible error even though it be conceded that technical error was committed in sustaining the challenge on an improper ground. St. v. Huffman, 89 M 194, 296 P 789 (1931). See also St. v. Williams, 262 M 530, 866 P2d 1099, 50 St. Rep. 1672 (1993).

Effect of Juror Admitting Bias: When a juror in a criminal case on examination first admits bias in favor of the defendant but later states that notwithstanding such bias he can consider the evidence impartially, the latter statement should be received with caution. St. v. Huffman, 89 M 194, 296 P 789 (1931).

When Trial Judge Should Sustain Challenge: On the voir dire examination of a prospective juror the trial court is the judge of the weight to be given to his testimony, and if it has any doubt as to the existence of such a state of mind in a juror as would disqualify him, it should sustain a challenge to him in the interest of justice. St. v. Huffman, 89 M 194, 296 P 789 (1931).

Causes Enumerated Not Exclusive: The constitutional provision that one accused of crime shall have the right to trial by an impartial jury is a limitation upon the power of the Legislature, and it is beyond its power to curtail it. Hence, when it clearly appeared from the examination of a juror on his voir dire that some circumstance or connection with the case rendered him unfit to serve, he should have been disqualified even though the cause did not fall within any of those specified in the former statute. St. v. Russell, 73 M 240, 235 P 712 (1925), followed in St. v. Williams, 262 M 530, 866 P2d 1099, 50 St. Rep. 1672 (1993).

Juror's Prejudice: A juror who testified on his voir dire examination that he entertained a bitter prejudice against the Industrial Workers of the World and against every member of it, that the prejudice would abide with him throughout the trial, and that it would require evidence to remove the prejudice and less evidence to convict the defendant, who was a member of the organization, than if he were not a member, was not an impartial juror, and refusal to grant a challenge for cause was error. St. v. Brooks, 57 M 480, 188 P 942 (1920).

Bias Concealed by Juror: Under former statute providing for a new trial when the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of all the jurors, the fact that a juror, when sworn, was biased and prejudiced against the defendant, which fact he concealed upon his voir dire examination and which neither the defendant nor his counsel discovered until after the verdict, was ground for a new trial. St. v. Mott, 29 M 292, 74 P 728 (1903).

Juror With Opinion Based on Newspaper Story or Hearsay: A juror is competent who has formed and expressed an opinion on the case from reading newspaper statements and from hearsay but who states that he does not know the defendant, has no prejudice, and notwithstanding such opinion, can impartially try the case. St. v. Sheerin, 12 M 539, 31 P 543 (1892). See also St. v. Howard, 30 M 518, 77 P 50 (1904); St. v. Byrne, 60 M 317, 199 P 262 (1921); St. v. Juhrey, 61 M 413, 202 P 762 (1921); St. v. Vettere, 76 M 574, 248 P 179 (1926); St. v. Simpson, 109 M 198, 95 P2d 761 (1939), overruled on other grounds in St. v. Knox, 119 M 449, 175 P2d 774 (1946); St. v. Moran, 142 M 423, 384 P2d 777 (1963); St. v. White, 151 M 151, 440 P2d 269 (1968).

Collateral References

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt. 50 ALR 4th 969.

Jury: visual impairment as disqualification. 48 ALR 4th 1154.

Exemption as juror: excusing, on account of public, charitable, or educational employment, one qualified and not specifically exempted as juror in state criminal case, as ground of complaint by accused. 99 ALR 3d 1261.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 ALR 3d 172.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR 3d 15.

Former law enforcement officers as qualified jurors in criminal cases. 72 ALR 3d 958.

Law enforcement officers as qualified jurors in criminal cases. 72 ALR 3d 895.

Similarity of occupation between proposed juror and alleged victim of crime as affecting juror's competency. 71 ALR 3d 974.

Jury: Membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge. 63 ALR 3d 1052.

Prior conviction: propriety, on voir dire in criminal case, of inquiries as to juror's possible prejudice if informed of defendant's prior convictions. 43 ALR 3d 1081.

Capital punishment: comment note on beliefs regarding capital punishment as disqualifying juror in capital case—post-Witherspoon cases. 39 ALR 3d 550.

Prior service on grand jury which considered indictment against accused as disqualification for service on petit jury. 24 ALR 3d 1236.

Social or business relationship between proposed juror and nonparty witness as affecting former's qualification as juror. 11 ALR 3d 859.

Prior case: juror's presence at or participation in trial of criminal case (or related hearing) as ground of disqualification in subsequent criminal case involving same defendant. 6 ALR 3d 519.

46-16-116. Peremptory challenges.

Commission Comments

Source: See commission comments to 46-16-114.

Compiler's Comments

1993 Amendment: Chapter 262 near middle of (4) substituted "prosecution" for "state".

1991 Amendment: In (4), after "tried", deleted "in the district court"; and made minor changes in style.

Case Notes

Defendant's Batson Challenge of Prosecution's Race-Based Use of Peremptory Challenges During Voir Dire Properly Dismissed: During voir dire in Barnaby's trial on drug charges, the state used two peremptory challenges to dismiss jurors who were tribal members. Defense counsel used one peremptory challenge to remove a tribal member. Barnaby objected to the state's use of challenges to remove members from the venire based solely on their race, citing Batson v. Ky., 476 US 79 (1986), but the objection was overruled. On appeal, the Supreme Court applied the three-part Batson test to determine whether the state exercised its peremptory challenges in a discriminatory manner. First, defendant must establish a prima facie case for discrimination based on the fact that defendant belongs to a cognizable racial group and then must raise an inference that the state used peremptory challenges to exclude members of the venire on account of their race. If defendant makes that case, the state must provide a race-neutral explanation for its use of peremptory strikes, and the trial court then determines whether the defendant has established purposeful discrimination. Here, the trial court did not rule whether Barnaby presented a prima facie case for discrimination. Nevertheless, the state provided its explanation for striking the jurors. One of the jurors was related to Barnaby, and the other was a close friend of Barnaby's attorney. The trial court also noted that the third strike was made by Barnaby, not the state. Although the trial court did not develop a complete record by providing a full explanation of the rationale for denying Barnaby's Batson challenge (subsequently required under St. v. Parrish, 2005 MT 112, 327 M 88, 111 P3d 671 (2005)), the Supreme Court affirmed because the state provided highly credible race-neutral explanations for its peremptory strikes. St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006).

Sufficient Race-Neutral Explanation Regarding Exercise of Peremptory Challenge to Remove Only Potential Juror of Different Ethnic Background — Batson Argument Properly Denied: During defendant's trial for deliberate homicide, aggravated kidnapping, and sexual intercourse without consent, the state exercised a peremptory challenge to remove the only potential juror of a different ethnic background. Defendant contended that the challenge was discriminatory, based on Batson v. Ky., 476 US 79 (1986). Despite the fact that the District Court did not make findings regarding its reason for denying defendant's objection, the record was sufficient for the Supreme Court to determine that the state provided a sufficient race-neutral explanation for its exercise of the peremptory challenge, namely that concern for the juror arose not from ethnic background, but rather from the juror's experience with assault cases. The explanation was sufficient to withstand defendant's Batson challenge, and the District Court was affirmed. St. v. Falls Down, 2003 MT 300, 318 M 219, 79 P3d 797 (2003).

Claim of Ineffective Assistance of Counsel During Voir Dire Dismissed on Direct Appeal — Chastain Overruled: Following a felony DUI conviction, Herrman appealed, claiming ineffective assistance of counsel during voir dire. Counsel failed to remove several jurors for cause, but later removed the jurors by peremptory challenge, effectively causing the loss of peremptory challenges to which Herrman was entitled. The Supreme Court noted that jury impartiality goes to the very integrity of the justice system and that the presence of even one juror who cannot fairly assess the credibility of witnesses must be presumed prejudicial and result in reversal. Herrman cited St. v. Chastain, 285 M 61, 947 P2d 57 (1997), for the proposition that ineffective assistance occurred because counsel failed to develop information in the record demonstrating

an individual juror's bias and to exercise challenges for cause against those jurors expressing bias. However, the Supreme Court overruled Chastain because it was a mistake to determine that counsel was ineffective during voir dire based on the lack of a reason apparent on the record. Although lawyers will state their reasons on the record for challenging a juror for cause, they do not state their reasons for not challenging a juror. Herrman's lawyer might have had tactical reasons for not challenging certain jurors for cause, but those reasons were not on the record, so the Supreme Court could not address Herrman's ineffective assistance claims without considering matters outside the record. Contentions based on matters outside the record are more appropriately raised in a petition for postconviction relief. Thus, Herrman's direct appeal was dismissed to allow a petition for postconviction relief that could address why counsel did not challenge certain jurors for cause. St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), followed in St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003), and, with regard to lack of a record regarding defense counsel's trial tactics as necessitating a postconviction hearing in lieu of direct appeal, in St. v. Henderson, 2003 MT 285, 318 M 31, 78 P3d 848 (2003). Herrman was also followed in St. v. Olsen, 2004 MT 158, 322 M 1, 92 P3d 1204 (2004). See also St. v. Whitlow, 2001 MT 208, 306 M 339, 33 P3d 877 (2001), and St. v. Racz, 2007 MT 244, 339 M 218, 168 P3d 685 (2007).

Peremptory Challenges to Prospective Jurors — Factors Necessary to Show Purposeful Discrimination in Jury Selection — Waiver of Batson Challenge When Not Timely Raised: Ford contended that the state violated his due process rights by improperly exercising all of its peremptory challenges at trial to exclude women from the jury panel, citing J.E.B. v. Ala. ex rel. T.B., 511 US 127 (1994), as a prohibition against gender discrimination during jury selection. In a case of first impression, the Supreme Court applied a de novo review to the trial court's application of the law, deferring to the trial court's findings of fact unless clearly erroneous. The Supreme Court then reviewed the history of the discriminatory use of peremptory challenges as addressed in Batson v. Ky., 476 US 79 (1986), and its progeny, noting that the rules regarding challenges to jury selection no longer apply exclusively to prosecutors striking members of the venire who are the same race as the defendant, but that any racially motivated reason for striking a prospective juror is prohibited whether the juror shares the racial identity of the defendant or not (see Powers v. Ohio, 499 US 400 (1991)). Further, the challenge is no longer limited to the government in criminal actions but has been extended to prevent a defendant in a criminal action from using peremptory challenges to exclude jurors based on race (see Ga. v. McCollum, 505 US 42 (1992)), has been applied to private litigants in civil cases (see Edmonson v. Leesville Concrete Co., 500 US 614 (1991)), and has been used to prohibit gender discrimination in jury selection, as in J.E.B. In order to establish a prima facie case of purposeful discrimination, a defendant must show that: (1) the defendant is a member of a cognizable racial group; (2) the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; and (3) these facts and other relevant circumstances raise an inference that the prosecutor used the peremptory jury selection practice to exclude members of the venire from the petit jury on account of their race. In addition, numerous courts have held that the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria must be exercised in a timely manner, and failure to raise a Batson challenge before the jury is sworn and before the venire is dismissed results in waiver of the challenge. In Ford's case, his counsel waited until after the jury was sworn and the venire dismissed before raising the Batson challenge. Because the motion was untimely, and therefore waived, the Supreme Court declined to address the merits of Ford's claim of discriminatory use of peremptory challenges. St. v. Ford, 2001 MT 230, 306 M 517, 39 P3d 108 (2001), followed in St. v. Parrish, 2005 MT 112, 327 M 88, 111 P3d 671 (2005), and Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Potential for Emotional Involvement as Juror Bias — Omissions by Counsel During and as Result of Voir Dire as Ineffective Assistance Warranting Reversal: Two prospective jurors expressed reservations about their ability to judge a case fairly, yet counsel failed either to follow up with additional questions about whether the prospective jurors could set aside their feelings and render a fair verdict or to exclude the jurors by challenge for cause or peremptorily. When counsel, for no apparent reason, abandons a client's right to challenge a juror, error is attributed to counsel. The presence on a jury of even one juror who cannot fairly assess the credibility of witnesses is considered prejudicial. Counsel's failure to take steps to prevent the presence on the jury of two such jurors constituted ineffective assistance of counsel and reversible error. St. v. Chastain, 285 M 61, 947 P2d 57, 54 St. Rep. 1044 (1997), following U.S. v. Eubanks, 591 F2d 513 (9th Cir. 1979), and overruled in St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003), to the extent that a claim of

ineffective assistance of counsel for failure to challenge prospective jurors in voir dire can be determined from a record that is silent as to counsel's reasoning.

Death Penalty Not Sought — No Capital Case — Peremptory Challenges Limited: When the prosecutor and court agree that the death penalty will not be sought, it will not be considered a capital case in determining the number of peremptory challenges to which a party is entitled. It was, therefore, proper for the court to limit each defendant to six peremptory challenges. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Absence During Peremptory Challenges Not Violative of Constitutional Rights: In a prosecution for theft by accountability, the defendant was not denied due process of law by her absence from the courtroom during peremptory challenges of jurors. Although the defendant's presence may be crucial during the voir dire questioning of the jury, the Supreme Court has previously held that a defendant's rights are not violated when the matters handled in his absence are purely legal and the peremptory challenge of jurors is only a pro forma execution of the decisions formulated during voir dire. Her absence was therefore not injurious to either her right of due process or her right of confrontation. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981).

How Challenges Taken — Waiver: When the State waived its fourth peremptory challenge and the defendant exhausted his peremptory challenges, it was not error, on the panel's being filled and passed for cause, to permit the State to peremptorily challenge a juror who was in the box when the State waived its fourth challenge; the State's waiver of its fourth challenge was not a waiver of any subsequent challenge to which it was entitled. St. v. Peel, 23 M 358, 59 P 169 (1899).

Collateral References

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction—state cases. 70 ALR 5th 587.

Use of peremptory challenges to exclude persons from criminal jury based on religious affiliation—post-Batson state cases. 63 ALR 5th 375.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury—post-Batson state cases. 47 ALR 5th 259.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury—post-Batson state cases. 20 ALR 5th 398.

Nature of offense or extent of punishment: validity and construction of statute or court rule prescribing number of peremptory challenges in criminal cases according to nature of offense or extent of punishment. 8 ALR 4th 149.

Multiple charges: additional peremptory challenges because of multiple criminal charges. 5 ALR 4th 533.

46-16-117. Time for challenges.

Commission Comments

Source: See commission comments to 46-16-114.

46-16-118. Alternate jurors.

Commission Comments

Source: See commission comments to 46-16-114.

Compiler's Comments

1991 Amendment: At beginning of (1) deleted "After the jury is impaneled and sworn"; and made minor changes in style.

Case Notes

Substitution of Juror After Case Submitted to Jury — No Error: After a felony sexual intercourse without consent case was submitted to the jury, a juror told the trial court that she could not perform her duties, and the trial court discharged her and replaced her with an alternate juror. Grindheim objected on grounds that this section does not allow substitution of a juror after a case is submitted to the jury. The Supreme Court disagreed and cited St. v. Pease, 222 M 455, 724 P2d 153 (1986), for the holding that substitution of an alternate for a juror who can no longer perform the juror's duties is permitted at any time prior to the reaching of a verdict. St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004).

Absence of Defendant From Critical Trial Proceeding Violative of Fundamental Right to Appear and Defend in Person — No Error Given Curative Action of Trial Court: During Kennedy's criminal trial, a juror communicated with one of the state's witnesses. The trial judge then met with the juror in chambers without Kennedy or any counsel present, and the juror

admitted the conversation, but denied mentioning anything about it to the jury. The court then met with counsel in chambers, replaced the juror with an alternate, excluded the witness from testifying, and went on with the trial. Defense counsel moved for mistrial and dismissal with prejudice, but the motion was denied. On appeal, the Supreme Court held that excluding Kennedy from the conversation with the juror violated Kennedy's fundamental right to be present at all critical stages of trial to defend in person. Further, any waiver by defense counsel by failing to object was ineffective because Kennedy was never told that he had a right to be present or that the juror questioning was about to occur. However, Kennedy was not prejudiced or deprived of a fair trial by the error in light of the District Court's corrective actions. Thus, denial of a mistrial was not an abuse of discretion. St. v. Kennedy, 2004 MT 53, 320 M 161, 85 P3d 1279 (2004), followed in St. v. Godfrey, 2009 MT 60, 349 M 335, 203 P3d 834 (2009).

Possibility of Felony Charge Against Juror as Affecting Impartiality — Replacement Affirmed: Defendant in a sexually related homicide case contended District Court erred by replacing a juror during trial after finding out the juror was to be arrested for felony sexual intercourse without consent. The court held that the possibility of the juror's being charged was sufficient to prevent his impartiality in deliberations. The Supreme Court affirmed, holding that defendant failed to demonstrate any prejudice from the action and that replacement was timely pursuant to this section. St. v. Pease, 222 M 455, 724 P2d 153, 43 St. Rep. 1417 (1986), followed in St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004).

Alternate Juror — Conversation With Jury After Jury Retires: A jury alternate returned to the jury room with the jury after the case had been submitted for decision, which defendant contended was reversible error, since 46-16-503 requires an officer of the court to prevent conversations between the jurors and others after the jury retires. The Supreme Court held that an alternate, although excluded from deliberating and voting, is in every other respect a juror; therefore, an alternate does not fall within the statutory ban against conversations with others. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Alternate Juror Properly Called: The court did not err when, prior to the jury retiring, it replaced with an alternate a juror who was a personal friend of the prosecutor and had personal knowledge of the evidence of the case. St. v. Baugh, 174 M 456, 571 P2d 779 (1977).

Collateral References

Threats of violence against juror in criminal trial as ground for mistrial or dismissal of juror. 3 ALR 5th 963.

Alternate jurors: presence of alternate juror in jury room as ground for reversal of state criminal conviction. 15 ALR 4th 1127.

46-16-120. Misdemeanor offenses.

Commission Notes

1991 Comment: This statute is a controlling provision for those cases in which a defendant is charged with a misdemeanor offense. The statute has retained elements of 1987 MCA 46-12-103 and 46-17-205 [now repealed].

Case Notes

Counsel Present but Defendant Not in Attendance for District Court Appeal in Misdemeanor Case — No Authority of District Court to Dismiss Appeal When Defendant Not Required to Be Present: Clark appealed a Justice's Court judgment for issuing a bad check, and the District Court set a trial de novo. On the day of trial, Clark's counsel was present, but Clark did not appear in person. Because Clark was not present, the District Court dismissed the appeal pursuant to 46-17-311 and reinstated the Justice's Court judgment. Clark appealed to the Supreme Court, which reversed and remanded. Under this section, a defendant may appear by counsel only in all misdemeanor cases unless the court requires the defendant's personal appearance. Because Clark's counsel was present and ready to proceed and because the District Court did not require Clark's personal presence, the District Court did not have authority to dismiss the appeal and should have proceeded with the trial pursuant to 46-16-122. St. v. Clark, 2006 MT 313, 335 M 39, 149 P3d 551 (2006).

Appearance of Accused Through Attorney Allowed Unless Personal Appearance Ordered: This section clearly allows persons charged with misdemeanor offenses to appear through their attorney only, unless the court specifically requires a personal appearance by the accused. In this case, a Justice of the Peace specifically ordered the defendant to "make all court appearances" but did not order the defendant to appear in person. Therefore, an appearance by the defendant's attorney satisfied the statute, and it was error for the defendant to be held in contempt for failure to appear. St. v. Voth, 270 M 349, 892 P2d 537, 52 St. Rep. 225 (1995).

46-16-121. Felony offenses.

Commission Comments

1991 Comment: This statute establishes the provision governing the presence of the defendant at proceedings in felony cases. It also directs that unless the court expressly orders the defendant's presence, the defendant has the option of being personally present at all other proceedings.

Subsection (3) expressly states that the defendant need not appear before the Supreme Court. Under this provision, the defendant's presence is not required for appeal, postconviction, and other motion hearings occurring after sentencing. This does not intend to alter the defendant's right to be present when that right is otherwise established. See Rule 14, Rules of Sentence Review Division (1987).

Case Notes

Shackling of Defendant at Trial to Ensure Security of Courtroom — No Due Process Violation: At Herrick's attempted deliberate homicide trial, the trial court agreed to provide additional security measures, including leg shackles, reasoning that the jury was not likely to see the shackles while Herrick was seated. Following conviction, Herrick appealed on grounds that the use of shackles violated his due process right to a fair trial. The Supreme Court noted that the due process clause of the U.S. Constitution entitles a criminal defendant to appear before a jury free of shackles and other physical restraints and concluded that the Montana Constitution does not provide more protection with regard to shackling than the U.S. Constitution. However, that right is not absolute, and a trial judge's decision to shackle a defendant is not unconstitutional per se (see Morgan v. Bunnell, 24 F3d 49 (9th Cir. 1994)). The Supreme Court adopted the two-part test in Morgan for determining whether a trial court has abused its discretion in restraining a defendant at trial. Under that test, the trial court must be persuaded by compelling circumstances that some measure is needed to maintain the security of the courtroom and must pursue less restrictive alternatives before imposing physical restraints. In this case, the trial court satisfied both parts of the test. The facts presented compelling circumstances to support the court's exercise of its broad discretion in determining that additional security was necessary, and the court took great care to prevent the jury from being aware that Herrick's ankles were shackled. Nothing indicated that the jury saw the leg restraints at any time, so Herrick's rights to individual dignity, a fair trial, and due process were not violated. St. v. Herrick, 2004 MT 323, 324 M 76, 101 P3d 755 (2004), distinguishing St. v. Finch, 975 P2d 967 (Wash. 1999), followed in St. v. Merrill, 2008 MT 143, 343 M 130, 183 P3d 56 (2008), to the extent that keeping a defendant shackled during trial without establishing compelling circumstances for security measures constitutes a violation of the defendant's constitutional due process rights. See also Ill. v. Allen, 397 US 337 (1970).

Presence of Defendant in Handcuffs — No Mistrial:

When Porter entered the courtroom for trial, he was in handcuffs. Defense counsel requested that the handcuffs be removed, and Porter was not shackled during trial. Nevertheless, Porter contended that the failure of counsel to request a mistrial constituted ineffective assistance of counsel. The Supreme Court disagreed. In St. v. Baugh, 174 M 456, 571 P2d 779 (1977), the court addressed a similar situation and concluded that a defendant is not denied a fair trial or entitled to a mistrial solely because the defendant was momentarily and inadvertently seen in handcuffs. In St. v. Pendergrass, 189 M 127, 615 P2d 201 (1980), the court found that in the absence of an indication of prejudicial circumstances, such an occurrence does not warrant a new trial. In St. v. Schatz, 194 M 59, 634 P2d 1193 (1981), the court concluded that no showing of prejudice to a defendant results from a momentary viewing of a defendant in handcuffs. Despite these previous holdings, Porter suggested that Rhoden v. Rowland, 172 F3d 633 (9th Cir. 1999), should apply. The Rhoden court found that a defendant's shackling during trial amounted to a due process violation. The Supreme Court distinguished Rhoden because Porter was not shackled during trial, and only briefly appeared in handcuffs in front of a group of potential jurors. Porter failed to establish any prejudice, and counsel's failure to move for a mistrial did not constitute ineffective assistance. Porter v. St., 2002 MT 319, 313 M 149, 60 P3d 951 (2002).

If there were no showing of prejudice to the defendant resulting from a momentary viewing of him in handcuffs by the jury outside the courtroom, he has not been denied a fair trial and hence is not entitled to a mistrial. St. v. Schatz, 194 M 59, 634 P2d 1193, 38 St. Rep. 1687 (1981).

It was not reversible error for the trial court to deny the defendant's motion for mistrial because the State had caused the defendant to appear in handcuffs before the jury panel. Defendant was "momentarily and inadvertently seen in handcuffs" by prospective jury members prior to trial, and there was no indication of prejudicial consequences in the record. St. v. Pendergrass, 189 M 127, 615 P2d 201 (1980).

Defendant's Exclusion From In-Chambers Individual Voir Dire Proceedings Violative of Right to Be Present at Critical Stages of Trial: Bird was accused of felony partner or family member assault. Prior to trial, the District Court conducted in-chambers voir dire specifically to elicit prospective jurors' personal feelings and experiences regarding domestic violence. Both the prosecutor and defense counsel were present, but Bird was not. Once the jury panel was passed for cause, the court recessed and met with counsel in chambers to allow the exercise of peremptory challenges, but again Bird was not included in the meeting. At the close of the meeting, the prosecutor noticed that Bird was not present and questioned whether the defendant's presence was necessary. The judge said that it was assumed that defense counsel wished to waive Bird's presence, and defense counsel stated that Bird had expressed no feelings about it one way or another. Bird was convicted and appealed on several grounds, including whether: (1) certain jurors should have been removed for cause; (2) defense counsel rendered deficient performance; (3) Bird should have been present during the individual voir dire; (4) Bird was prejudiced by certain testimony; and (5) the burden of proof was improperly shifted to Bird. The Supreme Court found the third issue to be dispositive. The court disagreed with the state's contention that Bird's presence at voir dire had been waived. The right of a defendant to be present at all critical stages of trial, including in-chambers individual voir dire, is a fundamental right that can be waived only if the trial court obtains an on-the-record personal waiver by the defendant, acknowledging that the defendant voluntarily, intelligently and knowingly waives that right. There can be no waiver by a person who does not know the person's rights or what is being waived. Bird was not informed of the constitutional right to be present during voir dire and was not given the opportunity to choose whether to participate, so not only did Bird not waive the constitutional right, he was never afforded the opportunity to waive it. Bird's exclusion from voir dire was a structural error that undermined the integrity of the entire trial, and constituted reversible error. St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), following St. v. Reed, 65 M 51, 210 P 756 (1922), and St. v. Allison, 116 M 352, 153 P2d 141 (1944), and distinguishing U.S. v. Gagnon, 470 US 522 (1985). See also St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000).

Motion for New Trial Properly Denied — Attorney Assistance Not Ineffective: Swan argued that he was ineffectively represented because his attorney failed to request an instruction on a lesser included offense, neglected to ensure Swan's presence at an in camera hearing at which the trial court considered and answered a note from the jury inquiring whether an assault instruction applied to a felony aggravated assault charge as well as a felony assault (now assault with a weapon) charge, and allowed joinder of felony assault (now assault with a weapon) and felony aggravated assault charges. Finding that Swan failed to meet the first prong of the Strickland test, the Supreme Court held that Swan was effectively represented because counsel's performance was within the range of competence demanded of counsel in such cases and did not prejudice Swan in a manner that would have resulted in a different trial result. St. v. Swan, 279 M 483, 928 P2d 933, 53 St. Rep. 1246 (1996).

Repronouncement of Sentence in Defendant's Presence: When the trial court pronounced sentence against the defendant, convicted of second-degree assault, while the defendant was absent, it was not error for the court on its own motion to vacate the sentence and repronounce the same sentence 2 days later in the presence of the defendant and his attorney. St. v. Porter, 143 M 528, 391 P2d 704 (1964).

Conclusive Presumption: One convicted of a crime may not assert prejudicial error on the ground that the record on appeal fails to disclose that he was present at the time the verdict was returned unless the record affirmatively shows the contrary, otherwise it must be conclusively deemed that he was present in court at all stages of the trial. St. v. Cates, 97 M 173, 33 P2d 578 (1934).

Presence of Accused at Trial — Substantial Right: Under former law, the presence of the defendant at his trial was a matter that affected the substantial rights of both parties, and therefore the provision requiring the Supreme Court to give judgment on appeal without regard to technical errors or defects not affecting the substantial rights of the parties had no application. St. v. Reed, 65 M 51, 210 P 756 (1922).

Clerk's Minutes Sufficient Showing: The clerk's minutes in a prosecution for a felony were construed on appeal to show that the defendant was present in court when the verdict was returned. St. v. Hall, 55 M 182, 175 P 267 (1918).

46-16-122. Absence of defendant from trial.

Commission Comments

1991 Comment: This statute is based on Rule 1043 of the California Rules of Criminal Procedure. Subsection (2) sets forth options for the court, including trial in absentia, in misdemeanor cases.

Subsection (3) governs those instances in which the defendant may be absent in felony cases after the trial has commenced in his presence.

Compiler's Comments

1993 Amendment: Chapter 262 in (2)(c) substituted "an arrest" for "a bench".

Case Notes

Conviction Not Entered in Violation of Defendant's Right to Be Present at Trial — Use of Prior DUI Conviction to Support Felony DUI Charge Not Error: The state sought to use three prior DUI convictions to enhance Weaver's 2005 DUI charge to felony DUI, fourth offense. Weaver contended that use of the prior 1996 conviction was constitutionally infirm because he had been tried in absentia in violation of his right to be present at the proceedings and that any waiver of that right had to be proved to be knowing, voluntary, and specific as required by this section. Because Weaver swore on direct examination that he did not have notice of the 1996 trial date, the burden shifted to the state to provide direct evidence that the 1996 conviction was not entered in violation of Weaver's rights. The Supreme Court concluded that the state met its burden. Oral and documentary evidence showed that either Weaver knew of the 1996 trial date and was willfully absent or he kept himself deliberately ignorant of the trial date, thus waiving the right to be present. When a defendant's failure to know of a continued trial date is directly attributable to the defendant's efforts to keep himself ignorant of that date, the defendant may not later complain about a lack of knowledge. Thus, the 1996 conviction was not entered in violation of Weaver's right to be present, and the District Court correctly ruled that the 1996 conviction could be used to support a charge of felony DUI. St. v. Weaver, 2008 MT 86, 342 M 196, 179 P3d 534 (2008), following U.S. v. Houtchens, 926 F2d 824 (9th Cir. 1991).

Failure of Counsel to Raise Issue of Defendant's Absence at In-Chambers Meetings as Ineffective Assistance — Failure to Raise Issue on Direct Appeal Prejudicial: During Price's trial for sexual intercourse without consent, there were 12 in-chambers conferences between the trial judge and counsels at which various subjects were discussed, including jury selection, presentation of witnesses, witness testimony, exclusion of evidence, removal of certain jurors after trial began, basic scheduling matters, and others. Price was present for only one conference. Price's trial counsel claimed that he had informed Price of the right to be present, but that Price declined to participate, and trial counsel waived Price's right to be present at 8 of the 11 conferences. Price attained new counsel for his appeal, and even though Price claimed that he never waived the right to be present at the conferences, appellate counsel failed to raise the issue of Price's absence, despite the holding in St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), that a defendant has the right to be present during critical stages of a trial. The District Court held that Price was not prejudiced because, taking into account the three meetings that counsel did not waive Price's right to be present, the outcome would not have changed had Price been there. Price appealed on grounds that the failure of appellate counsel to raise the issue constituted ineffective assistance. The Supreme Court agreed and reversed. There was a legitimate legal basis upon which to raise the issue that was sufficient to undermine confidence in the outcome of the appeal, and appellate counsel's failure to raise the issue constituted prejudicial error. The case was remanded to allow Price a new appeal on the issue. Price v. St., 2007 MT 307, 340 M 109, 172 P3d 1236 (2007). See also St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005).

Counsel Present but Defendant Not in Attendance for District Court Appeal in Misdemeanor Case — No Authority of District Court to Dismiss Appeal When Defendant Not Required to Be Present: Clark appealed a Justice's Court judgment for issuing a bad check, and the District Court set a trial de novo. On the day of trial, Clark's counsel was present, but Clark did not appear in person. Because Clark was not present, the District Court dismissed the appeal pursuant to 46-17-311 and reinstated the Justice's Court judgment. Clark appealed to the Supreme Court, which reversed and remanded. Under 46-16-120, a defendant may appear by counsel only in all misdemeanor cases unless the court requires the defendant's personal appearance. Because Clark's counsel was present and ready to proceed and because the District Court did not require Clark's personal presence, the District Court did not have authority to dismiss the appeal and should have proceeded with the trial pursuant to this section. St. v. Clark, 2006 MT 313, 335 M 39, 149 P3d 551 (2006).

Defendant's Voluntary Absence From Trial — Trial in Absentia Affirmed: Following arraignment in City Court on numerous misdemeanor charges, Clark was informed of a trial date. Clark's motion for a continuance because of gout was denied when the state objected on grounds that Clark had a history of continuing trials on the basis of a physical ailment. The morning of trial, Clark checked into the hospital complaining of chest pains, but the hospital was unable to verify Clark's physical complaints and released him. The court informed Clark through the nurse that the trial would progress, but Clark never appeared. Clark was tried in absentia

and convicted on all but two charges. The District Court affirmed the City Court decision to try Clark in absentia, and on appeal, the Supreme Court affirmed as well. Clark knew of the trial date and was voluntarily absent from trial, thereby waiving the fundamental right to be present at trial. St. v. Clark, 2005 MT 169, 327 M 474, 115 P3d 208 (2005).

Written Voluntary Waiver of Right to Be Present at Trial Properly Accepted: Rather than be present at the second day of trial, McCarthy signed a waiver of that fundamental right that was presented by his attorney. McCarthy later complained that the trial court erred by accepting the waiver without conducting a competency hearing and without determining whether the waiver was voluntary and whether McCarthy understood the consequences of the waiver. The Supreme Court found no error. McCarthy was informed through counsel of his right to be present, was afforded an opportunity to waive his rights, and made a knowing, intelligent, and voluntary waiver of the right to be present that was witnessed by the attorney and properly presented to the trial court for the record. There was no substantial evidence that McCarthy was incompetent to waive his right and thus no reason for the trial court to conduct a competency hearing prior to accepting the waiver. St. v. McCarthy, 2004 MT 312, 324 M 1, 101 P3d 288 (2004), distinguishing and following St. v. Tapson, 2001 MT 292, 307 M 428, 41 P3d 305 (2001), and St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002).

Defendant Excluded From Trial — Defendant to Be Allowed to Reclaim Right to Be Present — Violation of Fundamental Right to Be Present Absent on-the-Record Personal Waiver: At Aceto's criminal trial, he initially represented himself with counsel on standby but became agitated and frustrated when questioning a witness, cursed the court and the witness, threw files at the witness, and was removed from the courtroom. The next day, outside the presence of the jury, Aceto apologized to the court and objected to his removal. The court ordered standby counsel to take over the defense and ordered that Aceto would not be allowed in the courtroom, but would be allowed to view the proceedings from the county detention center. Following conviction, Aceto appealed on grounds that his fundamental rights were violated because he was neither warned prior to removal from the courtroom nor allowed to return after he apologized. The Supreme Court agreed and reversed. The right to appear and defend in person is a fundamental right, and waiver of the right must be informed, intelligent, specific, voluntary, knowing, personal, and on the record. Once Aceto was ejected from the courtroom, he was not accorded the right to be physically present as an option that could be waived. Thus, the District Court violated Aceto's right to be present, as well as the letter of this section, in excluding Aceto from the courtroom without warning and refusing to allow him to return. St. v. Aceto, 2004 MT 247, 323 M 24, 100 P3d 629 (2004), following St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002). See also Ill. v. Allen, 397 US 337 (1970), and Badger v. Cardwell, 587 F2d 968 (9th Cir. 1978).

Defendant's Exclusion From In-Chambers Individual Voir Dire Proceedings Violative of Right to Be Present at Critical Stages of Trial: Bird was accused of felony partner or family member assault. Prior to trial, the District Court conducted in-chambers voir dire specifically to elicit prospective jurors' personal feelings and experiences regarding domestic violence. Both the prosecutor and defense counsel were present, but Bird was not. Once the jury panel was passed for cause, the court recessed and met with counsel in chambers to allow the exercise of peremptory challenges, but again Bird was not included in the meeting. At the close of the meeting, the prosecutor noticed that Bird was not present and questioned whether the defendant's presence was necessary. The judge said that it was assumed that defense counsel wished to waive Bird's presence, and defense counsel stated that Bird had expressed no feelings about it one way or another. Bird was convicted and appealed on several grounds, including whether: (1) certain jurors should have been removed for cause; (2) defense counsel rendered deficient performance; (3) Bird should have been present during the individual voir dire; (4) Bird was prejudiced by certain testimony; and (5) the burden of proof was improperly shifted to Bird. The Supreme Court found the third issue to be dispositive. The court disagreed with the state's contention that Bird's presence at voir dire had been waived. The right of a defendant to be present at all critical stages of trial, including in-chambers individual voir dire, is a fundamental right that can be waived only if the trial court obtains an on-the-record personal waiver by the defendant, acknowledging that the defendant voluntarily, intelligently and knowingly waives that right. There can be no waiver by a person who does not know the person's rights or what is being waived. Bird was not informed of the constitutional right to be present during voir dire and was not given the opportunity to choose whether to participate, so not only did Bird not waive the constitutional right, he was never afforded the opportunity to waive it. Bird's exclusion from voir dire was a structural error that undermined the integrity of the entire trial, and constituted reversible error. St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), following St. v. Reed, 65 M

51, 210 P 756 (1922), and St. v. Allison, 116 M 352, 153 P2d 141 (1944), and distinguishing U.S. v. Gagnon, 470 US 522 (1985). See also St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000).

District Court Response to Unrepresented Defendant's Failure to Appear — Remand Precluded: Subsection (2) of this section governs a District Court's response to the failure of a defendant who is unrepresented by counsel to appear during the course of a misdemeanor trial. The court has no authority to remand an appeal to a lower court under that subsection. Rickett v. Billings, 262 M 339, 864 P2d 762, 50 St. Rep. 1586 (1993), affirming Hardin v. Myers, 194 M 248, 633 P2d 677 (1981).

Hearing on Motion for New Trial: This section and Art. III, sec. 16, 1889 Mont. Const. (now Art. II, sec. 24, 1972 Mont. Const.), do not require that the defendant be present at a hearing on a motion for a new trial because such a hearing is held after the verdict has been rendered and is not part of the trial. St. v. Peters, 146 M 188, 405 P2d 642 (1965).

Consent to Taking Exhibits to Jury Room: After the jury had retired to the jury room for deliberation of its verdict, the jury members requested certain exhibits be sent to them. While the defendant was not present in the courtroom, his counsel gave his consent. The Supreme Court held that the proceeding did not constitute a part of the trial and therefore the defendant's presence was not required. St. v. Olson, 87 M 389, 287 P 938 (1930).

Collateral References

Criminal Law *key* 636.

23A C.J.S. Criminal Law §§1580, 1581; 24 C.J.S. Criminal Law §§2044 through 2047.

21A Am. Jur. 2d Criminal Law §997, et seq.

Sufficiency of showing defendant's "voluntary absence" from trial for purposes of state criminal procedure rules or statutes authorizing continuation of trial notwithstanding such absence. 19 ALR 6th 697.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case. 33 ALR 4th 429.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions. 23 ALR 4th 955.

46-16-123. Absence of defendant on receiving verdict or at sentencing.

Commission Comments

1991 Comment: This statute establishes the procedure permitting the return of a verdict and imposition of sentence in the defendant's absence. Under the 1987 code, sentencing was to occur in open court but the defendant's presence was not expressly required. See 1987 MCA 46-18-102. The statute provides that the defendant need not be present for sentencing in misdemeanor cases and allows the defendant to be absent in some instances from sentencing in felony cases.

The 1987 code allowed a verdict to be returned in misdemeanor cases without the defendant being present. In felony cases, the defendant's presence was required. The statute also provides for the possibility of entering a verdict, under appropriate circumstances, despite the defendant's absence.

Compiler's Comments

2005 Amendment: Chapter 222 inserted (2)(b) authorizing the defendant's appearance by two-way electronic audio-video communication if certain conditions are met; and made minor changes in style. Amendment effective July 1, 2005.

Case Notes

Date Defendant Sentenced In Absentia Considered Date of Legally Effective Sentence for Appeal Purposes: Clark was charged with a misdemeanor traffic violation but failed to appear for trial and was tried, convicted, and sentenced by the Municipal Court in absentia pursuant to 46-16-123 on June 12, 2006. A warrant was issued for failure to appear, and Clark appeared before a different Municipal Court on July 14, 2006, and was informed of the June sentence. Clark sought to appeal to District Court, but the District Court dismissed the appeal on grounds that it was untimely. On appeal to the Supreme Court, Clark argued that dismissal of the appeal by the District Court was in error because the period for filing a Municipal Court appeal should have begun on July 14 when he was informed of the June sentence, rather than June 12 when the sentence was actually imposed. The Supreme Court disagreed. A valid sentence was imposed on June 12 and was not subject to postponement or modification until Clark appeared on the bench warrant. By Municipal Court Rule, Clark had until June 26 to file an appeal, but the appeal was not filed until July 28 and was therefore untimely and was properly dismissed by the District Court. St. v. Clark, 2008 MT 317, 346 M 80, 193 P3d 934 (2008). See also St. v. Bonamarte, 2006 MT 291, 334 M 376, 147 P3d 220 (2006).

Collateral References

Voluntary absence of accused when sentence is pronounced. 59 ALR 5th 135.

46-16-130. Pretrial diversion.

Commission Comments

1991 Comment: A provision regulating pretrial diversion, sometimes called deferred prosecution, is new to Montana, although the practice has been statutorily recognized since at least 1979. See 1987 MCA 44-5-103(10) and (12).

The Commission believed a pretrial diversion provision was necessary because prosecutors have long employed diversion on an informal, individual basis by deferring prosecution if, for example, the accused agreed to undergo rehabilitative treatment. Since the President's Commission on Law Enforcement and Administration of Justice recommended such programs in its 1967 report, many states have formalized diversion by statute or court rule. Pretrial diversionary programs are premised on the belief that it is not always necessary and, in fact, may often be detrimental to pursue formal courtroom prosecution for every criminal violation. In most situations, the criminal prosecution is suspended subject to the defendant's consent to treatment, rehabilitation, restitution, or other noncriminal or nonpunitive alternatives.

The statute contemplates that the decision to divert lies with the prosecutor in an exercise of his powers and is not ordinarily subject to judicial review. This conforms with existing practice in that several Montana County Attorneys conduct formal diversion programs, yet no Montana case has been found that discusses the practice. However, some litigation has occurred in other jurisdictions. These cases are collected in an annotation at 4 ALR 4th 147.

Compiler's Comments

2001 Amendment: Chapter 342 inserted (2) providing that condition of pretrial diversion may be for court to refer defendant for evaluation to determine appropriateness of proceedings; and made minor changes in style. Amendment effective October 1, 2001.

1995 Amendment: Chapter 447 inserted (3) concerning not deferring certain alcohol-related driving offenses.

1993 Amendment: Chapter 262 at beginning of (1)(a) inserted "Prior to the filing of a charge"; inserted (2) allowing entry into deferral of prosecution only with court approval after a charge is filed; and made minor changes in style.

Case Notes

Possible Deferred Prosecution Agreement Not Considered Confidential Criminal Justice Information — Discussion by Prosecutor With Newspaper of Possible Deferred Prosecution Agreement Not Privacy Violation or Breach of Duty: Plaintiff alleged that the County Attorney negligently breached a legal duty and violated the Montana Criminal Justice Information Act of 1979 when the County Attorney told a local newspaper that plaintiff was considering a deferred criminal prosecution agreement. Plaintiff asserted that the information was confidential and that dissemination of the information was tortious. The District Court granted summary judgment to defendant. On appeal, the Supreme Court noted that criminal justice information is defined as information relating to criminal justice that is collected, processed, or preserved by a criminal justice agency and held that mere discussion of a possible deferred criminal prosecution agreement does not constitute a discussion of criminal justice information. Although there may be circumstances in which a person suspected of having committed a crime has a reasonable expectation that the person's privacy will not be violated by the release of details of an investigation, plaintiff here could not seriously claim a privacy violation when it was already public knowledge that the allegations were against her, what the allegations were, who was involved as complainants, that she was the subject of a school board investigation concerning the allegations, and that her intended retirement from teaching was connected to the allegations. There was no material issue of fact concerning whether the County Attorney negligently breached a duty owed to plaintiff by discussing a possible deferred criminal prosecution agreement with the newspaper or by releasing a copy of the initial offense report, and summary judgment was affirmed. Svaldi v. Anaconda-Deer Lodge County, 2005 MT 17, 325 M 365, 106 P3d 548 (2005), following Great Falls Tribune Co., Inc. v. Sheriff, 238 M 103, 775 P2d 1267(1989), and Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74 (1992).

46-16-131. Justifiable use of force — burden of proof.

Compiler's Comments

Preamble: The preamble attached to Ch. 332, L. 2009, provided: "WHEREAS, the Legislature declares that:

(1) the right of Montanans to defend their lives and liberties, as provided in Article II, section 3, of the Montana Constitution, and their right to keep or bear arms in defense of their homes, persons, and property, as provided in Article II, section 12, of the Montana Constitution, are fundamental and may not be called into question;

(2) the use of firearms for self-defense is recognized within the right reserved to the individual people of Montana in Article II, section 12, of the Montana Constitution;

(3) self-defense is a natural right under section 1-2-104, MCA, and is included in sections 49-1-101 and 49-1-103, MCA;

(4) the lawful use of firearms for self-defense is not a crime or an offense against the people of the state;

(5) in a criminal case in which self-defense is asserted, the burden of proof is as provided in [section 10] [actually section 9, Ch. 332, L. 2009, enacting 46-16-131];

(6) in self-defense, the use of justifiable force discourages violent crime and prevents victimization; and

(7) the purpose of [sections 1 through 3] [enacting 45-3-110 through 45-3-112] is to clarify and secure the ability of the people to protect themselves."

Effective Date: Section 11, Ch. 332, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 27, 2009.

Part 2
Rules of Evidence for Criminal Cases

Part Commission Comments

1991 Part Comments: This part consolidates into a single part several 1987 code provisions concerning the use of evidence at a criminal trial. The statutes are modeled after and primarily preserve the 1987 code.

Part Case Notes

Inadmissible Recorded Commentary of Crime — Harmless Error: During Strauss's negligent homicide trial, the District Court admitted two videotape recordings of the crime scene. One tape included an audio commentary portion by an investigating officer, and one depicted the positions of Strauss and the victim relative to their positions at the time that the crime was committed. Strauss objected to both tapes, but they were admitted over objection. On appeal, the Supreme Court agreed that the tape with commentary should have been admitted without sound because the commentary was the prior statement of a nonparty witness that the Montana Rules of Evidence classify as nonhearsay. However, the commentary was not offered to rebut an allegation of fabrication, improper influence, or motive or for identification, so it could not be classified as admissible nonhearsay. Nevertheless, the state presented admissible evidence that proved the same facts as the commentary, so its admission was harmless error. As for the second videotape, based on Peschke v. Carroll College, 280 M 331, 929 P2d 874 (1997), the tape was a reenactment of Strauss's crime and was therefore subject to the foundational requirements in St. v. Leroux, 133 N.H. 781, 584 A2d 778 (1990), and Pickren v. St., 269 Ga. 453, 500 SE 2d 566 (1998), including authentication and identification. A recorded reenactment must accurately portray the event in question, and the party presenting the recording must show that the reenactment was filmed under conditions substantially similar to the actual event, which may be satisfied by testimony of a witness who was present at the crime. The state failed to meet its burden by not presenting testimony of a witness who was present at the crime scene and could testify to the accuracy of the tape. However, that error was also considered harmless because the second tape was largely cumulative of the first recording, was not injurious to Strauss's defense, was not probative of any disputed issue, and did not contribute to Strauss's conviction. St. v. Strauss, 2003 MT 195, 317 M 1, 74 P3d 1052 (2003).

Videotaped Testimony — Preliminary Showing of Necessity Not Required: When defendant was entitled to be present at videotaping of victim's testimony and to confront the accuser but chose not to, the essential elements required by the confrontation clause were present and, therefore, the procedure did not violate defendant's constitutional right to confrontation. St. v. Scott, 257 M 454, 850 P2d 286, 50 St. Rep. 353 (1993).

Videotaping Techniques Not Prejudicial: The District Court did not abuse its discretion by allowing the jury to watch videotaped testimony in which the videocamera operator zoomed in on the child sexual assault victim when she cried or was otherwise distressed. Whether prejudicial effect is outweighed by probative value is a matter within the discretion of the trial court. The Supreme Court declined a request to implement uniform procedures applicable to videotaping of testimony. St. v. Scott, 257 M 454, 850 P2d 286, 50 St. Rep. 353 (1993).

Redirect Examination as to Other Crimes Following Cross-Examination as to Whether Search Took Place: During cross-examination of a recalled prosecution witness in a prosecution for conspiracy to sell dangerous drugs, a detective was asked if defendant's house was searched and answered that they had no reason to do it. On redirect examination, it was error for the judge to allow, over objections, questions and answers regarding other evidence of defendant's prior involvement with drugs. The testimony exceeded the scope of the cross-examination and violated defendant's right to notice that the information would be brought out at trial. St. v. Shaw, 255 M 298, 843 P2d 316, 49 St. Rep. 1012 (1992).

Evidence of Activity Following Commission of Crime Improperly Suppressed: The state sought to introduce evidence of defendant Moore's activities following the alleged homicide of Brisbin. The District Court denied admission of the evidence based on the potential for prejudice. The Supreme Court held that the evidence was improperly suppressed because it was relevant as tending to prove commission of the crime charged and the defendant's responsibility for it. As stated in Cruz v. St., 645 SW 2d 498 (Tex. Ct. App. 1982), admissibility is predicated on the jury's right to hear what transgressed immediately prior and subsequent to the commission of the crime charged so that the jury may evaluate the evidence in the context in which the criminal act occurred. Actions of a defendant subsequent to the alleged commission of a crime tend to show the consciousness of guilt and are a part of the res gestae and corpus delicti of the crime charged. Such evidence is highly probative, is not subject to the "other crimes" restriction of this rule, and is therefore admissible. St. v. Moore, 254 M 241, 836 P2d 604, 49 St. Rep. 752 (1992), followed in St. v. Berosik, 1999 MT 238, 296 M 165, 988 P2d 775, 56 St. Rep. 938 (1999).

Admissions Made to Polygraph Examiner After Polygraph Examination Finished — Admissible: Admissions made to a polygraph examiner in a postexamination interview were not inadmissible because they were somehow tied to the inadmissibility of polygraph examination results. The admissions were made after disconnection from the device and in another room and were made in response to a note given to the examiner while the postexamination interview was being conducted. The evidence of the accused's admissions had nothing to do with polygraph test results wherein the operator evaluated the credibility of a witness. The operator merely related admissions he perceived from the accused, and it was then the jury's province to evaluate the testimony. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986).

Criminal Mischief for Damage to One's Own Property to Defraud Insurer — Relevance of Pictures of Property: Defendant was charged with criminal mischief in that he purposely drove his pickup over a steep bank to wreck it so he could collect from his insurance company. Later the pickup was vandalized. Pictures of the pickup taken after the vandalism were properly admitted as proof of defendant's motive, and their probative value was substantial and was not outweighed by prejudice to defendant, who claimed that they should not have been admitted because they were evidence of other crimes as well as the one with which he was charged and that he had not been charged with vandalism. St. v. Gray, 207 M 261, 673 P2d 1262, 40 St. Rep. 2023 (1983).

Parole Status of Defendant — Prosecution Questions Eliciting: On the first day of trial, the prosecutor agreed to caution his witnesses to avoid mention of defendant's parole status. The prosecutor breached his promise by twice asking one of his witnesses a question eliciting the answer that defendant was on parole. The court cautioned the jury to disregard the testimony. As a matter of law, the Supreme Court could not hold that failure to grant motion for mistrial was an abuse of discretion. Prejudice would not be presumed. Defendant failed to show that a substantial right was denied and that there was a reasonable possibility the inadmissible evidence might have contributed to his conviction. The evidence supporting conviction was substantial, if not overwhelming, and defendant's version of the events was simply incredible. St. v. Gray, 207 M 261, 673 P2d 1262, 40 St. Rep. 2023 (1983).

Circumstantial Evidence Insufficient to Sustain Conviction of Attempted Sale of Narcotics — Chemical Tests Inconclusive — Burden of Proof: Where the defendant offered to sell an undercover agent a pound of cocaine and field tests conducted on the substance offered for sale proved the substance could be either cocaine or a prescription drug called lidocaine, the District Court erred in convicting the defendant of felony sale of dangerous drugs (now criminal distribution of dangerous drugs), as there was insufficient evidence to support a conviction. Under St. v. Stoddard, 147 M 402, 412 P2d 827 (1966), circumstantial evidence must not only be entirely consistent with guilt, it must be inconsistent with any other rational theory. Here, the field test failed to prove the drug was a dangerous drug. St. v. Starr, 204 M 210, 664 P2d 893, 40 St. Rep. 796 (1983).

Chain of Evidence — Bicycle Ridden by Motor Vehicle Homicide Victims: Defendant purposely hit and killed, with auto he was driving, two persons riding a bicycle. Testimony

indicated that investigating officer picked up the bicycle at the scene and that it appeared to be in reasonably the same condition at trial as it was in when he picked it up. There was no indication at trial that it had been tampered with or was in worse condition than when officer picked it up. It was properly admitted in evidence over objection that there was insufficient evidence that it was in the same condition at trial as it was at the scene of the incident and that no chain of evidence establishing to whom it belonged and its condition prior to and after the incident was shown. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Photos of Persons Hit by Auto — Inflammatory Nature in Homicide Case: Photographs of place at which defendant purposely hit and killed two bicycle riders with auto he was driving were testified to by police officers who did not take or direct the taking of the photos but who came to the scene and investigated a very short time after the victims were hit. They testified that the photos depicted the scene as they remembered it. The photos were properly admitted in evidence. The probative value of a color photo of one victim was not outweighed by its allegedly inflammatory nature, and the photo was admissible since it lent credence to testimony of a witness that death was caused from injuries received when victim was struck by the auto. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Youth Court Proceedings — Admissibility in Criminal Proceeding: On appeal by defendant following his conviction, the Supreme Court held that evidence given in a Youth Court proceeding against a juvenile and evidence of the disposition of the juvenile in such a proceeding is to be excluded for all purposes. It was reversible error requiring a new trial when, upon cross-examination of defendant's character witness, the prosecutor asked the witness if he knew of a charge of attempted rape when defendant was 15 years old and service of 6 months' probation. The questions of the prosecutor in regard to the juvenile proceedings were evidence and inadmissible. St. v. Holzworth, 201 M 54, 651 P2d 1255, 39 St. Rep. 1949 (1982).

Other Crimes — Procedural Requirements Not Followed: Gray drove his pickup off an embankment and reported to the police that he was forced off the road. The truck was not totaled and was taken to a body shop for repairs. While at the body shop, the truck was vandalized on Gray's instructions. After the vandalism, the truck was not repairable. Gray was charged with criminal mischief with the purpose to defraud an insurer for driving the truck off an embankment. The evidence of Gray's involvement in the vandalism is evidence of other crimes. The court held that the four-element test to determine the admissibility of evidence of other crimes set out in St. v. Just, 184 M 262, 602 P2d 957 (1979), was met but that the procedural requirements of Just were not followed. The judgment was reversed and a new trial ordered. St. v. Gray, 197 M 348, 643 P2d 233, 39 St. Rep. 622 (1982).

Prosecutorial Misconduct: It is not the duty of the prosecuting attorney to make independent determinations concerning the admissibility of evidence once the court rules such evidence is inadmissible. Willful attempts by the prosecutor in this case to place excluded evidence before the jury resulted in a reversal of the conviction because of its prejudicial effect. St. v. Bain, 176 M 23, 575 P2d 919 (1978).

Erroneous Admission of Collateral Evidence: It was reversible error for the court to admit collateral, irrelevant, and prejudicial evidence as the underlying reason for a debt, payment of which was coerced by the defendant's intimidating acts. St. v. Williams, 174 M 288, 570 P2d 578 (1977).

Use of Photographic Evidence:

Since the alleged prejudice could have been easily explained away in cross-examination, there was no intent to excite feelings with the photographs, and the purpose and use of the photographs was to assist the jury in understanding the case. The defendant's allegation that the photographs were gruesome, inflammatory, or otherwise prejudicial was unfounded. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

If the probative value of the photographs is proved and the use is not calculated to arouse the sympathies or prejudices of the jury, there is no error in their admission. St. v. Buckley, 171 M 238, 557 P2d 283 (1976).

Use of Accused's Pretrial Testimony to Impeach: The pretrial testimony of the defendant at a suppression hearing may be used to impeach but not on the issue of guilt. St. v. Buckley, 171 M 238, 557 P2d 283 (1976).

Circumstantial Evidence: The conviction of the defendant on a charge of burglary in the first degree on only circumstantial evidence did not violate 46-16-601 (renumbered 46-16-204) on the grounds that the evidence was insufficient to warrant conviction. The burden of proof never shifts, but the burden of evidence may shift frequently, and when all the evidence is circumstantial, the test is whether the facts and circumstances are of such quality and quantity

to support the jury determination of guilt beyond a reasonable doubt. St. v. Proctor, 153 M 90, 454 P2d 616 (1969).

Statement Explaining Constitutional Rights: The trial court did not err in permitting the State's witness to read an entire statement in which the defendant was warned of his constitutional rights and which was signed by the defendant since the statement was material as evidence that the defendant's constitutional rights and waiver thereof were clearly and understandably enunciated. St. v. Lucero, 151 M 531, 445 P2d 731 (1968).

Improper Admission of Judgment Roll: While the trial court erred in permitting the State in a perjury trial to introduce the judgment roll in the cause in which the alleged false testimony was given, containing papers not properly part thereof under statute, the procedure amounted to a mere irregularity which could not in any manner have prejudiced the defendant. St. v. Jackson, 88 M 420, 293 P 309 (1930).

Part Law Review Articles

Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change, Harrison, 54 Mont. L. Rev. 297 (1993).

Criminal Procedure, Everly & Mullowney, 42 Mont. L. Rev. 371 (1981).

Presumptions in Criminal Cases, Ranney, 41 Mont. L. Rev. 21 (1980).

Chain of Custody Requirements in Admissibility of Evidence, Anderson, 37 Mont. L. Rev. 144 (1976).

Statutory and Common Law Presumptions in Montana: Paragraph II.B.2. briefly addresses criminal law statutory presumptions. Clarke, 37 Mont. L. Rev. 101 (1976).

Statutory and Common Law Presumptions in Montana, Clarke, 37 Mont. L. Rev. 91 (1976).

Statutory Presumption of Guilt From Presence at Illegal Distillery, Endsley, 27 Mont. L. Rev. 216 (1966).

46-16-201. Applicability of rules of evidence and civil rules.

Commission Comments

1991 Comment: This statute reflects 1987 MCA 46-16-201. The statute expressly states that the Rules of Evidence will apply to criminal prosecutions. This is not a change in established procedure.

Compiler's Comments

1991 Amendment: At beginning inserted "Montana Rules of Evidence and the statutory" and at end deleted "in this code".

Case Notes

Failure to Object to Firefighter's Lay Testimony Regarding Burn Patterns — Admissibility Affirmed: During Henderson's arson trial, the state sought to introduce testimony of a firefighter who was at the scene. Defense counsel objected that because the firefighter was not a qualified expert, the firefighter's opinion testimony should not be allowed. The trial court allowed counsel to voir dire the firefighter in the presence of the jury, and the firefighter responded by explaining how to find a point of origin of a fire, describing indications of arson, and discussing pour patterns. Defense counsel did not move to strike the testimony or move for a limiting instruction after the court allowed the firefighter to testify as a lay witness, nor did counsel register a continuing objection to ensuing testimony that was based in part on the voir dire responses. Following conviction, Henderson contended that the testimony amounted to impermissible expert testimony, but the Supreme Court affirmed. By eliciting the evidence on voir dire, Henderson waived the right to object on appeal. Additionally, even though the testimony went beyond personal observations made at the scene, given Henderson's failure to object to the voir dire testimony regarding pour patterns, the trial court did not err in allowing testimony concerning the firefighter's observation of pour patterns at the scene. St. v. Henderson, 2005 MT 333, 330 M 34, 125 P3d 1132 (2005).

Physician-Patient Privilege: The physician-patient privilege is not available to a defendant in a criminal action since the qualifying language "in a civil action", used in 26-1-805, specifically limits the privilege to civil actions and is thus within the exception of this section. St. v. Campbell, 146 M 251, 405 P2d 978 (1965).

Inspection of Writings: Even if section 93-8301, R.C.M. 1947 (now superseded by Rule 34, M.R.Civ.P.), was made applicable to criminal cases by this section, the defendant was not entitled to the inspection of written material when there was no showing as to what the material consisted of, whether it was relevant to the defense, or that it was admissible in evidence. State ex rel. Keast v. District Court, 135 M 545, 342 P2d 1071 (1959).

Explanation of Alterations in Written Confession: When alterations appeared in an alleged written confession of the defendant, it was incumbent upon the State, under 26-1-106, relating to writings offered in evidence as exhibits in civil cases but made applicable to criminal cases by this section, to account for them before it is admissible in evidence. In the instant case the defendant testified that the writing was inaccurate. St. v. Crighton, 97 M 387, 34 P2d 511 (1934).

Accused as a Witness: When a defendant in a criminal cause becomes a witness in his own behalf, he is subject to the same rules of cross-examination and impeachment as any other witness. St. v. O'Neill, 76 M 526, 248 P 215 (1926).

Law Review Articles

Reasonable Mistake as to the Age of the Prosecutrix Is an Affirmative Defense to a Charge of Statutory Rape, Williams, 26 Mont. L. Rev. 133 (1964).

Collateral References

Criminal Law *key* 304(1), et seq.
22A C.J.S. Criminal Law §§914, 915.
29 Am. Jur. 2d Evidence §6, et seq.

46-16-202. Evidence on trial for treason.

Collateral References

Treason *key* 12, 13.
87 C.J.S. Treason §§4, 12, 13.
70 Am. Jur. 2d Sedition, Subversive Activities, and Treason §§70 through 72, 84.

46-16-204. Defendant presumed innocent — reasonable doubt.

Commission Notes

1991 Comment: This statute is essentially a restatement of 1987 MCA 46-16-601. The statute requires that the defendant's guilt be proved beyond a reasonable doubt. An amendment changing the final phrase to read "the defendant must be found not guilty" has been adopted. The amendment does not affect the statute that establishes the prosecution's affirmative duty to prove the defendant's guilt.

Compiler's Comments

1991 Amendment: At end substituted "the defendant must be found not guilty" for "he is entitled to an acquittal"; and made minor change in style.

Justice Shaw's Reasonable Doubt Instruction: Due to the frequent citation to the instruction of Chief Justice Shaw on "reasonable doubt", found in Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711 (1850), the noted passage is printed here for convenience. "Then, what is a reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."

Case Notes

No Error in Refusal to Instruct Jury That Acquittal Required if Evidence Supportive of Either Guilt or Innocence: At Misner's deliberate homicide trial, Misner cited St. v. Sheriff, 188 M 26, 610 P2d 1157 (1980), in proposing a jury instruction stating that when a jury finds two interpretations of the evidence to be equally reasonable, one of which points to the defendant's guilt and the other to innocence, the jury must accept the interpretation that points to innocence. The trial court rejected the instruction, and on appeal, Misner asserted error, but the Supreme Court affirmed. Sheriff is no longer good law on this point. The correct rule, as set out in St. v. Hill, 2005 MT 216, 328 M 253, 119 P3d 1210 (2005), is that when circumstantial evidence is

susceptible to two interpretations, one of which supports guilt and the other innocence, it is the function of the trier of fact to determine which is most reasonable. St. v. Misner, 2007 MT 235, 339 M 176, 168 P3d 679 (2007).

Motion to Dismiss on Grounds of Insufficient Evidence Properly Denied: When it was clear from the record that a reasonable juror could have concluded from the evidence taken in a light most favorable to the prosecution that guilt on several counts was proved beyond a reasonable doubt, the District Court did not abuse its discretion in denying defendant's motion for a directed verdict of acquittal, and further prosecution was not barred on double jeopardy grounds. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000). See also St. v. Bromgard, 261 M 291, 862 P2d 1140 (1993), and St. v. Campbell, 278 M 236, 924 P2d 1304 (1996).

No Burden-Shifting in Statute Allowing Evidence of Refusal to Take DUI Test: Relying on St. v. Long, 778 P2d 1027 (Wash. 1989), Robertson argued that 61-8-404(2) allows the prosecution to argue that an inference of guilt could be drawn from the evidence of his refusal to take a Breathalyzer test, impermissibly shifting the burden of proof to him to establish that the refusal was not a reflection of guilt, in violation of this section. Although the Washington and Montana versions of 61-8-404(2) are virtually identical, the Montana Supreme Court distinguished Long, finding nothing in the statute that inferred a consciousness of guilt arising from the introduction of evidence of the proof of refusal to take the test. The state still must prove the offense of DUI beyond a reasonable doubt. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000).

Identification of Defendant as Perpetrator — Necessity of In-Court Identification: It was not reversible error to refuse to dismiss on the ground that there was no in-court identification of defendant as the perpetrator. The method of identifying a defendant as the perpetrator is largely within the discretion of the trial judge. It was sufficient in this case that several police officers referred in their testimony to defendant as being the perpetrator. St. v. Stringer, 263 M 295, 868 P2d 588, 51 St. Rep. 63 (1994).

Question of Whether Circumstantial Evidence Supports Finding of Guilt or Innocence for Trier of Fact: Bromgard moved for a directed verdict of acquittal on charges of rape, arguing that the state had only provided circumstantial evidence and no fingerprints or other forensic evidence. The Supreme Court held that a conviction could be based on circumstantial evidence alone and that if the evidence was susceptible to two interpretations, one supporting guilt and the other supporting innocence, the trier of fact determines which is most reasonable. St. v. Bromgard, 261 M 291, 862 P2d 1140, 50 St. Rep. 1320 (1993), followed in St. v. Sullivan, 266 M 313, 880 P2d 829, 51 St. Rep. 827 (1994), St. v. Treible, 275 M 59, 910 P2d 237, 53 St. Rep. 38 (1996), St. v. Sittner, 1999 MT 103, 294 M 302, 980 P2d 1053, 56 St. Rep. 434 (1999), and St. v. Billedeaux, 2001 MT 9, 304 M 89, 18 P3d 990 (2001).

Jury Instruction on Meaning of Reasonable Doubt:

The jury instruction approved in St. v. Lucero, 214 M 334, 693 P2d 511 (1984), was upheld by the Supreme Court against objections that it was "strikingly" similar to an instruction disapproved by the U.S. Supreme Court in Cage v. La., 498 US 39, 112 L Ed 2d 339, 111 S Ct 328, (1990). The Supreme Court examined both instructions and found that they were dissimilar. St. v. Flesch, 254 M 529, 839 P2d 1270, 49 St. Rep. 813 (1992).

The following jury instruction, specifically approved in St. v. Lucero, 214 M 334, 693 P2d 511 (1984), is a proper statement of the meaning of reasonable doubt: "Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt." St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991).

Evidence of Flight Instruction Proper: Defendant failed to appear on the first day of his trial, but appeared the next day with an implausible story to explain his nonappearance. An evidence of flight instruction by the trial court was therefore proper. A jury is allowed to infer a consciousness of guilt from evidence of defendant's flight either to avoid arrest or prosecution (citing St. v. Charlo, 226 M 213, 735 P2d 278, 44 St. Rep. 597 (1987)). Although mere failure to appear does not support the instruction, the failure to appear coupled with the implausible excuse does. St. v. Burk, 234 M 119, 761 P2d 825, 45 St. Rep. 1777 (1988), followed in St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993). Byers was overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Jury Instruction — Defendant's Failure to Produce Witnesses or Evidence: When the jury was instructed separately on the burden of proof in a criminal case, it was not error for the court to give the following instruction: "The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any

evidence and no adverse inferences may be drawn from his failure to do so." St. v. Elliott, 221 M 174, 717 P2d 572, 43 St. Rep. 723 (1986).

Instruction Defining "Reasonable Doubt":

For use in future criminal cases, the Supreme Court suggests general instruction No. 1-004 of the pattern jury instructions recommended by the Commission on District Courts, without further elaboration of the definition. The pertinent part of that instruction reads: "3. The State of Montana has the burden of proving the guilt of the defendant beyond a reasonable doubt. 4. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt." St. v. Lucero, 214 M 334, 693 P2d 511, 41 St. Rep. 2509 (1984).

An instruction that mere unexplained possession of stolen property was not sufficient to justify conviction but that one found in possession of property that may have been stolen must explain such possession in order to remove the effect of that fact as a circumstance to be considered with other evidence pointing to guilt did not deprive the defendant of the presumption of innocence. St. v. Gray, 152 M 145, 447 P2d 475 (1968).

An instruction on "reasonable doubt" not strictly adhering to the one given by Chief Justice Shaw in Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711 (1850), and generally followed by courts, but adding inter alia that the jury is "not at liberty to disbelieve as jurors if you believe as men; your oath imposes upon you no obligation to doubt where no doubt would exist if no oath had been administered", was held not erroneous, the court being of the opinion that the decision holding that the term "reasonable doubt" defines itself is the most logical of a large number of authorities reviewed. St. v. Curtiss, 114 M 232, 135 P2d 361 (1943); St. v. Wong Sun, 114 M 185, 133 P2d 761 (1943).

The trial court, in giving the definition of "reasonable doubt" in an instruction on the subject repeatedly approved by the Supreme Court, did not commit reversible error by prefacing it thus: "You are instructed that a doubt which a juror is allowed to retain in his mind and under the influence of which he should form a verdict of not guilty, must always be a reasonable one", and the contention of the appellant that the phrase in effect did away with the presumption of innocence declared by a former section was not sustained. St. v. Zorn, 99 M 63, 41 P2d 513 (1935).

While the court has frequently approved as correct and sufficient to meet all requirements the instruction taken from Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711 (1850) (Territory v. McAndrews, 3 M 158 (1878); St. v. Martin, 29 M 273, 74 P 725 (1903); St. v. DeLea, 36 M 531, 93 P 814 (1907)), error was not committed in submitting the following instruction: "The term reasonable doubt best defines itself. In a legal sense, however, a reasonable doubt is a doubt which has some reason for its basis; a doubt for which there exists in the minds of the jurors a reason, and not a doubt arising from mere caprice or groundless conjecture." (Chief Justice Brantly). St. v. Lewis, 52 M 495, 159 P 415 (1916).

Instruction That "Reasonable Doubt" Must Be Based on Evidence and Testimony: The instruction given in the present case was misleading because the jury was instructed that a reasonable doubt could only be surmised from the evidence or testimony presented at trial and not from any other source. A lawyer or one trained in the law may recognize that a lack of evidence or an insufficiency of evidence presented at trial may give rise to a reasonable doubt, but a juror relying on the letter of this instruction may not. The effect of a jury instruction is determined by the way in which a reasonable juror could have interpreted it, not by the state courts' interpretation of its legal import. The jury could reasonably interpret the instruction to mean that affirmative evidence supporting the appellant's innocence was required as the basis for a reasonable doubt. The effect is to shift the burden of proof to the appellant, which is not constitutionally permissible. St. v. Lucero, 214 M 334, 693 P2d 511, 41 St. Rep. 2509 (1984).

Intent Disputed — Improper to Conclude Beyond Reasonable Doubt That Sandstrom Instruction Was Harmless Error:

If intent was a disputed issue at trial, a reviewing court could not rationally conclude beyond a reasonable doubt that an unconstitutional Sandstrom instruction was harmless error and could not have tainted a jury verdict, even if the evidence of intent was overwhelming. The appropriate inquiry is whether any reasonable juror could have given the presumption raised by the instruction persuasion-shifting or conclusive effect. [Annotator's Note: See McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981), apparently holding to the contrary.] In re Hamilton, 721 F2d 1189 (9th Cir. 1983).

Reversal of mitigated deliberate homicide conviction was required where the court gave the following Sandstrom instruction: "The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him. This presumption, however, is termed a

disputable presumption and may be controverted by other evidence." The error was not harmless. The instruction obviously permitted the jury to presume intent without proof beyond a reasonable doubt. Intent was hotly contested and an important element of the crime charged, and because of the instruction the jury could disregard the defendant's claim that he intended only to fire a warning shot. Then, with the presumption of intent, the jury could have concluded that defendant used deadly force to intentionally kill the victim. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982).

Any Evidence Consistent With Theory of Innocence — Jury Not Bound to Acquit: Because of the presumption of innocence, the defendant contended that the jury must accept his interpretation of facts in a criminal trial when testimony at trial could reasonably be interpreted to support either the State's or defendant's view. A jury is not bound to accept defendant's view and reject State's view simply because the defendant would be found not guilty under the former and guilty under the latter. It is the duty of the jury to resolve conflicts of evidence. St. v. Greenwell, 206 M 233, 670 P2d 79, 40 St. Rep. 1616 (1983).

Effect of Possession of Stolen Property: Instruction taken from 45-6-304 (now repealed) that "you are instructed that possession of stolen property shall not constitute proof of the commission of the offense of theft. Such fact shall place a burden on the possessor to remove the effect of such fact as a circumstance to be considered with all the other evidence pointing to his guilt" was reversible error as it took away defendant's presumption of innocence and forced him to testify, by placing a burden on him to either disprove unlawful possession or prove lawful possession. That section was declared unconstitutional in St. v. Kramp, 200 M 383, 651 P2d 614, 39 St. Rep. 1819 (1982). St. v. Morigeau, 202 M 36, 656 P2d 185, 39 St. Rep. 2311 (1982).

"May Infer" Rather Than "Must Presume" Not a Sandstrom Instruction: A jury instruction that uses "may infer" rather than the "Sandstrom-like" language of "must presume" is not mandatory and does not shift the burden of proof to the defendant. St. v. Goltz, 197 M 361, 642 P2d 1079, 39 St. Rep. 613 (1982), followed in St. v. Charlo, 226 M 213, 735 P2d 278, 44 St. Rep. 597 (1987).

Sandstrom Instruction — Overwhelming Evidence of Intent: Petitioner was convicted of deliberate homicide by shooting victim four times in the head. Federal District Court found it to be a violation of due process that a Sandstrom instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" had been given at trial, and granted habeas corpus. The circuit court reversed on appeal, stating that it was inconceivable that any rational juror could have been convinced beyond a reasonable doubt that petitioner shot victim four times in the head without also being convinced beyond a reasonable doubt that he did so "knowingly or purposefully" (the mental element of deliberate homicide in Montana). Thus the error was harmless, for the jury would beyond a reasonable doubt have reached the same conclusion even absent the instruction. McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981); reversing McGuinn v. Crist, 492 F. Supp. 478 (D.C. Mont. 1980).

Substantial Circumstantial Evidence to Infer Burglary:

Even though the evidence concerning a burglary by the defendant was circumstantial, the evidence was substantial enough to support the crime of burglary. Further, the quality of the state's evidence was sufficient to meet its burden of proof. The question, following Jackson v. Va., 443 US 307, 61 L Ed 2d 560, 99 S Ct 2781 (1979), is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. St. v. Roberts, 194 M 189, 633 P2d 1214, 38 St. Rep. 1551 (1981).

The conviction of the defendant on a charge of burglary in the first degree on only circumstantial evidence did not violate 46-16-601 (renumbered 46-16-204) on the grounds that the evidence was insufficient to warrant conviction. The burden of proof never shifts, but the burden of evidence may shift frequently, and when all the evidence is circumstantial, the test is whether the facts and circumstances are of such quality and quantity to support the jury determination of guilt beyond a reasonable doubt. St. v. Proctor, 153 M 90, 454 P2d 616 (1969).

Truck Theft — Substantial Lack of Evidence: Where nothing in evidence proved that a truck sold elsewhere was the truck taken from a car lot and where there was no proof that defendant took the truck missing from the lot, the evidence was not sufficient to convict. St. v. West, 190 M 38, 617 P2d 1298, 37 St. Rep. 1772 (1980).

Sandstrom Instruction — Harmless Error Doctrine Correct Test — Plain Error Rule Not Applicable — Federal Habeas Corpus: In rejecting the State's contention that the giving of the Sandstrom instruction (Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979)) constituted harmless error, the court stated that in applying the "harmless constitutional error" doctrine, as set out in Chapman v. Calif., 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (1967), it must

be shown that the constitutional right affected is not a right basic to a fair trial and it must be found harmless beyond a reasonable doubt. For conviction the due process clause requires that each element of a crime be proved beyond a reasonable doubt, this being basic to a fair trial. The Sandstrom instruction by shifting the burden of proof of intent, an element of the crime of homicide, to the defendant denies him due process, and thus the court cannot consider the instruction as harmless error. The "plain error" doctrine is not applicable because it only sets a standard of "highly probable" that the instruction error "materially affected the verdict", the wrong standard by which to measure the effect of constitutional error. McGuinn v. Crist, 492 F. Supp. 478 (D.C. Mont. 1980); reversed by McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981), on the ground that under the facts of this case the error was harmless.

Sandstrom Instruction — Viewing Instructions as a Whole — Assurance of Effect on Jury: Petition for Writ of Habeas Corpus was filed in U.S. District Court. When the Sandstrom instruction (Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979)) was given at a homicide trial, it may be that the defect can be cured by viewing all of the instructions as a whole; other instructions may be so "rhetorically inconsistent" (ibid. 518-519, n. 7) with the Sandstrom instruction that they overcome its presumptive effect. The court may not speculate on the curative effects of the other instructions on the jury; it must be assured that the jury did not find the defendant guilty on the grounds that he merely acted voluntarily, rather than finding the necessary criminal intent. In examining the instructions given, the court was not so assured and the petition for a Writ of Habeas Corpus was granted. McGuinn v. Crist, 492 F. Supp. 478 (D.C. Mont. 1980); reversed by McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981), on the ground that under the facts of this case the error was harmless.

Proof of Elements of Crime — Sandstrom-Type Jury Instruction — Retrial Ordered: Defendant appealed his conviction for criminal sale of dangerous drugs (now criminal distribution of dangerous drugs). The only issue he raised which had substantive merit was the challenge to a jury instruction similar to the Sandstrom instruction which had been found defective previously. This case is the first considered in Montana since the Sandstrom decision which has been found to be controlled by Sandstrom. To sustain the charge against the defendant, the State needed to prove beyond a reasonable doubt that the defendant purposely or knowingly manufactured a dangerous drug. The voluntary act here is manufacturing. The ordinary consequence is a dangerous drug. Under this framework, the challenged jury instruction directed the jury to presume intent, purposely or knowingly, upon proof by the State of a voluntary act, manufacturing, and that act's ordinary consequence, a dangerous drug. Given the lack of qualifying instructions, a reasonable jury may have interpreted the instruction in either of two impermissible ways, as a conclusive presumption or as a shifting to the defendant of the burden of proving lack of intent upon proof by the State of the defendant's voluntary act and its ordinary consequences. The court could not agree that the offensive instruction could not have contributed reasonably to the jury's verdict because the State's case was entirely circumstantial and the evidence of intent was not overwhelming. Therefore, they could not find the error harmless. St. v. Wogamon, 188 M 34, 610 P2d 1161 (1980).

Proof of Elements of Crime — Sandstrom-Type Jury Instruction: Defendant, convicted of attempted deliberate homicide and aggravated burglary, appealed claiming error in the jury instruction stating that "you may infer that the attempted homicide was committed knowingly or purposely" under certain circumstances. Because the instruction did not apply to the burglary charge, that conviction stood. As to the homicide charge, the Supreme Court said that the instruction in question must be examined in the context of the other instructions given, as the court had decided previously that an identical instruction was not error in the context of the other instructions given. In finding the instruction in question here not error, the court contrasted the Sandstrom instruction, a presumption mandatory by its very terms which allowed the jury no discretion, with the instruction here in which the jury was told it "may infer" an element of the crime, namely, that the attempted homicide was committed knowingly or purposely. The latter instruction referred to an inference of fact and was, by its express terms, permissive. The language did not involve either a conclusive or burden-shifting presumption, nor did the instruction have the effect of allocating to the defendant some part of the burden of proof that properly rested on the State throughout the trial. This was made clear by the other instructions given by the trial court. It was not necessary for the jury to be instructed that they need not make the inference because the terms of the instructions made clear the effect and operation of the inference. Further, the operation and effect of the inference was clearly explained to the jury. St. v. Sheriff, 188 M 26, 610 P2d 1157 (1980).

Presumption of Intent — Effect on Due Process:
Defendant, charged with mitigated deliberate homicide, alleged as error the giving of the jury instruction: "The law presumes that a person intends the ordinary consequences of his voluntary acts." Under Montana law, causing the death of another becomes deliberate homicide only when it is committed purposely or knowingly. These elements are necessary to the proof of this particular crime and must be proved beyond a reasonable doubt by the prosecution. Intent is a difficult element to prove. The evidence normally must be in the nature of outward manifestations of the defendant's state of mind, but when a telephone line to the police station from the scene of the murder happened to be open and the defendant was overheard at length, the court knew what he was thinking from his own words. It is difficult to conceive of a better indication as to defendant's intent. Also, the officer heard the fight at the time these words were spoken and another officer found the defendant and the victim's body minutes later. The only contested element here was intent, and the evidence on it was overwhelming. Basing its holding on the probable impact of the instructions upon the mind of the average jury member, in light of the evidence, the impact of the instruction upon the jury could not reasonably have contributed to the verdict. The error in giving the contested instruction was harmless. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Distinguishing Sandstrom, the court noted that the jury was not given a mandatory presumption, but it was told it could reasonably infer the defendant's intent for all the consequences which one acting in a like position would reasonably have expected. Nothing in the instruction lessened the duty of the State to prove every element of the crime charged beyond a reasonable doubt, nor did it affect the presumption of the defendant's innocence. St. v. Bad Horse, 185 M 507, 605 P2d 1113 (1980), distinguishing Sandstrom v. St., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

The jury in a deliberate homicide case was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts". The U.S. Supreme Court determined that this instruction denied a defendant the constitutional right to a jury determination of proof beyond a reasonable doubt of all elements of the offense. The case was remanded to the Montana Supreme Court to determine if the instruction constituted harmless error. To find harmless error, the Supreme Court must be able to assert that the offensive instruction could not reasonably have contributed to the jury verdict. The court cannot make this assertion. The case is remanded to the District Court for retrial. St. v. Sandstrom, 184 M 391, 603 P2d 244 (1979).

In answer to the defendant's contention that the presumption in section 94-8-225, R.C.M. 1947 (since repealed), shifted the burden of proof of lack of intent to the defendant, the Supreme Court stated that if the existence of the proven fact would convince a rational juror of the existence of the inferred fact beyond a reasonable doubt, the statute comports with due process. St. v. McBenge, 175 M 362, 574 P2d 260 (1978).

Fair Trial — Self-Defense Instruction Proper: The jury was given the following instruction: "You are instructed that the defense of justifiable use of force or self-defense is an affirmative defense and the defendant has the burden of proving self-defense to raise a reasonable doubt of his guilt." In light of the Patterson and Leland cases the court held that, despite a stronger wording than it favors, the burden of proof did not shift to defendant with this instruction. Time and again the jury was instructed that the defendant was presumed to be innocent and that the State must prove the defendant's guilt beyond a reasonable doubt. St. v. Lopez, 185 M 187, 605 P2d 178 (1980), following Patterson v. N.Y., 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319 (1977), and Leland v. Oreg., 343 US 790, 96 L Ed 1302, 72 S Ct 1002 (1952), distinguishing Sandstrom v. St., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Jury Instructions — Presumption of Innocence: In a criminal prosecution for theft of an automobile in which the defendant timely requested and was twice denied an instruction on the presumption of innocence, an instruction on the State's burden of proof could not supplant an instruction on the presumption of innocence. The standard for prejudicial effect of the lack of the instruction was established in St. v. Harrison, 23 M 79, 57 P 647 (1899), and is stricter than that used by the U.S. Supreme Court. It is per se reversible error to deny the instruction. St. v. Williams, 184 M 111, 601 P2d 1194 (1979).

Sufficiency of Evidence — Pretrial Photographic Identification: Although a pretrial photographic identification may be suggestive, the court will examine the entire record and determine whether there are sufficient material facts, other than in-court identification, to support the conviction. St. v. Beaudette, 171 M 138, 557 P2d 297 (1976).

Possession as Prima Facie Evidence: A jury instruction taken verbatim from section 94-2704.1, R.C.M. 1947 (45-6-304, now repealed), that stated that possession of recently stolen livestock is prima facie evidence of guilt of larceny did not constitute reversible error since, even

though the State has the burden of proof in criminal cases, the burden of evidence may shift to the defendant. St. v. Gloyne, 156 M 94, 476 P2d 511 (1970).

Instruction Placing Burden to Explain on Defendant: In a prosecution for grand larceny, an instruction that had the effect of placing a burden on the defendant to explain his possession of stolen property was erroneous. Such a burden deprives the defendant of his cloak of innocence and forces him to testify. St. v. Greeno, 135 M 580, 342 P2d 1052 (1959).

Burden of Proof — Burden of Evidence: In criminal cases the burden of proof never shifts, but the burden of the evidence may shift frequently. St. v. Moorman, 133 M 148, 321 P2d 236 (1958).

Erroneous Directed Verdict — Conflicting Evidence: In a prosecution for unlawfully driving a truck with an overload, which is a misdemeanor, it was error for the court to instruct and direct the jury to return a verdict of guilty when the evidence as to the true weight of the truck was in conflict as shown by two different state police scales. St. v. Baillargeron, 126 M 310, 249 P2d 799 (1952).

Conviction Not Justified by Evidence: In a prosecution for the crime of carrying a concealed weapon in which the defendant was found guilty by a jury, it was held on appeal that in view of the uncertainty in the mind of the State's only eyewitness as compared with witnesses for the defendant, coupled with the effect of a former section, the evidence was not sufficient to justify a conviction for the crime charged. St. v. Gilbert, 125 M 104, 232 P2d 338 (1951).

Insufficient Evidence — Showing Required: A defendant is not required to show an entire absence of evidence of some fact necessary to make out a case in order to secure a new trial. If he can convince the District Court that the evidence in its entirety is insufficient in weight to justify the verdict, he is entitled to a new trial. St. v. Schoenborn, 55 M 517, 178 P 294 (1919).

Jurors Impeaching Own Verdict: The fact that jurors may impeach their own verdict when it has been decided by lot excludes all other exceptions to the general rule that jurors will not be heard to impeach their own verdict. St. v. Lewis, 52 M 495, 159 P 415 (1916); St. v. Wakely, 43 M 427, 117 P 95 (1911); Sutton v. Lowry, 39 M 462, 104 P 545 (1909); St. v. O'Brien, 35 M 482, 90 P 514 (1907); St. v. Beesskove, 34 M 41, 85 P 376 (1906).

Bias Concealed by Juror: Under a former statute providing for a new trial when the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of all the jurors, the fact that a juror, when sworn, was biased and prejudiced against the defendant, which fact he concealed upon his voir dire examination and which neither the defendant nor his counsel discovered until after the verdict, was ground for a new trial. St. v. Mott, 29 M 292, 74 P 728 (1903).

Law Review Articles

Presumptions in Criminal Cases, Ranney, 41 Mont. L. Rev. 21 (1980).

Statutory and Common Law Presumptions in Montana, Clarke, 37 Mont. L. Rev. 91 (1976).

Collateral References

Criminal Law *key* 308, 561(1).

22A C.J.S. Criminal Law §§958, 959; 23 C.J.S. Criminal Law §1502.

29 Am. Jur. 2d Evidence §§185 through 189.

46-16-211. Who are competent witnesses.

Case Notes

Procedure When Sequestered Witness Hears Testimony: Defendant, convicted of aggravated assault, aggravated burglary, and attempted sexual intercourse without consent contended on appeal that he was prejudiced by the State's failure to exclude a witness from the hearing room while the trial was in process. All witnesses had been put under the rule of exclusion. One witness, a physician, was not aware of the court's order and inadvertently came into the courtroom a few minutes before he was to testify. The Supreme Court held that excluding testimony is not an appropriate remedy. The jury should be instructed on the credibility of the witness. In this case the witness was unaware of the order. The testimony he heard was totally unrelated to that which he was giving. No prejudice to the defendant was shown. St. v. Wells, 202 M 337, 658 P2d 381, 40 St. Rep. 127 (1983).

Evidence of Drug Use of Witnesses Inadmissible as Too Remote and Without Foundation: The defendant appealed her conviction for deliberate homicide and aggravated assault in part by contending that it was error to prohibit the defense from referring to the use of marijuana by prosecution's primary witnesses in the hours before the shootings. In the Gleim case, Montana endorsed the majority rule requiring a showing that the witness was under the influence of drugs at the time the events about which he testified occurred before evidence of the witness' drug use is admissible. Implicit in the formulation of the Gleim rule is a recognition of the remoteness concept. The question of remoteness is directed to the discretion of the trial court.

While remoteness is a matter that generally goes to the credibility of the evidence rather than to its admissibility, evidence can be excluded if it is so remote that it has no evidentiary value. Given the defendant's failure to lay a proper foundation that the witnesses were under the influence of drugs at the time of the material events in this case, exclusion of the evidence was justified both under the Gleim rule and under the remoteness doctrine. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

Opinion Testimony Conditioned on Foundation: It is within the discretion of the trial court to allow opinion to be given, conditioned on the subsequent production and admission of evidence that forms the basis of the opinion. Since necessary evidence that served to complete the chain of possession was supplied, there was no prejudice to the defendant. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Fifteen-Year-Old Boy Competent: A boy 15 years old, called as a witness, who answered that he understood what he had done when he took the oath, that he knew the difference between truth and falsehood, that the truth was that which was so and not that which was not so, and that he knew that if he did not tell the truth he would be punished, sufficiently qualified himself to testify in a criminal case. St. v. Cadotte, 17 M 315, 42 P 857 (1895).

Collateral References

Witnesses *key* 35.

97 C.J.S. Witnesses §51.

81 Am. Jur. 2d Witnesses §§160 through 272.

46-16-212. Competency of spouses.

Commission Comments

1991 Comment: Two amendments to the 1987 code's provisions regarding privilege for communication between spouses have been adopted. See 1987 MCA 46-16-212. Subsection (1)(c) has added "abuse" to the language for clarification and has amended the exception to include either spouse's children. Subsection (2) emphasizes that the privilege applies only to communications or conversations.

Compiler's Comments

1991 Amendment: At beginning of (1) substituted "Neither spouse may testify to the communications or conversations between spouses that occur during their marriage unless" for "Except with the"; in (1)(a), at end, substituted "the defendant-spouse is obtained" for "both"; in (1)(b), at beginning, inserted "the defendant-spouse has been charged with an act of"; in (1)(c), at beginning, inserted "the defendant-spouse has been charged with abuse", before "children" inserted "the other spouse or either spouse's", and after "children" deleted "by either party, or abandonment or neglect of one by the other"; in (2), at beginning, inserted exception clause and at end deleted "in a criminal action or proceeding to which one or both are parties"; and made minor changes in style.

Case Notes

Testimony Allowed Despite Marriage Between Defendant and Witness After Crime Charged but Before Trial — Applicability of Spousal Privilege — Harmless Error: After Baldwin was charged for several drug crimes, he married one of the witnesses who was to testify against him. The District Court cited this section and allowed the witness to testify. Baldwin asserted error, and the Supreme Court agreed. The language of this section applies to the competency of a spouse to testify, not to spousal privilege. Because Baldwin and the witness were married at the time of trial, under 26-1-802, the testimony should have been excluded based on spousal privilege. However, admission of the testimony in this case was harmless error because the testimony of several other witnesses was sufficient to support Baldwin's conviction. St. v. Baldwin, 2003 MT 346, 318 M 489, 81 P3d 488 (2003).

Wife Not Incompetent Witness in Criminal Trial Against Husband — 1991 Amendment to Statute as Procedural Change: An alleged crime was committed prior to October 1, 1991. The version of this section in effect at that time held that with some exceptions, one spouse was incompetent to testify against another in a criminal proceeding. The legislative change to this section in 1991 provided that with some exceptions, one spouse was competent to testify against another in a criminal proceeding. Because the statutory change was procedural rather than substantive, the version in effect at the time of trial rather than at the time of the crime was held to apply. Therefore, the testimony of a spouse, if it meets the other rules of evidence, is not to be excluded on the grounds of competency as a witness unless it is testimony of communications and conversation between the spouses during their marriage. St. v. Moore, 254 M 241, 836 P2d 604, 49 St. Rep. 752 (1992).

Preindictment Delay — No Violation of Due Process: Defendant forged and cashed a check of his wife's and kept the proceeds for himself. The County Attorney's office investigated in March 1988 but declined to prosecute because the wife was barred from testifying against defendant by 26-1-802 (spousal privilege) and this section (competency of spouses). The couple was divorced in May 1989. On December 12, 1989, defendant was charged with theft and forgery and was eventually convicted of theft. The Supreme Court affirmed and found that defendant had not shown actual, substantial prejudice as a result of the delay in prosecution. Prosecution was commenced within the applicable 5-year statute of limitations. The fact that defendant could no longer rely on the spousal privilege and competency of spouses statutes to prevent a witness from coming into court and testifying about the theft does not constitute "prejudice" to defendant. St. v. Krinitt, 251 M 28, 823 P2d 848, 48 St. Rep. 1088 (1991).

Admission of Adverse Testimony of Wife — Harmless Error: The trial court erroneously allowed defendant's wife to testify over his objection under 46-16-212, which indicates that a wife is not a competent witness against her husband without his consent in a criminal proceeding against him regardless of whether the testimony pertains to observations of the spouse's actions or whether the testimony consists of communications made between spouses. To be distinguished is 26-1-802, which indicates that if a defendant is not married at the time of trial, his former spouse is competent to testify but cannot be examined without his consent as to any communication made between the spouses during the marriage. In the present case, the trial court's error was harmless since the wife's testimony was essentially identical to the defendant's and thus did not affect any substantial right of the defendant and there was no reasonable possibility that the wife's testimony could have contributed to defendant's conviction. St. v. Roberts, 194 M 189, 633 P2d 1214, 38 St. Rep. 1551 (1981), followed in St. v. Shaw, 199 M 248, 648 P2d 287, 39 St. Rep. 1324 (1982).

Neglect of Children: A wife could testify against her husband in a homicide prosecution for the alleged beating death of her child since such conduct amounted to "neglect" of a child within this section. "Neglect" includes any abuse of children, whether inflicted negligently or intentionally. This section rather than 26-1-802 was applicable in determining any marital privilege. St. v. Taylor, 163 M 106, 515 P2d 695 (1973).

Evidence Other Than Communications: The statute applies to communications only. Therefore, the testimony of the Deputy Sheriff that the wife of the defendant accompanied him to the area where evidence which served to convict the defendant was recovered should have been allowed. St. v. Houchin, 149 M 503, 428 P2d 971 (1967).

Improper Testimony: It was error to permit a wife to testify against her husband in a trial for assault when no offense against the wife was charged. St. v. Storm, 124 M 102, 220 P2d 674 (1950).

Collateral References

Witnesses *key* 52(7), 61(2), 62.

97 C.J.S. Witnesses §75, et seq.

81 Am. Jur. 2d Witnesses §§230 through 263.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction. 74 ALR 4th 277.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution—modern state cases. 74 ALR 4th 223.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications. 62 ALR 4th 1134.

46-16-213. Testimony of person legally accountable.

Commission Comments

1991 Comment: This statute is primarily a restatement of 1987 MCA 46-16-213, which recognized a limitation on the value of testimony provided by persons legally accountable. The statute continues to recognize that in order to sustain a conviction, such evidence must be corroborated. The second sentence was not retained because it was considered unnecessary.

Compiler's Comments

1991 Amendment: At beginning substituted "person may not be found guilty" for "conviction cannot be had" and deleted last sentence that read: "The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof"; and made minor change in style.

Case Notes

No Error in Instructing Jury That Determination of Accomplice Left to Trier of Fact: Dewitz's traveling companion was initially charged with setting up a meth lab because the rooms were rented in the companion's name, but the charges were dismissed when it was discovered that the companion was not involved in setting up the meth lab in Dewitz's room. At trial, an instruction was given to the jury stating that it was up to the jury to determine whether the companion was an accomplice. Dewitz contended that the trial court should have instead instructed the jury that, having been initially charged with the same crime, the companion was an accomplice as a matter of law and that corroborating evidence was therefore required. The Supreme Court disagreed. Because the parties disagreed whether the companion was an accomplice, the issue was properly given to the jury to decide. St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009), distinguishing St. v. Johnson, 276 M 447, 918 P2d 293 (1996).

Sufficient Corroborating Evidence to Testimony of Legally Accountable Witness: Corroborating evidence included testimony of the wife of a witness deemed legally accountable for offense, the hunting license records produced by a game warden, the testimony by a game warden as to the opening date of hunting season in 2002, a photo of defendant with the bear carcass, and the game warden's testimony that he inspected bear parts in a freezer located in a lodge owned by defendant. This was sufficient to support an accountable witness's testimony regarding unlawful possession of an illegally killed bear. St. v. Wendler, 2008 MT 370, 346 M 467, 197 P3d 932 (2008).

Photographs and Deer Tags Sufficient to Corroborate Accomplice Testimony: Envelopes containing photographs and unused deer hunting tags were sufficient to corroborate the testimony of an accomplice, who was the defendant's wife, regarding hunting and protected bird violations. State v. Torgerson, 2008 MT 303, 345 M 532, 192 P3d 695 (2008).

Sufficient Corroborative Evidence to Support Conspiracy Conviction: Marler was convicted of conspiracy to commit robbery. On appeal, Marler contended that there was insufficient corroborative evidence to support the conspiracy conviction. The Supreme Court disagreed. A person may not be found guilty solely from an accomplice's testimony unless that testimony is corroborated by other evidence that in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense. Pursuant to St. v. Burkhart, 2004 MT 372, 325 M 27, 103 P3d 1037 (2004), evidence may corroborate accomplice testimony sufficiently even though standing alone it fails to support a conviction or to make out a prima facie case against the defendant. Circumstantial evidence, disputed evidence, or evidence that is consistent with innocent conduct may suffice to corroborate accomplice testimony, but evidence fails to corroborate accomplice testimony sufficiently if it reveals nothing more than a crime's occurrence or the circumstances of the crime's commission. In this case, the state presented independent evidence tending to connect Marler with the conspiracy to commit robbery, including a map of the floor plan of the business to be robbed, testimony of Marler's attempts to recruit others in the robbery, the arrest of an armed conspirator outside the apartment where Marler was residing, cell phone images of the coconspirators holding handguns and displaying the same hand gestures, and testimony that Marler had plans to leave town but needed additional funds. When viewed in the light most favorable to the prosecution, the evidence was sufficient for a jury to conclude that Marler conspired to commit robbery, and the District Court's denial of Marler's motion for acquittal based on insufficient evidence was affirmed. St. v. Marler, 2008 MT 13, 341 M 120, 176 P3d 1010 (2008).

Eyewitness Testimony and Forensic Evidence Sufficient to Corroborate Accomplice Testimony: Forensic evidence matching the victim's head wounds to a ball-peen hammer and verified accounts of the defendant's demeanor and activities were adequate to corroborate an accomplice's testimony. St. v. Burkhart, 2004 MT 372, 325 M 27, 103 P3d 1037 (2004).

Failure of Counsel to Request Instruction on Accomplice Testimony Constituting Ineffective Assistance of Counsel — Failure of Court to Give Instruction Prejudicial: Kougl was convicted of operating an unlawful clandestine laboratory and subsequently appealed on grounds of ineffective assistance of counsel. The state's case was based largely on the testimony on three accomplices. At trial, both the prosecution and defense counsel pointed out to the jury in closing arguments that accomplice testimony should be viewed with suspicion because of the accomplices' criminal conduct and the deals that they cut with the state. However, Kougl's counsel did not request a jury instruction that accomplice testimony ought to be viewed with distrust and that it must be corroborated. Applying the Strickland test for effective assistance of counsel, the Supreme Court found that Kougl's counsel's failure to request the instructions constituted a failure to use the law to strike at the heart of the state's case, and because there

was no plausible explanation for not asking for the instructions, counsel's performance was deficient and the first prong of Strickland was satisfied. Further, the trial court failed its duty to instruct the jury on the law, which is a duty that may not be delegated to counsel because what the court tells the jury carries the force of law, while counsel's comments do not. Thus, the second prong of Strickland requiring a showing of prejudice was also satisfied because if the jury had been properly instructed, there was a reasonable probability that it would have arrived at a different outcome. Therefore, Kougl received ineffective assistance of counsel, and Kougl's conviction was reversed. St. v. Kougl, 2004 MT 243, 323 M 6, 97 P3d 1095 (2004), following St. v. Rose, 1998 MT 342, 292 M 350, 972 P2d 321 (1998), and followed in St. v. Johnston, 2008 MT 318, 346 M 93, 193 P3d 925 (2008).

Sufficient Independent Evidence Corroborating Accomplice Testimony of Conspiracy to Commit Theft: Following conviction for conspiracy to commit felony theft, Black asserted that the testimony of several witnesses was not sufficiently corroborated. The Supreme Court disagreed. Corroborating evidence need not extend to every fact to which an accomplice testifies, nor is corroborating evidence insufficient just because it is circumstantial, disputed, or inconsistent with innocent conduct. Setting aside the accomplice testimony entirely, in this case, there was sufficient independent evidence from Black himself and from nonaccomplice witnesses to indicate Black's complicity in the theft. St. v. Black, 2003 MT 376, 319 M 154, 82 P3d 926 (2003), followed in St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009), regarding the test for sufficiency of corroborating evidence.

Accomplice Facing Charges Related to Different Count From Defendant — Corroboration of Testimony: Byers was charged with conspiracy to manufacture dangerous drugs based on the testimony of three accomplices. The testimony of two of the accomplices was inadmissible under this section, but testimony was also given by a third accomplice who was charged with complicity with Byers in a different crime. Byers contended that the testimony of the third accomplice was also inadmissible; however, because the third accomplice was facing charges related to acts with Byers on a different count, the corroborative testimony of the third accomplice was proper. St. v. Byers, 2003 MT 83, 315 M 89, 67 P3d 880 (2003).

Evidence Unrelated to Accomplice Testimony Sufficient to Corroborate Drug Lab Operation: Byers was charged with operating a methamphetamine laboratory and conspiracy to manufacture methamphetamine. Two accomplices testified against Byers in exchange for use immunity. Byers asserted that the accomplices' testimony was inadmissible pursuant to this section, but the Supreme Court disagreed. There was sufficient physical evidence of drug manufacturing to provide independent corroboration of the witnesses' testimony, unrelated to the accomplice testimony, so that a jury could reasonably infer that Byers was involved in the manufacture of methamphetamine. Byers' conviction was affirmed. St. v. Byers, 2003 MT 83, 315 M 89, 67 P3d 880 (2003).

Sufficient Corroborative Evidence:

In Fey's trial for negligent homicide, negligent vehicular assaults, conspiracy, misdemeanor DUI, and misdemeanor transactions with minors, there was sufficient corroborating evidence for an accomplice's testimony that he removed alcohol from a wrecked car on Fey's instruction. A jury could have reasonably inferred from the fact that Fey walked into a field to investigate an object "which caught his eye as it reflected light from the sun" that he was looking for the alcohol containers that the witness had removed from the car the night of the crash. The evidence clearly tended to connect Fey with the commission of conspiracy. St. v. Fey, 2000 MT 211, 301 M 28, 7 P3d 358, 57 St. Rep. 829 (2000), following St. v. Kemp, 182 M 383, 597 P2d 96 (1979).

Defendant questioned the sufficiency of corroboration of the robber's testimony and defendant's girlfriend's testimony. The following corroborating evidence was sufficient to uphold a conviction of robbery by accountability: (1) defendant's admission to his girlfriend that he was in a bar with the robber prior to the robbery and that the robber had a gun and planned to commit a robbery; (2) defendant's statements to the FBI that he drove the getaway car that was used in the crime; (3) defendant's admission to the FBI that he had taken the robber to her residence to change clothes; (4) defendant's admission that he had taken money from the robber after the robbery; and (5) discovery by police of defendant and the robber in a car matching the description of the vehicle seen at the scene of the robbery less than 2 hours after the robbery. St. v. Koontz, 249 M 109, 813 P2d 463, 48 St. Rep. 601 (1991).

The following corroborating evidence was sufficient to uphold a conviction of arson: (1) a bank held a lien on the trailer house that burned; (2) the trailer was worth less than the lien, giving defendant a motive to burn it; (3) the trailer was insured; (4) both a fireman and the fire marshal testified that a propane burner was found face down on a bedspring after the fire, and the burner

was the only thing that could have started the fire; and (5) few remnants of items of value were found in the trailer after the fire. St. v. Conrad, 241 M 1, 785 P2d 185, 47 St. Rep. 32 (1990).

Testimony of defendant's accomplices linking him to two burglaries was corroborated by stolen items found in the vicinity of defendant's house and by testimony of a police officer linking defendant to the scene of one of the burglaries. In finding this corroboration sufficient, it was held that corroborative evidence need not be sufficient, by itself, to support conviction or even to make out a prima facie case. It need not extend to every fact to which the accomplice testifies. No specific instruction on the credibility of the witness's identification testimony need be given where general instructions addressed witness credibility and burden of proof required to convict. St. v. Price, 234 M 144, 762 P2d 232, 45 St. Rep. 1798 (1988), followed in St. v. Ungaretti, 239 M 314, 779 P2d 923, 46 St. Rep. 1710 (1989).

Where accomplices of the defendant testified that the defendant was guilty of felony theft from the Vets Club, there was other sufficient evidence presented at the defendant's trial to corroborate the testimony of the accomplices, in that: (1) the defendant admitted to being with the accomplices on the night of the theft; (2) the tire marks outside the Vets Club matched those on the defendant's vehicle; (3) the defendant was familiar with the interior of the club; and (4) the vehicle placed at the scene of the theft was the only vehicle owned by the defendant that was in the town where the theft occurred at the time in question. St. v. Shaw, 199 M 248, 648 P2d 287, 39 St. Rep. 1324 (1982).

Where accomplice's testimony was supported by his wife's testimony that defendant left with accomplice in a vehicle later found at the scene and by victim's testimony as to the taking of a wallet, which was later found outside by a utility worker just as accomplice's testimony had indicated, there was sufficient corroborative evidence of accomplice's testimony to sustain burglary conviction. St. v. Manthie, 197 M 56, 641 P2d 454, 39 St. Rep. 350 (1982).

Defendant questioned the sufficiency of corroboration of accomplice testimony. A codefendant testified that defendant drove the getaway car after the robbery of a bar. The only other testimony regarding defendant's possible presence and participation came from a witness who identified the driver as a woman, a deputy who interviewed accomplices, and an officer who overheard defendant express anger at a codefendant for turning State's evidence. Corroborative evidence may be circumstantial and can come from the defendant or his witnesses. One accomplice cannot supply the independent evidence necessary to corroborate another witness. The corroborative evidence must clearly: (1) be independent; (2) point toward defendant's guilt; and (3) provide a legally sufficient connection between defendant and offense. The State clearly failed to present any evidence corroborative of accomplice testimony. This failure necessitated reversal. St. v. Case, 621 P2d 1066, 37 St. Rep. 2057 (1980) (apparently not reported in Montana Reports).

Defendant could not have been convicted without the testimony of an accomplice witness, but this fact does not establish that the corroborating proof was insufficient. The physical evidence connects the defendant with the victim, with the victim's vehicle, and with the victim's coat. Such evidence, together with the defendant's behavior a short while after the crime and at his arrest, constitutes sufficient corroborating evidence. St. v. Shurtliff, 187 M 235, 609 P2d 303 (1980).

Fact that defendant, by his own admission, had possession of stolen guns on two occasions is sufficient to corroborate the testimony of an accomplice and support a conviction of burglary. St. v. Rose, 187 M 74, 608 P2d 1074 (1980).

There is no doubt that the crimes of burglary and theft were committed, and the corroborating evidence clearly tends to connect defendant with the commission of the crimes as a conspirator. Among other things, as to the burglary, the defendant had constructive possession of the stolen property, knew the victim, and had been to his house and seen the stereo; as to the theft, defendant admitted companionship with the perpetrators preceding the robbery, going to the gas station with one of them before the robbery, and having loaned his car to them during the time the crime was committed. St. v. Williams, 185 M 140, 604 P2d 1224 (1979).

The State presented sufficient evidence to corroborate the testimony of one responsible or legally accountable for the same offense. St. v. Fitzpatrick, 174 M 174, 569 P2d 583 (1977).

An accomplice's testimony was sufficiently corroborated by independent evidence, as a matter of law, to warrant the submission of the case to the jury for a determination of the trustworthiness of the accomplice's testimony. St. v. Briner, 173 M 185, 567 P2d 35 (1977).

In a prosecution for aggravated assault, an accomplice's testimony was sufficiently corroborated when part of it was undisputed and the victim of the assault identified the defendant as the person who struck him with the weapon. St. v. Orsborn, 170 M 480, 555 P2d 509

(1976), reaffirming St. v. Cobb, 76 M 89, 245 P 265 (1926), decided under section 94-7220, R.C.M. 1947 (a forerunner of this section).

The identification of the defendants by the pharmacist whose pharmacy had been robbed and by witnesses who observed the defendants fleeing the scene of the robbery constituted sufficient independent corroboration of an accomplice's testimony to support a conviction of robbery. St. v. Spielmann, 163 M 199, 516 P2d 617 (1973).

Sufficient Corroborative Evidence of Burglary and Theft to Allow Testimony of Legally Accountable Witness: Before his trial for burglary and theft, Teske sought to exclude the testimony of a witness who was alleged to be legally accountable for Teske's crimes. Nevertheless, the District Court allowed the witness to testify. The testimony was corroborated by the testimony of another witness and by the physical evidence. Although the witness may have been more involved in the crimes than he was willing to admit, the question before the jury was whether Teske was guilty, and on that issue, there was sufficient evidence to convict. St. v. Teske, 1999 MT 227, 296 M 88, 987 P2d 368, 56 St. Rep. 894 (1999).

Requirements for Application of Accomplice Testimony Corroboration Rule: Blackcrow was charged with robbery and aggravated burglary. At the close of the state's case, Blackcrow moved for directed verdict on grounds that the only evidence presented at trial that connected Blackcrow to the charged offenses was uncorroborated accomplice testimony, which was insufficient to support a conviction. There are two requirements that must be met in order for the application of this section to justify a directed verdict for acquittal: (1) the witness whose testimony is being offered must be an accomplice and legally accountable for the defendant's conduct; and (2) the accomplice's testimony must be uncorroborated by additional evidence. Whether a person may be held legally accountable for the conduct of another and so qualify as an accomplice for purposes of the accomplice testimony rule is, unless undisputed by the parties, a matter of fact to be determined by the jury. In this case, the fact that there was conflicting testimony on the issue of a witness's legal accountability further bolstered the conclusion that the issue was properly within the province of the jury. Denial of the motion for a directed verdict was therefore proper. St. v. Blackcrow, 1999 MT 44, 293 M 374, 975 P2d 1253, 56 St. Rep. 194 (1999).

Test for Sufficiency of Corroborative Evidence: The Supreme Court affirmed the lower court's finding that there was sufficient evidence to corroborate an accomplice's testimony against the defendant on the basis that the evidence met a three-part test that the evidence clearly: (1) be independent; (2) point toward the defendant's guilt; and (3) provide a legally sufficient connection between the defendant and the offense. St. v. Berger, 1998 MT 170, 290 M 78, 964 P2d 725, 55 St. Rep. 686 (1998). See also St. v. Grace, 2001 MT 22, 304 M 144, 18 P3d 1008 (2001).

Photographs of Defendant and Accomplices Relevant for Corroboration of Accomplice Testimony: McKeon contended that dated photographs depicting him brandishing firearms with his alleged robbery accomplices should have been excluded as irrelevant and highly prejudicial. The Supreme Court disagreed, holding that the photographs were relevant for the purpose of corroborating portions of an accomplice's testimony in which the chain of events leading up to the robbery were described, including the fact that the parties were traveling around the West around the time of the crime and that the accomplice had purchased firearms for McKeon and another accomplice similar to those in the photographs. Corroboration of the accomplice testimony was necessary and prudent, and the probative value of the photographs outweighed any possible prejudicial effect. St. v. McKeon, 282 M 397, 938 P2d 643, 54 St. Rep. 404 (1997).

Testimony of Accomplice Charged With Same Offense as Principal Defendant — Conviction Reversed: Johnson was charged with criminal mischief in vandalizing an automobile. Perez, also present at the scene of the offense, was also charged but was offered a deferred prosecution if she would testify against Johnson. At trial, the state sought to connect Johnson's presence at the scene of the offense only by the testimony of Perez. Johnson moved for a directed verdict of acquittal on the grounds that Perez's testimony violated this section, but the District Court denied the motion. The Supreme Court reversed, holding that because Perez was charged with being an accomplice, the District Court could not convict on the basis of her testimony alone. The Supreme Court noted that the statutes authorizing the complaint and arrest warrant against Perez required probable cause as a precondition and also noted that Rule 3.8 of the Rules of Professional Responsibility requires a prosecutor to dismiss charges that are not supported by probable cause. The Supreme Court referred to cases cited by the state in which witnesses were accomplices as distinguishable because those witnesses were not charged as accomplices. St. v. Johnson, 276 M 447, 918 P2d 293, 53 St. Rep. 464 (1996), distinguished in St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009).

Ineffective Assistance Claims Denied — No Prejudice Shown Under Strickland Test: Applying the Strickland test for determining effectiveness of counsel, the Supreme Court dismissed defendant's claims that he was ineffectively represented at trial, during the penalty phase proceedings, and during the course of direct appeal, including claims based on: (1) failure to object to prosecutor's statements that defendant was intoxicated at the time of the crime, when that was in fact true, and to object to an intoxication instruction that was based on statutory language; (2) failure to object to closing arguments during which the prosecutor portrayed himself as the victim and narrated in the first person (following U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)); (3) failure to object to the lack of corroborating evidence regarding a witness's testimony when the objection lacked merit and would have been properly overruled (following St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993)); (4) failure to investigate and pursue a mental defect defense after defendant's own psychologist of choice found him capable of going to trial (see Harris v. Vasquez, 949 F2d 1497 (9th Cir. 1990)); (5) failure to move for a substitute judge when there was no reasonable probability that the outcome of the trial would have differed with another judge presiding; (6) failure to request a change of venue absent evidence of juror bias and failure to adequately voir dire the jury when there was no reasonable probability that the outcome of the trial would have differed had voir dire been conducted more thoroughly; (7) ineffectiveness in investigating a witness's background when counsel's investigation fell within the wide range of competent assistance; (8) failure to investigate defendant's suicide attempt; (9) failure to object to certain jury instructions allowing inference of the existence of the requisite mental state from the acts of the accused (following St. v. Cowan, 260 M 510, 861 P2d 884 (1993)); (10) failure to object to instructions setting out the elements of aggravated kidnapping when defendant did not specify which of the alternatives in the instruction were objectionable (following Schad v. Ariz., 501 US 624, 115 L Ed 2d 555, 111 S Ct 2491 (1991)); (11) failure to object to the absence of Native Americans on the jury when, given recent census data, counsel could not have demonstrated that Native Americans were underrepresented on the panel; and (12) failure to object to the presence of armed officers in the courtroom (following Holbrook v. Flynn, 475 US 560, 89 L Ed 2d 525, 106 S Ct 1340 (1986)). Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Witness Not Chargeable With Same Crime: The defendant, charged with selling illegal drugs, argued that the testimony of two state witnesses was inadmissible because there was no corroboration of their statements. The Supreme Court held that no corroboration was necessary because the witnesses testified to having committed similar illegal sales with the defendant rather than to having committed the crime for which the defendant was charged. St. v. Paulson, 250 M 32, 817 P2d 1137, 48 St. Rep. 838 (1991), distinguished in St. v. Johnson, 276 M 477, 918 P2d 293, 53 St. Rep. 464 (1996).

Record Connecting Defendant With Alleged Accomplice — Jury Instruction on Accomplice Testimony Proper: Trial testimony indicated that the defendant had an accomplice and that one of his witnesses may have been the accomplice. The trial court instructed the jury that if the jury found the witness was the accomplice, his testimony must be corroborated by other evidence, but the court did not require the jury to make that finding. Because the record connected the actions of the defendant and his witness, it was not error to give the instruction on accomplice testimony. St. v. West, 245 M 298, 800 P2d 1047, 47 St. Rep. 2129 (1990).

Make of Defendant's Car as Corroborating Evidence: The defendant argued that the corroborating evidence produced by the prosecution was insufficient to support his conviction. The Supreme Court held that the testimony of a witness who saw a car of the same make as the defendant's parked in front of the burglarized house and two men in the vehicle, one with a build similar to the defendant's, was sufficient for corroboration purposes. St. v. Kaczmarek, 243 M 456, 795 P2d 439, 47 St. Rep. 1319 (1990), followed in St. v. Johnson, 257 M 157, 848 P2d 496, 50 St. Rep. 209 (1993), and St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Reference to Name of Accomplice Unnecessary in Instruction on Accomplice Testimony: Defendant contended the jury instruction on accomplice testimony was inadequate because it did not identify by name the parties who were accomplices and whose testimony should be viewed with distrust. However, the Supreme Court found no requirement that an instruction on accomplice testimony refer by name to the accomplice, noting that whether a witness is an accomplice within the meaning of the law may be a factual question for the jury. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Corroborative Physical Evidence Held Relevant in Murder Case: The defendant argued that certain physical evidence introduced to corroborate an accomplice's testimony against him was irrelevant and prejudicial. The Supreme Court held that the evidence was relevant in that each

of the objects independently corroborated the testimony of one of the accomplices. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Receiver of Stolen Property Not Accomplice: The defendant in a burglary trial argued that the jury should have been instructed to view with distrust the testimony against him given by a witness who had received some of the stolen property. The Supreme Court ruled that one receiving stolen property is not an accomplice and no jury instruction was needed. St. v. Moreno, 241 M 359, 787 P2d 334, 47 St. Rep. 351 (1990).

Weight Given to Recanted Accomplice Testimony — Discretion of Trial Court to Determine Veracity: An accomplice recanted testimony relied on in the conviction of defendant 15 years earlier. Defendant contended the District Court improperly applied the presumption of truthfulness to the original testimony but not to the recantation. In light of the inherent suspicion surrounding recanted testimony and the public interest in swift and sure justice, the Supreme Court adopted the view that the weight to be given such testimony is for the judge passing on the motion for a new trial to determine. Absent a clear abuse of discretion, the trial court will be upheld. St. v. Perry, 232 M 455, 758 P2d 268, 45 St. Rep. 1192 (1988).

Notification of Authorities by Person Asked to Participate — No Accountability: A person who was solicited for participation in a crime and, upon learning of the specifics of the intended criminal act, notified authorities and prevented the crime from occurring was not accountable for any crime and was not an accomplice to the crime of solicitation. St. v. Morse, 229 M 222, 746 P2d 108, 44 St. Rep. 1919 (1987).

Accomplice Testimony Corroborated by Expert: Testimony by an accomplice to a school break-in was sufficiently corroborated by a fingerprint expert's opinion that a fingerprint found on a cash box in the school was that of defendant. St. v. Martin, 226 M 463, 736 P2d 477, 44 St. Rep. 804 (1987).

State's Witnesses Not Accomplices — No Corroboration Required — Burglary: There was sufficient evidence in the record to show that neither of two state witnesses was an accomplice to make the question one for the jury. As the jury determined that neither witness had the requisite criminal intent, their corroborative testimony was admissible. St. v. Gonyea, 225 M 56, 730 P2d 424, 44 St. Rep. 39 (1987), followed in St. v. Blackcrow, 1999 MT 44, 293 M 374, 975 P2d 1253, 56 St. Rep. 194 (1999).

Conspiracy — Corroborating Evidence: Defendant was convicted of conspiracy to commit criminal sale of dangerous drugs (now criminal distribution of dangerous drugs). He contended that accomplice testimony was not properly corroborated. Because the conviction was for conspiracy, the court considered only testimony which corroborated testimony of accomplices by tending to connect defendant with the conspiracy. The court found that two grandsons and a son testified to defendant's involvement in the enterprise. Accomplice testimony was properly corroborated. St. v. Walton, 222 M 340, 722 P2d 1145, 43 St. Rep. 1312 (1986).

Corroborative Evidence to Prove Burglary — Eyewitness and Notes by Defendant: The defendant in a burglary case questioned whether there was sufficient corroborative evidence to confirm testimony at trial by the accomplices to the crime that defendant committed burglary. The Supreme Court found that the record contained corroborative testimony of a service station attendant who witnessed the crime, as well as notes written by the defendant himself discussing the events surrounding the burglary, which tended to connect the defendant with the burglary. This was found to be sufficient evidence to corroborate testimony from the accomplices. St. v. Woods, 221 M 17, 716 P2d 624, 43 St. Rep. 601 (1986).

Adequacy of Physical Evidence Corroboration: Defendant was charged with criminal possession of dangerous drugs with intent to sell. An accomplice-informer testified as to his involvement in purchasing the drugs from Florida. Defendant contended the accomplice's testimony was not adequately corroborated. The Supreme Court held that because defendant was arrested with 30 pounds of marijuana in his possession, his keyring contained keys which opened the suitcase containing the marijuana, phone records verified 13 long-distance calls charged to defendant's home during the transaction, 5 of which were to Florida, and the State introduced into evidence incriminating tape recordings made with the informant-accomplice's consent, there was adequate corroboration of the accomplice's testimony. The court also noted that the tape recordings in and of themselves were sufficient to corroborate the accomplice's testimony. St. v. Canon, 212 M 157, 687 P2d 705, 41 St. Rep. 1659 (1984).

Accomplice — Knowing, Voluntary Behavior Required: The defendant was convicted of attempted deliberate homicide. On appeal, she contended that four witnesses for the state were accomplices and that their testimony had not been corroborated. The court held that two of the witnesses were arguably accomplices while the other two were clearly not. The mere fact that someone suspects that another may commit a crime does not make him an accomplice. There was

no knowing, voluntary behavior necessary to make the witnesses accomplices; therefore, corroboration was not required. St. v. Nordahl, 208 M 513, 679 P2d 241, 41 St. Rep. 502 (1984), followed in St. v. Duncan, 247 M 232, 805 P2d 1387, 48 St. Rep. 176 (1991).

Possession of Stolen Property — Sufficient Corroboration: Defendant's possession of a knife stolen from a residence was circumstantial evidence connecting him to the crime that the jury was entitled to consider. The possession of the stolen knife was sufficient, independent evidence to satisfy the statutory requirements to corroborate the testimony of three accomplices. St. v. Hammons, 204 M 340, 664 P2d 922, 40 St. Rep. 884 (1983).

Witness Testimony That Defendant Admitted Act to Him — Sufficient: Testimony that defendant told witness that he had killed victims by hitting them with auto he was driving constituted more than sufficient accomplice corroboration evidence. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Accomplice Testimony — Theft Offenses Distinct Crimes: The theft crimes enumerated in 45-6-301 are statutorily distinct crimes; hence, a person who may have received stolen property, a possession theft crime under 45-6-301(3)(c), was not legally accountable for the same crime as the defendant charged with theft by actual taking under 45-6-301(1)(a) for the purposes of requiring corroboration of his testimony under 46-16-213. St. v. Lamere, 202 M 313, 658 P2d 376, 40 St. Rep. 110 (1983), distinguished in St. v. Hernandez, 213 M 221, 689 P2d 1261, 41 St. Rep. 2063 (1984).

Burglarized Items Found in Defendant's Closet — Sufficient: Stolen items were found in defendant's closet and auto. This constituted sufficient evidence as a matter of law to corroborate the testimony against defendant of immunized witness who had participated in the two burglaries of the found items of which defendant was convicted. St. v. Morigeau, 202 M 36, 656 P2d 185, 39 St. Rep. 2311 (1982).

Adequate Jury Instruction — How to View Corroborating Evidence: The following gives adequate guidance to a jury on how to view corroborating evidence in the light of accomplice testimony: "A conviction cannot be had on the testimony of one responsible or legally accountable for the same offense, unless the testimony is corroborated by other evidence which in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." St. v. Laubach, 201 M 226, 653 P2d 844, 39 St. Rep. 2074 (1982), followed in Bishop v. St., 254 M 100, 835 P2d 732, 49 St. Rep. 650 (1992).

Testimony of Accomplice — Corroborating Evidence Consonant With Innocence or Guilt — Jury Question: The defendant was convicted of criminal sale of dangerous drugs (now criminal distribution of dangerous drugs). His conviction was based on the testimony of an undercover agent and an accomplice. The testimony of the undercover agent tended to connect the defendant with the commission of the offense. The defendant argued that the agent's testimony was equally consonant with a reasonable explanation pointing toward innocent conduct and is not the corroboration needed to support an accomplice's testimony. The court held that whether or not the defendant's explanation was believable was a factual question for the jury. As a matter of law, the testimony of the undercover agent was sufficient to corroborate the accomplice's testimony. St. v. Anderson, 197 M 374, 643 P2d 564, 39 St. Rep. 629 (1982).

Connection to Defendant Not Shown: Prymarks, footprints, and stolen drugs were never shown to be connected with the defendant. Other physical evidence merely gave rise to suspicion. The explanation of this evidence given by the accomplice was no more reasonable than the explanation given by the defendant. Therefore, the evidence was insufficient when coupled with the accomplice's testimony to support a conviction. St. v. Casagranda, 196 M 56, 637 P2d 826, 38 St. Rep. 2122 (1981).

Accomplice as Matter of Law — No Corroborating Evidence — Directed Verdict Required: The defendant was charged with suppressing evidence in connection with the investigation of his son on a deliberate homicide charge. The case against the defendant was based entirely on the testimony of Hopkins, who testified that the defendant gave him a pistol that belonged to the homicide suspect and asked him to dispose of it. Hopkins kept the pistol for 5 months before turning it over to the police. The court concluded that if the jury inferred from the evidence that the defendant intended to suppress the evidence then it would have to infer that the same intent existed for Hopkins. That would make Hopkins an accomplice as a matter of law. Since there was no corroborating evidence to support the testimony of Hopkins, the District Court should have entered a judgment of acquittal. St. v. Warren, 192 M 436, 628 P2d 292, 38 St. Rep. 773 (1981), distinguished in St. v. McColley, 239 M 466, 781 P2d 280, 46 St. Rep. 1836 (1989).

Prima Facie Case of Culpability Unnecessary: In a prosecution for felony criminal mischief and soliciting another to commit a crime, which prosecution was based on the defendant's alleged arson of his mobile home for purposes of obtaining insurance compensation, the trial testimony of the defendant's accomplice was sufficiently corroborated by other evidence to sustain the conviction. While the other trial evidence does not establish a prima facie case of culpability, that is unnecessary as the evidence need only "tend to connect" the defendant with the commission of the offense. The total sum of the other trial evidence does more than create a suspicion of guilt; it is consistent with the state's theory of culpability. St. v. Mitchell, 192 M 16, 625 P2d 1155, 38 St. Rep. 487 (1981), followed in St. v. Dannels, 226 M 80, 734 P2d 188, 44 St. Rep. 472 (1987); St. v. Cain, 221 M 318, 718 P2d 654, 43 St. Rep. 842 (1986).

Delinquent Youth Conviction — Inadmissible Hearsay — Corroboration of Testimony of Others Accountable for Same Offense: After a minor was cited for running a red light and for driving without a license, the County Attorney charged he was a delinquent youth under the Youth Court Act, alleging the minor had taken the car without the owner's consent. The minor appealed stating that the testimony of two police officers concerning the stolen property report was inadmissible hearsay and that his conviction declaring him a delinquent youth was improperly based on the testimony of other individuals who were legally accountable for the offense. The Supreme Court found that the officers' testimony was inadmissible hearsay. The court also found that the corroborating evidence supplied by the officer who stopped the vehicle tended to connect the youth directly with the offense and that, therefore, the testimony of other minors responsible or legally accountable for the same offense was properly admitted. Despite the fact that the testimony of the other youths in the car, in conjunction with the independent corroborating evidence, could support a conviction in some cases, the reviewing court reversed the conviction. It found that the admission of the hearsay so affected the substantial rights of the accused as to require reversal. In re D.W.L., A Youth, 189 M 267, 615 P2d 887 (1980).

Relevance and Admissibility of Testimony of Previously Acquitted Alleged Principal: The testimony of a previously acquitted alleged principal in a robbery was allowed in the trial of an alleged participant in the same robbery. The denial of any participation in the robbery provided the foundation for the admission of the witness's prior inconsistent statements in which he admitted his participation. There was additional evidence tending to establish that the witness and the defendant had planned the robbery with others. The witness's testimony was therefore relevant and clearly admissible. St. v. Bad Horse, 185 M 507, 605 P2d 1113 (1980).

State's Witness Not Accomplice — No Corroboration Required — Robbery: Defendant claimed a witness had been his accomplice and as such his testimony could not convict him or support his conviction unless corroborated by independent evidence. The Montana Supreme Court found the alleged accomplice did not solicit, advise, or encourage anyone in the planning or commission of the robbery in question. He did not ever agree to aid or attempt to aid anyone in such planning or commission. His statements about robbing the store were made at a remote time, and there is no concrete connection between those statements and the robbery. Since the witness was not an accomplice, his testimony stands on the same basis as any other witness's. He need not be corroborated, and his credibility is for the jury to decide. St. v. Bad Horse, 185 M 507, 605 P2d 1113 (1980).

State's Witness Not Accomplice — No Corroboration Required — Theft: While one may not be convicted solely on an accomplice's testimony, there is no evidence in the record indicating that Paulus, the State's witness, knowingly, voluntarily, and with common intent united with Harvey in the commission of the theft of the rifle. Paulus does not fit the definition of accomplice, therefore the State was not required to corroborate his testimony. St. v. Harvey, 184 M 423, 603 P2d 661 (1979).

Sufficiency of Evidence to Corroborate Accomplice Testimony — Test: Sufficiency of evidence to corroborate testimony of an accomplice is a question of law. To be sufficient, it must show more than that a crime was in fact committed or the circumstances of its commission. It must raise more than the suspicion of the defendant's involvement or opportunity to commit the crime charged. But the evidence need not be sufficient by itself to support the defendant's conviction or even to make out a prima facie case against him. It may be circumstantial and can come from the defendant or his witnesses. St. v. Kemp, 182 M 383, 597 P2d 96, 36 St. Rep. 1215 (1979), followed in St. v. Forsyth, 197 M 248, 642 P2d 1035, 39 St. Rep. 540 (1982), St. v. Laubach, 201 M 226, 653 P2d 844, 39 St. Rep. 2074 (1982), St. v. Morigeau, 202 M 36, 656 P2d 185, 39 St. Rep. 2311 (1982), St. v. Cain, 221 M 318, 718 P2d 654, 43 St. Rep. 842 (1986), St. v. Holzapfel, 230 M 105, 748 P2d 953, 45 St. Rep. 53 (1988), St. v. Conrad, 241 M 1, 785 P2d 185, 47 St. Rep. 32 (1990), St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), St. v. Maier, 1999 MT 51, 293 M 403, 977

P2d 298, 56 St. Rep. 208 (1999), and St. v. Fey, 2000 MT 211, 301 M 28, 7 P3d 358, 57 St. Rep. 829 (2000). See also St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Kind of Corroborating Testimony Required:

While a conviction cannot be had on the testimony of one equally accountable for the same offense, when the corroborating evidence tends to connect the defendant with the commission of the offenses of robbery and homicide as a participant in the actual robbery and as an accomplice in the commission of and flight after the deliberate homicide, the evidence as a whole is sufficient to sustain the defendant's conviction. St. v. Owens, 182 M 338, 597 P2d 72 (1979).

Corroborating evidence may be circumstantial evidence. It need not be sufficient in itself to sustain a conviction but must tend to connect the defendant with the crime. St. v. Standley, 179 M 153, 586 P2d 1075 (1978).

The District Court did not err in denying the defendant's motion to dismiss the information or, in the alternative, for a judgment of acquittal for lack of corroboration of a State's witness when the evidence tended to connect the defendant with the commission of the offenses charged, was evidence of more than mere opportunity or suspicion that the defendant committed the offenses, and did not establish any reasonable explanation pointing toward innocent conduct. St. v. Coleman, 177 M 1, 579 P2d 732 (1978).

Act or Declaration of Conspirator: Evidence of the act or declaration of a conspirator relating to the conspiracy may, after proof of the conspiracy, be given against his coconspirator. Lane v. Bailey, 29 M 548, 75 P 191 (1904); St. v. Dotson, 26 M 305, 67 P 938 (1902); Pincus v. Reynolds, 19 M 564, 49 P 145 (1897); Harrington v. Butte & Boston Min. Co., 19 M 411, 48 P 758 (1897); St. v. Byers, 16 M 565, 41 P 708 (1895); Territory v. Campbell, 9 M 16, 22 P 121 (1889).

46-16-215. Use of confession.

Commission Comments

1991 Comment: This statute is a newly developed provision concerning the usefulness of extrajudicial confessions at a criminal trial. The statute recognizes that independent evidence must establish that a crime has been committed before a confession may be admitted into evidence. See St. v. Traufer, 109 Mont. 275 (1939), St. v. Gould, 216 Mont. 455 (1985), and St. v. Campbell, 278 M 236, 924 P2d 1304, 53 St. Rep. 879 (1996).

Case Notes

Sufficient Probable Cause for Filing Information — No Requirement That Information Supporting Charge Be Excised Before Determination of Probable Cause Made: Attorney Holt pleaded not guilty to five counts of felony theft of clients' funds, then moved to dismiss two of the counts, alleging that the affidavit supporting the information did not establish probable cause. The motion was denied. Pursuant to a subsequent plea agreement, Holt pleaded nolo contendere to the contested counts, but reserved the right to withdraw the plea if the agreed sentences were not imposed. Following conviction, Holt appealed on grounds that the District Court erred by not dismissing the counts because the affidavit in support of the information did not allege independent admissible evidence that Holt exercised unauthorized control over the money that was allegedly stolen, asserting in effect that the affidavit contained evidence that must be excised and that without that evidence, the affidavit failed to establish probable cause. The Supreme Court affirmed. A showing of a mere probability that a defendant committed the offense charged is sufficient to establish probable cause to file an information. It is not required that information in the affidavit supporting a charge, which might later be found inadmissible at trial, be excised before a determination of probable cause is made. At the time that Holt entered a plea, it was too early in the case to hold that a motion to dismiss would be successful at the conclusion of the state's case in chief, so denial of the dismissal motion was not error. St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006).

No Corroboration of Testimony of Witnesses to Extrajudicial Confession — Homicide Conviction Affirmed: Following McGarvey's conviction for deliberate homicide, McGarvey asserted that because the two witnesses who testified regarding McGarvey's extrajudicial confession were patently unreliable, corroboration should have been required to uphold their testimony. The Supreme Court agreed that corroboration is required when a defendant's confession is obtained by law enforcement, but the confession in this instance was heard by two lay witnesses, and the Supreme Court declined to require independent corroborating evidence to establish the trustworthiness of McGarvey's alleged extrajudicial confession. Rather, the court noted that in addition to the lay testimony alleging that McGarvey confessed, the state provided sufficient evidence, as a whole, for the trier of fact to determine that McGarvey was guilty beyond a reasonable doubt. The conviction was affirmed. St. v. McGarvey, 2005 MT 308, 329 M 439, 124

P3d 1131 (2005), distinguishing Opper v. U.S., 348 US 84 (1954), Escobedo v. Ill., 378 US 478 (1964), and U.S. v. Lopez-Alvarez, 970 F2d 583 (9th Cir. 1992).

Character of Independent Evidence Tending to Establish Commission of Crime — Confession of DUI Admissible: Over Martinosky's objection, the District Court admitted a tape recording of his confession as evidence of DUI. On appeal, Martinosky contended that there was insufficient independent evidence to establish the offense, so the confession should not have been allowed as evidence, pursuant to this section. However, independent evidence tending to establish commission of a crime before a defendant's confession may be admitted need not be evidence establishing the crime beyond a reasonable doubt or even evidence establishing a prima facie case that the offense was committed. Citing St. v. Palmer, 247 M 210, 805 P2d 580, 48 St. Rep. 166 (1991), the Supreme Court held that the manner in which a vehicle is operated, including excessive speed and failing to stop when signaled to stop by a law enforcement officer, can be evidence that the driver was under the influence of alcohol. The fact that Martinosky spent several hours drinking in a bar, smelled of alcohol, left the scene of an accident, failed to stop for pursuing police, failed to stop at two stop signs and a stoplight, and was traveling at a high rate of speed in a residential area before crashing into a house was sufficient to establish DUI, so the confession was properly allowed. St. v. Martinosky, 1999 MT 122, 294 M 427, 982 P2d 440, 56 St. Rep. 495 (1999).

Independent Evidence of Commission of Attempted Deliberate Homicide Held Sufficient: Hayworth was charged with and was convicted of attempted deliberate homicide. As part of his appeal, Hayworth argued that his conviction was based only upon his own admission of the offense and the testimony of his accomplice, Burwell. Citing St. v. Campbell, 278 M 236, 924 P2d 1304 (1996), the Supreme Court held that the District Court properly denied Hayworth's motion for a directed verdict because there was sufficient independent evidence introduced by the state, in the form of testimony of the victims and rifle casings found by the police on the street, that the offense was in fact committed. St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

46-16-220. Child hearsay exception — criminal proceedings.

Compiler's Comments

Preamble: The preamble attached to Ch. 456, L. 2003, provided: "WHEREAS, the state has an interest in protecting the welfare of children generally; and

WHEREAS, the state has an interest in protecting the well-being of children who are victims of sexual offenses and other violent crimes; and

WHEREAS, the state has an interest in giving child witnesses a voice in criminal proceedings; and

WHEREAS, it is the Legislature's prerogative to enact laws for the protection of children; and

WHEREAS, the Legislature finds that the admission of child hearsay testimony under a residual exception to the general hearsay rules does not always serve the general purposes of the rules and the interests of justice; and

WHEREAS, Rule 802 of the Montana Rules of Evidence provides that the Legislature may by statute provide for exceptions to the general rule that hearsay is not admissible; and

WHEREAS, the Legislature acknowledges the necessity that child hearsay testimony must be examined closely for reliability."

Saving Clause: Section 3, Ch. 456, L. 2003, was a saving clause.

Severability: Section 4, Ch. 456, L. 2003, was a severability clause.

Effective Date: Section 5, Ch. 456, L. 2003, provided that this section is effective July 1, 2003.

Applicability: Section 6, Ch. 456, L. 2003, provided: "[This act] applies to criminal proceedings begun after June 30, 2003."

Source: This section is modeled on much of the opinion in St. v. J.C.E., 235 M 264, 767 P2d 309 (1988).

Case Notes

Admissibility of Child Victim's Hearsay Statements When Statutory Criteria Met: Under this section, a District Court may admit a child victim's hearsay statements if: (1) the child is unavailable as a witness; (2) the hearsay is evidence of a probative fact and more probative than any other available evidence; (3) the offering party gives proper notice of the statement; and (4) the court finds that the statement has circumstantial guarantees of trustworthiness. If these conditions are met, the court must then set forth its reasoning on the admissibility in findings of fact and conclusions of law, considering the child victim's attributes, information regarding the testifying witness, information regarding the statement, corroborating evidence, and other considerations that in the judge's opinion may bear on the admissibility of the child hearsay

testimony. In this case, defendant contended that the court failed to comply with the statutory requirements. The Supreme Court disagreed and affirmed. The District Court issued a 12-page order setting forth its reasoning and analyzing each statutory admissibility factor in turn. The District Court did not act arbitrarily without employing conscientious judgment, its decision did not exceed the bounds of reason resulting in substantial injustice, and after complying with the statutory criteria, the court did not abuse its discretion in admitting the child victim's hearsay statement through a professional counselor and the child's foster mother. St. v. Spencer, 2007 MT 245, 339 M 227, 169 P3d 384 (2007).

46-16-221. Testimony of third person in cases of abuse of individual with developmental disability.

Compiler's Comments

Preamble: The preamble attached to Ch. 282, L. 2007, provided: "WHEREAS, physical or sexual abuse of an individual with a developmental disability is an abhorrent phenomenon that should not be tolerated in any society; and

WHEREAS, physical or sexual abuse of an individual with a developmental disability is sometimes hard to prove because no one except the abuser and the individual are present and the individual is sometimes incapable of expressing in language the circumstances of the abuse sufficiently to allow for criminal prosecution of the abuser and because testimony of another individual on behalf of the developmentally delayed individual could be excluded by various provisions of the Montana Rules of Evidence, especially the rule governing exceptions to the rule against the admissibility of hearsay evidence, contained in Rule 804 of the Montana Rules of Evidence, adopted by the Montana Supreme Court in 1976; and

WHEREAS, Rule 802 of the Montana Rules of Evidence adopted by the Montana Supreme Court allows the Legislature to provide exceptions to the rule against admission of hearsay statements into evidence because Rule 802 provides that hearsay is inadmissible except as provided by statute; and

WHEREAS, the Legislature therefore believes that it is appropriate for the Legislature to adopt, using as a guide the guidelines on child hearsay adopted by the Montana Supreme Court in State v. J.C.E., 235 Mont. 264, 767 P.2d 309 (1988), and applied in such opinions as State v. Osborne, 1999 MT 149, 295 Mont. 54, 982 P.2d 1045 (1999), a statute allowing the admission into evidence of testimony of third persons under circumstances in which there are sufficient guarantees of trustworthiness to render the testimony of the third person probative and valuable to the trial court or jury."

Severability: Section 3, Ch. 282, L. 2007, was a severability clause.

Effective Date: This section is effective October 1, 2007.

Applicability: Section 4, Ch. 282, L. 2007, provided: "[This act] applies to criminal proceedings begun on or after October 1, 2007."

46-16-226. Definitions.

Compiler's Comments

Severability: Section 7, Ch. 488, L. 2007, was a severability clause.

Effective Date: This section is effective October 1, 2007.

46-16-227. Raising issue of testimony of child witness outside presence of defendant — motion by prosecution or defense.

Compiler's Comments

Severability: Section 7, Ch. 488, L. 2007, was a severability clause.

Effective Date: This section is effective October 1, 2007.

46-16-228. Hearing — procedure — evidence that may be received — protection for child witness.

Compiler's Comments

Severability: Section 7, Ch. 488, L. 2007, was a severability clause.

Effective Date: This section is effective October 1, 2007.

46-16-229. Order for two-way electronic audio-video communication testimony — finding by court — procedure for conducting testimony.

Compiler's Comments

Severability: Section 7, Ch. 488, L. 2007, was a severability clause.

Effective Date: This section is effective October 1, 2007.

Part 4
Order of Trial

Part Commission Comments

1991 Part Comments: This part is, in general, a reflection of the 1987 code. The part also contains elements from the federal rule concerning jury instructions. See Rule 30, Fed. R. Crim. P. The statutes establish the order of trial and provide for the settlement of jury instructions. The language of the 1987 code has been changed mainly for clarity; significant departure from established procedure is not anticipated.

Part Case Notes

Mitigating Circumstances in Homicide — Not Affirmative Defense: The defendant shot and killed the companion of his "girlfriend" in a parking lot at Montana Tech (now Montana Tech of the University of Montana). On appeal, the issue was who had the burden of proving the presence or absence of mitigating circumstances to determine whether the defendant was guilty of deliberate homicide or the lesser offense of mitigated deliberate homicide. The court held that mitigation sufficient to reduce deliberate homicide to mitigated deliberate homicide is not an affirmative defense, which would require the burden of proof to be placed upon the defendant. The court went on to hold that the State does not have the burden of proving the absence of mitigating circumstances. Although neither party has the burden of proof, either party may assume such burden. St. v. Gratzer, 209 M 308, 682 P2d 141, 41 St. Rep. 727 (1984), followed in St. v. Ballenger, 227 M 308, 738 P2d 1291, 44 St. Rep. 1107 (1987).

46-16-401. Order of trial.

Commission Comments

1991 Comment: This statute is modeled after and intended to preserve 1987 MCA 46-16-401. The statute contains elements from the federal rule concerning the delivery of instructions to the jury. Compare subsections (4) and (5) and Rule 30, Fed. R. Crim. P. The code provisions concerning the settlement of instructions are preserved in 46-16-410. Although the statute differs significantly in terms and format, no major changes in established procedure are anticipated.

Source: R.C.M. 1947, section 94-7201.

Subdivision [(1)] has been added to implement the present practice of the court in instructing the jury generally as to their duties at the beginning of the trial.

Compiler's Comments

1991 Amendment: Substituted (1) concerning general instructions regarding the conduct of the trial after the jury is sworn but before the introduction of any evidence and cautionary instructions during the course of the trial for former text that read: "(1) The court may instruct the jury as to its duties. Such general instructions must be settled in the same manner as provided for the settlement of special instructions in subsection (4) of this section"; in (2), in first sentence, substituted "prosecutor may make an opening statement" for "county attorney must state the case" and in second sentence substituted "prosecutor's" for "state's" and at end substituted "at the close of the prosecution's case but prior to the defendant's offer of evidence" for "may state his defense and then offer evidence in support thereof after the state rests"; in (3), at end, inserted "at any time before the close of evidence"; deleted former (4) through (6) that read: "(4) (a) When the evidence is concluded, if either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered, signed by the party or his attorney, and delivered to the court.

(b) The instructions shall be settled by the court without the presence of the jury. At the settlement counsel for the parties or the defendant, if he is without counsel, shall be allowed reasonable opportunity to examine the instructions requested and proposed to be given by the court and to present and argue to the court objections to the adoption or rejection of any instruction offered by counsel or proposed to be given to the jury by the court. On such settlement of instructions, the respective counsel or the parties shall specify and state the particular ground on which an instruction is objected to. It shall not be sufficient to object generally that the instruction does not state the law or is against the law, but the objection must specify particularly wherein the instruction is insufficient or does not state the law or what particular clause therein is objected to.

(c) The court shall pass upon the objections to the instructions and shall either give each instruction as requested or proposed, positively refuse to do so, or give the instruction with modification. The court shall mark or endorse upon each instruction in such a manner that it shall distinctly appear what instructions were given in whole or in part and, in like manner,

those refused or modified and, if modified, wherein and how modified. All instructions must be filed as a part of the record of the cause. No exceptions are necessary to the rulings of the court on the settlement of instructions.

(d) The court reporter shall be present at such settlement and shall take down all the objections to any or all of the instructions given or refused by the court together with modifications made therein and the ruling of the court thereon.

(5) When the instructions have been passed upon and settled by the court and before the arguments to the jury have begun, the court shall charge the jury in writing, giving in such charge only such instructions as have been passed upon and settled. In charging the jury, the court shall give them all matters of law which it thinks necessary for the jury's information in rendering a verdict.

(6) When the jury has been charged, unless the case is submitted to the jury on either side or on both sides without argument, the county attorney must commence and may conclude the argument. If several defendants having several defenses appear by different counsel, the court must determine their relative order in evidence and argument. Counsel, in arguing the case to the judge or jury, may argue and comment upon the law of the case as given in the instructions of the court, as well as upon the evidence of the case"; inserted (4) concerning giving of instructions; inserted (5) concerning delivery of instructions to jury; and made minor changes in style.

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GENERAL

Defendant's Absence From In-Chambers Trial Conferences Not Considered Prejudicial — No New Trial Based on Lack of Fair Trial: At Price's trial for sexual intercourse without consent, Price was excluded from 11 in-chambers conferences. Price contended that his absence from the conferences violated his right to be present at all criminal proceedings against him and that he was therefore denied a fair trial. The Supreme Court assumed for purposes of analysis that the conferences constituted critical stages of the trial and that Price did not validly waive the right to be present at the conferences. Nevertheless, the court concluded that failure to include Price in the conferences at worst constituted trial error, rather than structural error that would require automatic reversal, so the court examined the record to determine whether Price was prejudiced and concluded that he was not. The record was not ambiguous as to what occurred at the conferences, and nothing that occurred at the conferences concerned or affected the framework within which Price's trial proceeded or necessarily rendered the trial fundamentally unfair. The one conference at which Price particularly contended that his presence should have been required was one in which a juror expressed concern regarding possible bias toward Price. However, Price's concern was irrelevant when the juror was removed from the jury. After review of the complete trial record, the court concluded that Price's absence from the conferences did not cause any conceivable prejudice depriving Price of a fair trial. Absent reversible error, the District Court was affirmed. St. v. Price, 2009 MT 129, 350 M 272, 207 P3d 298 (2009). See also St. v. Kennedy, 2004 MT 53, 320 M 161, 85 P3d 1279 (2004), St. v. Mann, 2006 MT 160, 332 M 476, 139 P3d 159 (2006), and St. v. Matt, 2008 MT 444, 347 M 530, 199 P3d 244 (2008).

Limitation on Opening Statement on Issue Unrelated to Charged Offense Not Abuse of Discretion: At Wilson's trial for tampering with evidence in a vehicle allegedly used in a homicide, the trial court prohibited Wilson from referring in opening statements to evidence concerning a coconspirator's motives to kill the victim. The court did not address any similar limits on cross-examination, and Wilson did not bring up the subject of motivation on cross-examination of the coconspirator. Nevertheless, because of the limitation on opening statements, on appeal, Wilson argued an inability to develop evidence regarding the coconspirator's prior false statements and motive to cover up the homicide and to tamper with

evidence of the homicide, which purportedly violated Wilson's right to confront the witness. The Supreme Court disagreed. The main purpose of the right to confront a witness is to secure an opportunity for cross-examination, including the opportunity to expose the witness's motivation for testifying. However, this does not mean that a defendant may cross-examine a witness on any subject in any manner whatsoever without limitations imposed by the trial judge. Rather, trial judges retain wide latitude to impose limits on cross-examination based on various concerns, including confusion of the issues. In this case, the trial court limited opening comments regarding motivation for murder because the trial was not a homicide trial, but rather a trial for tampering with evidence, and motive was outside the scope of the tampering charge and would confuse the jury. Thus, the court did not abuse its discretion by limiting opening comments, and Wilson suffered no prejudice. Wilson's conviction was affirmed. St. v. Wilson, 2007 MT 327, 340 M 191, 172 P3d 1264 (2007).

Trial Court's Sua Sponte Objection to Testimony Not Violative of Court's Duty to Ensure Fairness of Trial: Price was charged with assault with a weapon, and his defense was based upon the assertion that his roommate committed the crime. On the opening day of trial, both the prosecution and the defense elicited testimony regarding the roommate's propensity for violence. At the beginning of the second day of trial, outside the presence of the jury, the trial judge objected sua sponte to the admission of the character testimony and heard arguments from both parties regarding the objection before ruling that the testimony was inadmissible. The judge then instructed the jury to disregard the testimony and limited testimony on the subject by a future witness. Following conviction, Price appealed on grounds that the judge's actions constituted an abuse of discretion that impaired Price's defense and entitled Price to a new trial. The Supreme Court noted that although a trial judge should avoid officious interference in proceedings and remain impartial, the judge is not a mere figurehead or umpire at a trial who must remain silent and passive throughout a jury trial, speaking only to rule on motions and objections. Rather, the judge's duty is to ensure fairness, avoid waste of time, keep from the jury extraneous, potentially confusing matters, and facilitate the ascertainment of truth, which does not preclude a judge from excluding inadmissible evidence on the judge's own motion if the judge believes exclusion is in the interests of justice. Here, the judge did not cross the line between arbiter and advocate. The judge's objection pertained to testimony elicited by both parties and thus was not partial to the prosecution. The purpose of the objection was to prevent the jury from being misled by extraneous matters or basing the verdict on incompetence evidence, and the judge's action was in the nature of regulating the proceedings to ensure a fair trial. In addition, limiting the testimony by a future witness to the extent that the state opened the door regarding the roommate's character was not an abuse of discretion because the ruling was proportional to that testimony. St. v. Price, 2006 MT 79, 331 M 502, 134 P3d 45 (2006).

Discretion of Trial Court to Accept One Psychologist's Testimony Over Another's in Deciding Whether Defendant's Mental Condition Warranted Treatment or Incarceration: Pittman's psychologist testified that Pittman was mentally ill and unable to appreciate the criminality of her conduct and should be placed in treatment. The state's psychologist opined that Pittman did not suffer from a mental disease or defect and had the capacity to act with knowledge and purpose at the time of the offenses and recommended sentencing to the state prison and placement in a prison chemical dependency program, mental health therapy, and medication. The trial court accepted the state psychologist's assessment and sentenced Pittman to prison. On appeal, the Supreme Court noted that the weight and credibility of evidence was within the province of the trial court, and because the trial court's resolution of the conflicting evidence was supported by the record, the Supreme Court affirmed. St. v. Pittman, 2005 MT 70, 326 M 324, 109 P3d 237 (2005).

Absence of Defendant From Critical Trial Proceeding Violative of Fundamental Right to Appear and Defend in Person — No Error Given Curative Action of Trial Court: During Kennedy's criminal trial, a juror communicated with one of the state's witnesses. The trial judge then met with the juror in chambers without Kennedy or any counsel present, and the juror admitted the conversation, but denied mentioning anything about it to the jury. The court then met with counsel in chambers, replaced the juror with an alternate, excluded the witness from testifying, and went on with the trial. Defense counsel moved for mistrial and dismissal with prejudice, but the motion was denied. On appeal, the Supreme Court held that excluding Kennedy from the conversation with the juror violated Kennedy's fundamental right to be present at all critical stages of trial to defend in person. Further, any waiver by defense counsel by failing to object was ineffective because Kennedy was never told that he had a right to be present or that the juror questioning was about to occur. However, Kennedy was not prejudiced or deprived of a fair trial by the error in light of the District Court's corrective actions. Thus,

denial of a mistrial was not an abuse of discretion. St. v. Kennedy, 2004 MT 53, 320 M 161, 85 P3d 1279 (2004), followed in St. v. Godfrey, 2009 MT 60, 349 M 335, 203 P3d 834 (2009).

No Error in Refusal to Allow Two Impeachment Witnesses After Start of Trial — Failure to Object at Trial Precluding Raising Issue on Appeal: After commencement of his trial on charges of attempted deliberate homicide, LaDue moved to add two additional witnesses, asserting that they would verify that two other witnesses were essentially coordinating their testimony to LaDue's disadvantage and that the other witnesses' testimony at trial differed substantially from their earlier statements to police. The motion was denied. LaDue was convicted on a lesser charge and appealed. After examining the record, the Supreme Court concluded that the testimony of the two additional witnesses was not probative and that the independent statements to police shortly after the incident were not notably inconsistent with the oral testimony at trial. Further, LaDue did not suggest a motive for the other witnesses to fix their testimony to his disadvantage, and no such nefarious intent could be gleaned from the record. LaDue failed to establish good cause for adding two new witnesses after the trial commenced, and the District Court did not err in refusing their testimony. The court properly inquired as to the nature of the testimony to be offered by the proposed witnesses and the circumstances surrounding the matter in controversy. Thus, the court had sufficient information to rule, and the ruling was not in error. St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

Failure to Raise Hall-Type Objection to Jury Instruction on Flight From Crime Scene as Waiver of Appellate Review of Claim of Unnecessary Comment on Evidence: In St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929 (1999), the Supreme Court ruled that a jury instruction on the significance of flight should no longer be given because it could be an unnecessary comment on the evidence by the trial court. Nevertheless, during Davis's trial for negligent homicide and failure to remain at the scene of an accident that resulted in death or personal injuries, the trial court instructed the jury that it could consider testimony regarding flight by Davis as a circumstance tending to prove consciousness of guilt, but not actual proof of guilt. Davis objected, not because the instruction was an improper comment on the evidence, but on grounds that there was no evidence of actual flight in the case. Before the Supreme Court can consider the application of Hall, a defendant must make a proper objection on the basis of an improper comment on the evidence. Davis's failure to raise a Hall-type objection constituted waiver of appellate review of the claim that the flight instruction was an unnecessary comment on the evidence. Further, Davis was not prejudiced by the instruction because it contained the qualification that flight itself was not sufficient evidence of guilt. St. v. Davis, 2000 MT 199, 300 M 458, 5 P3d 547, 57 St. Rep. 773 (2000), following St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939 (1999), and followed in St. v. Nolan, 2003 MT 13, 314 M 47, 62 P3d 1118 (2003).

Judge's Questions About Foreigner's Immigration Status as Showing Racial Bias: The District Court erred in asking Ahmed, a resident and native of Bangladesh and a student at MSU-Bozeman, about his immigration status in a trial for aggravated kidnapping and assault but cured the error by sustaining an objection and striking the questioning from the record. Ahmed offered no specific evidence that the questioning showed racial bias by the judge, and the Supreme Court would not presume bias from the mere posing of the questions. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Raising Issue in Postconviction Relief That Could Have Been Preserved for Appeal — Abuse of Process: Defendant sought to challenge jury instructions in a petition for postconviction relief after failing to object to the disputed instructions at trial. He offered no excuse for failing to object and did not argue that he could not have reasonably complied with the procedural requirements of 46-20-104 and this section. Because objections to the instructions could have been raised at trial, those grounds for relief could have reasonably been available for direct appeal. To allow defendant to raise an issue in postconviction relief that he could reasonably have preserved for direct appeal would constitute an abuse of process. St. v. Gorder, 243 M 333, 792 P2d 370, 47 St. Rep. 958 (1990).

Error in Admission of Evidence Cured Upon Jury Admonishment: An error in the admission of evidence may be cured if the jury is admonished to disregard it. St. v. Conrad, 241 M 1, 785 P2d 185, 47 St. Rep. 32 (1990), followed in St. v. Ford, 278 M 353, 926 P2d 245, 53 St. Rep. 947 (1996), and St. v. Brady, 2000 MT 282, 302 M 174, 13 P3d 941, 57 St. Rep. 1178 (2000). See also St. v. White, 2008 MT 129, 343 M 66, 184 P3d 1008 (2008).

Rape-Trauma Syndrome — Expert Testimony Admissible on Whether There Was Consent: Testimony of experts on whether the complaining witness in a sexual intercourse without consent case suffers from rape-trauma syndrome is admissible to aid a jury in determining whether there was consent to engage in the sexual intercourse that all parties acknowledge occurred. St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984).

Trial Judge's Role: Trial judge has a duty to conduct the trial in a speedy and fair manner and is allowed wide latitude in doing so. St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982).

Purpose: Predecessor section did not undertake to do more than prescribe an orderly procedure for the trial of criminal cases. St. v. Hall, 55 M 182, 175 P 267 (1918).

PRELIMINARY INSTRUCTIONS

Potential Jurors Informed That Death Penalty Not to Be Sought as Punishment — No Error: Before voir dire began in a deliberate homicide case that carried a potential punishment of death, the presiding judge informed the jury panel that it was not considered a capital case and that the state would not seek to have the death penalty imposed. Defendant argued that this statement violated the rule against informing a jury of the possible range of sentences available, as stated in St. v. Herrera, 197 M 462, 643 P2d 588 (1982). The Supreme Court distinguished Herrera and adopted St. v. Dawson, 783 P2d 1221 (Ariz. App. 1989), acknowledging that it is generally improper to inform a jury about the potential punishment that a defendant faces upon conviction; however, there is no error, fundamental or otherwise, in informing a jury that a defendant does not face the risk of a death sentence if convicted. A jury panel might include members disposed against capital punishment. The Dawson court approved of a trial court's efforts to relieve the risk that jurors so disposed might be distracted in considering issues of guilt by concern that, in the event of a guilty verdict, the death penalty might result. By advising the jury up front that the state is not requesting the death penalty, a broader-based jury may be retained. St. v. Wild, 266 M 331, 880 P2d 840, 51 St. Rep. 872 (1994).

When Offenses Charged Are Complex: Presentation of preliminary jury instructions before the evidence, especially when some of the offenses charged were complex and difficult to understand, was for good reason. It allowed the jury to have some understanding of the complex circumstantial evidence to be presented. A less complex case not based only on circumstantial evidence might not require such preliminary instructions. In such a case there might not be good reasons for varying the usual trial order. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Language Not Inflammatory: The defendant's contention that extensive preliminary instructions given by the court were erroneous was rejected by the Supreme Court when it concluded that the language was not inflammatory but as neutral as language detailing the charges involved could be, even though the instructions were given prior to the introduction of evidence. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Failure to Read Information: It is not error to fail to read the information, there being no statutory requirement for such procedure. St. v. Gall, 135 M 131, 337 P2d 932 (1959).

COUNTY ATTORNEY TO STATE CASE AND OFFER EVIDENCE

Prosecutor's Comments Characterizing Defendant as Gangster and Liar Not Warranting Mistrial: Dubois moved for a mistrial when the prosecutor described Dubois as a gangster when questioning a witness and when describing a statement by Dubois as a lie during closing arguments. Both mistrial motions were denied, and Dubois raised the issues again on appeal, but the Supreme Court affirmed. Given the substantial evidence regarding Dubois' violent behavior and use of drugs, use of the word "gangster" was unlikely to cause the jury to punish Dubois even if he had not been proved guilty. In addition, even though the Supreme Court has strongly disapproved of characterizing testimony as a lie, when the trial judge strikes improper statements from the record with an accompanying cautionary instruction to the jury, as occurred here, any error and prejudicial effect committed by its introduction are presumed cured. The mistrial motions were properly denied. St. v. Dubois, 2006 MT 89, 332 M 44, 134 P3d 82 (2006), following St. v. Brush, 228 M 247, 741 P2d 1333 (1987).

Failure to Timely Object to Opening Statement — Waiver of Appeal: Paoni moved for a mistrial based on allegedly impermissible statements by the prosecutor during opening statements, but failed to timely object when the statements were made. The mistrial motion was denied, and Paoni appealed. The Supreme Court noted that a defendant must make a timely objection to properly preserve an issue for appeal. Although unproved facts asserted in an opening statement may constitute grounds for a mistrial if there is a reasonable possibility that the unproved facts contributed to a conviction, in this case, even if the objection had been timely, the state later established a proper foundation for the statement, so denial of the motion for mistrial was proper, and Paoni's conviction was affirmed. St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006), following St. v. Gardner, 2003 MT 338, 318 M 436, 80 P3d 1262 (2003), and followed, with regard to the necessity for timeliness of an objection to the prosecutor's statements, in St. v. McWilliams, 2008 MT 59, 341 M 517, 178 P3d 121 (2008).

No Prosecutorial Misconduct in Eliciting Facts to Aid Witness Recollection, Disclosing Prior Witness Conversations, or Offering Statements in Rebuttal Based on Testimony: Defendant alleged several instances of prosecutorial misconduct in his trial for sexual intercourse without consent and incest with his daughter. The prosecutor had instructed the daughter that the assault occurred in Montana rather than Idaho, thereby avoiding Duffy's challenge to Montana's jurisdiction. However, the prosecutor was not prohibited from discovering facts to aid the daughter's recollection of where the incident occurred and doing so was not misconduct. Duffy also contended that the prosecutor's questioning of a detective about a telephone call to Duffy was misconduct because the prosecutor did not disclose the conversation, but the trial court cured any potential for violating Duffy's substantial rights by instructing the jury to disregard the testimony and by refusing to give the prosecution's flight instruction that was the basis for that line of inquiry. Lastly, Duffy claimed misconduct when the prosecutor elicited testimony from the daughter regarding her desire to see Duffy convicted and then later reiterated that testimony during rebuttal. However, Duffy's own counsel opened the door for the testimony, and the prosecutor was then free to reexamine the daughter for the purpose of discovering the daughter's motive; therefore, the prosecutor's subsequent comments were not construed as misconduct warranting a mistrial. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000), followed in St. v. Hayden, 2008 MT 274, 345 M 252, 190 P3d 1091 (2008). See also St. v. Berger, 1998 MT 170, 290 M 78, 964 P2d 725 (1998), and St. v. Soraich, 1999 MT 87, 294 M 175, 979 P2d 206 (1999).

Evidence of Flight as Showing Guilt: Evidence of defendant's flight after an offense occurs may be admitted as a circumstance tending to show consciousness of guilt. Having found that the charged crimes occurred, the trial judge properly considered evidence of defendant's flight in reaching the conclusion that defendant was the one who committed the crimes. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Refusal to Characterize Other Witness as Liar: In his cross-examination of defendant, the County Attorney sought to have defendant characterize a prosecution witness as a liar; defendant refused to do so. In the absence of an answer to the question, the Supreme Court was unwilling to use it as grounds for reversal of defendant's conviction. The court restated its holding in St. v. Rhys, 40 M 131, 105 P 494 (1909), that when a defendant goes upon the witness stand in his own behalf and denies the commission of the crime with which he is charged, a very wide latitude of cross-examination is allowed. St. v. Campbell, 241 M 323, 787 P2d 329, 47 St. Rep. 321 (1990), clarified, as to propriety of asking defendant if other witnesses lied, in St. v. Hart, 2000 MT 332, 303 M 71, 15 P3d 917, 57 St. Rep. 1398 (2000).

Prosecutor Comment on Homicide Victim's Family and Character: It was inappropriate for the prosecutor, in his opening and closing statements, to comment on the family of the victim and on the victim's outstanding personal characteristics. However, the record did not show denial of a substantial right, and a conviction necessarily followed from defendant's testimony, which established every element of the offenses with which he was charged. St. v. Nichols, 225 M 438, 734 P2d 170, 44 St. Rep. 382 (1987), followed in St. v. Whitlow, 285 M 430, 949 P2d 239, 54 St. Rep. 1227 (1997).

Motion to Amend Complaint to Conform to Confession at Trial: During the state's questioning, defendant testified she possessed marijuana 2 or 3 weeks before the date contained in the information. The prosecutor stated he thought the defendant had just made a full confession and that he would change the time stated in the information and accept a guilty plea. The motion to amend the information was denied. The jury's hearing of the motion did not require that a mistrial be declared. St. v. Scheffelman, 225 M 408, 733 P2d 348, 44 St. Rep. 357 (1987).

Prosecution Comments on Witnesses in Opening and Closing — No Objection — No Effect on Substantial Rights: The prosecution in opening and closing made comments on the truthfulness and credibility of witnesses and other matters not related to the defendant's right not to testify. A lack of objection does not preclude consideration in the trial court of error that affects the defendant's substantial rights, but these matters were subject to free comment to the jury under the circumstances of this case and thus did not affect substantial rights of the defendant. St. v. Harris, 209 M 511, 682 P2d 159, 41 St. Rep. 866 (1984).

Actions of Prosecutor Based on Provocation by Defense Counsel — Personal Attack Upon Defense Counsel: Where, in a prosecution for deliberate homicide, the prosecuting attorney responded to certain evidentiary tactics of defense counsel by questioning him about his drinking habits, the court did not err in failing to caution the jury with respect to the alleged prejudicial comments of the prosecuting attorney. It has generally been held that an appellant may not predicate error upon the prosecuting attorney's actions where such were induced or

provoked by the appellant's counsel. The defendant also failed to offer an appropriate cautionary instruction. Any irregularity did not affect the defendant's substantial rights. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981), cited in St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986), and followed in St. v. Campbell, 241 M 323, 787 P2d 329, 47 St. Rep. 321 (1990). Close and Campbell were followed in St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827, 56 St. Rep. 1 (1999).

Demonstrative Evidence — Admission Upheld: In a prosecution for deliberate homicide caused by blows struck with a pick handle inside an automobile, the court did not err in overruling the defendant's objection to demonstrative evidence consisting of two pieces of a wooden handle and parts of an automobile. Allowing demonstrative evidence is within the discretion of the trial court and will not be reversed except upon a showing of manifest abuse of discretion. The record of the case shows no such abuse but shows that the witnesses, attorneys, and trial judge made it clear that the evidence admitted was demonstrative only and was not the actual items used in commission of the crime. Defendant offered no cautionary instruction on this issue and therefore cannot claim error on appeal because none was given. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Difficulty in Locating Witness as Grounds for Reopening Case: Where the State had difficulty in locating an eyewitness, kept the trial court and the defendant informed of its difficulty, and the defendant was given full opportunity to rebut the witness's testimony, it was not error to allow the State to reopen its case in chief to receive the eyewitness testimony. St. v. White, 185 M 213, 605 P2d 191 (1980), followed in St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Opinion Testimony Conditioned on Foundation — Discretionary: It is within the discretion of the trial court to allow opinion to be given, conditioned on the subsequent production and admission of evidence that forms the basis of the opinion. Since necessary evidence that served to complete the chain of possession was supplied, there was no prejudice to the defendant. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Testimony by Prosecution: It was not prejudicial for the prosecution to offer testimony that it was the policy of the County Attorney's office to delay filing charges until the office felt it could prove the defendant's guilt beyond a reasonable doubt since the defendant opened the door for that testimony. St. v. Hensley, 171 M 38, 554 P2d 745 (1976).

Permitting Witness to Correct Testimony — Discretionary: The trial court did not abuse its discretion in permitting a State's witness the opportunity to correct testimony made on direct examination under a former statute authorizing the court to permit the State to offer evidence upon its original case during the period reserved for rebuttal testimony. St. v. Crockett, 148 M 402, 421 P2d 722 (1966).

Evidence of Prior Felonies: It was not a denial of a fair trial when the jury was allowed to consider the proven and admitted fact that the defendant in a first degree assault case had been convicted of three prior felonies. Petition of Jones, 144 M 13, 393 P2d 780 (1964).

Opening Statement:

The County Attorney must refer to evidence the State intends to prove in his opening statement but is not required to state for what purpose he intends to produce certain evidence; hence, the trial court did not err in denying a request of the counsel for the defendant requiring him to do so. St. v. Keays, 97 M 404, 34 P2d 855 (1934).

A former provision requiring the County Attorney to make an opening statement in a criminal prosecution was merely directory. St. v. Hall, 55 M 182, 175 P 267 (1918).

PRESENTATION OF DEFENSE

No Error in Ruling Given Party's Participation or Acquiescence: The trial court admitted a transcript of 9-1-1 calls involving the pursuit of Cybulski while she was driving on the wrong side of an interstate highway. Cybulski contended that admitting the transcript was error when the original tape was available and should have been played to the jury. The Supreme Court disagreed. Cybulski did not object to admission of the transcript during a pretrial evidentiary hearing and did not challenge the accuracy of the transcript. The state laid a foundation for admission of the transcript at trial, and the trial court stated that Cybulski could play the actual tape at trial if desired, but Cybulski declined. The Supreme Court will not put a trial court in error for a ruling or procedure in which a party acquiesced or participated, and it was disingenuous for Cybulski to argue on appeal that the trial court erred in not admitting the actual tape of the calls when Cybulski was afforded the opportunity to play the tape but failed to do so. St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009). See also In re Pedersen, 261 M

284, 862 P2d 411 (1993), In re R.B.O., 277 M 272, 921 P2d 268 (1996), and St. v. Clay, 1998 MT 244, 291 M 147, 967 P2d 370 (1998).

Sufficient Evidence of Impairment to Support Negligent Homicide and DUI Conviction: Larson contended that evidence was insufficient to support a jury's determination of impairment by alcohol at the time of a fatal accident and that the inference of impairment resulting from Larson's blood alcohol concentration was rebutted by other evidence indicating that the accident was caused by a momentary lapse of attention while driving on a dangerous road. The state presented evidence that Larson drank a substantial amount of alcohol during the evening and morning hours prior to the accident; admitted that he had consumed a considerable amount of alcohol; drove his pickup at a high rate of speed off the shoulder of the highway, causing the vehicle to roll and eject the passengers; and tested for a blood alcohol concentration of 0.12 2 hours after the accident and 4 hours after he had stopped drinking. Although the Supreme Court could not discern precisely why the jury reached its decision to convict Larson, Larson fully presented his defense theory, and the jury rejected it. The evidence was sufficient to support the conviction, and the Supreme Court affirmed. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

Failure to Object at Trial to Refusal to Allow Testimony of Additional Witnesses After Trial Commenced — No Interference With Constitutional Right to Present Defense: LaDue contended that failure to allow the testimony of two additional witnesses after the start of his trial on charges of attempted deliberate homicide interfered with his constitutional right to present a defense. However, LaDue did not raise the constitutional question at trial, thus failing to preserve the issue for appeal. Failure to raise the issue at trial constituted waiver of the right to appeal it. St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

No Prejudice From Alleged Ineffective Assistance of Counsel During Trial Phase — Reasonable Trial Strategy: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the trial phase. Dawson alleged that counsel was ineffective in: (1) agreeing to the procedure used to present the testimony of the state's key witness, which involved questioning of the witness by the guardian ad litem; (2) failing to corroborate the defense theory through examination of the witness; (3) failing to give an opening statement; (4) failing to object to guilt phase errors, including improper questions and comments by the state; (5) failing to obtain experts to testify regarding Dawson's drug ingestion, head injuries, and EEG tests; and (6) failing to give a closing argument. On the first point, counsel's decision to use a special procedure to examine the fragile witness was reasonable, and Dawson agreed to the procedure. On the second point, counsel's decision not to subject the witness to further questioning after her very emotional testimony was also reasonable when counsel believed that further questioning would have been more damaging to the defense than helpful. Third, waiver of an opening statement was a reasonable trial tactic under the circumstances, and that decision could not form a basis for an ineffective assistance claim (see U.S. v. Rodrigues-Ramirez, 777 F2d 454 (9th Cir. 1985), and U.S. v. Nersesian, 824 F2d 1294 (2nd Cir. 1987)). Fourth, counsel's failure to object to certain prosecutorial questions and comments was reasonable and within the wide range of permissible professional legal conduct (see U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)). Fifth, counsel's decision not to call experts did not amount to ineffective assistance. Sixth, the decision not to give a closing statement did not constitute ineffective assistance per se and was a reasonable trial strategy that did not fall below the standard of what a minimally competent defense attorney would have done in the same circumstances (see St. v. Lee, 689 P2d 153 (Ariz. 1984)). The District Court did not err when it found that Dawson did not receive ineffective assistance at trial. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

Failure to Object to Testimony — Choice of Trial Tactics in Presentation of Evidence Held Not Ineffective Assistance as Matter of Law — Failure to Object to Prosecutor Comment on Credibility Held Not to Be Denial of Effective Assistance of Counsel: Hanson was convicted of sexual assault and deviate sexual conduct. He retained different counsel and appealed his conviction, alleging ineffective assistance of counsel because his trial counsel failed to object to the testimony of three witnesses. The Supreme Court held that Hanson's trial counsel may have failed to object as a

matter of trial strategy because his strategy was to disprove the credibility of the witnesses' testimony through cross-examination or through the testimony of other witnesses. The Supreme Court also held that one comment by the prosecutor on the believability of the testimony of an expert witness may have been improper but, in this case, did not rise to the level of ineffective assistance of counsel. St. v. Hanson, 283 M 316, 940 P2d 1166, 54 St. Rep. 678 (1997).

Lack of Notice of Changed Testimony — Continuance Proper: It was not revealed to defendant until trial that the initial story of an alleged sexual assault victim had changed. Prior to the victim's in-court testimony, defendant was unaware that the victim had made more than one statement to the investigating officer. Nevertheless, on the grounds that the court's calendar was full and defendant should have subpoenaed the witnesses before trial, the trial court denied defendant's motion for continuance until other witnesses could be subpoenaed to test the victim's credibility. The Supreme Court noted that the credibility of a witness is of utmost importance between a sexual abuse victim and a denying defendant, often constituting the only defense available, and that a change in testimony goes to the credibility of the victim. A reasonable continuance would have satisfied defendant's constitutional rights with regard to compulsory process, due process, and fair trial, and denial of the motion was an abuse of discretion warranting reversal and a new trial. St. v. Timblin, 254 M 48, 834 P2d 927, 49 St. Rep. 617 (1992), distinguished in St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705, 55 St. Rep. 1093 (1998).

Refusal to Allow Defense to Cease Cross-Examination and Recall Witness After Studying Evidence: Counsel for defendant asked to cease his cross-examination of a witness and to be able to recall her after he reviewed the evidence. The court did not err in refusing and in citing the time being taken by the trial. Copies of financial document exhibits relating to the witness's testimony were available to counsel before trial, and he had ample time to examine them. St. v. Korang, 237 M 390, 773 P2d 326, 46 St. Rep. 892 (1989).

Proper Restriction — Attorney Giving Instructions and Arguing Case: The judge interrupted defense counsel during her opening and closing statements and during voir dire. Although a judge should not interrupt the opening so as to prevent defendant from outlining his defense, the trial judge can stop counsel from giving instructions or arguing the case as was done here. Admonishing counsel's use of "law school questions" during voir dire is within the judge's latitude in controlling voir dire. The judge's conduct of the trial was meant to expedite and facilitate the trial, and the defendant is not entitled to a new trial. St. v. Lamere, 190 M 332, 621 P2d 462, 37 St. Rep. 1936 (1980).

Opening Statement of Defense:

Defense counsel, in his opening statement, attempted to review the elements of the crime of theft. His purpose was to show to the jury each of the items that they should look for and that if any of those items were missing they should take note of that fact. The District Court ruled that defense counsel was attempting to argue the case before the jury instead of telling the jury what he intended to prove. The Supreme Court found no error in the District Court's restrictions. St. v. Martinez, 188 M 271, 613 P2d 974 (1980).

The denial to the defendant of an opportunity to make an opening statement concerning insanity defense until after the presentation of the prosecution's case was an improper interference with the defendant's right to have the jury consider his defense. St. v. Olson, 156 M 339, 480 P2d 822 (1971).

FINAL ARGUMENT

Prosecutor's Closing Comments Not Improper or Prejudicial — No Prosecutorial Misconduct in Referencing Defendant's Evidence: Dewitz contended that the prosecutor committed misconduct in closing arguments by referencing a plea agreement entered by an alleged accomplice. However, the plea agreement was entered into evidence by defense counsel in an effort to show that the alleged accomplice was not credible, so Dewitz could not complain of the prosecutor's reference to evidence that Dewitz introduced. Nor did Dewitz demonstrate how the comments could be considered improper or prejudicial. The prosecutor's comments were not so egregious as to deprive Dewitz of a fair trial, so no misconduct occurred. St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009).

Prosecutor's Closing Comments Regarding Witness's Credibility Not Improper: Green contended that the prosecutor improperly commented on the credibility of a witness during closing arguments at Green's homicide trial. The Supreme Court disagreed. During closing arguments, a prosecutor may comment on the gravity of the crime charged, the volume of evidence, credibility of witnesses, inferences to be drawn from the various phases of evidence, and legal principles involved. Although it is generally improper for a prosecutor to offer personal

opinions regarding the credibility of the accused or witnesses, it is proper to comment on conflicts and contradictions in testimony, as well as to comment on the evidence and to suggest to the jury inferences that may be drawn from the evidence. Here, the prosecutor was reminding the jury of the inconsistency between the witness's statement to police after arrest and the witness's later testimony, and the prosecutor was allowed to point out the inconsistency and to question which version was the truth. St. v. Green, 2009 MT 114, 350 M 141, 205 P3d 798 (2009). See also St. v. Staat, 251 M 1, 822 P2d 643 (1991), and St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827 (1999).

Prosecutor's Comments on Contradictions in Testimony and Suggestions on Inferences From Evidence: It is improper for a prosecutor to comment on evidence that is not in the record or to offer a personal opinion regarding the credibility of witnesses, but a prosecutor may comment on contradictions in testimony and on the evidence presented and may suggest inferences that the jury may draw from the evidence. St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009), following St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), and St. v. Roubideaux, 2005 MT 324, 329 M 521, 125 P3d 1114 (2005).

Prosecutor's Comments on Credibility of Witnesses and Defendant's Failure to Present Evidence — Plain Error Review Declined: Lindberg claimed reversible error because the prosecutor, in closing arguments during Lindberg's trial on sex crimes, made personal comments regarding the credibility of witnesses and evidence presented by the defense, which Lindberg asserted shifted the burden to Lindberg to prove his innocence and violated the right to a fair trial. Because defense counsel did not object to the comments, Lindberg contended that the rights violation was reviewable under the plain error doctrine. Although not condoning the prosecutor's comments, the Supreme Court nevertheless declined to apply the plain error doctrine because, given the totality of the circumstances, the comments did not rise to a level sufficient to invoke plain error. The comments did not unconstitutionally shift the burden of proof to Lindberg. Failure to review Lindberg's claims would not have resulted in a manifest miscarriage of justice, so plain error review was unwarranted. St. v. Lindberg, 2008 MT 389, 347 M 76, 196 P3d 1252 (2008).

Prosecutor's Statements and Questions Regarding Witness Credibility Violative of Right to Fair Trial — Remand: At Hayden's trial, the prosecutor questioned a detective concerning the credibility of two other witnesses who had recanted their prior statements at trial, eliciting the detective's impressions of the credibility of the witness's initial statements following an assault. The detective responded that he thought the initial statements, rather than the trial statements, were true. The prosecutor also offered his own opinion as to the witness's testimony, stated that the jury could rely on the detective's testimony, and improperly testified during closing by vouching for the efficacy of the search of Hayden's residence and stating his opinion that a scale found during the search was used for drugs. The prosecutor's conduct invaded the role of the jury, creating a clear danger that jurors adopted the prosecutor's views instead of exercising their own independent judgment, and unfairly added the probative force of the prosecutor's personal, professional, and official influence to the testimony of the witnesses. The prosecutor's conduct undermined the fundamental fairness of the proceedings and Hayden's constitutional right to a fair trial, and the case was reversed and remanded for a new trial. St. v. Hayden, 2008 MT 274, 345 M 252, 190 P3d 1091 (2008).

Closing Arguments Regarding Defendant's Failure to Present Evidence Contradicting Testimony of Prosecution Witnesses Not Warranting Mistrial: During closing arguments in Rodarte's incest trial, the prosecution referenced Rodarte's failure to present evidence that contradicted the testimony of prosecution witnesses. Citing U.S. v. Williams, 739 F2d 297 (7th Cir. 1984), and U.S. v. Viera, 819 F2d 498 (5th Cir. 1987), Rodarte contended that a mistrial should have been granted because it was error for the prosecution to draw inferences from defendant's failure to call a particular witness. The Supreme Court distinguished Rodarte's cited cases, noting that although it is improper for the prosecution to comment on the failure of a defendant to testify on the defendant's own behalf, the prosecution is permitted to point out facts at issue that could have been controverted by persons other than the defendant, but were not. St. v. Rodarte, 2002 MT 317, 313 M 131, 60 P3d 983 (2002). See also Lockett v. Ohio, 438 US 586 (1978).

Prosecutor's Comments Improper — References to Unrelated Cases, Attempting to Define Reasonable Doubt, and Personal Opinions Regarding Guilt and Appropriateness of Sentence: In closing arguments in a case in which defendant was charged with attempting to fraudulently obtain dangerous drugs by altering a prescription, the prosecutor attempted to define reasonable doubt by referring to a rape case that he tried several years earlier and by citing the need for a new county jail as evidence that the state proved reasonable doubt every day. The comments were not only irrelevant but also misrepresented the state's burden of proof. Arguments

attempting to define reasonable doubt will cause reversible error. The prosecutor also told the jury that defendant's denials were so commonplace that prosecutors had named it the "some dude" defense, as in "Blame it on somebody, some dude, some dude sitting out there". The "some dude" remarks were essentially the prosecutor's personal opinion on the strength of the state's case, referred to matters outside the record and to the prosecutor's own experience, and were similar to a prosecutor commenting on the believability of a witness. Closing arguments that reflect the prosecutor's personal opinions as to guilt are improper. Lastly, the prosecutor assured the jury that even if it found defendant guilty, the judge had the authority to order treatment rather than jail time. The comments were meant to reassure the jury that a guilty verdict would not hurt defendant, but would actually be a benefit in the long run. However, sentencing is solely the duty of the trial court, and in a noncapital case, the verdict should not be influenced in any way by sentencing considerations. It is impermissible for a jury to give weight to possible punishment when reaching a verdict. Although the case was remanded on other grounds, the Supreme Court admonished the prosecution not to make such comments on retrial. St. v. Stewart, 2000 MT 379, 303 M 507, 16 P3d 391, 57 St. Rep. 1615 (2000).

No Prejudice From Alleged Ineffective Assistance of Counsel During Trial Phase — Reasonable Trial Strategy: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the trial phase. Dawson alleged that counsel was ineffective in: (1) agreeing to the procedure used to present the testimony of the state's key witness, which involved questioning of the witness by the guardian ad litem; (2) failing to corroborate the defense theory through examination of the witness; (3) failing to give an opening statement; (4) failing to object to guilt phase errors, including improper questions and comments by the state; (5) failing to obtain experts to testify regarding Dawson's drug ingestion, head injuries, and EEG tests; and (6) failing to give a closing argument. On the first point, counsel's decision to use a special procedure to examine the fragile witness was reasonable, and Dawson agreed to the procedure. On the second point, counsel's decision not to subject the witness to further questioning after her very emotional testimony was also reasonable when counsel believed that further questioning would have been more damaging to the defense than helpful. Third, waiver of an opening statement was a reasonable trial tactic under the circumstances, and that decision could not form a basis for an ineffective assistance claim (see U.S. v. Rodrigues-Ramirez, 777 F2d 454 (9th Cir. 1985), and U.S. v. Nersesian, 824 F2d 1294 (2nd Cir. 1987)). Fourth, counsel's failure to object to certain prosecutorial questions and comments was reasonable and within the wide range of permissible professional legal conduct (see U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)). Fifth, counsel's decision not to call experts did not amount to ineffective assistance. Sixth, the decision not to give a closing statement did not constitute ineffective assistance per se and was a reasonable trial strategy that did not fall below the standard of what a minimally competent defense attorney would have done in the same circumstances (see St. v. Lee, 689 P2d 153 (Ariz. 1984)). The District Court did not err when it found that Dawson did not receive ineffective assistance at trial. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

Prosecutor's Personal Opinion on Strength of Case Held Improper — "Invited Reply" Held Inapplicable — No Prejudice Found: At the trial of Gladue on charges stemming from Gladue's assault of his girlfriend, the County Attorney stated in final argument: (1) that it was his job to determine which cases "flew" and which didn't and that the case against Gladue "flew" to a greater extent than other cases brought by his office; and (2) that it was Gladue who "committed the crimes". After reviewing the standards and previous opinions, including St. v. Statczar, 228 M 446, 743 P2d 606 (1987), St. v. Stuit, 268 M 176, 885 P2d 1290 (1994), and St. v. Stringer, 271 M 367, 897 P2d 1063 (1995), the Supreme Court held that the language used by the County Attorney was improper because it constituted the prosecutor's personal opinion that Gladue was guilty. Also, the Supreme Court rejected the applicability of the "invited reply" doctrine examined in U.S. v. Gwaltney, 790 F2d 1378 (9th Cir. 1986), because the defense counsel's statements were not sufficiently objectionable to justify the improper final argument by the County Attorney. Although it held the County Attorney's statements to be improper, the Supreme Court also held, principally because Gladue was acquitted of most of the charges

against him, that there was no evidence that the County Attorney's statements were prejudicial to Gladue. St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827, 56 St. Rep. 1 (1999).

Prosecutor's Closing Statement Not Admitted Into Evidence — Cautionary Statement Sufficient to Cure Prejudicial Effect: In closing statements in a rape trial, the state prosecutor improperly commented on the fact that defendant made unfounded accusations as to the victim's alleged prostitution activities. Defendant alleged that the comments were grounds for mistrial because there was in fact evidence available that the victim was a prostitute, but the evidence had been found to be inadmissible under the rape shield law. However, evidence of prostitution did not establish a defense, nor did prostitution in and of itself show a lack of credibility on the part of the witness. The prosecutor's statement was not admitted into evidence, and the court's cautionary statement that the jury was not to consider such statements as evidence was sufficient to cure any prejudicial effect of the prosecutor's comment, precluding any reasonable possibility that the prosecutor's comment contributed to defendant's conviction. St. v. Ahto, 1998 MT 200, 290 M 338, 965 P2d 240, 55 St. Rep. 851 (1998), following St. v. Partin, 287 M 12, 951 P2d 1002, 54 St. Rep. 1474 (1997).

Prosecutor's Comments on Guilt of Accused: County Attorney's remarks in his closing argument did not constitute reversible error when he stated that the inescapable conclusion from the evidence presented was that defendant was guilty. The County Attorney did not state his personal opinion that he believed defendant had committed the crimes, which would have been highly improper. His statements were based on his analysis of the evidence and were a matter on which he could properly argue. St. v. Campbell, 241 M 323, 787 P2d 329, 47 St. Rep. 321 (1990). See also St. v. McColley, 247 M 524, 807 P2d 1358, 48 St. Rep. 290 (1991).

Prosecutor's References to Punishment During Closing Argument Nonprejudicial — Mistrial Denied: Defendant claimed that the prosecutor's references to punishment during rebuttal closing arguments warranted grant of a motion for mistrial. However, the references to differences in punishment were made to explain why the defendant had a motive to lie. Further, the prosecutor's action in calling defendant a liar was nothing more than an opinion based on the state's analysis of evidence and did not constitute an expression of personal opinion of guilt. The comments did not prejudice defendant in light of overwhelming evidence of criminal conduct and the judge's cautionary instruction admonishing the jury to disregard the references. The motion for mistrial was properly denied. St. v. Clawson, 239 M 413, 781 P2d 267, 46 St. Rep. 1792 (1989).

Prosecutor's Assertion of Personal Opinion — Motion for Mistrial Denied: Defendant moved for mistrial, asserting that the state's attorney's closing arguments constituted improper prosecutorial comment and misconduct. During closing, the state had argued that its office was too busy to prosecute innocent persons, stating: "We don't have time to do that, ladies and gentlemen. We do have 1,450 cases a year in the county attorney's office. We don't have time to spend chasing people that we believe are innocent or [have time] to frame people." The Supreme Court affirmed its disapproval of an attorney's assertion of a personal opinion and cautioned the state to refrain from such a tactic. However, since defendant had no evidence that these statements resulted in undue prejudice, the motion for mistrial was properly denied. St. v. Statczar, 228 M 446, 743 P2d 606, 44 St. Rep. 1668 (1987). See also St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999).

Prosecutor Comment on Homicide Victim's Family and Character: It was inappropriate for the prosecutor, in his opening and closing statements, to comment on the family of the victim and on the victim's outstanding personal characteristics. However, the record did not show denial of a substantial right, and a conviction necessarily followed from defendant's testimony, which established every element of the offenses with which he was charged. St. v. Nichols, 225 M 438, 734 P2d 170, 44 St. Rep. 382 (1987), followed in St. v. Whitlow, 285 M 430, 949 P2d 239, 54 St. Rep. 1227 (1997).

Prosecution Comments on Witnesses in Opening and Closing — No Objection — No Effect on Substantial Rights: The prosecution in opening and closing made comments on the truthfulness and credibility of witnesses and other matters not related to the defendant's right not to testify. A lack of objection does not preclude consideration in the trial court of error that affects the defendant's substantial rights, but these matters were subject to free comment to the jury under the circumstances of this case and thus did not affect substantial rights of the defendant. St. v. Harris, 209 M 511, 682 P2d 159, 41 St. Rep. 866 (1984).

Conclusory Inferences by Prosecutor Proper: In an appeal alleging ineffective assistance of counsel, the defendant objected to the prosecution's conclusory inferences that the victims were wounded while attempting to flee from the defendant. Because there was substantial evidence to support the inferences, the prosecutor's comments were proper. St. v. Dupre, 200 M 165, 650 P2d 1381, 39 St. Rep. 1660 (1982).

Prejudicial Remarks by Prosecutor — Review in Federal Habeas Corpus Proceeding: Generally, prejudicial remarks made by a prosecutor to a jury in a state court trial are not cognizable in a federal habeas corpus proceeding. To constitute a proper ground for habeas corpus relief, the prosecutorial remarks must be so egregious as to render the trial fundamentally unfair. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Comments on Trial Evidence — Remarks to the Jury by Counsel — Limitations: This section allows an attorney to comment on the evidence of a case as long as there are facts to support such statements. Here, the prosecutor's version of the homicide was supported by the evidence. The defendant claimed that the prosecutor's closing remarks were made unfairly because the remarks were contrary to polygraph test results that the defendant unsuccessfully sought to have entered into evidence. This argument was rejected by the Supreme Court because the polygraph examinee (the defendant) was allowed to testify to the facts covered by the test and the defendant's version of the death also was given to the jury. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Improper to Characterize Witness as Liar: In most instances, it is highly improper for an attorney in final argument to characterize the testimony of a witness as a lie or the party or a witness himself as a liar. St. v. Musgrove, 178 M 162, 582 P2d 1246 (1978), followed in St. v. Stewart, 253 M 475, 833 P2d 1085, 49 St. Rep. 540 (1992), St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994), St. v. Stringer, 271 M 367, 897 P2d 1063, 52 St. Rep. 473 (1995), and St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827, 56 St. Rep. 1 (1999). Stringer was followed in St. v. Hanson, 283 M 316, 940 P2d 1166, 54 St. Rep. 678 (1997). Hanson was followed in St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827, 56 St. Rep. 1 (1999). See also St. v. Campbell, 241 M 323, 787 P2d 329, 47 St. Rep. 321 (1990), St. v. Houle, 1998 MT 235, 291 M 95, 966 P2d 147, 55 St. Rep. 989 (1998), and St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827, 56 St. Rep. 1 (1999).

JURY INSTRUCTIONS GENERALLY

Jury Instruction on Criminal Endangerment Not Prejudicial to Defendant — Additional Language Not Relevant to Case Properly Excluded From Instruction: At Cybulski's trial for DUI and criminal endangerment, the District Court gave the following jury instruction: "A person commits the offense of criminal endangerment if the person knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another. A person acts knowingly when the person is aware there exists the high probability that the person's conduct will cause a specific result." Cybulski requested additional language from 45-5-207 regarding endangerment caused by tree spiking, but the request was denied. Cybulski also requested additional language regarding the definition of "knowingly", but that request was denied as well. On appeal, Cybulski contended that the District Court erred by not including the requested language in the jury instruction. The Supreme Court disagreed. The language regarding tree spiking had no application to Cybulski's case and was properly refused. The District Court's definition language was shorter and clearer and properly stated the law. Cybulski was not prejudiced by the jury instruction because she was still able to argue her defense theory that she was not aware that her conduct would cause a substantial risk of death or serious bodily injury. The District Court was affirmed. St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009).

No Abuse of Discretion in Denying Mistrial for Ordering Continued Jury Deliberations: Doyle moved for a mistrial after the trial court ordered the jury to continue deliberating after the jurors notified the court that they were at an impasse. Doyle contended that the trial court improperly pressured the jury to reach a decision and created the impression that the jury could return only a unanimous verdict rather than a hung jury and that the court failed to explain to the jurors that they should never give up their honest opinion concerning Doyle's guilt or innocence. The motion was denied. On appeal, the Supreme Court affirmed. The transcript showed that the jury was in fact instructed that it should not surrender an honest opinion as to the weight or effect of the evidence or the guilt or innocence of the defendant. The court sent the jury home the first day after 10 hours of deliberations when the jury informed the court that it could not reach a decision. At the end of the second day, the jury sent a note to the court informing the judge that the jury was at an impasse. The court asked the jury if it wished to go home or continue deliberations, and the jury opted to go home. The third day, the jury returned a unanimous guilty verdict. Based on the transcript, the trial court never forced deliberations, and the court did not abuse its discretion in denying Doyle's mistrial motion. St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Standard of Review of Jury Instructions in Criminal Case: The Supreme Court reviews jury instructions in a criminal case to determine if the instructions fully and fairly instructed the jury on the law applicable to the case. A District Court has broad discretion in instructing a jury and

will be reversed only if an instruction prejudicially affects the substantial rights of a defendant. St. v. Dubois, 2006 MT 89, 332 M 44, 134 P3d 82 (2006). See also St. v. Baker, 2004 MT 393, 325 M 229, 104 P3d 491 (2004).

Prosecutor's Improper Reference to Hearsay Statement in Opening Cured by Court's Instruction: Defendant contended that the prosecutor's reference to a hearsay statement by a person who did not testify at trial was prejudicial. Defendant did not move for mistrial based on the statement, but asserted on appeal that the improper reference should warrant reversal. The Supreme Court noted that a lawyer's statements are not evidence and held that it would be inappropriate to apply the abuse of discretion standard to an action or lack of action that defendant never requested the trial court to take. In this case, the quoting of hearsay was cured by the trial court's instruction that the jury disregard the prosecutor's statement, and the Supreme Court declined to reverse the conviction. St. v. High Elk, 2006 MT 6, 330 M 259, 127 P3d 432 (2006), distinguishing St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), and St. v. Runs Above, 2003 MT 181, 316 M 421, 73 P3d 161 (2003).

Jury Instruction Regarding Witness Credibility Not Erroneous: Marble contended that the trial court erred in giving a jury instruction regarding witness credibility. The Supreme Court looked at the jury instructions as a whole and concluded that the instructions fully and fairly instructed the jury on the law applicable to the case and gave the jury adequate guidance on assessing and weighing the credibility of witnesses. Marble was not prejudiced by the jury instructions, and his conviction was affirmed. St. v. Marble, 2005 MT 208, 328 M 223, 119 P3d 88 (2005), following St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004).

Sufficient Evidence of Attempted Obstruction of Peace Officer — Jury Properly Instructed Regarding Mental Standards of Offense: When she saw heavily armed officers approaching a neighbor's residence, Baker called the neighbor and left a recorded message that it would be in the neighbor's interests to peek out the window. The message was subsequently confiscated, and Baker was charged with and convicted of attempted obstruction of a police officer. On appeal, Baker challenged the use of evidence regarding the neighbor's history and arrest, the purpose and use of the high-risk unit in arresting the neighbor, and an officer's outrage at Baker's interference with the police, contending that the evidence was irrelevant and unfairly prejudicial. The Supreme Court disagreed. Under the transaction rule set out in St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999), the trial court did not err in allowing the evidence because it enabled the jury to understand the circumstances surrounding the police activity and how Baker's interference could have affected the outcome. Baker also contested the jury instructions. Under 45-7-302, a person obstructs an officer when the person knowingly hinders the enforcement of the criminal law, so for a person to commit the offense of attempted obstruction, the person need only perform any act toward the commission of obstruction while aware of the fact that the person is performing the act. The instructions to the jury contained an explanation of the "knowingly" standard and multiple instructions on Baker's purpose for making the call and thus were a fair and full instruction on the law. The conviction was affirmed. St. v. Baker, 2004 MT 393, 325 M 229, 104 P3d 491 (2004).

Jury Properly Instructed on Definition of Criminal Negligence — Mental State Not at Issue: In Larson's negligent homicide trial, the court instructed the jury that a person acts negligently when an act is done with a conscious disregard of the risk of death or when a person disregards a risk of causing death that the person should be aware that the result will occur or that the circumstance exists. Larson contended that the instruction erroneously omitted the word "consciously" before the word "disregards". The Supreme Court disagreed. Under St. v. Gould, 216 M 455, 704 P2d 20 (1985), mental state is not at issue in negligent homicide cases. Contrary to Larson's contention, the instruction did not effectively lower the standard of proof for proving negligence, but rather constituted a correct statutory definition. Larson had a full opportunity to argue his defense, and the jury was properly instructed. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

Bailiff's Instructions to Split Jury to Continue Deliberations Not Reversible Error: Steele was charged with eight offenses and conceded guilt on all but one charge. During deliberations on the remaining charge, the jury became deadlocked and notified the bailiff. Outside the presence of the parties and without the court's approval, the bailiff told the jury that they needed to keep working on it and needed to find common ground. Steele contended that the bailiff's action denied the parties and counsel the opportunity to consult with the court in violation of 46-16-503 and moved for mistrial. The motion was denied, and Steele appealed. It is not the prerogative of any court officer except the trial judge to give instructions to the jury regarding deliberations. However, without condoning the bailiff's actions, the Supreme Court held that the bailiff's instructions did not misadvise the jury but merely asked the jury to continue deliberating, the

same instruction that the District Court would have offered, so a mistrial was not warranted on those grounds. Further, the jury did not disagree as to any testimony received or desire any information regarding the law, so 46-16-503 was not triggered. Although not given or condoned by the trial judge, the bailiff's instructions did not attempt to pressure the jurors into reaching a verdict or assert to the minority jurors that their positions should change, as was the case in St. v. Randall, 137 M 534, 353 P2d 1054 (1960), so denial of the mistrial motion was proper. St. v. Steele, 2004 MT 275, 323 M 204, 99 P3d 210 (2004), distinguishing St. v. Herron, 169 M 193, 545 P2d 678 (1976). See also St. v. George, 219 M 377, 711 P2d 1379 (1986).

Counsel Decision to Forego Certain Defense Considered Trial Strategy — Insufficient Record to Determine Effective Assistance of Counsel on Direct Appeal: On direct appeal, Hendricks contended that he was provided ineffective assistance of counsel in his assault trial because his attorney failed to raise the affirmative defense of justifiable use of force. However, in a disclosure statement filed prior to the omnibus hearing, Hendricks's counsel specifically noted that the defense of justifiable use of force would not be asserted. On the morning of trial, counsel stated that no jury instructions on the defense of justifiable use of force would be offered. Thus, the decision not to raise the defense was made consciously and was not the result of ignorance or neglect and was presumed to be sound trial strategy falling within the realm of reasonable professional conduct absent evidence to the contrary. Absent a sufficient record to address the issue of ineffective assistance, the direct appeal was dismissed, requiring Hendricks to raise the issue by a postconviction relief proceeding, if at all. The Supreme Court clarified that it will no longer use the approach in St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001), to determine effective assistance of counsel, but rather the procedure set out in St. v. Herrmann, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003). St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003), followed in St. v. Webster, 2005 MT 38, 326 M 112, 107 P3d 500 (2005).

Entry of Trial Court Judge Into Jury Room Without Counsel, Defendant, and Court Reporter — Automatic Reversible Error Absent Recorded Waiver by Defendant of Constitutional Rights: On the second full day of jury deliberations in Tapson's trial on charges of sexual intercourse without consent, aggravated kidnapping, and attempted deliberate homicide, the trial judge met with counsel, on the record, to notify them that the jury had a verdict on one of the three counts, but was unable to reach a verdict on the other two counts. With Tapson present, the state suggested substituting the existing verdict form, which listed all three charges, with six verdict forms—one "guilty" form and one "not guilty" form for each of the three charges—to avoid the problem of the jury switching its current verdict on one charge for some sort of last minute compromise. The state also suggested that the judge take the forms into the jury room, rather than moving the jury and handling the matter in open court. Tapson's counsel stated that the defense did not have any objection to the proposition, so the judge took the forms into the jury room, without counsel or Tapson present, and returned 11 minutes later. There was no record of whether the judge spent the entire time with the jury, what the judge told the jury, whether the jury had any questions, or whether the judge gave any responses. Tapson was subsequently convicted of attempted deliberate homicide, although the jury could not reach a verdict on the other charges. Tapson was sentenced to life imprisonment, but appealed the conviction and sentence. The Supreme Court noted Tapson's fundamental constitutional right to be present and defend in person and by counsel, and the fundamental right to a public trial, which extends to the entire trial, including the judge's instructions to the jury. The state contended that defense counsel waived Tapson's right to be present, but the Supreme Court declined to engage in presumptions of waiver, holding that if a defendant chooses to waive these constitutional rights, the trial court must obtain an on-the-record personal waiver, by the defendant, acknowledging that the defendant voluntarily, intelligently, and knowingly waives the rights. Thus, when there is some circumstance arguably making it necessary for a trial judge to enter the jury room while the jury is present, the court must contemporaneously explain to the defendant, on the record, the constitutional right to be present at all critical stages of the trial and the right to a public trial. The defendant may then choose to waive those rights. However, absent a contemporaneous, personal, knowing, voluntary, intelligent, on-the-record waiver by the defendant, if a judge enters a jury room while the jury is present and without counsel, the defendant, and the court reporter, reversal will be automatic. Tapson's constitutional rights were violated, so the case was reversed and remanded for further proceedings. St. v. Tapson, 2001 MT 292, 307 M 428, 41 P3d 305 (2001), following St. v. Reed, 65 M 51, 210 P 756 (1922), St. v. Allison, 116 M 352, 153 P2d 141 (1944), U.S. v. U.S. Gypsum Co., 438 US 422 (1978), and Commonwealth v. Patry, 722 NE 2d 979 (Mass. App. Ct. 2000), and distinguishing St. v. Harris,

1999 MT 115, 294 M 397, 983 P2d 881 (1999), and St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

Failure to Instruct Jury Regarding Need for Unanimous Verdict on Alternative Charges — Reversible Error: Hardaway was initially charged with burglary, and the information was amended to charge that Hardaway knowingly entered or remained unlawfully in an unoccupied structure with intent to commit theft or a sexual crime. Hardaway contended that the jury instructions were improperly given in the alternative, allowing the jury to convict even though some members believed that he intended theft, while others believed that he intended a sexual crime. The Supreme Court agreed. Article II, sec. 26, Mont. Const., requires a unanimous verdict in all criminal actions. Unanimity requires more than a conclusory agreement that the accused is guilty of some charged offense. The jury must agree as to the principal factual elements underlying a specified offense, so when an accused is charged in the alternative, the jury must be clearly instructed that it is required to reach a unanimous verdict as to each individual alternative. Absent such an instruction, Hardaway was denied his right to a unanimous verdict, constituting reversible error. St. v. Hardaway, 2001 MT 252, 307 M 139, 36 P3d 900 (2001).

Failure by State to Articulate Permissible Purpose for Introduction of Evidence of Other Crimes — Lack of Proof of Defendant's Knowledge of Fact of Consequence: During pretrial proceedings for Dobson's trial for sexual intercourse without consent, the state indicated its intent to introduce evidence that Dobson had been previously charged with sexual intercourse without consent with a minor. The purported purpose was for proof of knowledge or the absence of mistake or accident, establishing that Dobson knew that someone under 16 years of age could not legally consent to sexual intercourse. Instead of objecting, defense counsel offered to stipulate that Dobson did have knowledge of that fact. The state objected that Dobson should not be able to stipulate away its case, and urged that the jury instructions contain details of the prior charge. The trial court declined the specific instructions offered by both Dobson and the state and fashioned and gave its own instruction, advising the jury that Dobson was previously charged with sexual intercourse without consent with a minor and thus had knowledge of the law, but instructing that the evidence was not to be construed by the jury as evidence of Dobson's character, but only as evidence of Dobson's prior knowledge that such conduct was criminal. On appeal, Dobson contended that the instruction was erroneous. The Supreme Court agreed that the trial court abused its discretion in giving the instruction because it did not meet the third criteria of the modified Just rule (see St. v. Matt, 249 M 136, 814 P2d 52 (1991)). Although it appeared at first blush that the state asserted permissible purposes of knowledge or the absence of mistake or accident for the admission of other crimes evidence, merely reciting an allowable purpose is not sufficient if the evidence does not further that purpose or if that purpose is not an issue in dispute (see St. v. Weldy, 273 M 68, 902 P2d 1 (1995)). Rather, as set out in U.S. v. Mehrmanesh, 689 F2d 822 (9th Cir. 1982), the state must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence, which in this case, the state did not do. Dobson's knowledge of the law that it is a felony offense to have sexual intercourse with someone under 16 years of age was not a fact of consequence to the action. Thus, admission of the evidence via the jury instruction was reversible error, and the case was remanded for a new trial. St. v. Dobson, 2001 MT 167, 306 M 145, 30 P3d 1077 (2001). See also St. v. Anderson, 275 M 344, 912 P2d 801 (1996).

Failure to Offer Alternative Jury Instruction on Aggravated Assault When Defendant Maintains Innocence on All Charges Not Considered Ineffective Assistance of Counsel: Despite a daunting evidentiary record of Aliff's commission of a rape and attempted murder, he maintained his innocence and claimed that he was home with his wife while the victim was fighting for her life. Aliff contended on appeal that he received ineffective assistance of counsel because no alternative jury instruction was offered regarding the offense of aggravated assault. However, Aliff never claimed that he intended only to assault the victim, but rather that he did not commit the crimes for which he was charged or any other offense in connection with the incident. Counsel did not provide inadequate assistance by failing to offer an instruction that was inconsistent with the defense. The instructions that were actually offered were based on trial strategy and did not stem from neglect or ignorance. Counsel's performance was not deficient in any way, and judgment was affirmed. St. v. Aliff, 2001 MT 52, 304 M 310, 21 P3d 624 (2001).

Duty to Object to Instructions:

Where the defendant in a prosecution for felony theft offered and was refused an instruction on the lesser included offense of misdemeanor theft, the defendant had no duty to object to the court's refusal of the instruction. No exceptions are necessary to the rulings of the court on the settlement of instructions. St. v. Young, 206 M 19, 669 P2d 239, 40 St. Rep. 1474 (1983).

Defendant contended that jury instructions given by the District Court were improper and that rejected instructions should have been given. No objection to the instructions was raised at trial. Instructions cannot be challenged for the first time on appeal. The errors asserted did not affect the substantial rights of the defendant and were disregarded. St. v. Wurtz, 195 M 226, 636 P2d 246, 38 St. Rep. 1808 (1981).

Where the defendant was convicted of felony murder, aggravated kidnapping, and robbery, the Supreme Court found that the defendant was precluded from raising certain alleged errors in the jury instructions that related to proof of knowledge and purpose as no objection had been made to those instructions in the trial court. The Supreme Court also found that the objections had no merit as the instructions objected to, or instructions substantially similar to them, had been approved in St. v. Coleman, 185 M 229, 605 P2d 1000 (1979). St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

When a defect in an instruction given was not pointed out specifically by the defendant at the settlement of the instructions, the Supreme Court on appeal may not, under a former section, consider an objection not so pointed out. St. v. Vallie, 82 M 456, 268 P 493 (1928); St. v. Cassill, 71 M 274, 229 P 716 (1924); St. v. Sawyer, 71 M 269, 229 P 734 (1924); St. v. Dougherty, 71 M 265, 229 P 735 (1924); St. v. Bolton, 65 M 74, 212 P 504 (1922).

When the defendant, through his attorney, at the settlement of the instructions stated that he had no objections to them, assignments based on alleged error in them cannot be considered on appeal. St. v. Evans, 60 M 367, 199 P 440 (1921); St. v. Chronopoulos, 60 M 329, 199 P 266 (1921).

The defendant in a criminal case is bound by instructions to which he does not object. St. v. Crean, 43 M 47, 114 P 603 (1911).

When the defendant fails to make an objection to any portion of the charge or to any action of the trial court in its settlement during trial, he will not on appeal be heard to complain of error therein or of any omission by the court to submit any special instruction. St. v. Stone, 40 M 88, 105 P 89 (1909).

Assault defendant who failed to object to or offer other instructions regarding the "no aggressor" rule contained in the court's self-defense instructions could not, on appeal, raise the issue of failure to instruct on exceptions to that rule. The issue would not be addressed under the common-law plain error rule because declining review did not rise to the level of a manifest miscarriage of justice, did not leave unsettled the question of the fundamental fairness of the trial, and did not compromise the integrity of the judicial process. St. v. Gonzales, 278 M 525, 926 P2d 705, 53 St. Rep. 1015 (1996).

No Right to Instruction on Every Nuance of One's Argument: A defendant is entitled to have instructions on the defendant's theory of the case, but is not entitled to an instruction concerning every nuance of the argument. St. v. Gonzales, 278 M 525, 926 P2d 705, 53 St. Rep. 1015 (1996).

Court Admonition Not Required Each Time Prior Acts Evidence Received: Under St. v. Just, 184 M 262, 602 P2d 957 (1979), the trial court must properly admonish the jury prior to admitting evidence of a defendant's prior acts. In the present case, the court cautioned the jury prior to admitting evidence of a sexual abuse victim's many years of abuse and beatings but did not again admonish the jury prior to evidence of a specific incident of abuse. The Supreme Court followed the holding in St. v. Tecca, 220 M 168, 714 P2d 136 (1986), and St. v. Keefe, 232 M 258, 759 P2d 128 (1988), that Just does not require an admonition each time that prior acts evidence is received. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Duty to Submit an Instruction if Desired:

Defendant contended District Court error in refusing to give a cautionary instruction sua sponte after the introduction of evidence that defendant had previously been convicted of child molesting even though the conviction was actually for sexual abuse. However, the burden of drafting and offering the necessary instruction fell on defendant. The Supreme Court refused to consider the alleged error predicated on the lack of a cautionary instruction because the defendant had never offered the necessary instruction. St. v. Benton, 251 M 401, 825 P2d 565, 49 St. Rep. 95 (1992).

When the testimony of a physician touching a physical examination of the complaining witness was admitted solely for the purpose of showing that sexual intercourse might have taken place, and for none other, the failure of the defendant to offer an instruction on the subject of its limitation deprived him of the right to complain that such an instruction was not given. St. v. Richardson, 63 M 322, 207 P 124 (1922).

When the defendant failed to offer an instruction on circumstantial evidence, he is in no position to complain of the omission to instruct the jury on that point. St. v. Francis, 58 M 659, 194 P 304 (1920).

It is well settled in this state that if a party is not satisfied with an instruction proposed to be given, he must submit an instruction which more fully covers the particular matter or he cannot be heard to complain unless the instruction given is inherently wrong. St. v. Powell, 54 M 217, 169 P 46 (1917); St. v. Tracey, 35 M 552, 90 P 791 (1907); St. v. Gordon, 35 M 458, 90 P 173 (1907); St. v. Broadbent, 19 M 467, 48 P 775 (1897); Territory v. Manton, 8 M 95, 19 P 387 (1888); Territory v. Hart, 7 M 489, 17 P 718 (1888).

Failure to Raise Due Process Issue in Instructions as Waiver in Entrapment Case: Defendant argued that a due process instruction based on outrageous government conduct should have been given in an entrapment case but did not submit such an instruction for consideration by the trial court. By failing to offer a due process instruction, defendant waived his claim. St. v. Farnsworth, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989).

Improper Testimony Stricken With Accompanying Cautionary Instructions — Error Presumed Cured: A police officer improperly testified to other crimes of defendant. The testimony was stricken, and the trial court gave three cautionary instructions admonishing the jury to disregard the testimony. The Supreme Court restated the general rule that where the trial judge withdraws or strikes improper testimony from the record with an accompanying cautionary instruction to the jury, any error committed by its introduction is presumed cured. The court also cited its discussion in St. v. Freeman, 183 M 334, 599 P2d 368 (1979), that a jury cannot be presumed to ignore its duties to respect the instructions of the court and to decide a case based only upon the evidence admitted. St. v. Brush, 228 M 247, 741 P2d 1333, 44 St. Rep. 1495 (1987), followed in St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989), and in St. v. Staat, 251 M 1, 822 P2d 643, 48 St. Rep. 1041 (1991). The general rule referred to in Brush was applied in St. v. West, 252 M 83, 826 P2d 940, 49 St. Rep. 170 (1992).

Failure to Object to Jury Instruction — No Show of Prejudice — No Reversible Error: Appellant failed to object at the time the court informed the parties that it would not give the omnibus instruction or reread the preliminary jury instructions and would instead send the preliminary instruction with the final instructions to the jury. Because of the failure to make a timely objection and failure upon appeal to show any prejudice affecting substantial rights, pursuant to 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987), there was no reversible error. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986).

Instruction on Every Issue or Theory in Evidence: A trial court judge's instructions must cover every issue or theory having support in the evidence. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985), following St. v. Buckley, 171 M 238, 557 P2d 283 (1976). See also St. v. DeMers, 234 M 273, 762 P2d 866, 45 St. Rep. 1901 (1988).

Quasi-Entrapment Theory — Refusal to Instruct Not Error: Defendant convicted of felony theft alleged on appeal that he was denied fundamental fairness by the District Court's refusal to instruct on his theory that if he did exert unauthorized control over the stolen trucks, he did so negligently rather than purposely and knowingly and therefore he was not guilty because he did not have the requisite mental state to commit the offense. The Supreme Court held that while the defendant was entitled to have instructions on his theory, he was not entitled to put his arguments in those instructions; therefore, the defendant was denied neither fundamental fairness nor the opportunity to present his theory to the jury. St. v. Short, 217 M 62, 702 P2d 979, 42 St. Rep. 1026 (1985), followed in St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992), and in St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Negligent Homicide Instruction When Deliberate Homicide Charged — Right to Instruction if any Evidence Supports Negligence: It was reversible error requiring a new trial when court in which appellant was charged with deliberate homicide and convicted of mitigated deliberate homicide refused to give a negligent homicide instruction, because there was conflicting evidence on what blows were inflicted upon victim, who died after a fight with appellant, and on the reasons for the blows and the exact cause of death. There was evidence to support a negligent homicide instruction, and it is a fundamental rule that the instructions should cover every issue or theory having support in the evidence. St. v. Sotelo, 209 M 86, 679 P2d 779, 41 St. Rep. 568 (1984).

Error to Give Instruction Not Required by Evidence: Where the defendant was charged with criminal sale of a dangerous drug and the defendant and his wife testified that the substance offered for sale was not cocaine but a prescription drug known as lidocaine, the District Court erred in giving a jury instruction that the defendant could be convicted if he believed the substance sold was a dangerous drug. There was no evidence that the defendant believed he was in fact offering cocaine for sale. As no evidence therefore existed in the record to warrant an instruction, it should not have been given by the court. St. v. Starr, 204 M 210, 664 P2d 893, 40 St. Rep. 796 (1983).

Instruction That Sentence Is Mandatory: District Court properly refused to give and avoided prejudicial error by refusing to give defendant's requested instruction that there is a mandatory 2-year sentence for each verdict of guilty of kidnapping which may not be suspended or deferred by the court. Sentencing is solely for the court, and the jury is not to consider possible punishment upon conviction. St. v. Herrera, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

Judge to Instruct Jury on Law — Testimony of Constitutional Expert Excluded: The interpretation and application of the U.S. Constitution was a question of law and not a fact in issue in a prosecution for failure to file proper state tax returns. It was a determination to be made by the trial judge within his statutory powers. Instructing the jury on the law necessary for the jury's rendering of a verdict in a criminal case is a duty within the exclusive province of the trial judge. It was proper to exclude the testimony of an expert on the U.S. Constitution. St. v. Poncelet, 187 M 528, 610 P2d 698 (1980).

Review of Instruction Later Declared Unconstitutional in Other Case — Plain Error Rule: The giving of a jury instruction, without objection by the defendant, that was subsequently declared unconstitutional in another case did not justify the use of the plain error rule when the instruction did not go to the essence of the case and was harmless beyond a reasonable doubt. St. v. Hardy, 185 M 130, 604 P2d 792 (1980).

Consideration of Instructions as a Whole:

On appeal the Supreme Court reviews jury instructions as a whole. It is impossible to deliver the whole of the law in any one instruction, and for that reason, all instructions are considered as a whole and if they fairly tender the case to the jury, the fact that one instruction standing alone is not as full or accurate as it might be is not reversible error. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979).

The trial court need not deliver repetitive instructions. Instructions to the jury must be read as a whole, and if they fairly cover the issues and tender the case to the jury, they are sufficient. St. v. Azure, 181 M 47, 591 P2d 1125 (1979), followed in St. v. Webb, 252 M 248, 828 P2d 1351, 49 St. Rep. 236 (1992), Webb was followed in St. v. Long, 274 M 228, 907 P2d 945, 52 St. Rep. 1204 (1995). See also St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994).

When jury instructions, as a whole, correctly state the law, prejudice is not created because of the refusal of a proposed instruction. St. v. Farnes, 171 M 368, 558 P2d 472 (1976).

A jury instruction that was not a complete statement of the law defining manslaughter was not reversible error as the whole of the law on a subject cannot be given in one instruction. In determining the effect of given instructions, all instructions must be considered as a whole to determine if they fairly tender the case to the jury. St. v. Caryl, 168 M 414, 543 P2d 389 (1975).

Instructions must be considered as a whole and, if they fairly tender the case to the jury, the fact that one or more of the instructions standing alone is not as full or accurate as it might have been is not reversible error. St. v. Watson, 144 M 576, 398 P2d 949 (1965).

In determining whether an instruction is erroneous, the charge as a whole must be considered. St. v. Wong Sun, 114 M 185, 133 P2d 761 (1943).

Instruction Not Offered at Trial as Improper Issue on Appeal: Where error is alleged for failure to instruct the jury on the lesser included offense of misdemeanor theft, the instruction must have been offered at the trial court level. The Supreme Court will not rule on issues not presented to the trial court. St. v. Harvey, 184 M 423, 603 P2d 661 (1979).

Objection to Instruction — Appeal: Defense counsel's failure to raise a specific objection alleged later on appeal precluded defendant from assigning error to an instruction objected to on another ground. St. v. Murphy, 174 M 307, 570 P2d 1103 (1977).

Inadequate Instructions: When the jury was inadequately instructed on the applicable law and returned inconsistent and legally unsupportable verdicts, the judgments of conviction were reversed and causes remanded for new trials. St. v. Fitzpatrick, 174 M 174, 569 P2d 383 (1977).

Withdrawal of Instruction: A court may withdraw an instruction after submission to the jury if the instruction is not a required instruction. St. v. Buckley, 171 M 238, 557 P2d 283 (1976).

Instructions Coercive to Minority Members of Jury: A jury instruction instructing jurors of their duty to render a verdict was not objectionably coercive, did not mandate a minority juror to reexamine his views, and was not an instruction to continue deliberations until a unanimous verdict was reached. St. v. Cline, 170 M 520, 555 P2d 724 (1976). See also St. v. Bieber, 2007 MT 262, 339 M 309, 170 P3d 444 (2007).

Oral Instructions by Bailiff: When the jury was confused as to whether or not to sign three of the charges the jury had voted unanimously to acquit defendant of and requested the bailiff to convey a question to the judge for clarification, the oral instructions to the jury by the bailiff to sign only one of the charges not only violated the proscription against oral jury instructions but

was patently prejudicial error as the defendant's attorney was not notified or present and had no way to protect his client from the jury's confusion. St. v. Herron, 169 M 193, 545 P2d 678 (1976).

Requirement That Instructions Be Written:

The requirement that offered instructions be in writing is mandatory to preserve the issue for appeal; and, when the defendant failed to offer an instruction in writing, the appeal was lost. St. v. Radi, 168 M 320, 542 P2d 1206 (1975).

The court held that the explanations made were not instructions on the law of the case and that, therefore, prejudicial error was not committed in making them orally. St. v. Kennedy, 82 M 165, 266 P 386 (1928).

In the absence of a waiver by the parties, it is imperative that all instructions be submitted to the jury in writing. St. v. Tudor, 47 M 185, 131 P 632 (1913).

If a charge is not in writing when delivered to the jury, or is not read to the jury as written, it is an oral charge. St. v. Fisher, 23 M 540, 59 P 919 (1900).

A statute requiring written instructions in a criminal action is mandatory, and the violation thereof is reversible error. St. v. Fisher, 23 M 540, 59 P 919 (1900).

Mere silence of the accused or his counsel is not equivalent to a consent to the giving of oral instructions. St. v. Fisher, 23 M 540, 59 P 919 (1900).

Instructions When Facts Weak: The trial court was bound to instruct the jury on manslaughter despite the fact that the court may have considered the evidence in support of manslaughter weak and inconclusive since the weight to be given the evidence was a question for the jury. St. v. Taylor, 163 M 106, 515 P2d 695 (1973).

Harmless Error — Inaccurate Instructions: Instructing the jury on assault by willfully inflicting grievous bodily harm when the defendant had been charged with assault with intent to prevent or resist his lawful detention or apprehension was harmless error because the evidence conclusively demonstrated the defendant's guilt of the offense charged. St. v. Jones, 161 M 117, 505 P2d 97 (1973).

Sufficiency of Objection:

An objection to an instruction cannot state merely that the instruction is not the law but must state specifically wherein the instruction is insufficient or what particular clause is objected to. St. v. Schleining, 146 M 1, 403 P2d 625 (1965).

When the defendant sought an appeal from his conviction for robbery on the ground that the instructions to the jury were incomplete, it was incumbent on the defendant to request more specific instructions at the time of trial and failure to do so did not furnish grounds for reversible error. St. v. Watson, 144 M 576, 398 P2d 949 (1965).

Any error in giving instructions is not available to appellants on appeal when the record shows no objections made by the appellants. St. v. Holt, 121 M 459, 194 P2d 651 (1948).

An objection to an instruction that "it is repetitious and not a correct statement of the law; it is not applicable to the facts in this case" did not comply with the predecessor section. St. v. Hay, 120 M 573, 194 P2d 232 (1948).

An objection made at the settlement of the instructions in a criminal case that a certain paragraph thereof "is not applicable to the facts of this case" is insufficient to warrant review of the alleged errors. St. v. McClain, 76 M 351, 246 P 956 (1926).

Review of Instructions: Even though the Supreme Court may not review instructions which were not given, it may examine the instructions which were given for the purpose of determining whether or not the jury was properly instructed. Failure to instruct in certain particulars cannot be assigned as error when the trial court has properly covered the issues since, in the absence of request for instructions, there is no ruling to review. St. v. Watson, 144 M 576, 398 P2d 949 (1965).

Erroneous Instruction — No Prejudice: Erroneous instructions are not cause for reversal in the absence of any prejudice. St. v. Hay, 120 M 573, 194 P2d 232 (1948).

Duty of Court to Instruct: The defendant introduced testimony tending to show that "prior to the occasion in question" his reputation for "truth and veracity" in the community in which he lived was good, and his counsel offered an instruction on the subject. This the court refused, and it did not give any instruction on that phase of the case. Whether the trial court was of the opinion that the offered instruction was not good or that the defendant was not entitled to an instruction upon the subject, the record does not disclose. Upon the evidence introduced, the defendant was entitled upon his request to the benefit of a proper instruction upon the subject. The trial court is required to instruct a jury upon all matters of law necessary for its information in rendering a verdict. St. v. Jackson, 88 M 420, 293 P 309 (1930).

Improper Oral Instructions: After retiring to the jury room to deliberate, the jury returned, asking the court whether two instructions given were conflicting. The court, in the absence of the

defendant though in the presence of his attorney, orally instructed the jury to disregard one of them and withdrew it. The Supreme Court held that withdrawing the instruction and directing the jury to disregard it was instructing the jury orally, constituting reversible error. St. v. Jackson, 88 M 420, 293 P 309 (1930).

Name of County Attorney on Instructions: Requested instructions are required to be signed merely for the purpose of identification, to be used by the court in making up its charge to the jury. It is an irregularity but not a reversible error for the court to permit the name and official title of the County Attorney to be placed on instructions requested by him and given to the jury. St. v. Martin, 29 M 273, 74 P 725 (1903).

REPETITIOUS INSTRUCTIONS

Instructions on Presumption of Innocence and Deliberation Properly Refused: The District Court properly refused defendant's instructions on presumption of innocence and deliberation because they were repetitive, conflicted with the instructions already approved by the court, and were redundant. St. v. Hess, 252 M 205, 828 P2d 382, 49 St. Rep. 217 (1992).

Repetitive Instruction on Burden of Proof Rejected — No Error: The District Court need not give repetitious instruction or instruct on every nuance of a theory of a defense. St. v. Van Haele, 207 M 162, 675 P2d 79, 40 St. Rep. 1964 (1983).

Standard Self-Defense Instruction Given — Second Instruction Tailored to Facts Improper: In aggravated assault trial, the 9th instruction fully set forth the elements of self-defense and the 10th instruction related to self-defense by one assaulted with fists, as defendant claimed he had been. The 10th instruction was repetitious and may have placed undue emphasis on the requirements for self-defense. On remand following reversal on another issue, the court recommended that the repetitious instruction not be given. St. v. White, 202 M 491, 658 P2d 1111, 40 St. Rep. 235 (1983).

Substance of Offered Instruction Already Covered — No Error: Defendant contended it was error for the District Court to refuse to give a jury instruction he offered detailing factors the jury should consider in determining the reliability of his admissions. The substance of the refused instruction was adequately covered by another instruction. The court held that where the jury is adequately instructed, no error occurs for failure to give a party's proposed instruction which is already covered. St. v. Lapp, 202 M 327, 658 P2d 400, 40 St. Rep. 120 (1983).

Refusal of Instruction on Credibility of Eyewitness Identification — Subject Already Adequately Covered: In a prosecution for theft by accountability in which the defendant's conviction was based in part upon eyewitness identification, the trial court did not err in refusing the defendant's instruction offered on the credibility of eyewitness identifications. By another instruction, the jury was properly and adequately instructed on the credibility of all witnesses, including the eyewitness. Fingerprint evidence was also sufficiently supportive of the eyewitness' testimony to amply justify the refusal of the offered instruction. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981), followed in St. v. Hall, 244 M 161, 797 P2d 183, 47 St. Rep. 1501 (1990).

Refusal of Perjury Instruction Already Adequately Covered: Where the defendant was convicted of felony murder, aggravated kidnapping, and robbery partially upon the testimony of former felons, it was not prejudicial error for the trial court to refuse the defendant's instruction relating to perjury. The Supreme Court held citing St. v. Sullivan & DePue, 182 M 66, 595 P2d 372 (1979), that refusal to give an offered instruction on a subject already adequately covered by another instruction is not prejudicial error. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Several Instructions on Same Matter: The trial judge did not err in giving five instructions to the jury which were in part repetitious on the matter of conspiracy since the number of fact situations to be covered required them and, while fewer instructions possibly would have been sufficient, they might have been difficult for the jury to understand. St. v. Schleining, 146 M 1, 403 P2d 625 (1965).

INSTRUCTIONS ON INFERENCES AND PRESUMPTIONS

No Error in Refusal to Instruct Jury That Acquittal Required if Evidence Supportive of Either Guilt or Innocence: At Misner's deliberate homicide trial, Misner cited St. v. Sheriff, 188 M 26, 610 P2d 1157 (1980), in proposing a jury instruction stating that when a jury finds two interpretations of the evidence to be equally reasonable, one of which points to the defendant's guilt and the other to innocence, the jury must accept the interpretation that points to innocence. The trial court rejected the instruction, and on appeal, Misner asserted error, but the Supreme Court affirmed. Sheriff is no longer good law on this point. The correct rule, as set out in St. v. Hill, 2005 MT 216, 328 M 253, 119 P3d 1210 (2005), is that when circumstantial evidence is

susceptible to two interpretations, one of which supports guilt and the other innocence, it is the function of the trier of fact to determine which is most reasonable. St. v. Misner, 2007 MT 235, 339 M 176, 168 P3d 679 (2007).

Failure to Give Defendant's Instruction on Testimony of Informants Not Erroneous: At a homicide trial, DuBray offered a jury instruction that would have required the jury to determine whether the testimony of each of several informants had been affected by the witness's self-interest, by any agreement with the state, by the witness's own interest in the outcome of the case, or by prejudice against DuBray, citing St. v. Grimes, 1999 MT 145, 295 M 22, 982 P2d 1037 (1999). The trial court refused that cautionary instruction and gave one offered by the state instead, consistent with St. v. Long, 274 M 228, 907 P2d 945 (1995), which adequately addressed the credibility of informants, "witness motive, bias or prejudice, and bad character for truthfulness". On appeal, DuBray contended that without his proposed instruction, the jury instructions were incomplete. The Supreme Court noted that Grimes and Long were not inconsistent and that the jury instruction that was given fully and fairly instructed the jury. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Jury Instruction Regarding False Exculpatory Statements Not to Be Given — Fabrication Instruction Improper but Not Prejudicial: During Nelson's trial on five felony charges, the trial court gave the jury an instruction allowing consideration of any showing of fabrication by Nelson as a circumstance tending to prove a consciousness of guilt, although not proof of guilt itself. Nelson argued that the instruction allowed improper comment on his credibility by interjecting argument into the court's instructions. The Supreme Court agreed. Citing the Ninth Circuit Model Jury Instruction Committee's recommendation, the court held that an instruction concerning false exculpatory statements should not be given, and expressly disapproved the use of such instructions in future trials. If evidence permits an adverse inference on statements by a defendant, counsel should be allowed to make arguments accordingly. General instructions on credibility of witnesses should suffice in most instances, obviating the need for more specific instructions. Here, in addition to the fabrication instruction, the trial court also provided a general jury instruction regarding the credibility of witnesses. The jury was free to reject Nelson's story and was entitled to accept all or part of the other key witnesses' testimony, so Nelson was not prejudiced by the giving of the fabrication instruction. St. v. Nelson, 2002 MT 122, 310 M 71, 48 P3d 739 (2002). See also St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929 (1999).

Ineffective Assistance Claims Denied — No Prejudice Shown Under Strickland Test: Applying the *Strickland* test for determining effectiveness of counsel, the Supreme Court dismissed defendant's claims that he was ineffectively represented at trial, during the penalty phase proceedings, and during the course of direct appeal, including claims based on: (1) failure to object to prosecutor's statements that defendant was intoxicated at the time of the crime, when that was in fact true, and to object to an intoxication instruction that was based on statutory language; (2) failure to object to closing arguments during which the prosecutor portrayed himself as the victim and narrated in the first person (following U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)); (3) failure to object to the lack of corroborating evidence regarding a witness's testimony when the objection lacked merit and would have been properly overruled (following St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993)); (4) failure to investigate and pursue a mental defect defense after defendant's own psychologist of choice found him capable of going to trial (see Harris v. Vasquez, 949 F2d 1497 (9th Cir. 1990)); (5) failure to move for a substitute judge when there was no reasonable probability that the outcome of the trial would have differed with another judge presiding; (6) failure to request a change of venue absent evidence of juror bias and failure to adequately voir dire the jury when there was no reasonable probability that the outcome of the trial would have differed had voir dire been conducted more thoroughly; (7) ineffectiveness in investigating a witness's background when counsel's investigation fell within the wide range of competent assistance; (8) failure to investigate defendant's suicide attempt; (9) failure to object to certain jury instructions allowing inference of the existence of the requisite mental state from the acts of the accused (following St. v. Cowan, 260 M 510, 861 P2d 884 (1993)); (10) failure to object to instructions setting out the elements of aggravated kidnapping when defendant did not specify which of the alternatives in the instruction were objectionable (following Schad v. Ariz., 501 US 624, 115 L Ed 2d 555, 111 S Ct 2491 (1991)); (11) failure to object to the absence of Native Americans on the jury when, given recent census data, counsel could not have demonstrated that Native Americans were underrepresented on the panel; and (12) failure to object to the presence of armed officers in the courtroom (following Holbrook v. Flynn, 475 US 560, 89 L Ed 2d 525, 106 S Ct 1340 (1986)). Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Reference to Name of Accomplice Unnecessary in Instruction on Accomplice Testimony: Defendant contended the jury instruction on accomplice testimony was inadequate because it did not identify by name the parties who were accomplices and whose testimony should be viewed with distrust. However, the Supreme Court found no requirement that an instruction on accomplice testimony refer by name to the accomplice, noting that whether a witness is an accomplice within the meaning of the law may be a factual question for the jury. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Evidence of Flight Instruction Proper: Defendant failed to appear on the first day of his trial, but appeared the next day with an implausible story to explain his nonappearance. An evidence of flight instruction by the trial court was therefore proper. A jury is allowed to infer a consciousness of guilt from evidence of defendant's flight either to avoid arrest or prosecution (citing St. v. Charlo, 226 M 213, 735 P2d 278, 44 St. Rep. 597 (1987)). Although mere failure to appear does not support the instruction, the failure to appear coupled with the implausible excuse does. St. v. Burk, 234 M 119, 761 P2d 825, 45 St. Rep. 1777 (1988), followed in St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), Byers was overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Prior Inconsistent Statements: No error was committed by the District Court when it refused to add to a jury instruction that stated, "Every witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, by the character of his testimony, or by evidence affecting his reputation for truth, honesty, integrity, or his motives or by contradictory evidence." the following redundant sentence: "Furthermore, this presumption may be rebutted by evidence that the witness has made, at other times, statements inconsistent with his present testimony." St. v. Sanderson, 214 M 437, 692 P2d 479, 42 St. Rep. 94 (1985).

Intent Disputed — Improper to Conclude Beyond Reasonable Doubt That Sandstrom Instruction Was Harmless Error: If intent was a disputed issue at trial, a reviewing court could not rationally conclude beyond a reasonable doubt that an unconstitutional Sandstrom instruction was harmless error and could not have tainted a jury verdict, even if the evidence of intent was overwhelming. The appropriate inquiry is whether any reasonable juror could have given the presumption raised by the instruction persuasion-shifting or conclusive effect. [Annotator's Note: See McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981), apparently holding to the contrary.] In re Hamilton, 721 F2d 1189 (9th Cir. 1983).

Instruction on Acting "Knowingly" — Inference Permitted: In deliberate homicide case, the court instructed the jury that one acts knowingly with respect to conduct or a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists and that he acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. The court also gave an instruction that if the jury found that defendant committed a homicide and that no circumstances of mitigation, excuse, or justification appeared, the jury could infer that the homicide was committed knowingly or purposely. Neither instruction had the effect of allocating to defendant some part of the State's burden of proof through use of a presumption or contained a conclusive presumption. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Sandstrom Instruction With Statement Presumption Disputable — Intent Contested: Reversal of mitigated deliberate homicide conviction was required where the court gave the following Sandstrom instruction: "The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him. This presumption, however, is termed a disputable presumption and may be controverted by other evidence." The error was not harmless. The instruction obviously permitted the jury to presume intent without proof beyond a reasonable doubt. Intent was hotly contested and an important element of the crime charged, and because of the instruction the jury could disregard the defendant's claim that he intended only to fire a warning shot. Then, with the presumption of intent, the jury could have concluded that defendant used deadly force to intentionally kill the victim. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982).

Jury Instruction With Permissive Inference Proper: The defendant was charged with burglary after kicking in the door of a bar at 3:00 a.m. The trial court instructed the jury ". . . if you find that the defendant was unlawfully in the Wagon Wheel Bar in the nighttime you may or may not infer, as you find the evidence to be, that he was there for the purpose of committing a theft." Because the instruction was clearly worded as a permissive inference, it was proper. St. v. Welling, 199 M 135, 647 P2d 852, 39 St. Rep. 1215 (1982).

"May Infer" Rather Than "Must Presume" Not a Sandstrom Instruction: A jury instruction that uses "may infer" rather than the "Sandstrom-like" language of "must presume" is not mandatory and does not shift the burden of proof to the defendant. St. v. Goltz, 197 M 361, 642 P2d 1079, 39 St. Rep. 613 (1982), followed in St. v. Charlo, 226 M 213, 735 P2d 278, 44 St. Rep. 597 (1987).

Sandstrom Instruction — Nonmandatory Charge Not Shifting Burden: In defendant's trial on the charge of robbery, the jury was instructed substantially as follows: "in order to constitute the offense charged, it is necessary to prove the alleged intent. Intent need not be proved by direct and positive testimony but may be inferred from the evidence if there are any facts proved that satisfy the jury of its existence. The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him. This latter presumption is a disputable presumption and may be controverted by other evidence." The court found that this instruction could not be interpreted by any juror to be mandatory in nature and did not shift the burden of going forward with the evidence or the burden of persuasion. Spurlock v. Risley, 520 F. Supp. 135, 38 St. Rep. 1339 (D.C. Mont. 1981).

Sandstrom Instruction Allowing Permissive Inference — Not Conclusive Presumption: A "Sandstrom-type" instruction was given at petitioner's trial, which resulted in his conviction on seven counts of armed robbery and one count of assault. No objection to the instruction was made at the trial, but the Supreme Court reviewed the instruction under the "plain error" rule. Petitioner contended that the instruction either shifts the burden of proof on the issue of intent from the State to the defendant or constitutes a presumption against the defendant, either of which is constitutionally impermissible under Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979). The instruction given was a permissive inference and not a conclusive presumption. The questioned instruction was not a "naked" presumption as in Sandstrom; the instructions as a whole made it abundantly clear that the State bears the burden of proving beyond a reasonable doubt every essential element of the crimes of which defendant was charged. The court found that the error, if any, was harmless. Parker v. Crist, 190 M 376, 621 P2d 484, 37 St. Rep. 2048 (1980).

Sandstrom Instruction — Not Harmless: Martinez was charged with theft of a stereo owned by Polotto. Polotto told the police that he had not given anyone permission to take his stereo. On cross-examination Polotto testified that he ratified the taking after he found out that the stereo was being sold to raise his bail money. There was also testimony that Martinez was selling the stereo for money to get out of town. The jury was given the Sandstrom instruction. The element of intent was one of the principal issues at trial and there was no overwhelming evidence of Martinez's intent. As a result, the use of the instruction cannot be considered harmless. Conviction was reversed and a new trial ordered. St. v. Martinez, 188 M 271, 613 P2d 974 (1980).

Sandstrom Instruction — Not Unconstitutional: An instruction, permissive in character, that the jury may infer that a "person ordinarily intends the natural and probable consequences of acts knowingly done, knowingly omitted, purposely done, or purposely omitted" from which it appears that the connection between the inference that the jury is permitted to draw and the proven facts upon which the inference must be based is both reasonable and logical is not unconstitutional under Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979), since the instruction does not invade the factfinding duty of the jury or allocate the burden of proof between the defendant and the state. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

"Sandstrom" Instruction as Not Violating Federal "Plain Error" Rule: The use of the instruction "the law presumes that a person intends the ordinary consequences of his voluntary act", which was declared invalid in Sandstrom v. U.S., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979), did not violate the federal "plain error" rule since it was not highly probable that the error materially affected the verdict. The instructions given made it clear that the State was obligated to prove every material fact beyond a reasonable doubt. Also, the instruction had little relevance in this case since the defendant denied that he had voluntarily fired a rifle at the victim. United States ex rel. Collins v. Crist, 473 F. Supp. 1354 (D.C. Mont. 1979).

"Sandstrom" Instruction — Presumption of Intent: The jury in a deliberate homicide case was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts". The U.S. Supreme Court determined that this instruction denied a defendant the constitutional right to a jury determination of proof beyond a reasonable doubt of all elements of the offense. The case was remanded to the Montana Supreme Court to determine if the instruction constituted harmless error. To find harmless error, the Supreme Court must be able to assert that the offensive instruction could not reasonably have contributed to the jury verdict. The court cannot make this assertion. The case is remanded to the District Court for retrial. St. v. Sandstrom, 184 M 391, 603 P2d 244 (1979).

LESSER INCLUDED OFFENSE INSTRUCTIONS

No Prejudice Arising From Lesser Included Offense Instruction — Reversal Unwarranted: Potter was charged with aggravated assault. At trial, the District Court included two lesser included offense instructions for attempted aggravated assault and assault, and Potter objected to including the attempted aggravated assault instruction. The jury returned a guilty verdict on the aggravated assault charge. On appeal, Potter contended that the court erred by instructing the jury on attempted aggravated assault because attempted aggravated assault is not a lesser included offense of aggravated assault. However, the jury never reached the question of whether Potter committed the lesser offense, so Potter was not prejudiced by inclusion of the attempted aggravated assault instruction. Absent prejudice, the Supreme Court declined to reverse the conviction. St. v. Potter, 2008 MT 381, 347 M 38, 197 P3d 471 (2008).

Misdemeanor Assault Not Lesser Included Offense of Sexual Assault — Denial of Lesser Included Offense Instruction Not Error: In a sexual assault trial, Cameron requested a jury instruction that misdemeanor assault was a lesser included offense of sexual assault. The request was denied. On appeal, Cameron raised several arguments regarding the lesser included offense and claimed error in denial of the instruction. The Supreme Court noted that under St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705 (1998), two criteria must be met before a defendant is entitled to a lesser offense instruction: (1) the offense must actually constitute a lesser included offense of the offense charged; and (2) there must be sufficient evidence to support the lesser included offense instruction. The court examined the elements of both offenses and concluded that the elements of misdemeanor assault and sexual assault are not similar and do not overlap. Thus, misdemeanor assault is not a lesser included offense of sexual assault. The jury was therefore properly instructed, and the sexual assault conviction was affirmed. St. v. Cameron, 2005 MT 32, 326 M 51, 106 P3d 1189 (2005), followed in St. v. Gerstner, 2009 MT 303, 353 M 86, 219 P3d 866 (2009).

Improper Jury Instructions — Mitigated Deliberate Homicide Verdict Without First Finding Guilt of Deliberate Homicide — Reversible Error: Demontiney was charged with deliberate homicide. On the first morning of trial, counsel exchanged jury instructions, and neither party's instructions included mitigated deliberate homicide. Following 3 days of testimony, the state proposed an instruction on mitigated deliberate homicide, arguing that evidence introduced at trial obligated the state to offer the instruction. The trial court agreed and stated that the jury would be instructed on mitigated deliberate homicide. Consistent with St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202 (2000), the state prepared instructions and a verdict form incorporating the "failure to agree" concept, directing the jury to consider all evidence relating to both the greater and lesser charges before considering the verdict on the greater charge. Nevertheless, the trial court's instructions and verdict form did not match those offered by either party. Rather, the trial court instructed the jury that it should first consider the deliberate homicide charge, and if it reached a not guilty verdict or was unable to reach a verdict on that charge, it was then to consider the mitigated deliberate homicide charge. The jury found Demontiney not guilty of deliberate homicide, but guilty of mitigated deliberate homicide. The Supreme Court found that the jury instructions were not a full and fair instruction on the applicable law. The District Court was bound by Scarborough, whether the court agreed with that decision or not. A finding of guilt on mitigated deliberate homicide requires a finding of every element of deliberate homicide, plus an additional finding of extreme mental or emotional stress. Thus, the jury's verdict was logically impossible, prejudicing Demontiney, and the jury instructions constituted reversible error. The verdict was vacated, and Demontiney was immediately discharged. (See 2003 amendment to 45-5-103.) Demontiney v. District Court, 2002 MT 161, 310 M 406, 51 P3d 476 (2002).

Ineffective Assistance of Counsel in Failure to Offer "Failure to Agree" Instruction — Prejudice Warranting Remand for New Trial: At Rogers' trial for attempted sexual intercourse without consent and felony assault, the District Court provided jury instructions with misdemeanor sexual assault and misdemeanor assault as lesser included offenses. Rogers' attorney requested the "acquittal first" instruction, which provided that the jury was not to consider the lesser included offenses unless they first acquitted on the greater offenses. Rogers contended that the failure of the attorney to request the "failure to agree" instruction allowed under 46-16-607, which provides that the jury may consider a lesser included offense if it is unable to reach a verdict on the greater offense, constituted ineffective assistance of counsel. The Supreme Court agreed. The "failure to agree" instruction was drafted to protect against the serious risk identified in U.S. v. Jackson, 726 F2d 1466 (9th Cir. 1984), which arises when jurors harboring a doubt as to defendant's guilt of the greater offense, but at the same time convinced that defendant had committed some offense, might wrongly yield to the majority and convict of the

greater offense rather than not convict at all. The failure to offer this potentially beneficial instruction, when that failure is not part of counsel's trial strategy, is an error so serious that it falls outside the range of competence required of attorneys in criminal cases. Thus, when sufficient facts exist to support a conviction for a lesser included offense, defense counsel must offer the "failure to agree" instruction unless there is a tactical reason for not doing so, and failure to offer the instruction in such cases is prejudicial error. St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Failure to Offer Alternative Jury Instruction on Aggravated Assault When Defendant Maintains Innocence on All Charges Not Considered Ineffective Assistance of Counsel: Despite a daunting evidentiary record of Aliff's commission of a rape and attempted murder, he maintained his innocence and claimed that he was home with his wife while the victim was fighting for her life. Aliff contended on appeal that he received ineffective assistance of counsel because no alternative jury instruction was offered regarding the offense of aggravated assault. However, Aliff never claimed that he intended only to assault the victim, but rather that he did not commit the crimes for which he was charged or any other offense in connection with the incident. Counsel did not provide inadequate assistance by failing to offer an instruction that was inconsistent with the defense. The instructions that were actually offered were based on trial strategy and did not stem from neglect or ignorance. Counsel's performance was not deficient in any way, and judgment was affirmed. St. v. Aliff, 2001 MT 52, 304 M 310, 21 P3d 624 (2001).

Gopher Rule Relates to Instructions on Lesser Included Offenses, Not Alternative Offenses: Beavers was charged with criminal endangerment, but maintained that he was entitled to a jury instruction on reckless driving as an alternative theory under the rule in St. v. Gopher, 194 M 227, 633 P2d 1195, 38 St. Rep. 1521 (1981), that a defendant is entitled to an instruction to cover every issue or theory having support in the evidence. However, Gopher applies only to instructions on lesser included offenses, not alternative offenses. The rule of law applied to alternative offenses is that of prosecutorial discretion. When the facts support a possible charge of more than one crime, the crime charged is a matter of prosecutorial discretion. (See St. v. Booke, 178 M 225, 583 P2d 405 (1978).) Beavers was properly disallowed arguing an alternative offense theory that involved an offense that was not a lesser included offense of the offense charged. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999).

Lesser Included Offense Must Constitute Included Offense of Crime Charged: A criminal defendant is entitled to jury instructions that cover every issue or theory having support in the evidence, including an instruction on a lesser included offense when one of the parties requests it and when the record contains evidence from which the jury could rationally find defendant guilty of the lesser included offense and acquit of the greater. However, in order for the District Court to instruct the jury on a lesser included offense, the offense must actually constitute an included offense of the crime charged. To make the determination, the Supreme Court will apply the test in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), and consider the statutory definitions of the offenses involved, in light of the definitions in 46-1-202. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999).

Reckless Driving Not Lesser Included Offense of Criminal Endangerment: Reckless driving is a distinct offense and not an included offense of criminal endangerment. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999), following Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932).

Assault Lesser Included Offense of Deliberate Homicide — Error to Refuse Instruction on Lesser Included Offense: The defendant was convicted of deliberate homicide. At trial, the court refused the defendant's proposed jury instruction on the offense of assault. The Supreme Court determined that as a matter of law, under the express terms of 46-1-202, assault is an included offense of the crime of deliberate homicide. When there was some evidence supporting a defendant's theory that the defendant was guilty of assault but not murder, the District Court erred in refusing the proposed jury instruction on assault as a lesser included offense of deliberate homicide. St. v. Castle, 285 M 363, 948 P2d 688, 54 St. Rep. 1194 (1997).

Failure to Request Not Ineffective Assistance of Counsel — Tactical Decision Supported by Defendant: The District Court properly denied a petition for postconviction relief based on claimed ineffective assistance of counsel in that counsel did not request an instruction that misdemeanor sexual assault was a lesser included offense of the charged offense of sexual intercourse without consent. Counsel's decision to not offer the instruction was a tactical one based on all the facts and on defendant's strident proclamations of innocence. Counsel stated that he believed that he had put on a strong defense and that he and defendant decided to force the jury to either convict or acquit on the charged offense. The courts will not second guess the

tactical and strategic decisions of counsel. St. v. Sheppard, 270 M 122, 890 P2d 754, 52 St. Rep. 106 (1995).

Failure to State Specific Grounds for Objection to Instruction on Lesser Included Offense as Waiver of Appeal: At the settlement conference for jury instructions, the state proposed a series of instructions that sought to include sexual assault as a lesser included offense of sexual intercourse without consent. Defense counsel objected to the giving of the instruction but did not state specific reasons for the objection. The absence of a proper objection constituted waiver of the objection for appeal purposes, and thus the lesser included offense issue was not preserved for appeal. St. v. Ogle, 255 M 246, 841 P2d 1133, 49 St. Rep. 932 (1992).

Sua Sponte Instruction on Lesser Included Offense Not Required by Law or Due Process: Defendant contended that the District Court erred in not giving an instruction of its own accord on the lesser offense of misdemeanor sexual assault following his trial for felony sexual intercourse without consent when a request for the instruction was never made by the defense. Although a defendant has a right to a lesser included offense jury instruction if requested, mandatory instruction on lesser offenses on the judge's own accord is inconsistent with Montana law and the public policy of allowing trial counsel to conduct the case according to strategy and could result in unfair surprise to both the defense and the prosecution. Moreover, a District Court's failure to instruct the jury sua sponte on a lesser included offense does not constitute deprivation of a defendant's right to due process. St. v. Sheppard, 253 M 118, 832 P2d 370, 49 St. Rep. 382 (1992), followed in St. v. Howell, 254 M 438, 839 P2d 87, 49 St. Rep. 759 (1992), St. v. Leyba, 276 M 45, 915 P2d 794, 53 St. Rep. 7 (1996), and St. v. Gunderson, 282 M 183, 936 P2d 804, 54 St. Rep. 283 (1997).

Giving of "Acquittal First" Versus "Failure to Agree" Instruction: The defendant contended that if a defendant requests a "failure to agree" instruction, giving an "acquittal first" instruction is error. The Supreme Court adopted the view held by other jurisdictions that under the "failure to agree" instruction, the jury could convict a defendant of the lesser included offense without actually finding the defendant not guilty of the greater offense. In such a case, regardless of the jury's actual findings regarding the greater offense, the defendant would be found not guilty of its commission and a retrial on the greater offense would be barred under settled double jeopardy principles. St. v. Van Dyken, 242 M 415, 791 P2d 1350, 47 St. Rep. 835 (1990).

No Evidence in Record to Warrant Jury Instruction on Mitigating Circumstances: Defendant contended District Court erred in refusing to give jury instructions on the lesser offense of mitigated deliberate homicide. On appeal, the Supreme Court found no error in refusing to instruct for two reasons: (1) the only potentially mitigating circumstance presented at trial concerned defendant's use of alcohol on the night in question; however, in St. v. White, 194 M 421, 632 P2d 1118, 38 St. Rep. 1417 (1981), the court held that voluntary intoxication alone was insufficient to show the extreme mental or emotional stress which would mitigate deliberate homicide charges; and (2) since defendant's main defense at trial was alibi, he was entitled either to an acquittal or to be found guilty, and if the jury believed his testimony, it would have been inconsistent with finding defendant guilty of mitigated deliberate homicide. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Aggravated Assault — Assault and Resisting Arrest Co-Equal Lesser Included Offenses Under the Facts: When a Department of Highways (now Department of Transportation) enforcement officer stopped a truck to weigh it, the passenger unloaded it against officer's orders, threatened the officer with a chain binder, and drove away after being told he was under arrest. In light of these facts, it was not reversible error to instruct the jury that if the defendant was not found guilty of aggravated assault he could be found guilty of the lesser offense of assault, instead of instructing the jury that he could be found guilty of the lesser included offense of resisting arrest. The instruction amply covered defendant's version of the event as well as the instruction he requested would have done. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985).

Unsworn Falsification to Authorities — Not Lesser Included Offense of Criminal Mischief by Destroying Property to Defraud Insurer: In trial for criminal mischief for knowingly or purposely damaging or destroying property with the intent to defraud an insurer, it was not error to refuse to give defendant's requested instruction on the alleged lesser included offense of unsworn falsification to authorities. The elements of the two offenses were separate and distinct and had little in common, and the elements of unsworn falsification to authorities do not have to be proved to establish criminal mischief. St. v. Gray, 207 M 261, 673 P2d 1262, 40 St. Rep. 2023 (1983).

Value of Stolen Property at Issue — Error in Refusal of Instruction on Lesser Included Offense: Where the defendant had been charged with the felony theft of a guitar alleged to have a value of

more than $150, the District Court erred in refusing an instruction requiring the jury to convict the defendant of the lesser included offense of misdemeanor theft if they found the value of the guitar to be less than $150 (raised to $300 by 1983 amendment). Under the rationale of St. v. Taylor, 163 M 106, 515 P2d 695 (1973), the instruction should have been given because the weight of the evidence of value of the guitar was a question for the jury. St. v. Young, 206 M 19, 669 P2d 239, 40 St. Rep. 1474 (1983).

Failure to Instruct on Lesser Included Offense — Record to Contain Evidence of Lesser Included Offense: After a trial on a charge of deliberate homicide during which no evidence had been presented regarding the nature or extent of defendant's mental condition, the District Court refused defendant's request for an instruction to the jury on the charge of mitigated deliberate homicide. The Supreme Court affirmed, ruling that while defendant was correct in his theory that if any evidence exists in the record which would permit the jury to find a defendant guilty of a lesser included offense and acquit him of a greater offense, then he is entitled to instruction on the lesser included offense; however, in this case, defendant's theory was not supported by the factual record. St. v. Norgaard, 201 M 165, 653 P2d 483, 39 St. Rep. 2028 (1982).

Failure to Instruct on Lesser Included Offense — Review in Federal Habeas Corpus Proceeding: Failure of the trial court to instruct the jury on the lesser included offenses of mitigated and negligent homicide does not present a federal question cognizable in a federal habeas corpus proceeding. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Resisting Arrest — Lesser Included Offense of Aggravated Assault: It was reversible error to refuse an instruction that resisting arrest was a lesser included offense of aggravated assault (of a peace officer), since the facts satisfied the necessary elements of both offenses. St. v. Gopher, 194 M 227, 633 P2d 1195, 38 St. Rep. 1521 (1981).

Lesser Included Offenses — Test for Instructions:

Defendant, convicted of burglary and theft, alleged error in the failure to instruct the jury on the lesser included offense of criminal trespass. The Supreme Court noted the fundamental rule that the defendant is entitled to an instruction on a lesser included offense if the evidence would enable the jury rationally to find him guilty of a lesser offense and to acquit him of the greater. However, if the evidence is such to show that the defendant is either guilty of the offense charged or entitled to an acquittal, the District Court does not err by refusing to instruct as to the lesser included offense. Once the determination was made that the mobile home was an occupied structure within the meaning of the statute, the evidence was not in dispute and the defendant was either guilty of burglary or entitled to an acquittal. Therefore, the judge acted correctly in not giving the instruction on the lesser included offense. St. v. Kyle, 189 M 38, 614 P2d 1059 (1980), followed in St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Assuming arguendo that negligent homicide is a lesser included offense of deliberate homicide, the court considered whether or not an instruction on negligent homicide should have been given at trial. The rule is that an instruction on a lesser included offense is required where there is some evidence to support the lesser included offense; that is, any evidence which would permit the jury rationally to find him guilty of a lesser offense and acquit him of a greater. The court agreed with the trial court that, considering that death by manual strangulation takes 2 to 3 minutes (or longer if the victim struggles), it was inconceivable how the death could have occurred as a result of negligence. Therefore, the instruction was properly refused. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Restricting Consideration of Lesser Offense: While under former law the offense of kidnapping included the minor offenses of false imprisonment and assault in the third degree, the trial court did not need to so formulate the charge that the jury could find the defendant guilty of a lower offense or of an included offense when the evidence was such as to show that the defendant was guilty of the offense charged or was entitled to an acquittal. St. v. McDonald, 51 M 1, 149 P 279 (1915).

Manslaughter Included in Murder: When under former law there was evidence tending to show that the defendant was guilty of murder in the first degree, murder in the second degree, and manslaughter, it was the duty of the trial court to instruct that a verdict for manslaughter could be returned since manslaughter was not a degree of murder. St. v. Shadwell, 26 M 52, 66 P 508 (1901).

INSTRUCTIONS ON ELEMENTS OF OFFENSE

Charge of Single Criminal Act — No Unanimity Instruction Required Absent Possibility of Jury Confusion: In Vernes' attempted deliberate homicide and attempted deliberate homicide by accountability trial, Vernes asserted that a unanimity instruction should have been given to the jury to prevent a conviction occurring as a result of different jurors concluding that Vernes

committed different unlawful acts when a single count alleged more than one unlawful act, so that the jury would be required to agree unanimously on specific facts that constituted the elements of each offense. The trial court declined to give a unanimity instruction, and Vernes appealed, but the Supreme Court affirmed. In St. v. Weaver, 1998 MT 167, 290 M 58, 964 P2d 713 (1998), the Supreme Court held that a specific unanimity instruction to the jury was required when different criminal acts were charged in one count. Although different jurors may generally be persuaded by different pieces of evidence, even when they agree on the bottom line, in this case, the state did not charge Vernes in the alternative, but rather brought two charges stemming from a single attack. Thus, jurors were free to determine that different pieces of evidence supported proof of a material step taken by Vernes to carry out the attacks, as long as the jurors unanimously agreed on the same set of facts, so a unanimity instruction was not required. St. v. Vernes, 2006 MT 32, 331 M 129, 130 P3d 169 (2006), followed in St. v. Russell, 2008 MT 417, 347 M 301, 198 P3d 271 (2008).

No Error in Denying and Modifying Jury Instructions on Elements of Theft by Deception: Field contended that the District Court erroneously modified one jury instruction and denied two of Field's requested instructions. The Supreme Court found no error. The amended instruction was covered in another instruction, and Field's proposed instructions regarding agency and the fungibility of money were unrelated to the charge of theft by deception, common scheme. The Supreme Court affirmed. St. v. Field, 2005 MT 181, 328 M 26, 116 P3d 813 (2005).

Burden of Proof — General Jury Instructions on Entrapment: Citing U.S. v. Mkhsian, 5 F3d 1306 (9th Cir. 1993), the Supreme Court emphasized that once evidence of inducement is shown by the defendant, it is the government's burden to prove that the defendant was predisposed to violate the law before the government intervened. The court cautioned against an entrapment instruction containing the phrase "where a person already has the readiness and willingness to engage in a crime, the mere fact that law enforcement officers or their agents provided what appears to be a favorable opportunity is not entrapment". St. v. Brandon, 264 M 231, 870 P2d 734, 51 St. Rep. 244 (1994).

Alleged Error in Instruction Given at Defendant's Request: The Supreme Court would not consider an alleged error in an instruction that was given at defendant's request. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992).

Error to Refuse Instruction That One Cannot Conspire Solely With Government Agent: It is legally impossible for a person to conspire with an undercover government agent to commit a crime. There must be at least two nonagents conspiring between themselves and involved with the agent. It was error to refuse defendant's instruction to that effect. St. v. Shaw, 255 M 298, 843 P2d 316, 49 St. Rep. 1012 (1992).

Instructions on Required Proof of Lack of Consent — Statement of Law: In instructing the jury on the definition of "lack of consent", the District Court included language from 45-5-501, which defines "without consent", and general language from 45-5-511, which includes language applicable to sexual crimes. Defendant contended that the use of the general language improperly diluted the state's burden of proof. However, consistent with St. v. Thompson, 243 M 28, 792 P2d 1103 (1990), the element of force required to find a conviction was properly stated. Because the instruction was a direct statement of law and was consistent with prior case law, defendant was not prejudiced. St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991).

Specific Intent as Element of Crime: A defendant charged with deliberate homicide wanted a jury instruction stating that to be convicted, the jury had to find that he acted with the intent to cause death. The Supreme Court held that unless required by statutory language, it is not necessary to prove specific intent as part of the crime. St. v. Van Dyken, 242 M 415, 791 P2d 1350, 47 St. Rep. 835 (1990).

Jury Instruction Concerning Elements of Felony Assault (Now Assault With a Weapon) Not Required: In conviction for felony assault (now assault with a weapon) the fact that victim is age 14 or younger and defendant is 18 or older is not an element of the crime but relates to sentencing only, determination of which is the exclusive province of the judge. No jury instruction distinguishing felony assault (now assault with a weapon) and misdemeanor assault is required. St. v. Probert, 221 M 476, 719 P2d 783, 43 St. Rep. 988 (1986).

Intent to Cause Death Instruction: Defendant was convicted of deliberate homicide. On appeal he contended an instruction that said the State must prove defendant "purposely or knowingly performed the act or acts causing the death of Floyd Azure" allowed the jury to convict him if it found he intended to perform the act which caused death rather than intending death as the result of the act. The court held that although the requisite mental state attaches to the result in deliberate homicide cases, the instructions taken as a whole were proper and fairly and accurately presented the case to the jury. The jury could not have convicted defendant unless it

found he had performed the act or acts causing Azure's death with the knowledge that he was causing or with the purpose to cause Azure's death. St. v. Weinberger, 204 M 278, 665 P2d 202, 40 St. Rep. 844 (1983), distinguished in In re R.L.S., 1999 MT 34, 293 M 288, 977 P2d 967, 56 St. Rep. 149 (1999).

Failure to Instruct on Elements of Crime — Plain Error: The jury was not instructed on the statutory elements of the crime. The jury's instructions on the defendant's civil remedy, an agister's lien, permitted the inference from his failure to pursue the civil remedy that he was guilty of theft. In granting a new trial, the Supreme Court noted that the issue of jury instructions not offered or objected to at trial, usually a nonappealable issue, was reviewed here to determine if the jury was properly instructed. The failure to instruct on the elements of the crime constituted "plain error". Instructing the jury that each element of the crime had to be proved was insufficient if the elements were not given to the jury as well. St. v. Lundblade, 191 M 526, 625 P2d 545, 38 St. Rep. 441 (1981).

Sufficiency of Instruction as to Offense Charged: The court did not err by not instructing the jury that the items alleged to be false in a prosecution for obtaining money by false pretenses and falsification of evidence were petitions for workers' compensation settlements filed by the defendant. The jury was adequately apprised of the nature and subject of the charges against the defendant. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Instructions as Law of the Case: An instruction stating that in order to convict the defendant of obtaining money or property by false pretenses, the prosecution must prove that the accused received property became the "law of the case". Although the State argued that such proof was unnecessary, a failure to prove that element was a ground for reversal of the conviction. St. v. Cline, 170 M 520, 555 P2d 724 (1976).

INSTRUCTIONS ON DEFENSES

Jury Instruction Denying Intoxication Defense When Defendant Claims Justifiable Use of Force — No Error: Contesting a jury instruction based on 45-2-203 that intoxication was not a defense, McCaslin contended that it was fundamentally unfair for the state to introduce evidence of McCaslin's intoxicated condition to illustrate that McCaslin was too intoxicated to act reasonably in self-defense, rebutting McCaslin's justifiable use of force defense, while on the other hand prohibiting McCaslin from using the inebriated condition as a defense or for determining intent. However, the jury was instructed on: (1) the elements of each offense and the state's burden of proving each element beyond a reasonable doubt; (2) the definitions of purposely and knowingly; (3) the ability to infer the existence of a mental state from the acts of an accused and from the facts and circumstances connected with an offense; (4) the difference between direct and circumstantial evidence; (5) witness credibility; and (6) the need for a unanimous verdict. As a whole, the jury instructions did not prejudicially affect McCaslin's substantial rights, and the District Court did not abuse its discretion in giving the contested jury instruction. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004). See also St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004).

Defendant Entitled to Jury Instruction on Defense Theory but Not Stating Arguments of Defense: Bowman asserted District Court error in disallowing a jury instruction that purportedly gave Bowman's theory of his defense. However, Bowman's proposed instruction was a statement of Bowman's version of the facts, not law. A defendant is not entitled to an instruction detailing every nuance of the defense argument or to put defense arguments in jury instructions. Bowman's proposed instruction was properly disallowed. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

Failure to Give Unsupported Accountability Jury Instruction Proper: Hall contended that the District Court erred in refusing to give an accountability instruction in Hall's trial for theft because certain evidence at the crime scene implicated that a witness was an accomplice in the crime, so the jury should have been instructed that the witness's testimony should be viewed with distrust. The Supreme Court disagreed. In this case, the accomplice instruction was inconsistent with Hall's theory of complete innocence, and the witness's testimony established no element of accountability. It is not proper to give an accountability instruction when it is not supported by the evidence and is inconsistent with a defendant's claim of innocence. St. v. Hall, 2003 MT 253, 317 M 356, 77 P3d 239 (2003).

Voluntary Intoxication Instruction Not Prejudicial: Following Strauss's negligent homicide trial, the trial court instructed the jury about the scope of an intoxicated person's responsibilities, noting that voluntary intoxication is not a defense to a crime. Strauss asserted that the instruction was given in error and was confusing and prejudicial because Strauss had not claimed intoxication as a defense. The Supreme Court disagreed. Strauss did not raise a

valid state constitutional challenge to the instruction, and the argument that the instruction was confusing was mere conjecture. A District Court has broad discretion when instructing a jury, and reversible error occurs only if the instructions prejudicially affect a defendant's substantial rights. Strauss established no prejudice, and the trial court did not err in giving the voluntary intoxication instruction. St. v. Strauss, 2003 MT 195, 317 M 1, 74 P3d 1052 (2003), followed in St. v. Gray, 2004 MT 347, 324 M 334, 102 P3d 1255 (2004). See also St. v. McLaughlin, 2009 MT 211, 351 M 282, 210 P3d 694 (2009), citing Strauss for the holding that a defendant does not necessarily have to raise intoxication as a defense in order for the intoxication instruction to be appropriate.

Adequate Instructions on Use of Force: Claric contended that the trial court erred in giving jury instructions on his defense of justifiable use of force. A defendant is not entitled to have the jury instructed on every nuance of the defendant's theory of the case. The court adequately instructed the jury that Claric was free to act upon his perceptions, if reasonable, even if mistaken, using the instruction previously approved in St. v. Stone, 266 M 345, 880 P2d 1296 (1994). Claric's proposed instruction regarding the defense was repetitious and thus unnecessary. Further, Claric's assertion of court error in not giving an instruction on the reasonable apprehension of harm when the assailant is larger and stronger was misplaced, given the presence of both parties in the court and the jury's ability to observe them, along with Claric's opportunity to argue the issue in closing. St. v. Claric, 271 M 141, 894 P2d 946, 52 St. Rep. 377 (1995). See also St. v. Hess, 252 M 205, 828 P2d 382 (1992), and St. v. Webb, 252 M 248, 828 P2d 1351 (1992).

Instruction on Proper Burden of Proof for Self-Defense as Cure for Misstatement During Voir Dire: Arlington contended that the prosecutor's misstatement of the law in voir dire as to the burden of proof for self-defense constituted prosecutorial misconduct. Citing St. v. West, 252 M 83, 826 P2d 940 (1992), the Supreme Court noted that any error by the prosecution had been cured by the District Court's admonishment of the jury and a reading of the applicable jury instruction giving correct information on the burden of proof for self-defense. St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Proposed Instruction Covered by Given Instruction: The defendant argued that the lower court erred in not giving the defendant's proposed instruction concerning the burden of proof in a burglary case. The Supreme Court ruled that it was not error to refuse to give the instruction because other instructions given by the court adequately covered the rejected instruction's legal theory. St. v. Floyd, 243 M 269, 790 P2d 475, 47 St. Rep. 720 (1990).

Instruction on Justifiable Use of Force Not Requested but Given — Supporting Evidence — No Error: Neither party requested an instruction on justifiable use of force or self-defense, but the District Court decided to give one. Defendant claimed the instruction lacked evidentiary support and confused the jury with conflicting theories of negligent homicide and self-defense. The Supreme Court found that defendant's testimony describing the victim's statements and his own actions could have led the jury to conclude defendant was not the aggressor. Because the theory was supported in the evidence, giving of the instruction was not error. St. v. DeMers, 234 M 273, 762 P2d 866, 45 St. Rep 1901 (1988).

Self-Defense — Judge's Refusal to Give Instruction Without Testimony of Defendant — Not Contrary to Right Against Self-Incrimination: Defendant raised the affirmative defense of self-defense in his trial for homicide. There were no witnesses to the killing other than the defendant. The defendant argued that he could introduce evidence tending to show the decedent was the aggressor by showing his reputation and specific acts of turbulence or violence. It was not error for the District Court to require the defendant to testify as to his own fear or apprehension, based upon the deceased's reputation, to lay a foundation for other witnesses to testify as to the deceased's violence or risk being denied an instruction on self-defense. Neither at that point nor during the trial did defense counsel object to the ruling or assert his client could not be compelled to testify against himself, and it was never asserted, even at appellate argument, that defendant would not have testified except for that ruling. St. v. Kutnyak, 211 M 155, 685 P2d 901, 41 St. Rep. 1277 (1984).

Jury Instructions on Self-Defense — Review in Federal Habeas Corpus Proceeding: Jury instructions given in a state court trial involve questions of state law. It is only where the instructions rendered the trial fundamentally unfair that a federal question cognizable in a habeas corpus proceeding is presented. Where jury instructions on self-defense contained several phrases that could be read as a misstatement of the law, but when read in their entirety clearly informed the jury, no error of constitutional magnitude was committed. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Incorrect Self-Defense Instruction — Error Not Prejudicial: Although a jury instruction to the effect that absence of justifiable use of force is an element of the crime of deliberate homicide to be proved by the prosecutor is erroneous and the more correct statement of law, which should have been phrased in the jury instruction, is that justification for use of force is an affirmative defense that requires the defendant to produce sufficient evidence before justification for use of force is placed in issue, the District Court did not commit prejudicial error in giving the erroneous instruction since, viewing the instruction as a part of the whole body of instruction, the defendant was not limited from fairly presenting his theory of defense. Nor was omission of defendant's proposed instruction prejudicial error since defendant's instruction was merely repetitive. St. v. Graves, 191 M 81, 622 P2d 203, 38 St. Rep. 9 (1981). (J. Sheehy, specially concurring, sets out the elements, which would be contained in a jury instruction, to be considered by a jury in determining whether the use of force is justified. Additional instructions regarding justification in use of force are suggested.)

"Mere Presence at Scene" Instruction Not Required:

In appealing his conviction for robbery, the defendant claimed that he had been entitled to a jury instruction that "mere presence at or about the scene where a crime is committed does not make one a party to a crime" because his defense involved an admission of being at the scene of the crime but of not being involved except after the fact. The reviewing court concluded that the defendant had not been prejudiced by the trial court's refusal to give this instruction, noting that no authority was cited for this instruction, that the jury instruction fairly covered the issues raised, and that the charge of robbery as well as the jury instructions required the jury to find more than mere presence at the scene of the robbery. Thus, the jury was fully aware, even without the instruction, that mere presence at the scene of a crime was not sufficient to prove criminal involvement. The jury believed that the defendant committed the crime by holding the knife to the store clerk's throat, and the evidence was clearly sufficient to sustain this belief. St. v. Dahl, 190 M 207, 620 P2d 361, 37 St. Rep. 1852 (1980).

The trial court did not err in omitting an instruction to the effect that defendant's proximity to the crime did not, in and of itself, support a finding of guilt where the prosecution's case was based on evidence other than mere presence of the defendant at the scene of the crime. St. v. Sheriff, 190 M 131, 619 P2d 181, 37 St. Rep. 1793 (1980).

Assault — Instruction on Self-Defense: Defendant charged with mitigated deliberate homicide alleged as error the refusal of defendant's offered instruction on self-defense. The defendant argued that because of the expert testimony regarding the intimidating effects on defendant caused by his bizarre relationship with his mother, it was essential that the jury be instructed in terms of the apparent danger which he perceived and not the actual dangers which faced him. The court said that, where counsel is not limited under the instructions given from fairly presenting his defense to the jury, the defendant will not be heard to complain that the court failed to give the many different nuances on a theory of defense that might have been devised. It was therefore not reversible error to refuse the defendant's offered instruction. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980), following St. v. Reiner, 179 M 239, 587 P2d 950 (1978).

Restitution Not a Defense — Larceny by Bailee: Under former law, a jury instruction stating that in the crime of larceny by a bailee restitution is not a defense when the criminal intent existed at the time of the taking was proper. The crime is complete at the point of taking with the intent to permanently deprive, and restitution is only a defense when the defendant intended to return the property at the time it was taken. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Failure to Instruct Jury to Acquit on Finding of Self-Defense: Defendant charged with deliberate homicide and convicted of the lesser offense of mitigated deliberate homicide was not denied due process by the failure of the court to instruct the jury that if they found that the defendant had acted in self-defense they must acquit him. When viewed with the instructions as a whole, the failure to give the instruction did not render the trial so fundamentally unfair as to deny the defendant due process. United States ex rel. Collins v. Crist, 473 F. Supp. 1354 (D.C. Mont. 1979).

Proper Refusal of Proposed Instruction on Accountability: The defendant's proposed instruction on accountability that stated: "You are instructed that some evidence has been introduced tending to show that a person other than the defendant, Alfred Owens, is responsible for the crimes here charged. If, after a consideration of all the evidence, there remains in your minds a reasonable doubt as to who is responsible for the crimes, then it is your duty to acquit." was an incorrect statement of the law. It created the distinct impression that the defendant could not be held responsible for the crimes charged if somebody else actually performed the offensive conduct and was therefore properly refused. The instruction given by the trial court in the

language of 45-2-301 and 45-2-302 was a correct presentation of the law on accountability and a proper jury instruction. St. v. Owens, 182 M 338, 597 P2d 72 (1979).

Alibi Defense — Instruction Rejected: The court properly rejected an instruction concerning the defense of alibi since the defendant's case was not founded upon alibi and no notice of such a defense was given. St. v. McGuinn, 177 M 215, 581 P2d 417 (1978).

Instruction on Defense of Threat or Menace: When the defendant was convicted of robbery, the trial court did not commit reversible error in giving no instruction to the jury on the defense of threat or menace since the jury in considering the court's instructions found the allegations of willful commission of the crime proven beyond a reasonable doubt. St. v. Watson, 144 M 576, 398 P2d 949 (1965).

INSTRUCTIONS ON EVIDENCE AND BURDEN OF PROOF

Failure of Counsel to Request Instruction on Accomplice Testimony Constituting Ineffective Assistance of Counsel — Failure of Court to Give Instruction Prejudicial: Kougl was convicted of operating an unlawful clandestine laboratory and subsequently appealed on grounds of ineffective assistance of counsel. The state's case was based largely on the testimony on three accomplices. At trial, both the prosecution and defense counsel pointed out to the jury in closing arguments that accomplice testimony should be viewed with suspicion because of the accomplices' criminal conduct and the deals that they cut with the state. However, Kougl's counsel did not request a jury instruction that accomplice testimony ought to be viewed with distrust and that it must be corroborated. Applying the Strickland test for effective assistance of counsel, the Supreme Court found that Kougl's counsel's failure to request the instructions constituted a failure to use the law to strike at the heart of the state's case, and because there was no plausible explanation for not asking for the instructions, counsel's performance was deficient and the first prong of Strickland was satisfied. Further, the trial court failed its duty to instruct the jury on the law, which is a duty that may not be delegated to counsel because what the court tells the jury carries the force of law, while counsel's comments do not. Thus, the second prong of Strickland requiring a showing of prejudice was also satisfied because if the jury had been properly instructed, there was a reasonable probability that it would have arrived at a different outcome. Therefore, Kougl received ineffective assistance of counsel, and Kougl's conviction was reversed. St. v. Kougl, 2004 MT 243, 323 M 6, 97 P3d 1095 (2004), following St. v. Rose, 1998 MT 342, 292 M 350, 972 P2d 321 (1998), and followed in St. v. Johnston, 2008 MT 318, 346 M 93, 193 P3d 925 (2008).

Jury Instructions on Offense of Stalking Affirmed: Tichenor contended that two jury instructions confused the jury by including references to the fact that Tichenor had been ordered on two occasions to have no contact with the victim. The Supreme Court disagreed. The instructions did not diminish the state's burden of proving every element of the stalking offenses and, as a whole, fully and fairly instructed the jury on the applicable law without prejudicially affecting Tichenor's substantive rights. Tichenor's stalking convictions were affirmed. St. v. Tichenor, 2002 MT 311, 313 M 95, 60 P3d 454 (2002).

Prosecutor's Comments in Response to Defense Counsel's Opening Statement Not Prejudicial: Defense counsel told the jury in opening statements that a witness had made inconsistent statements, referring to a statement given to the investigator for the public defender's office. The investigator was never called, and the theory was not substantiated. The prosecutor referred to the theory in closing, noting that the defense had failed to present the evidence that defense counsel had referred to in opening. Although it is improper to comment on a criminal defendant's failure to testify, it is proper for a prosecutor to direct the jury's attention to facts in issue that could be controverted by persons other than the defendant. The prosecutor was entitled to comment on the theory suggested by defense counsel because the theory lacked evidentiary support. The District Court did not err in refusing to grant a mistrial on grounds of prosecutorial comments because the comments were plainly in response to defense counsel's opening statements. St. v. Soraich, 1999 MT 87, 294 M 173, 979 P2d 206, 56 St. Rep. 370 (1999).

Instruction on Admissions and Confessions Appropriate: At trial for robbery, the court allowed the statements made by the defendant to the investigating officer after the robbery that "I want it to be known that I did not have a gun" and that the defendant could not "make it" in the outside world. On appeal, the defendant asserted that the District Court improperly instructed the jury on admissions and confessions. The Supreme Court held that the instruction was a correct statement of the law and that the lower court did not err in instructing the jury on the law applicable to admissions. St. v. Craig, 274 M 140, 906 P2d 683, 52 St. Rep. 1158 (1995).

Instruction That Date of Offense Need Not Be Exact — Alibi Defense: The court instructed the jury that when the alleged victim of a sexual assault is a child, the state need not establish the

date of the offense with exact precision and that proof that the offense occurred "on or about" a particular date is sufficient. Defendant contended that the instruction effectively amended the charge against him and impermissibly undermined his alibi defense. Upon review, the Supreme Court held that the instruction mirrored the information filed against defendant with regard to when the offense occurred and that, pursuant to St. v. Shaver, 233 M 438, 760 P2d 1230 (1988), a defendant cannot restrict the state's case by merely asserting intent to rely on an alibi defense for a limited period of time within which the crime could have occurred. The instruction was a correct statement of the law. St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994).

Instruction on Circumstantial Evidence as Requiring Acquittal — Not Warranted in Light of Direct Evidence: Defendant's proffered jury instruction that jury must acquit if the circumstantial evidence gives rise to any reasonable interpretation in support of defendant's innocence is warranted only where the state's case rests substantially or entirely on circumstantial evidence. In light of direct evidence of statements by defendant and a coconspirator that connected defendant with the crime, the state's instruction was proper when it allowed the jury to find guilt even if defendant's theory of the case was reasonably supported by the circumstantial evidence. St. v. Stever, 225 M 336, 732 P2d 853, 44 St. Rep. 283 (1987).

Substantial Direct Evidence — Defendant's Circumstantial Evidence Instruction Denied: Where there was substantial direct evidence of defendant's guilt and the court instructed the jury on the definitions of direct and circumstantial evidence, it was not error to refuse to give defendant's following preferred instruction: "Acts may be proved by circumstantial evidence as well as by direct testimony of eye witnesses, but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of the defendant's innocence. Both direct evidence and circumstantial evidence are acceptable as means of proof. Neither is entitled to greater weight than the other." St. v. Lewis, 220 M 418, 715 P2d 1064, 43 St. Rep. 492 (1986).

Sexual Intercourse Without Consent — "Easy to Charge but Difficult to Defend" Instruction Improper: The cautionary jury instruction providing that sexual intercourse without consent is an easy charge to make but is difficult to defend is an improper instruction. The Supreme Court, in holding that the instruction is an unwarranted and improper comment on the evidence which is not required by law or public policy, specifically overruled St. v. Smith, 187 M 245, 609 P2d 696, 37 St. Rep. 583 (1980). St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984).

Planted Evidence Instruction Not Warranted: There was insufficient evidence to support a logical inference that evidence was planted and therefore insufficient evidence to support an instruction on that theory where defendant in an assault case claimed at trial that certain evidence was planted, victim testified she had not planted it, police had not been able to find the evidence at first because victim gave them the wrong location of where she claimed it was, and victim had later found it herself a block away and notified the police. St. v. Howard, 195 M 400, 637 P2d 15, 38 St. Rep. 1980 (1981).

Refusal of Instruction That Sexual Assault Is Easy to Charge and Difficult to Defend:

The defendant, convicted of sexual intercourse without consent and sexual assault, alleged error on appeal in the refusal of the trial court to give some of his offered jury instructions. One refused instruction was that the charge against the defendant was one easily made and difficult to defend against. The Supreme Court indicated that the instruction was incorrect as offered because, as to two of the witnesses against the defendant, there was no evidence showing any personal enmity toward the defendant. As to a third witness, there was sufficient basis in the evidence for this type of instruction under the Smith case, but the defendant failed to limit the instruction to advising the jury to look with caution only at the testimony of the third witness, whose enmity toward the defendant was in evidence. Accordingly, the instruction was correctly refused in its offered form. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981), following St. v. Smith, 187 M 245, 609 P2d 696, 37 St. Rep. 583 (1980). St. v. Smith was overruled as to the propriety of the easy to charge-difficult to defend instruction. See St. v. Liddell casenote above.

When the defendant was charged with sexual intercourse without consent and offered the defense of consent of the victim, the trial court did not err in refusing to give the jury instruction approved in St. v. Smith, 187 M 245, 609 P2d 696 (1980), that "the accusation of rape . . . is easy to make, but hard to defend against". The Supreme Court held in St. v. Pecora, 190 M 115, 619 P2d 173 (1980), that such an instruction is applicable only if the evidence presented at trial shows personal enmity between the defendant and the victim and that corroborating evidence supporting the victim does not exist. The record in this case does not satisfy these requirements. St. v. Mackie, 191 M 138, 622 P2d 673, 38 St. Rep. 86 (1981). St. v. Smith was overruled as to the propriety of the easy to charge-difficult to defend instruction. See St. v. Liddell casenote above.

Instruction to Distrust Weaker Evidence — No Adverse Effect on Presumption of Innocence: It was not reversible error for the trial court to instruct the jury to view weaker evidence with distrust when it appeared stronger evidence was available. It did not adversely affect the presumption of innocence and did not allow the jury to draw an inference from defendant's failure to take the stand. St. v. Pendergrass, 189 M 127, 615 P2d 201 (1980).

Instruction on Effect of Possession of Stolen Property: The District Court did not err in giving the instruction that "one who is found in the possession of property that was stolen from burglarized premises is bound to explain such possession in order to remove the effect of that fact as a circumstance to be considered with all other evidence pointing to his guilt". St. v. Rose, 187 M 74, 608 P2d 1074 (1980).

Instruction as to Date Crime Was Committed: When an instruction is given that when the crime charged is alleged to have been committed on or about a certain date, it is not necessary to prove the precise date but is sufficient that the proof shows commission of the crime prior to the filing of the information. The jury should be apprised of the date the information was filed; however, in the absence of prejudice, failure to do so is not reversible error. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Instructions as to Evidence of Other Crimes Not Charged: It was not improper for the court to instruct the jury as to the purposes for which the jury could consider evidence of other crimes not charged. The instruction benefited the defendant, not the State, by narrowly restricting the consideration which may be given such evidence. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Presumption of Innocence: In a criminal prosecution for theft of an automobile in which the defendant timely requested and was twice denied an instruction on the presumption of innocence, an instruction on the State's burden of proof could not supplant an instruction on the presumption of innocence. The standard for prejudicial effect of the lack of the instruction was established in St. v. Harrison, 23 M 79, 57 P 647 (1899), and is stricter than that used by the U.S. Supreme Court. It is per se reversible error to deny the instruction. St. v. Williams, 184 M 111, 601 P2d 1194 (1979).

Instruction on Uncorroborated Testimony Properly Refused: In a trial of the defendant for sexual intercourse without consent, it was not error for the trial court to refuse cautionary instruction on the uncorroborated nature of the prosecutrix's testimony as the law does not require corroboration, some corroborating evidence was presented, and there was nothing in the record to suggest malice by the prosecutrix. St. v. Just, 184 M 262, 602 P2d 957 (1979).

Possession as Prima Facie Evidence: A jury instruction taken verbatim from 45-6-304 (now repealed) that stated that possession of recently stolen livestock is prima facie evidence of guilt of larceny did not constitute reversible error since, even though the State has the burden of proof in criminal cases, the burden of evidence may shift to the defendant. St. v. Gloyne, 156 M 94, 476 P2d 511 (1970).

Instruction Placing Burden to Explain on Defendant:

An instruction that mere unexplained possession of stolen property was not sufficient to justify conviction but that one found in possession of property that may have been stolen must explain such possession in order to remove the effect of that fact as a circumstance to be considered with other evidence pointing to guilt did not deprive the defendant of the presumption of innocence. St. v. Gray, 152 M 145, 447 P2d 475 (1968).

In a prosecution for grand larceny, an instruction that had the effect of placing a burden on the defendant to explain his possession of stolen property was erroneous. Such a burden deprives the defendant of his cloak of innocence and forces him to testify. St. v. Greeno, 135 M 580, 342 P2d 1052 (1959).

Cautionary Instruction — Victim's Testimony in Rape Case: In a rape trial, when there was no inconsistency, contradictory evidence, or proof of falsity shown in the prosecutrix's testimony and no showing of malice or desire for revenge against the accused, it was not error for the court to refuse to give a cautionary instruction. St. v. Lagge, 143 M 289, 388 P2d 792 (1964).

Instruction Defining "Reasonable Doubt":

An instruction on "reasonable doubt" not strictly adhering to the one given by Chief Justice Shaw in Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711 (1850), and generally followed by courts, but adding inter alia that the jury is "not at liberty to disbelieve as jurors if you believe as men; your oath imposes upon you no obligation to doubt where no doubt would exist if no oath had been administered", was held not erroneous, the court being of the opinion that the decision holding that the term "reasonable doubt" defines itself is the most logical of a large number of authorities reviewed. St. v. Curtiss, 114 M 232, 135 P2d 361 (1943); St. v. Wong Sun, 114 M 185, 133 P2d 761 (1943).

The trial court, in giving the definition of "reasonable doubt" in an instruction on the subject repeatedly approved by the Supreme Court, did not commit reversible error by prefacing it thus: "You are instructed that a doubt which a juror is allowed to retain in his mind and under the influence of which he should form a verdict of not guilty, must always be a reasonable one", and the contention of the appellant that the phrase in effect did away with the presumption of innocence declared by a former section was not sustained. St. v. Zorn, 99 M 63, 41 P2d 513 (1935).

While the court has frequently approved as correct and sufficient to meet all requirements the instruction taken from Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711 (1850) (Territory v. McAndrews, 3 M 158 (1878); St. v. Martin, 29 M 273, 74 P 725 (1903); St. v. DeLea, 36 M 531, 93 P 814 (1907)), error was not committed in submitting the following instruction: "The term reasonable doubt best defines itself. In a legal sense, however, a reasonable doubt is a doubt which has some reason for its basis; a doubt for which there exists in the minds of the jurors a reason, and not a doubt arising from mere caprice or groundless conjecture." (Chief Justice Brantly). St. v. Lewis, 52 M 495, 159 P 415 (1916).

Technical Error in Instruction: On an appeal from a judgment of conviction for forgery, while it was error to advise the jury, in an instruction as to the purpose for which testimony of other like acts had been admitted, that testimony had been admitted relating to certain "forgeries", since whether or not a forgery had been committed was the fact to be determined by the jury, in view of other portions of the charge carefully safeguarding the rights of the defendant, the inadvertent use of the term "forgeries" could not have worked to his prejudice. St. v. Daems, 97 M 486, 37 P2d 322 (1934).

Law Review Articles

Criminal Procedure, Johnson & Johnson, 41 Mont. L. Rev. 329, 351 (1980).

Collateral References

Criminal Law *key* 633(1), 680(1), 801, 804(1) through (9).

23A C.J.S. Criminal Law §§1561 through 1568.

75 Am. Jur. 2d Trial §§1, 2, 135.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant—methamphetamine cases. 8 ALR 6th 265.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant—heroin cases. 7 ALR 6th 169.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant—cocaine cases. 2 ALR 6th 551.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant—marijuana cases. 1 ALR 6th 549.

Exclusion of public from state criminal trial to preserve safety or confidentiality of undercover police officer witness. 100 ALR 5th 171.

Admissibility of expert testimony regarding questions of domestic law. 66 ALR 5th 135.

Cautionary instructions to jury as to reliability of, or factors to be considered in evaluating, voice identification testimony. 17 ALR 5th 851.

Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities. 10 ALR 5th 700.

Propriety of trial court order limiting time for opening or closing argument in criminal case—state cases. 71 ALR 4th 200.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases. 70 ALR 4th 664.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial, or mistrial. 60 ALR 4th 1063.

Admissibility of impeached witness' prior consistent statement—modern state criminal cases. 58 ALR 4th 1014, §§16, 22.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant. 55 ALR 4th 1170, §4[d].

Lesser-related state offense instructions: modern status. 50 ALR 4th 1081, §§16[a, c], 27, 28[a], §21 superseded by 1 ALR 6th 549, 2 ALR 6th 551, 7 ALR 6th 169, 8 ALR 6th 265.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial—state cases. 36 ALR 4th 1046.

Instructions to jury as to credibility of child's testimony in criminal case. 32 ALR 4th 1196.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases. 32 ALR 4th 774.

Necessity and content of instructions to jury respecting reasons for or inferences from accused's absence from state criminal trial. 31 ALR 4th 676.

Failure to testify: propriety and prejudicial effect of prosecutor's argument commenting on failure of defendant's spouse to testify. 26 ALR 4th 9.

Provability: prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief. 16 ALR 4th 810.

Polygraph test: propriety and prejudicial effect of informing jury that witness in criminal prosecution has taken polygraph test. 15 ALR 4th 824.

Entrapment defense in sex offense prosecutions. 12 ALR 4th 413.

Credibility of witnesses: propriety of jury instruction regarding credibility of witness who has been convicted of a crime. 9 ALR 4th 897.

Instructions urging dissenting jurors in state criminal case to give due consideration to opinion of majority (Allen charge)—modern cases. 97 ALR 3d 96.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge. 92 ALR 3d 866.

Retiring jury: propriety and prejudicial effect of sending written instructions with retiring jury in criminal case. 91 ALR 3d 382.

Prejudicial effect of prosecutor's argument giving jury impression that judge believes defendant guilty. 90 ALR 3d 822.

Evidence of guilt: propriety and prejudicial effect of prosecutor's argument to jury indicating that he has additional evidence of defendant's guilt which he did not deem necessary to present. 90 ALR 3d 646.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that defense counsel believes accused guilty. 89 ALR 3d 263.

Self-incrimination: instruction allowing presumption of inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination. 88 ALR 3d 1178.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused—modern cases. 88 ALR 3d 449.

Polygraph test: propriety and prejudicial effect of informing jury that accused has taken polygraph test, where results of test would be inadmissible in evidence. 88 ALR 3d 227.

Propriety of trial court's declaration of mistrial or discharge of jury, without accused's consent, on ground of prosecution's disclosure of prejudicial material, or making prejudicial remarks in presence of jury. 77 ALR 3d 1143.

Dismissal of prosecution: power of trial court to dismiss prosecution or direct acquittal on basis of prosecutor's opening statement. 75 ALR 3d 649.

Sympathy to accused as appropriate factor in jury consideration. 72 ALR 3d 842.

Propriety and prejudicial effect of instructions on credibility of alibi witnesses. 72 ALR 3d 617.

Duty of court, in absence of specific request, to instruct on subject of alibi. 72 ALR 3d 547.

Drugs and narcotics: validity and construction of statutes creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs. 60 ALR 3d 1128.

Homosexual acts: prejudicial effect of prosecutor's reference in argument to homosexual acts or tendencies of accused which are not material to his commission of offense charged. 54 ALR 3d 897.

Felony-murder doctrine: what felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine. 50 ALR 3d 397.

God: propriety of reference, in instruction in criminal case, to juror's duty to God. 39 ALR 3d 1445.

Privileged testimony: propriety and prejudicial effect of comment by counsel as to refusal to permit introduction of privileged testimony. 32 ALR 3d 906.

Propriety and prejudicial effect of prosecuting attorney acquiring new matter or points in closing summation in criminal case. 26 ALR 3d 1409.

Unrequested instruction: propriety under Griffin v. California and prejudicial effect of unrequested instruction that no inferences against accused should be drawn from his failure to testify. 18 ALR 3d 1335.

Pardon: prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR 3d 1137.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify. 14 ALR 3d 723.

Pardon or parole: prejudicial effect of statement or instruction of court as to possibility of parole or pardon. 12 ALR 3d 832.

Propriety of specific jury instructions as to credibility of accomplices. 4 ALR 3d 351.

Comment on accused's failure to testify, by counsel for codefendant. 1 ALR 3d 989.

46-16-402. When order may be departed from.

Commission Comments

1991 Comment: This statute establishes a general provision intended to provide the same practices as 1987 MCA 46-16-402. The statute, however, does not expressly recognize that the "state of the pleading" may require a departure from the stated order. The statute generally recognizes that the court may depart from the stated order when good cause is shown.

Source: R.C.M. 1947, section 94-7202.

No change.

Compiler's Comments

1991 Amendment: At beginning substituted "For good cause shown" for "When the state of the pleading requires it or in any other case for good reasons".

Case Notes

Discretion of Court to Reopen Case in Chief — Admissibility of Surprise Defense Testimony: The District Court allowed the state to reopen its case in chief after defense testimony at trial revealed that a defense witness had fabricated evidence and that a previously unknown witness, who had also fabricated physical evidence, was involved. These facts constituted good cause sufficient to allow the court to exercise its discretion to depart from the usual order of trial and allow examination of the witnesses and the relevance of the fabricated evidence. Further, introduction of the surprise testimony was relevant, and its probative value far outweighed any danger of unfair prejudice to the defendant. St. v. Snaric, 262 M 62, 862 P2d 1175, 50 St. Rep. 1443 (1993).

Introduction of Evidence of Other Crimes Prior to Case in Chief — Court Discretion to Allow Chronological Presentation of Evidence: Defendant claimed the District Court improperly allowed introduction of evidence of other crimes, wrongs, and acts before the prosecution presented evidence of the crime charged. The state gave sufficient notice that it intended to introduce evidence of five burglaries or attempted burglaries, in chronological order, attributed to defendant. To cure any defect, the state filed a sealed affidavit with the court 1 week before trial, setting out what this evidence would prove. The court carefully apprised the jury of what crime was charged and admonished the jury as to the limited purposes of the prior crimes and acts evidence. The Just rules for admissibility having been met and an offer of proof having been received by the court for the chronological presentation of evidence, it was within the court's discretion to allow the sequence and order of presentation. St. v. Keefe, 232 M 258, 759 P2d 128, 45 St. Rep. 1034 (1988).

Preliminary Instructions:

Presentation of preliminary jury instructions before the evidence, especially when some of the offenses charged were complex and difficult to understand, was for good reason. It allowed the jury to have some understanding of the complex circumstantial evidence to be presented. A less complex case not based only on circumstantial evidence might not require such preliminary instructions, and in such a case there might not be good reasons for varying the usual trial order. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

The defendant's contention that extensive preliminary instructions given by the trial court were erroneous was rejected by the Supreme Court when it concluded that the language was not inflammatory but as neutral as language detailing the charges involved could be, even though the instructions were given prior to the introduction of evidence. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Requiring Out-of-Order Presentation by Defendant:

Opinion testimony was allowed as to evidence the witnesses had examined but which had not yet been admitted into evidence because a portion of the chain of possession had not been established in testimony. The missing links in the chain of possession were later supplied by testimony. It was within the discretion of the trial court to allow opinion to be given, conditioned on the subsequent production and admission of the evidence which formed the basis of the opinion. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

The trial court did not err in requiring the defendant to make an out-of-order presentation of his case in chief during the state's case in chief because certain prosecution witnesses were under time constraints that the defendant failed to overcome with "good reasons" why they should be

required to stay several days to testify during the defendant's case in chief. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

The judge's reading a cautionary instruction in substantially standard language prior to the introduction of evidence was not error. St. v. Armstrong, 172 M 296, 562 P2d 1129 (1977).

Difficulty in Locating Witness as Grounds for Reopening Case: Where the State had difficulty in locating an eyewitness, kept the trial court and the defendant informed of its difficulty, and the defendant was given full opportunity to rebut the witness's testimony, it was not error to allow the State to reopen its case in chief to receive the eyewitness testimony. St. v. White, 185 M 213, 605 P2d 191 (1980), followed in St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Amendment of Witness List During Trial:

The trial court did not err in permitting the endorsement of an x-ray by a radiologist as a witness added in midtrial by the prosecution when the defense counsel knew of the existence of the x-ray prior to trial and nothing indicated an intentional or deliberate withholding of evidence by the State or lack of good cause. St. v. Gafford, 172 M 380, 563 P2d 1129 (1977).

Allowing the amendment of the witness list requested because of evidentiary matters developed during presentation of the State's case was not an abuse of discretion on the part of the trial judge when the court offered the accused a continuance and there was no objection to the witnesses based on surprise by the defendant. St. v. Klein, 169 M 350, 547 P2d 75 (1976).

Good Cause for Continuance: If a defendant wishes to protect himself from alleged prejudice incurred by the use of an approximate date in charging an offense and the proof offered at trial, he can move for a continuance under this section. St. v. Hall, 171 M 33, 554 P2d 755 (1976).

Defendant Wrongfully Denied Opening Statement: The denial to the defendant of opportunity to make an opening statement concerning insanity defense until after the presentation of the prosecution's case was an improper interference with the defendant's right to have the jury consider his defense. St. v. Olson, 156 M 339, 480 P2d 822 (1971).

46-16-403. Evidence insufficient to go to jury.

Commission Comments

1991 Comment: This statute is primarily a restatement of 1987 MCA 46-16-403. The final sentence has been amended to clarify that a case may be reopened only prior to dismissal. The statute otherwise preserves established procedure.

Source: See commission comments to 46-16-114.

Compiler's Comments

1991 Amendment: Near beginning of first sentence substituted "prosecution's" for "state's" and near beginning of second sentence inserted "prior to dismissal".

Case Notes

Criminal Endangerment — Sufficient Proof of Mental State and Jurisdiction: Cybulski contended that the state failed to prove criminal endangerment because there was insufficient proof that Cybulski acted knowingly or that the alleged offense occurred in Custer County. The Supreme Court disagreed with both arguments. Under 45-2-103, the existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense. Here, Cybulski drove at a high rate of speed for nearly 50 miles on the wrong side of the interstate while intoxicated. A rational trier of fact could conclude beyond a reasonable doubt that Cybulski either was aware of her conduct and the risk it was creating or was unaware solely because of her intoxicated condition, so the element of knowingly was proven. Under 46-3-112, if two or more acts are requisite to the commission of an offense, the charge may be filed in any county in which any of the acts occurred. Cybulski admitted that she drove on the wrong side of the interstate in Custer County and made no objection to charges being filed in Custer County, so venue in Custer County was proper. St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009).

Failure to Prove Unconstitutionality of Municipal Ordinance Prohibiting Storage of Salvage: Albert was charged in City Court with two counts of unlawful storage of salvage pursuant to a Billings municipal ordinance. Albert moved to dismiss, asserting that the ordinance was unconstitutionally vague because substantive terms in the ordinance were not defined, so the ordinance failed to provide actual notice of what conduct was proscribed and minimal guidelines sufficient to govern city code enforcement officers. Albert's motion was denied and Albert appealed. The Supreme Court applied the test for vagueness from St. v. Dixon, 2000 MT 82, 299 M 165, 998 P2d 544 (2000), which requires that actual notice be given to citizens and that the statute contain minimal guidelines sufficient to govern law enforcement. The first element was met because Albert received multiple warnings before being cited, was told specifically what items had to be removed from his yard, and was even offered assistance in removal efforts; thus

Albert was clearly on notice of a potential violation. The second element was also met inasmuch as the enforcement process did not encourage arbitrary and discriminatory enforcement because enforcement was generated only by citizen complaints, and officers were entitled to exercise a certain degree of subjective judgment in enforcement efforts. Therefore, Albert failed to show that the ordinance was vague and the dismissal motion was properly denied. There was sufficient evidence to show that Albert failed to move the salvage within 5 days as required by the ordinance, so Albert's conviction was affirmed. Billings v. Albert, 2009 MT 63, 349 M 400, 203 P3d 828 (2009). See also Kolender v. Lawson, 461 US 352 (1983).

Sufficient Evidence of Common-Law Marriage to Allow Conviction for Incest With Stepchild: Following conviction for incest with his stepdaughter, Bullman asserted that the state failed to prove sufficient evidence that Bullman was married to the victim's mother, so the victim was not Bullman's stepdaughter and Bullman could not be convicted of incest. However, the jury concluded that a common-law marriage existed based on facts that: (1) Bullman and the victim's mother lived together as husband and wife for many years and had children together; (2) Bullman supported the mother and her children, including the victim; (3) Bullman purchased a house and the mother was "on the deed"; (4) the mother filed joint tax returns while Bullman was incarcerated; (5) the mother testified that Bullman sometimes referred to her as his wife in front of others; (6) the victim testified that Bullman assumed a father-daughter relationship and asked her to call him "Dad"; and (7) the mother had obtained a divorce decree that was filed over Bullman's objection. The evidence of a common-law marriage, although circumstantial, was sufficient for the jury to conclude that Bullman and the victim's mother were married at the time the sexual contact occurred. St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

No Error in Denying Motion to Dismiss Felony Indecent Exposure Charge for Insufficient Evidence: Defendant's actions coupled with facts and circumstances constituted sufficient evidence for the jury to find the essential elements of the crime beyond a reasonable doubt. St. v. Ommundson, 2008 MT 340, 346 M 263, 194 P3d 672, (2008).

Waiver of Right to Raise Issue of Unreasonable Delay — Failure to Move Court for Ruling at or Before Omnibus Hearing: Approximately 4 hours after Kummerfeldt was involved in a single-vehicle accident, his blood was drawn for a BAC test, which produced a 0.14% result. At trial, he moved for a judgment of acquittal on the DUI per se charge, based on the state's failure to prove his BAC result was 0.08 or greater at the time he was driving and because under St. v. McGowan, 2006 MT 163, 332 M 490, 139 P3d 841 (2006), 4 hours was an unreasonable delay between the driving and the drawing of blood. However, not only did Kummerfeldt fail to raise this objection at the omnibus hearing, he also entered into a pretrial stipulation as to the admissibility of the BAC report. Therefore, Kummerfeldt waived his arguments. St. v. Kummerfeldt, 2008 MT 333, 346 M 187, 194 P3d 662, (2008).

Conviction Based on Victim's Uncorroborated Testimony — Evidence Sufficient to Go to Jury: At Swenson's trial for sexual assault, Swenson asserted that the evidence was insufficient to go to the jury because the victim testified that she did not hear or see anything during the alleged incident, and her minor cousin who was present at the time testified that he saw Swenson simply wake the victim and then leave the room. However, the victim testified at trial that she kept her eyes closed and pretended to sleep during the touching, then pretended to wake up and saw Swenson standing over her. A conviction for a sex offense may be based entirely on the uncorroborated testimony of the victim, and the victim's testimony, combined with both circumstantial and direct evidence, was sufficient to submit the issue to the jury and to support a conviction. St. v. Swenson, 2008 MT 308, 346 M 34, 194 P3d 625 (2008). See also St. v. Maetche, 2008 MT 184, 343 M 464, 185 P3d 980 (2008).

No Error on Lower Court's Part for Not Dismissing Drug Case on Argument of Insufficient Evidence to Prove Defendant Knew Vial Contained Drugs: Wood argued that the lower court erred in not dismissing his case on the basis that insufficient evidence existed to show that he knew that the vial in his possession contained drugs. The Supreme Court stated that the trial transcript showed that the police officers testifying for the state gave credible testimony that the behavior of the defendant was consistent with that of a person under the influence of drugs. Based on the testimony of the officers, the Supreme Court ruled that the trial court had properly submitted the case to the jury to determine the credibility and weight of conflicting testimony and that there was sufficient evidence for the jury to conclude that Wood knowingly possessed the drugs. St. v. Wood, 2008 MT 298, 345 M 487, 191 P3d 463 (2008).

Sufficient Evidence of Felony Criminal Mischief by Accountability — Denial of Directed Verdict Proper: Maetche had a rental contract for a mobile home and gave the owner 2 weeks' notice of the intent to move out. During that 2-week period, the home sustained over $11,000 in damages. Maetche's husband confessed to causing the damage, but Maetche was charged with

felony criminal mischief by accountability. At the close of the state's case, Maetche moved for a directed verdict, asserting that the state failed to present any evidence that, either before or during the damage, Maetche had "solicited, aided, abetted, agreed, or attempted to aid" in committing the damage and thus could not be held legally accountable. The District Court denied the motion and found Maetche guilty, and on appeal, the Supreme Court affirmed. Circumstantial evidence placed Maetche at the crime scene while the damage was occurring, and an eyewitness observed Maetche removing a washer and dryer from the home, thereby contributing to the damage. This evidence, combined with direct evidence of the purposeful nature of the destruction, was sufficient to permit a rational trier of fact to conclude that Maetche was criminally accountable for other destruction to the home and thus guilty of criminal mischief beyond a reasonable doubt and provided a circumstantial basis for a determination that Maetche was also involved in destruction of other parts of the home as well. St. v. Maetche, 2008 MT 184, 343 M 464, 185 P3d 980 (2008), distinguishing St. v. Johnston, 267 M 474, 885 P2d 402 (1994), and St. v. Cochran, 1998 MT 138, 290 M 1, 964 P2d 707 (1998).

Sufficient Evidence of Sexual Assault to Submit Case to Jury: Bomar was charged with sexual intercourse without consent or alternatively with sexual assault. Following presentation of the state's case, Bomar contended that there was insufficient evidence to send the case to the jury. The trial court disagreed, and the jury found Bomar guilty of sexual assault. On appeal, Bomar reasserted his claim of insufficient evidence, but the Supreme Court affirmed. Despite some inconsistencies in the testimony of the child victim regarding whether penetration occurred, the evidence was sufficient to show that Bomar had sexual contact with the child and to send the case to the jury on the sexual assault charge. St. v. Bomar, 2008 MT 91, 342 M 281, 182 P3d 47 (2008), following St. v. York, 2003 MT 349, 318 M 511, 81 P3d 1277 (2003).

Sufficient Circumstantial Evidence to Show Essential Elements of Deliberate Homicide, Burglary, and Evidence Tampering to Warrant Jury Consideration: At the close of the state's case, Rosling moved for dismissal of deliberate homicide, burglary, and evidence tampering charges on grounds that the evidence was insufficient to send the case to the jury. The motion was denied, and on appeal, the Supreme Court affirmed. Rosling was with the victim the night of her death and was apparently the last person to see the victim alive. The victim was murdered at home, and a neighbor saw Rosling's car and a person matching Rosling's description at the home around the time of the murder. Footprints found at the home matched Rosling's shoes. The victim's father found the victim and discovered burning magazines beneath the victim, apparently left in an attempt to cover up the crime. A spot of the victim's blood was found on Rosling's coat, and other blood stains on the coat could not be ruled out as belonging to the victim. Rosling was unable to account for his whereabouts at the time of the murder and gave police inconsistent statements concerning his actions the night before and day of the murder. Although the evidence was circumstantial, it was sufficient the send the case to the jury, and the trial court did not err in denying Rosling's motion to dismiss on grounds of insufficient evidence. St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

Sufficient Evidence of Issuing Bad Checks to Warrant Submission to Jury: At the close of the state's evidence in McWilliams' trial for issuing bad checks, McWilliams moved to dismiss for lack of sufficient evidence. The trial court denied the motion, and McWilliams appealed, but the Supreme Court affirmed. Evidence showed that McWilliams issued checks upon a real depository but that the checks were not honored either because of insufficient funds or because McWilliams stopped payment. Viewed in the light most favorable to the prosecution, there was sufficient evidence that McWilliams issued bad checks to warrant submitting the issue to the jury, and the trial court did not err in denying the motion to dismiss. St. v. McWilliams, 2008 MT 59, 341 M 517, 178 P3d 121 (2008).

De Novo Standard of Review of Denial of Motion for Directed Verdict Not Abuse of Discretion: Prior to the present case, case law incorrectly assumed that use of the word "may" in this section left the determination of whether there was sufficient evidence to send the matter to the jury within the sound discretion of the trial court. However, when "may" is used in statute to confer power upon a court and the public has an interest in the exercise of power, then the exercise of the power becomes imperative. A trial court's conclusion as to whether sufficient evidence exists to convict is ultimately an analysis and application of the law to the facts. There either is, or is not, sufficient evidence to convict, and that determination is not a matter of discretion. Thus, the proper standard of review of denial of a motion for a directed verdict is de novo. St. v. Swann, 2007 MT 126, 337 M 326, 160 P3d 511 (2007), following St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001), overruling any prior cases to the extent that they stood for a different standard of review, and followed in St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

Sufficient Evidence of Criminal Accountability — Motion for Directed Verdict on Grounds of Insufficient Evidence to Go to Jury Properly Denied: High Elk contended that there was insufficient evidence of accountability for assault with a weapon to send the case to the jury and moved for a directed verdict. The District Court denied the motion, and on appeal, the Supreme Court considered the record and affirmed. Evidence showed that High Elk was angry with the victim and argued with and punched the victim, preventing the victim's exit from a vehicle, at which time a friend of High Elk undisputedly stabbed the victim several times from the back seat of the vehicle, after which High Elk asked, "Did you get him?" A rational trier of fact could have found High Elk guilty of the elements of accountability, and the District Court did not err in allowing the case to go to the jury. St. v. High Elk, 2006 MT 6, 330 M 259, 127 P3d 432 (2006).

Sufficient Evidence to Submit Homicide Case to Jury — Directed Verdict Properly Denied: In a deliberate homicide trial, Smith asserted that the state failed to prove that he purposely and knowingly caused the death of another and that although the evidence may have established negligent homicide, there was an absence of proof that it was Smith's conscious object to cause the death, so Smith's motion for a directed verdict should have been granted. The evidence was conflicting, and some evidence was circumstantial but substantiated. However, without a complete absence of evidence to justify not sending the case to the jury, the trial court correctly declined to invade the province of the jury by directing the verdict. St. v. Smith, 2005 MT 325, 329 M 526, 127 P3d 353 (2005), followed in Adams v. St., 2007 MT 35, 336 M 63, 153 P3d 601 (2007).

Motion for Directed Verdict Following State's Case in Chief — Preservation of Issue for Appeal: Following the state's case in chief in McGarvey's deliberate homicide trial, McGarvey moved for a directed verdict based on insufficiency of the evidence because the two witnesses who testified regarding McGarvey's extrajudicial confession were patently unreliable, so corroboration should have been required to uphold their testimony. On appeal, the state contended that McGarvey failed to preserve the issue for appeal because he never raised the claim that the witnesses ought to be held unworthy of credit as a matter of law. The Supreme Court disagreed. By moving for a directed verdict on insufficiency of the evidence after the state concluded its case in chief, McGarvey preserved the issue for appeal. St. v. McGarvey, 2005 MT 308, 329 M 439, 124 P3d 1131 (2005).

Sufficient Evidence to Support Assault Convictions — Motion to Dismiss for Insufficient Evidence Properly Denied: Following the close of the state's case against McCaslin for aggravated assault and assault with a weapon, McCaslin moved to dismiss both counts on grounds of insufficient evidence, asserting that the state failed to prove that he purposely or knowingly caused bodily harm to another and that because he was not the aggressor, a self-defense argument was justified. The motion was denied, and the jury subsequently convicted McCaslin on both counts. On appeal, the Supreme Court reviewed the record and concluded that, with deference to the jury and in a light most favorable to the prosecution, a reasonable trier of fact could have found the essential elements of both crimes beyond a reasonable doubt. McCaslin's convictions were affirmed. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004).

Conflicting Evidence Regarding Falsification of Prison Payroll Records — Denial of Directed Verdict Proper: Struble was charged with falsifying payroll records at the state prison where he was employed. After the state presented its case, Struble moved for a directed verdict on grounds that: (1) no evidence was presented to show that he was not entitled to the payroll and benefits that he received; (2) there was no direct evidence linking him to the offense; (3) no witnesses testified that he was not working or engaged in employment at the times reported on his time cards; and (4) the logbooks on which the state relied were inaccurate, untrustworthy, and unreliable. The District Court denied the motion, and the Supreme Court affirmed. A directed verdict is proper only if reasonable persons could not conclude from the evidence taken in a light most favorable to the prosecution that guilt has been proved beyond a reasonable doubt. Here, the jury had considerable evidence that was susceptible to differing interpretations, and it was within the province of the jury to decide which interpretation would prevail, so the standard for granting a directed verdict was not satisfied. St. v. Struble, 2004 MT 107, 321 M 89, 90 P3d 971 (2004).

Circumstantial Evidence Supporting Conclusion That Victim Sustained Reasonable Apprehension of Bodily Injury: Defendant contended that a directed verdict motion should have been granted requesting dismissal of a partner or family member assault charge because no evidence was presented that the victim had sustained reasonable apprehension of bodily injury, which the state had to prove in order to meet its burden of proof. The standard for determining whether a person sustained reasonable apprehension of bodily injury is that of a reasonable

person under similar circumstances. Direct evidence is not necessary to establish the elements of the offense. A conviction may be based entirely on circumstantial evidence, and direct proof of other facts may give rise to an inference that a victim sustained reasonable apprehension of bodily injury. In this case, the victim: (1) fled from her apartment with her dog over concern about defendant's past behavior; (2) locked herself in a neighbor's bathroom; (3) heard defendant scream that he was going to kill her; (4) observed knife holes that defendant was making in her apartment door; and (5) ultimately fled the building. From these facts a jury could find that the victim sustained reasonable apprehension of bodily injury, and denial of defendant's directed verdict motion was not an abuse of discretion. St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003).

Substantial Evidence of Proof of Speeding in Construction Zone — Directed Verdict Properly Denied: Mathis was charged with speeding in a construction zone and, following submission of the state's case, moved for a directed verdict on grounds that the state failed to provide sufficient proof of the crime. The motion was denied, and Mathis appealed. The Supreme Court found sufficient proof that the elements of the crime had been proved. Administrative authority was properly granted to appropriate entities to set the applicable speed limit, and the proper requisite action was taken by the entities to establish a speed limit in accordance with state uniform traffic control guidelines and to adequately post the construction zone. A reasonable person could conclude that the state proved the elements of the offense; thus, Mathis's motion for a directed verdict was properly denied. St. v. Mathis, 2003 MT 112, 315 M 378, 68 P3d 756 (2003).

Criminal Cases — Directed Verdict Proper Only When No Evidence Supports Guilty Verdict — Sufficient Evidence of Mitigation Element of Mitigated Deliberate Homicide to Preclude Directed Verdict: After the state presented its evidence in Lamere's mitigated deliberate homicide trial, Lamere moved for a directed verdict, asserting that the state failed to prove the mitigation element of the crime. The District Court denied the motion on grounds that the state cannot be required to prove a mitigating factor and that sufficient evidence of mitigation had been presented to defeat the motion for directed verdict. Lamere appealed. On the first issue, the Supreme Court decided that the District Court erred, because when the state charges the offense of mitigated deliberate homicide, the state must prove every element of the crime, including the mitigation element, beyond a reasonable doubt. In contrast, when a defendant asserts mitigating circumstances as an affirmative defense, the defendant must prove by a preponderance of the evidence that mitigating factors exist. On the second issue, the Supreme Court noted that a District Court should grant a directed verdict of acquittal only when there is no evidence whatsoever to support a guilty verdict and if a reasonable person could not conclude from the evidence that, taken in a light most favorable to the prosecution, guilt has not been proved beyond a reasonable doubt. Whether the trial court or a reviewing court would have viewed the evidence or found the facts differently from the jury is not the appropriate inquiry; rather, what is dispositive is the existence of evidence from which the jury could have found the mitigation element proved beyond a reasonable doubt, and if the evidence is properly before the jury, then resolving conflicts in the evidence, judging the credibility of witnesses, and finding the facts are acts uniquely within the province of the jury and the verdict will not be disturbed on appeal unless there is no evidence whatsoever to support the verdict. In Lamere's case, a reasonable trier of fact could have found that a person engaged in a fight and subjected to a threat from another person who is wielding a gun or knife may experience and act under extreme mental or emotional stress for which there is a reasonable explanation or excuse. Thus, the mitigation element was proved and the denial of the directed verdict motion on grounds of insufficient evidence of mitigation was affirmed. The Supreme Court applied the same standard as in civil cases to this criminal case—that unless there is an absence of any credible evidence in support of a verdict, a motion for a directed verdict is inappropriate. St. v. Lamere, 2003 MT 49, 314 M 326, 67 P3d 192 (2003).

Denial of Motion for Directed Verdict on Grounds of Insufficient Evidence — Standard of Review: A denial of a motion for a directed verdict is within the sound discretion of the trial court. Denial of a motion to dismiss based on insufficient evidence is reviewed for an abuse of discretion. In reviewing the sufficiency of evidence, the court determines whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. St. v. Lamere, 2003 MT 49, 314 M 326, 67 P3d 192 (2003), followed in St. v. Hausauer, 2006 MT 336, 335 M 137, 149 P3d 895 (2006). The abuse of discretion standard of review of a motion for a directed verdict was replaced by the de novo standard of review in St. v. Swann, 2007 MT 126, 337 M 326, 160 P3d 511 (2007). See also St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721 (1998).

Possibility That Statements Made During Custodial Interrogation, After Lawyer Requested, Contributed to Conviction — New Trial Warranted: Spang was charged in connection with a double homicide. He made statements to police after being read his rights at arrest and again 2 days later after requesting a lawyer. Spang moved to suppress the statements, but the motion was denied on grounds that Spang waived the right to counsel after voluntarily answering interrogators' questions on both occasions. Transcripts of the interrogations were made available to the jury, and Spang was subsequently convicted on two counts of intimidation by accountability, but appealed based on insufficiency of evidence. The Supreme Court reviewed the denial of the suppression motion to determine whether the trial court's findings of fact were clearly erroneous and whether they were correctly applied as a matter of law. Here, Spang's request for counsel was neither ambiguous nor equivocal, so cessation of questioning was required until Spang either reinitiated conversation with the officers or was provided an attorney. Because neither event occurred, the trial court erred when it denied Spang's motion to suppress the statements. To determine whether the error was prejudicial, the Supreme Court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), determining in this case that the error was trial error, because it occurred during presentation of the case to the jury and was amenable to qualitative assessment for prejudicial impact relative to other evidence introduced at trial. Under the cumulative evidence test, the state was required to show admissible evidence that proved the same facts as the tainted evidence. Although there was other sufficient evidence tending to prove that Spang committed intimidation by accountability, qualitatively there existed a reasonable possibility that the statements that Spang made during the second interrogation contributed to his conviction because of the strong emphasis placed on those statements during trial. Therefore, the District Court committed reversible error when it admitted the statements during the state's case in chief. The case was remanded for a new trial, and the District Court was directed not to admit the statements made during the second interrogation. Statements from the first interrogation were admissible, however, because Spang had waived the right to counsel. Spang's argument that the first interrogation statements also be suppressed on unnecessary delay grounds failed, absent evidence that the delay between arrest and initial appearance influenced the voluntariness of those statements. St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002), distinguishing St. v. Brubaker, 184 M 294, 602 P2d 974 (1979), and overruled, to the extent that the right to counsel for self-incrimination purposes may be invoked in custodial interrogation, in St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006).

Proper Denial of Directed Verdict on Charges of Intimidation by Accountability: Spang moved for a directed verdict on charges of intimidation by accountability, contending that there was insufficient evidence to establish his accountability because there was no evidence to show that he aided in communicating any threat to the crime victims. The state asserted that the evidence was sufficient because it showed that Spang was not only present at the crime scene, but also took actions prior to and during the intimidation that aided in the commission of the crimes. The District Court denied a directed verdict, Spang appealed, and the Supreme Court affirmed. Although mere presence at a crime scene is not enough to establish accountability, an accused need not take an active part in any overt criminal acts to be adjudged criminally liable for the acts. Further, although mere presence and the failure to disapprove or oppose another's commission of an offense are insufficient to sustain an accountability charge, those factors may be considered along with other circumstances that might indicate that the accused in some way aided or abetted the principal in the commission of the crime. Here, Spang was not only associated with the principal prior to commission of a double homicide and present at the scene of the crime, but he also unloaded and reloaded a rifle used to intimidate the victims, helped collect items from the victim's garage, pulled telephone wires from the victim's wall, and failed to oppose or disapprove commission of the crimes—sufficient evidence upon which a rational trier of fact could find beyond a reasonable doubt the Spang committed two offenses of intimidation by accountability. St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002). See also St. v. Hart, 191 M 375, 625 P2d 21 (1981), and St. v. Miller, 231 M 497, 757 P2d 1275 (1988).

Evidence of Flight Unacceptable as Sole Corroboration of Inconsistent Statement: After Giant's conviction of aggravated assault for attacking his wife in her home, he moved for dismissal on grounds that the evidence was insufficient to convict him as a matter of law because evidence of flight was the only corroboration of the prior inconsistent statements of the victim identifying him as the assailant. The victim initially identified Giant as the assailant in pretrial statements, but at trial, she identified her son as the attacker. No forensic testing was performed on evidence seized from the home, and there was no other testimony to corroborate either statement. The state argued, and the trial court agreed, that undisputed testimony of Giant's flight behavior was sufficient to corroborate the victim's prior inconsistent statements and that

evidence seized from the home matched her statements. When considering a motion for a directed verdict to determine whether any rational trier of fact could find the elements of a crime satisfied beyond a reasonable doubt, the Supreme Court will consider trial testimony and the evidence properly admitted and before the jury according to the criminal rules of evidence, but will not consider potential unintroduced evidence or other evidence outside the trial setting. A criminal conviction cannot be sustained when the only evidence of some essential element of a crime is a prior inconsistent statement. In Montana, all prior inconsistent statements are admissible as substantive evidence under Rule 801(d)(1)(A), M.R.Ev. (Title 26, ch. 10); however, prior inconsistent statements admitted as substantive evidence of guilt must be corroborated in order to sustain a conviction. Evidence of flight is not sufficient in itself to prove guilt or to support a conviction as a matter of law because evidence of flight by itself is as consistent with innocence as it is with guilt. Therefore, evidence of flight cannot be the sole corroboration of a prior inconsistent statement admitted as substantive evidence of guilt. Here, the physical evidence recovered from the home and photographs of the victim's injury, which would normally be sufficient corroborating evidence, were insufficient because they did not corroborate the essential element of identity because the victim identified another possible assailant. Further, the victim's prior inconsistent statements alone were insufficient as a matter of law to support Giant's conviction, in light of evidence that the victim stopped cooperating with the County Attorney's office when Giant was released on bail and asked that the case be dismissed after her divorce proceedings against Giant were voluntarily dismissed—actions that affected the reliability of the prior inconsistent statements but did not independently corroborate the statements. Giant's conviction was reversed. St. v. Giant, 2001 MT 245, 307 M 74, 37 P3d 49 (2001). See also St. v. White Water, 194 M 85, 634 P2d 636 (1981).

Sufficient Circumstantial Evidence of Deliberate Homicide — Motion for Directed Verdict Properly Denied: At the end of the state's case in chief in Clausell's deliberate homicide trial, Clausell moved for a directed verdict on grounds that the state failed to introduce evidence upon which the jury could conclude that Clausell knowingly or purposely caused his girlfriend's death. The District Court denied the motion, which Clausell contended on appeal was an abuse of discretion because gunshot residue tests failed to establish who was holding the gun when it discharged, there was no other evidence that Clausell was the shooter, there was no well-established motive to prove intent, and there was no evidence of flight. The Supreme Court agreed with the state that there was sufficient circumstantial evidence from which any rational trier of fact could infer that Clausell was holding the gun and that he acted knowingly or purposely. The court also noted that neither motive nor flight is an element of deliberate homicide. Clausell recounted at least eight different versions of the facts that were inconsistent with each other and with the physical evidence. When viewed in the light most favorable to the state, the record showed ample circumstantial evidence that Clausell committed the crime, and denial of the motion for a directed verdict was not an abuse of discretion. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001). The abuse of discretion standard of review of a motion for a directed verdict was replaced by the de novo standard of review in St. v. Swann, 2007 MT 126, 337 M 326, 160 P3d 511 (2007). See also St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358 (1998).

No Abuse of Discretion in Failure to Dismiss Case on Court's Own Motion for Insufficient Evidence: Brady was charged with DUI, fourth or subsequent offense, arising from circumstances surrounding a single-vehicle accident in which Brady swerved off the highway, hit a rock wall, and rolled the vehicle. After the state's case in chief, Brady moved for a directed verdict of acquittal, but the motion was denied. Brady was subsequently convicted and contended on appeal that the trial court erred when it did not dismiss the case on its own motion because the evidence was far from overwhelming, arguing that taken as a whole, the evidence was insufficient to submit to the jury because there was no direct or even circumstantial evidence that he had anything to drink, much less was intoxicated, at the time of the accident. However, there was circumstantial evidence of conduct before and after the accident that could have led the jury to believe Brady had been drinking. When circumstantial evidence is susceptible to differing interpretations, it is within the province of the jury to decide which will prevail. The jury apparently did not believe that the wreck happened because Brady's car malfunctioned, that his injuries accounted for his drunken behavior, or that his apparent intoxication when officers tracked him down at home after the accident was the consequence of a single beer that he drank after the accident. Taken in a light most favorable to the state, a reasonable juror could have found Brady guilty beyond a reasonable doubt, and it was not error for the trial court to allow the evidence to go to the jury. St. v. Brady, 2000 MT 282, 302 M 174, 13 P3d 941, 57 St. Rep. 1178 (2000). The abuse of discretion standard of review of a motion for a

directed verdict was replaced by the de novo standard of review in St. v. Swann, 2007 MT 126, 337 M 326, 160 P3d 511 (2007).

Motion to Dismiss Based on Insufficient Evidence of Negligent Homicide Properly Denied — Deviation From Reasonableness Standard Sufficient to Support Finding of Negligent Conduct: After consuming at least five shots of brandy and four beers at a tavern, Davis hit and killed a pedestrian on the way home, then left the accident scene. Upon arriving home, he told his girlfriend that he had hit a deer. He then ate dinner and went to bed. Davis was later charged with negligent homicide and failure to remain at the scene of an accident that resulted in death or personal injuries. Following presentation of the state's case, Davis moved for dismissal based on insufficient evidence, which was denied. Davis was convicted and appealed. The Supreme Court affirmed, concluding that a rational trier of fact could have found the essential elements of negligent homicide beyond a reasonable doubt based on evidence that Davis consciously disregarded the risk posed by his driving under the influence of alcohol (even though blood alcohol content could not be tested because he left the scene) and that Davis's conduct immediately before, during, and after the accident revealed a gross deviation from the standard of conduct that a reasonable person not under the influence of alcohol would have observed. St. v. Davis, 2000 MT 199, 300 M 458, 5 P3d 547, 57 St. Rep. 773 (2000), followed in St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Motion to Dismiss on Grounds of Insufficient Evidence Properly Denied: When it was clear from the record that a reasonable juror could have concluded from the evidence taken in a light most favorable to the prosecution that guilt on several counts was proved beyond a reasonable doubt, the District Court did not abuse its discretion in denying defendant's motion for a directed verdict of acquittal, and further prosecution was not barred on double jeopardy grounds. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000). The abuse of discretion standard of review of a motion for a directed verdict was replaced by the de novo standard of review in St. v. Swann, 2007 MT 126, 337 M 326, 160 P3d 511 (2007). See also St. v. Bromgard, 261 M 291, 862 P2d 1140 (1993), and St. v. Campbell, 278 M 236, 924 P2d 1304 (1996).

Sufficient Circumstantial Evidence to Justify Aggravated Assault Charge — Directed Verdict Properly Denied: At the conclusion of the state's evidence on Hall's aggravated assault charge, Hall moved for a directed verdict of acquittal based on the contention that because only circumstantial evidence had been offered, under this section, the action should have been dismissed. Under this section, dismissal of an action based on insufficient evidence is within the discretion of the court. After examining the trial transcript, the Supreme Court found that the evidence, although circumstantial, when viewed in the light most favorable to the prosecution, was sufficient for any rational trier of fact to find that Hall committed the essential elements of the crime beyond a reasonable doubt. The trial court did not err in denying Hall's motion for directed verdict. St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929, 56 St. Rep. 1190 (1999), following St. v. Arthun, 274 M 82, 906 P2d 216, 52 St. Rep. 1133 (1995). The abuse of discretion standard of review of a motion for a directed verdict was replaced by the de novo standard of review in St. v. Swann, 2007 MT 126, 337 M 326, 160 P3d 511 (2007).

Identity of Perpetrator — Hearsay Testimony of Child Held Sufficient: Heen became suspicious that his 33-month-old granddaughter, Cassie, had been sexually abused by her stepfather, Osborne, Heen's son-in-law. Heen and his daughter, Jamie, Cassie's mother, talked to Cassie, who said or indicated to either or both Heen and Jamie that she had played with "daddy's rubber duck" and that the rubber duck was Osborne's genitalia. Cassie also gave information tending to implicate Heen, whom she called "Papa", as opposed to Osborne, whom she called "Daddy". Cassie's hearsay testimony was also that "Daddy is yucky" and to the effect that Cassie was afraid of Osborne. A medical examination showed that Cassie had physical injuries consistent with sexual abuse. The District Court interviewed Cassie and found her unable to testify because she was extremely shy and was intimidated by the courtroom. The state relied upon the hearsay testimony by Heen and Jamie, and based upon that hearsay evidence, Osborne was convicted of sexual intercourse without consent. The Supreme Court held that when the evidence is viewed in a light most favorable to the state, there was sufficient evidence from which a rational jury could have found beyond a reasonable doubt that Osborne was the perpetrator of the offense, even though there was no direct physical evidence connecting Osborne with the crime. Concerning Osborne's objection that the evidence did not conclusively show that Osborne had penetrated Cassie with his penis, the Supreme Court held that under the language of the statute, penetration by a different object made no difference. St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045, 56 St. Rep. 589 (1999).

"Repeatedly" Means "More Than Once" in Stalking Statute: McCarthy was convicted of stalking and, while incarcerated, twice tried to contact the victim by letter, but the victim did not

read the letters. He was charged with stalking, second offense. At trial, he moved to dismiss on grounds that two instances of attempted contact by letter were insufficient to support a stalking conviction. Legislative intent and the common definition of "repeatedly" persuaded the Supreme Court that the state need demonstrate only more than one instance of harassment, intimidation, or threat. The motion to dismiss was properly denied. St. v. McCarthy, 1999 MT 99, 294 M 270, 980 P2d 629, 56 St. Rep. 418 (1999).

Circumstantial Evidence of Assault Insufficient — Motion for Directed Verdict Granted: The victim denied that his girlfriend, Cochran, had stabbed him with a pair of scissors. The state offered circumstantial evidence showing a likelihood that Cochran had been the perpetrator and that the victim's story was not supported by any physical evidence. The Supreme Court held that the trial court had erred in not granting the defendant's motion for dismissal because the state's evidence was not conclusive in showing that no one but the defendant could have committed the crime. St. v. Cochran, 1998 MT 138, 290 M 1, 964 P2d 707, 55 St. Rep. 551 (1998).

Mere Proximity Insufficient to Establish Connection Between Common Items and Illegal Drug Activity — Burden of Proof Required in Criminal Forfeiture Proceedings: Before the state may criminally convict a citizen and deprive that citizen of property by forfeiture under 45-9-206, the state must establish, by direct or circumstantial evidence, a more substantial connection between common household items and illegal drug activity than merely their proximity to one another in a residence. The state must prove not only that the property has the required statutory connection to illegal drug activity, but also that each specific item seized is subject to forfeiture. Criminal forfeiture based on nothing more than a justifiable suspicion cannot be affirmed, nor is a suggestion of guilt by association sufficient to establish beyond a reasonable doubt that a statutory connection exists between the property and the drug activity. The kind and amount of circumstantial evidence offered in the present case were insufficient as a matter of law to warrant the jury's finding of guilt beyond a reasonable doubt. Therefore, defendant's motion to dismiss, on grounds of insufficient evidence that the property was subject to forfeiture, should have been granted. St. v. Hegg, 1998 MT 100, 288 M 254, 956 P2d 754, 55 St. Rep. 391 (1998).

Driver Asleep at Wheel of Pickup Not Running — Sufficiency of Evidence: Testimony of a peace officer that when he shook awake a driver slumped over the wheel of a parked pickup that was not running, the driver started the engine and of the driver's wife that when she left the truck after an argument, she threw him keys belonging to her son and that they contained a worn key that could fit defendant's pickup (she had parked the pickup and took the keys with her when she started to leave) was sufficient for the jury to find that defendant was in actual physical control of the pickup and to convict him of DUI. St. v. Hagen, 283 M 156, 939 P2d 994, 54 St. Rep. 542 (1997).

DNA and Other Evidence Held Sufficient to Convict on Sexual Intercourse Without Consent: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based upon DNA evidence and testimony of the stepdaughter. That evidence showed that Weeks had intercourse with the stepdaughter, the stepdaughter did not have intercourse with anyone else, the stepdaughter had a baby, and Weeks was up to 1.9 million times more likely to be the baby's father than any other randomly chosen male. The District Court was therefore correct in refusing to grant a directed verdict of acquittal. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Circumstantial Evidence of Child Abuse — Motion for Directed Verdict Properly Denied: Mergenthaler was charged with negligent homicide of Ashley, a 13-month-old female. The state's evidence showed that Ashley suffered injuries to her skull and brain that were attributed by all of the state's medical experts to "whiplash shaken infant syndrome" and not to a fall from a couch, as claimed by Mergenthaler. Citing St. v. Haskins, 255 M 202, 841 P2d 542 (1992), the Supreme Court held that a directed verdict was appropriate only when there was no evidence to support a guilty verdict and that in this case, there was strong circumstantial evidence that Mergenthaler's conduct was the cause of Ashley's death. St. v. Mergenthaler, 263 M 198, 868 P2d 560, 51 St. Rep. 13 (1994).

Evidence of Possession and Circumstances Sufficient to Support Burglary Conviction: The defendant moved for a directed verdict at the close of the state's case against him on burglary charges. The Supreme Court held that although evidence of possession alone was not sufficient to support a burglary conviction, there was sufficiently strong circumstantial evidence of guilt to justify submitting the case to the jury. St. v. Floyd, 243 M 269, 790 P2d 475, 47 St. Rep. 720 (1990).

Sufficient Evidence of Speeding and Reckless Driving — Motion for Acquittal Denied: Defendant contended his motion for acquittal on charges of speeding and reckless driving should

have been granted because the officer in pursuit did not use his siren and because defendant never saw the officer's flashing lights. The motion was properly denied on evidence that another officer saw the flashing lights from 2 miles away, occupants in defendant's car were aware of the pursuit and of defendant's speeding, and use of the siren was not mandatory. St. v. Keil, 231 M 187, 751 P2d 680, 45 St. Rep. 532 (1988).

Use of Weapon in Aggravated Assault Case as Sufficient Evidence to Preclude Dismissal: In a case of aggravated assault, evidence that a weapon was used in conjunction with threats was sufficient to preclude dismissal at the close of the state's case. St. v. Matson, 227 M 36, 736 P2d 971, 44 St. Rep. 874 (1987), distinguished in St. v. Clemo, 1999 MT 323, 297 M 316, 992 P2d 1263, 56 St. Rep. 1292 (1999).

Prima Facie Showing of Knowledge of Insufficient Funds in Checking Account: Sufficient evidence was presented in the prosecution's case in chief to indicate that defendant was aware that it was highly probable that his checks would not be paid by the banks upon which they were written. This evidence included bank statements showing significant negative balances, numerous overdraft notices mailed to the defendant, numerous certified letters sent to defendant notifying him of the overdrafts and requesting payment, and the fact that numerous checks remained unpaid at the time of the trial. St. v. McHugh, 215 M 296, 697 P2d 466, 42 St. Rep. 371 (1985).

Oral Statement by Judge Not a Finding of Fact: At the close of evidence in a misdemeanor assault nonjury trial, the court made an oral statement that the defendant could have and did hit the victim. The court then requested briefs on the issue of justification. A month later the court vacated its factual finding and dismissed the charge. Because the court was still in the process of its judicial determination of facts and law when it made the oral statement, it could properly vacate its statement. St. v. Nicholls, 200 M 144, 649 P2d 1346, 39 St. Rep. 1635 (1982).

Dismissal Discretionary: Defendant moved for a dismissal of a rape charge due to insufficient evidence. The general rule in Montana is that a directed verdict of acquittal is appropriate in criminal cases only where the State fails to prove its case and there is no evidence upon which a jury could base its verdict. The decision whether to dismiss the charge or direct a verdict of acquittal lies within the sound discretion of the trial court and will be disturbed on appeal only when abuse is shown. St. v. Goltz, 197 M 361, 642 P2d 1079, 39 St. Rep. 613 (1982), and St. v. Smith, 187 M 245, 609 P2d 696 (1980), following St. v. Yoss, 146 M 508, 409 P2d 452 (1965), and St. v. Just, 184 M 262, 602 P2d 957 (1979), and followed in St. v. Graves, 241 M 533, 788 P2d 311, 47 St. Rep. 483 (1990). The abuse of discretion standard of review of a motion for a directed verdict was replaced by the de novo standard of review in St. v. Swann, 2007 MT 126, 337 M 326, 160 P3d 511 (2007). See also St. v. Romannose, 281 M 84, 931 P2d 1304, 54 St. Rep. 72 (1997), and St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721, 55 St. Rep. 719 (1998).

Guilt Based Solely on Unreliable Prior Inconsistent Statement: An unreliable prior inconsistent statement of a witness should not be the sole substantive evidence upon which a jury is allowed to base guilt, and a conviction supported only by a prior inconsistent statement should not be allowed to stand. St. v. White Water, 194 M 85, 634 P2d 636, 38 St. Rep. 1664 (1981), clarified in St. v. Giant, 2001 MT 245, 307 M 74, 37 P3d 49 (2001), which required that prior inconsistent statements admitted as substantive evidence of guilt be corroborated in order to sustain a conviction.

Standards for Deciding Directed Verdict Motion: A directed verdict for defendant should be granted only where there is no evidence upon which a jury could base a verdict; that is, the defendant is entitled to an acquittal if reasonable men could not conclude from the evidence taken in a light most favorable to the prosecution that guilt has been proved beyond a reasonable doubt. The ruling on the motion will be disturbed on appeal only when abuse of trial court's sound discretion to decide the motion is shown. St. v. White Water, 194 M 85, 634 P2d 636, 38 St. Rep. 1664 (1981), followed in St. v. Howie, 228 M 497, 744 P2d 156, 44 St. Rep. 1711 (1987), and St. v. Salois, 235 M 276, 766 P2d 1306, 45 St. Rep. 2382 (1988). The abuse of discretion standard of review of a motion for a directed verdict was replaced by the de novo standard of review in St. v. Swann, 2007 MT 126, 337 M 326, 160 P3d 511 (2007).

Statutory Rape Not Proven Solely by Unreliable Prior Inconsistent Statement: Charge of sexual intercourse without consent was properly dismissed at the end of the State's presentation of its case where the only evidence upon which conviction could be based was an unreliable prior statement of the alleged victim that was inconsistent with her testimony at trial in which she repudiated the statement. St. v. White Water, 194 M 85, 634 P2d 636, 38 St. Rep. 1664 (1981).

Substantial Circumstantial Evidence to Infer Burglary: Even though the evidence concerning a burglary by the defendant was circumstantial, the evidence was substantial enough to support the crime of burglary. Further, the quality of the state's evidence was

sufficient to meet its burden of proof. The question, following Jackson v. Va., 443 US 307, 61 L Ed 2d 560, 99 S Ct 2781 (1979), is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. St. v. Roberts, 194 M 189, 633 P2d 1214, 38 St. Rep. 1551 (1981), cited in St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988).

Sexual Assault Erroneously Dismissed — "Sexual Contact" Construed: The Supreme Court reversed the District Court's decision to grant defendant's motion for dismissal under this section of a sexual assault charge and held that the sexual contact proscribed by 45-5-502 is not limited to a touching of the anal or genital area of a male or female or the breast of a female. Looking to the purpose of the statute, the court found that the definition of "sexual contact" encompasses the rubbing of the belly and chest of a prepubescent female child because of the societal concern for such impositions and their resultant outrage, disgust, or shame in the victim. St. v. Weese, 189 M 464, 616 P2d 371, 37 St. Rep. 1620 (1980).

Sufficient Evidence of Rape: It was not reversible error for the lower court to deny the defendant's motion for a directed verdict on the grounds that there was not sufficient evidence to support the charge of sexual intercourse without consent. There was no question that a rape occurred, and numerous items of evidence adduced at trial tended to prove that the defendant committed the crime. St. v. Pendergrass, 189 M 127, 615 P2d 201 (1980).

Circumstantial Evidence: Circumstantial evidence is not always inferior in quality nor is it necessarily relegated to a second-class status in the consideration to be given it. The fact that it is circumstantial is not a sufficient allegation to justify a reversal of the judgment, for such evidence may be and frequently is most convincing and satisfactory. In determining the sufficiency of circumstantial evidence to make a case for the jury and to sustain a conviction, all of the facts and circumstances must be taken into consideration collectively. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Sufficient Evidence of Theft: In a theft proceeding, if the evidence shows that defendant was in possession of recently stolen property, either singly or jointly with others, an inference of guilt is warranted. Evidence of exclusiveness of possession by the defendant is not rebutted merely by showing another's presence. Where this evidence is presented, there is sufficient evidence to send the case to the jury, and the trial court may properly reject a motion to dismiss for failure to establish a prima facie case and the verdict, supported by substantial evidence, will be upheld on appeal. St. v. White, 185 M 213, 605 P2d 191 (1980).

Motion to Dismiss — Province of Jury and Court: It is within the province of the jury, not the court, to weigh the evidence. The decision upon a motion to dismiss is within the discretion of the court. St. v. Buckley, 171 M 238, 557 P2d 283 (1976). The abuse of discretion standard of review of a motion for a directed verdict was replaced by the de novo standard of review in St. v. Swann, 2007 MT 126, 337 M 326, 160 P3d 511 (2007).

Corroborated Admission of Guilt: The court properly denied the defendant's motion for an acquittal for the failure of the State to present sufficient evidence because the defendant admitted shooting the victim and witnesses testified that the defendant, after quarreling with the victim, had driven home to get a gun in order to accomplish the slaying. St. v. French, 166 M 196, 531 P2d 373 (1975).

Utter Lack of Proof by State: When there is an utter failure or lack of evidence to establish the state's case, the court may direct the jury to return a verdict for the defendant. St. v. Widdicombe, 130 M 325, 301 P2d 1116 (1956).

46-16-410. Settlement of jury instructions.

Commission Comments

1991 Comment: This statute consolidates several provisions into one statute concerning the settlement of instructions. The statute contains elements from both the 1987 code and the federal rule. Compare 1987 MCA 46-16-401, Rule 30, Fed. R. Crim. P., and this statute. While some changes in established procedure may be anticipated, the prevailing practice is adopted by this statute.

Case Notes

Defendant's Presence Not Required During Settling of Jury Instructions: This section specifically allows for a defendant's absence during the settling of jury instructions without the need for the trial court to obtain the defendant's voluntary, intelligent, and knowing waiver of the right to be present during this critical stage of the proceedings. St. v. Roedel, 2007 MT 291, 339 M 489, 171 P3d 694 (2007).

Sufficient Evidence to Submit Homicide Case to Jury — Directed Verdict Properly Denied: In a deliberate homicide trial, Smith asserted that the state failed to prove that he purposely and

knowingly caused the death of another and that although the evidence may have established negligent homicide, there was an absence of proof that it was Smith's conscious object to cause the death, so Smith's motion for a directed verdict should have been granted. The evidence was conflicting, and some evidence was circumstantial but substantiated. However, without a complete absence of evidence to justify not sending the case to the jury, the trial court correctly declined to invade the province of the jury by directing the verdict. St. v. Smith, 2005 MT 325, 329 M 526, 127 P3d 353 (2005), followed in Adams v. St., 2007 MT 35, 336 M 63, 153 P3d 601 (2007).

Failure to Raise Double Jeopardy Objection at Settling of Jury Instructions or to Object to Verdict Form in Which Offenses Listed as Separate Counts — Appeal Precluded: Minez was convicted of both criminal possession and criminal production of dangerous drugs. On appeal, Minez argued that conviction of both offenses, which arose out of the same transaction, constituted double jeopardy. However, at trial, Minez abandoned a request for jury instructions on double jeopardy and never returned to the issue, failed to raise a double jeopardy objection at the settling of jury instructions, and did not object to the verdict form in which both offenses were listed as independent counts. Having abandoned the constitutional double jeopardy objections at trial, Minez was precluded from raising the issue on appeal, and the convictions were affirmed. St. v. Minez, 2004 MT 115, 321 M 148, 89 P3d 966 (2004).

Failure to Give Defendant's Instruction on Testimony of Informants Not Erroneous: At a homicide trial, DuBray offered a jury instruction that would have required the jury to determine whether the testimony of each of several informants had been affected by the witness's self-interest, by any agreement with the state, by the witness's own interest in the outcome of the case, or by prejudice against DuBray, citing St. v. Grimes, 1999 MT 145, 295 M 22, 982 P2d 1037 (1999). The trial court refused that cautionary instruction and gave one offered by the state instead, consistent with St. v. Long, 274 M 228, 907 P2d 945 (1995), which adequately addressed the credibility of informants, "witness motive, bias or prejudice, and bad character for truthfulness". On appeal, DuBray contended that without his proposed instruction, the jury instructions were incomplete. The Supreme Court noted that Grimes and Long were not inconsistent and that the jury instruction that was given fully and fairly instructed the jury. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Failure by State to Articulate Permissible Purpose for Introduction of Evidence of Other Crimes — Lack of Proof of Defendant's Knowledge of Fact of Consequence: During pretrial proceedings for Dobson's trial for sexual intercourse without consent, the state indicated its intent to introduce evidence that Dobson had been previously charged with sexual intercourse without consent with a minor. The purported purpose was for proof of knowledge or the absence of mistake or accident, establishing that Dobson knew that someone under 16 years of age could not legally consent to sexual intercourse. Instead of objecting, defense counsel offered to stipulate that Dobson did have knowledge of that fact. The state objected that Dobson should not be able to stipulate away its case, and urged that the jury instructions contain details of the prior charge. The trial court declined the specific instructions offered by both Dobson and the state and fashioned and gave its own instruction, advising the jury that Dobson was previously charged with sexual intercourse without consent with a minor and thus had knowledge of the law, but instructing that the evidence was not to be construed by the jury as evidence of Dobson's character, but only as evidence of Dobson's prior knowledge that such conduct was criminal. On appeal, Dobson contended that the instruction was erroneous. The Supreme Court agreed that the trial court abused its discretion in giving the instruction because it did not meet the third criteria of the modified Just rule (see St. v. Matt, 249 M 136, 814 P2d 52 (1991)). Although it appeared at first blush that the state asserted permissible purposes of knowledge or the absence of mistake or accident for the admission of other crimes evidence, merely reciting an allowable purpose is not sufficient if the evidence does not further that purpose or if that purpose is not an issue in dispute (see St. v. Weldy, 273 M 68, 902 P2d 1 (1995)). Rather, as set out in U.S. v. Mehrmanesh, 689 F2d 822 (9th Cir. 1982), the state must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence, which in this case, the state did not do. Dobson's knowledge of the law that it is a felony offense to have sexual intercourse with someone under 16 years of age was not a fact of consequence to the action. Thus, admission of the evidence via the jury instruction was reversible error, and the case was remanded for a new trial. St. v. Dobson, 2001 MT 167, 306 M 145, 30 P3d 1077 (2001). See also St. v. Anderson, 275 M 344, 912 P2d 801 (1996).

Ineffective Assistance of Counsel in Failure to Offer "Failure to Agree" Instruction — Prejudice Warranting Remand for New Trial: At Rogers' trial for attempted sexual intercourse without consent and felony assault, the District Court provided jury instructions with misdemeanor

sexual assault and misdemeanor assault as lesser included offenses. Rogers' attorney requested the "acquittal first" instruction, which provided that the jury was not to consider the lesser included offenses unless they first acquitted on the greater offenses. Rogers contended that the failure of the attorney to request the "failure to agree" instruction allowed under 46-16-607, which provides that the jury may consider a lesser included offense if it is unable to reach a verdict on the greater offense, constituted ineffective assistance of counsel. The Supreme Court agreed. The "failure to agree" instruction was drafted to protect against the serious risk identified in U.S. v. Jackson, 726 F2d 1466 (9th Cir. 1984), which arises when jurors harboring a doubt as to defendant's guilt of the greater offense, but at the same time convinced that defendant had committed some offense, might wrongly yield to the majority and convict of the greater offense rather than not convict at all. The failure to offer this potentially beneficial instruction, when that failure is not part of counsel's trial strategy, is an error so serious that it falls outside the range of competence required of attorneys in criminal cases. Thus, when sufficient facts exist to support a conviction for a lesser included offense, defense counsel must offer the "failure to agree" instruction unless there is a tactical reason for not doing so, and failure to offer the instruction in such cases is prejudicial error. St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Jury Instruction Disallowing Evidence of Intoxication in Determining State of Mind Not Error — Full and Fair Instructions on Law: Following Raugust's criminal trial, the court instructed the jury that it could not consider evidence of intoxication for any purpose, pursuant to 45-2-203. Raugust maintained on appeal that the instruction was in error because depriving him of the ability to admit intoxication evidence lessened the state's burden of proof and confused the jury, in violation of his due process rights. However, the error urged on appeal was not contained in the objection made to the instruction during the final settling of jury instructions, constituting waiver of the argument on appeal. Moreover, the plain error doctrine did not apply because review under that doctrine was requested for the first time on appeal. Here, the jury was instructed regarding: (1) the elements of each offense charged and the state's burden of proving each element beyond a reasonable doubt; (2) the definition of the applicable mental states—purposely and knowingly; (3) the fact that the existence of a mental state may be inferred from the acts of the accused and from the facts and circumstances connected with the offense; (4) the difference between direct and circumstantial evidence; (5) witness credibility; and (6) the need for a unanimous verdict. Read as a whole, these instructions fairly and fully instructed the jury on the law applicable to the case, and giving the instruction disallowing the defense of intoxication was not erroneous. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Hagen, 283 M 156, 939 P2d 994 (1997).

Jury Instruction Proposed but Rejected — No Further Objection Required: Objections to jury instructions proposed by the opposing party serve the same function as evidentiary objections. When a party proposes a jury instruction and the trial court refuses to give the instruction, the court knows that an issue of law has been raised by the party seeking the instruction and, from the nature of the proposed instruction, knows the nature of the party's contentions. Thus, that party has made a sufficient objection for purposes of this section and has no duty to make a further objection for the record. St. v. Grimes, 1999 MT 145, 295 M 22, 982 P2d 1037, 56 St. Rep. 571 (1999), followed in St. v. Dobson, 2001 MT 167, 306 M 145, 30 P3d 1077 (2001).

Refusal of Proposed Cautionary Instruction — Standard of Prejudice: When a trial court refuses a proposed cautionary instruction, the standard of prejudice is whether the testimony is crucial to the state's case in light of other evidence. In the present case, an informant with apparent personal motivation offered testimony about Grimes's crimes, but no cautionary instruction was given, which Grimes contended constituted reversible error. However, in light of other overwhelming evidence linking Grimes to the crime, the informant's testimony was not crucial to the state's case, so failure to give a cautionary instruction was harmless and not prejudicial to Grimes. St. v. Grimes, 1999 MT 145, 295 M 22, 982 P2d 1037, 56 St. Rep. 571 (1999), following Guam v. Dela Rosa, 644 F2d 1257 (9th Cir. 1981).

Testimony by Government Agent Motivated by Personal Gain — Cautionary Instruction Prudent: When a government agent motivated by personal gain rather than an independent law enforcement purpose provides testimony, a cautionary instruction is prudent. St. v. Grimes, 1999 MT 145, 295 M 22, 982 P2d 1037, 56 St. Rep. 571 (1999), following Guam v. Dela Rosa, 644 F2d 1257 (9th Cir. 1981).

"Failure to Agree" Instruction — When Corrective Instruction Required: Generally, when a claimed error concerns jury instructions that were not objected to at the time that the instructions were settled, the alleged error may not be raised for the first time on appeal; however, the Supreme Court will review jury instructions in certain circumstances even in the

absence of an objection to determine whether the jury was properly instructed. In the present case, there was significant confusion among the court, the prosecutor, and the defense counsel concerning the correct procedural sequence for the jury to consider greater and lesser offenses during deliberations, given a timely request by defendant. If a judge is of the opinion that instructions already given fully advise the jury on the procedures that it is to follow in deliberations, the judge's refusal to answer a jury's question already answered in the instruction is not error. However, when the instruction fails to fully advise, the judge should provide a corrective instruction. The withdrawal of defendant's timely request for an instruction at settlement was due to the mistaken representation of the court and the prosecutor that the law did not allow an instruction that the jury may consider a lesser offense if it fails to agree on a verdict for the greater offense, so the Supreme Court chose to review defendant's claim of error in a jury instruction. Under 46-16-607(3), as long as a criminal defendant requests a "failure to agree" instruction at the settling of jury instructions, a District Court must instruct the jury that it may consider the lesser offense without first reaching a unanimous verdict on the greater offense. St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998), following U.S. v. Jackson, 726 F2d 1466 (9th Cir. 1984).

Failure to Record Jury Question and Court Response — No Prejudice: Defendant contended that the trial court's failure to respond in writing or to create a record regarding a question asked by the jury after being retired for deliberation constituted prejudicial error requiring a new trial. Although this section requires a record to be made at the settlement of instructions, a jury's question asked during deliberations does not constitute the period of trial relating to settlement of instructions; thus, this section does not apply. Given the court's response to rely on the instructions already given, there was no prejudice to defendant, and any error in failing to make a record was harmless and not reversible. St. v. Brogan, 272 M 156, 900 P2d 284, 52 St. Rep. 636 (1995).

Use of Information and Surplus Language in Instructions Not Error: Mummey was found not guilty on the first count against him of aggravated assault against Miller. He was found guilty of the second count of felony assault (now assault with a weapon) against Darling. Mummey argued that he could not be found guilty of the second charge because it was inconsistent in its language in that it described the assault as having been perpetrated by the use of the same footwear worn in the assault of which he had been found innocent. The Supreme Court held that there was no error in incorporating the information into the jury instructions when they did not redefine the elements of the crime and that in view of all the instructions, the surplus language in the second count did not invalidate the verdict. St. v. Mummey, 264 M 272, 871 P2d 868, 51 St. Rep. 198 (1994).

Error to Refuse Instruction That One Cannot Conspire Solely With Government Agent: It is legally impossible for a person to conspire with an undercover government agent to commit a crime. There must be at least two nonagents conspiring between themselves and involved with the agent. It was error to refuse defendant's instruction to that effect. St. v. Shaw, 255 M 298, 843 P2d 316, 49 St. Rep. 1012 (1992).

Part 5
Conduct of Jury

Part Commission Comments

1991 Part Comments: This part governs the conduct of the jury during the trial and deliberations. The provisions of this part are chiefly a restatement of the 1987 code. Nothing in these provisions is intended to alter established procedure.

Part Law Review Articles

Publicity Before and During Trial, Johnson & Johnson, 41 Mont. L. Rev. 355 (1980).

Part Collateral References

Contempt *key* 14; Criminal Law *key* 848, 850, 852, 854(1) through (9), 857(1), 858(1) through (4), 863(1), (2), 867.

23A C.J.S. Criminal Law §1843.

75B Am. Jur. 2d Trial §1254.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial. 59 ALR 5th 1.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—post-Parker cases. 35 ALR 4th 890.

Criminal Defense, State Bar of Montana C.L.E. publication, 1990.

46-16-501. Conduct of jury during trial.

Commission Comments

1991 Comment: This statute preserves the substance of 1987 MCA 46-16-501. The code language has been significantly altered for clarity, but these alterations should not affect established procedure.

Commission Comment Not Divided: This section is a recodification of part of section 95-1913, R.C.M. 1947. Sections 46-16-503 and 46-16-504 are also derived from section 95-1913. The commission comments to section 95-1913 are printed in their entirety under 46-16-501.

Source: R.C.M. 1947, section[s] 94-7230, 94-7304, 94-7231 and Criminal Code of Illinois [Chapter] 38, section 115-4. C.C.P. California section 612 and R.C.M. 1947, section 94-7303.

No substantial change.

Compiler's Comments

1991 Amendment: In (1), in first sentence after "time", deleted "before the submission of the case" and after "separate or be" substituted "ordered to remain sequestered" for "kept" and at beginning of second sentence inserted "If sequestered", after "together" deleted "until the next meeting of the court", and at end substituted "as directed" for "at the next meeting thereof"; in (3) deleted reference to subsection (a) of subsection (2); and made minor changes in style.

Case Notes

Absence of Defendant From Critical Trial Proceeding Violative of Fundamental Right to Appear and Defend in Person — No Error Given Curative Action of Trial Court: During Kennedy's criminal trial, a juror communicated with one of the state's witnesses. The trial judge then met with the juror in chambers without Kennedy or any counsel present, and the juror admitted the conversation, but denied mentioning anything about it to the jury. The court then met with counsel in chambers, replaced the juror with an alternate, excluded the witness from testifying, and went on with the trial. Defense counsel moved for mistrial and dismissal with prejudice, but the motion was denied. On appeal, the Supreme Court held that excluding Kennedy from the conversation with the juror violated Kennedy's fundamental right to be present at all critical stages of trial to defend in person. Further, any waiver by defense counsel by failing to object was ineffective because Kennedy was never told that he had a right to be present or that the juror questioning was about to occur. However, Kennedy was not prejudiced or deprived of a fair trial by the error in light of the District Court's corrective actions. Thus, denial of a mistrial was not an abuse of discretion. St. v. Kennedy, 2004 MT 53, 320 M 161, 85 P3d 1279 (2004), followed in St. v. Godfrey, 2009 MT 60, 349 M 335, 203 P3d 834 (2009).

Juror Outburst — Court's Removal of Child Witness From Stand — No Prejudice to Defendant: A juror's request to be dismissed when defense counsel persisted in questioning a 9-year-old witness who repeatedly broke down in tears at a certain point in questioning and the court's removal of the witness from the stand did not warrant a mistrial. There was no showing that the juror's outburst resulted in prejudice to defendant, and removal of the witness did not deprive defendant of the right to confront and cross-examine witnesses when the court gave defense counsel the option to resume questioning at a later time. St. v. McNatt, 257 M 468, 849 P2d 1050, 50 St. Rep. 365 (1993), followed in St. v. Gollehon, 262 M 293, 864 P2d 1257, 50 St. Rep. 1564 (1993), and cited in St. v. Brandon, 264 M 231, 870 P2d 734, 51 St. Rep. 244 (1994).

Distinction Between Brief Encounter and Intimate Association: In a case in which the defendant claimed that two jurors spoke briefly to one another about the defendant and his witnesses, there was no initial showing of prejudice against the defendant. No juror affidavits were presented to the court to support defendant's claim. The statements, if made, were brief and do not support the claim they injured the defense because they do not reflect on intimate association but are merely indicative of a brief encounter. There is a distinction between a brief encounter and an intimate association as it pertains to either the relationship among jurors or between jurors and witnesses. St. v. Salois, 235 M 276, 766 P2d 1306, 45 St. Rep. 2382 (1988).

Attempt by Jury Foreman to Convey Information on Defendant's Criminal Record to Jury — Remand for New Trial: The jury foreman heard in a third-party conversation that "defendant had a criminal record as long as your arm" and attempted to convey the information to the rest of the jury. Although the jury declined to hear the offered information, the injury to defendant had already occurred when the foreman heard the prejudicial comments and informed the remaining jurors that he had reliable information from the Sheriff's office. The District Court denied a motion for mistrial after examining three jurors, but the Supreme Court would not assume that the entire panel was safeguarded from contamination. In remanding for a new trial, the Supreme Court held that the presumption of prejudice that was created when uncontroverted evidence established that prejudicial statements reached one or more jurors was not rebutted

when no evidence existed to rebut the presumption other than testimony of three of the jurors. St. v. DeGraw, 235 M 53, 764 P2d 1290, 45 St. Rep. 2154 (1988), distinguishing St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987), St. v. Counts, 209 M 242, 679 P2d 1245 (1984), and St. v. Gillham, 206 M 169, 670 P2d 544 (1983).

Mistrial Denied Despite Juror Misconduct — No Error: A juror disregarded trial court instructions by talking with a County Attorney, who assisted in the prosecution, about the propriety of allowing evidence of child abuse in open court. Another juror was seen entering Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) offices after evidence was allowed showing the agency was peripherally involved in the case, and there was evidence the juror discussed the defendant and her children during a conversation at a restaurant. Arguably, the jury misconduct tended to injure the defendant, and therefore prejudice should be presumed; however, the trial judge could determine that there was sufficient evidence to rebut the presumption. Since there was not clear and convincing evidence of error in denying a motion for mistrial, the ruling was affirmed. St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987), followed in St. v. Salois, 235 M 276, 766 P2d 1306, 45 St. Rep. 2382 (1988).

Mistrial Following Hung Jury — Bailiff Misconduct — Original Jeopardy Not Terminated: Following mistrial because of a jury deadlock, defendant petitioned for a Writ of Supervisory Control, claiming double jeopardy. He contended that misconduct on the part of the bailiff was chargeable to the State in the same manner as misconduct committed by a prosecutor or judge. The Supreme Court refused the petition, but proceeded to declare that in Montana a mistrial following a hung jury does not terminate the original jeopardy. If governmental conduct giving rise to a motion for mistrial was intended to provoke defendant into moving for mistrial, then retrial might properly be prohibited. However, the court held that comments by the bailiff were not intended to provoke defendant into moving for mistrial. State ex rel. Forsyth v. District Court, 216 M 480, 701 P2d 1346, 42 St. Rep. 965 (1985), overruled in Keating v. Sherlock, 278 M 218, 924 P2d 1297, 53 St. Rep. 855 (1996).

Defendant to Show Prejudice From Media Reports: Defendant was tried and convicted of attempted deliberate homicide. After the verdict, defense counsel polled the jury and discovered that a juror had read an entire newspaper article summarizing the case. The juror stated that this had not affected her opinions or deliberations. The District Court denied a motion for a mistrial. On appeal, the Supreme Court held that the burden is on the defendant to show that: (1) the juror was specifically exposed to media reports; and (2) the reports were prejudicial to the defendant. Mere proof that a juror was exposed to a factual account of the trial did not meet this burden of proof. St. v. Gillham, 206 M 169, 670 P2d 544, 40 St. Rep. 1576 (1983).

Jury Misconduct Not Grounds for New Trial Unless Material: A new trial will be ordered because of alleged jury misconduct only if the alleged misconduct affects a material matter in dispute and prejudices the complaining party. St. v. Maxwell, 198 M 498, 647 P2d 348, 39 St. Rep. 1149 (1982), followed in St. v. Sor-Lokken, 247 M 343, 805 P2d 1367, 48 St. Rep. 142 (1991).

Bailiff Telling Jury of Problem in Arranging Sleeping Quarters: During the evening, while the jurors were deliberating, the bailiff told them that he was having difficulty finding a place for them to stay overnight. However, shortly afterward, the bailiff told them that he had found a place. Additionally, the jurors had told him that despite the lateness of the hour, they wished to continue their deliberations. The Supreme Court held that the defendant had not been prejudiced by the bailiff's conduct. St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982).

Juror Facing Witness and Moving Mouth: Allegation that members of the jury were seen facing prosecution witnesses and moving their mouths was not proof that communication sufficient to warrant a new trial had taken place. St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982), followed in St. v. Hedrick, 229 M 145, 745 P2d 355, 44 St. Rep. 1849 (1987); St. v. Counts, 209 M 242, 679 P2d 1245, 41 St. Rep. 681 (1984).

Nonprejudicial News Story During Trial: Defendant was tried and convicted of felony theft. Prior to trial several continuances were granted to avoid prejudice from articles about the defendant that were appearing in the local press. On the second day of trial, an article concerning the trial appeared in the local newspaper and defendant moved for a mistrial. The judge denied the motion and admonished the jury to refrain from reading the paper and listening to news broadcasts. Defendant appealed the denial of his motion, contending that the judge should have at least interrogated the jurors. The Supreme Court held that absent any indication on the record of prejudice to appellant so grave as to deny him a fair trial, the District Court properly exercised its discretion in denying the motion. The admonition to the jury was sufficient

to correct any damaging influence from the news article. St. v. Weaver, 195 M 481, 637 P2d 23, 38 St. Rep. 2050 (1981).

Juror Misconduct — Presumption of Prejudice: The District Court failed to remove any prejudicial effect occasioned by statements by a juror in a public place which disqualified him as a juror. The court did not inquire into an alleged statement by the juror that "half of the jury is Hanson's friends" nor did it act properly in allowing the juror to sit until the end of the day on which the court determined his misconduct before substituting an alternate. The presumption of prejudice remained because the members of the jury were not interrogated to determine if they had been contaminated. St. v. Eagen, 178 M 67, 582 P2d 1195 (1978).

Invitation to Juror to Participate in Experiment: The prosecuting attorney's invitation to a juror to participate in an experiment not supported by the evidence was harmless error because the juror did not participate and the court immediately sustained the defendant's objection. St. v. Thompson, 164 M 415, 524 P2d 1115 (1974).

Admonition to Jury: When a jury was completed on the afternoon of the sixth of the month and an adjournment was then taken until the seventh and at noon on the seventh a recess was taken until 1:30 p.m. of that day, a new trial was not granted because of the failure of the court to give to the jury the full statutory admonition since the jury was properly admonished, as required by the former section, at each adjournment taken after the noon recess on the seventh. St. v. Hall, 55 M 182, 175 P 267 (1918).

Showing of Compliance With Statute: The record on appeal in a criminal case which disclosed that when an adjournment was taken "the jury was admonished by the court and placed in charge of the sheriff" was sufficient to disclose compliance with a former statute, imported verity, and could not be impeached by affidavit. St. v. Hall, 55 M 182, 175 P 267 (1918).

Law Review Articles

General Admonitions to Jury Not to Read Newspaper Accounts of Trial Held Sufficient to Counteract Adverse Publicity, (St. v. Moran, 142 M 423, 384 P2d 777), 25 Mont. L. Rev. 156 (1963).

Collateral References

Final submission of case: propriety and effect of jurors' discussion of evidence among themselves before final submission of criminal case. 21 ALR 4th 444.

Jury's discussion of parole law as ground for reversal or new trial. 21 ALR 4th 420.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case. 38 ALR 3d 1012.

Questioning by jury: propriety of jurors asking questions in open court during course of trial. 31 ALR 3d 872.

Prejudicial effect, in criminal case, of communications between witnesses and jurors. 9 ALR 3d 1275.

46-16-502. View of relevant place or property.

Commission Comments

Source: R.C.M. 1947, section 94-7228.

No substantial change.

Compiler's Comments

1991 Amendment: In first sentence, after "presence of the", inserted "court, the prosecutor"; and made minor changes in style.

Case Notes

General 724
Discretion of Court 725
Defendant's Right to Be Present 725

GENERAL

Jurors' Unauthorized View of Crime Scene — No Prejudice to Defendant: The defendant was not prejudiced by the improper view taken by two jurors of the crime scene. The state successfully rebutted the presumption that defendant was prejudiced by the unauthorized view. St. v. Bell, 225 M 83, 731 P2d 336, 44 St. Rep. 56 (1987).

Visits to Scene — Purpose: In considering a motion to suppress evidence discovered during a search of the defendant's motel room, the trial judge visited the room under circumstances allegedly similar to those on the night of the search. In expressing its disapproval of the trial court's participation in the recreation of the scene, the Supreme Court stated that visits to the scene should be designed for the trier of fact to view the scene, not for the trier of fact to place

himself in the shoes of one of the parties. St. v. Wilson, 218 M 359, 708 P2d 270, 42 St. Rep. 1647 (1985).

Experimenting With Exhibit: The jury may have the privilege of examining a dangerous instrument provided that the jury does not use it in any different manner than that involved in the testimony and that no new fact is discovered from its experiment which is hurtful to the defendant. St. v. Thompson, 164 M 415, 524 P2d 1115 (1974).

Failure to Object to Jury View: By failing to object to an order of the trial court, made in its discretion and at the close of the testimony in a prosecution for murder, permitting the jury to view an automobile in which the shooting occurred, the defendant waived his right to secure a review of the propriety of the order. St. v. Cates, 97 M 173, 33 P2d 578 (1934).

DISCRETION OF COURT

Jury View of Crime Scene Denied — Other Evidence:

The defendant's testimony as to how the gun fired was, with or without corroboration, sufficient credible evidence for the jury to find guilt of negligent homicide. Hence, the court's denial of a jury view was not an abuse of discretion. St. v. Bier, 181 M 27, 591 P2d 1115 (1979).

The trial court did not abuse its discretion in denying a jury view of the crime scene since there was extensive testimony describing the scene of the shooting, a 45-mile trip one way under zero-degree weather conditions would have diminished the jurors' ability to perceive and appreciate the subtleties the defendant suggests inhered in the scene, and there was a significant danger that the jury might be misled by the view. St. v. Gone, 179 M 271, 587 P2d 1291 (1978).

Condition of Premises: The facts that the premises to be viewed had accumulated dirt which had been hastily swept away, doors had been replaced, and the view was bleak and morbid furnished no ground for interfering with an order permitting a view of the premises. St. v. Allison, 122 M 120, 199 P2d 279 (1948).

Permitting Jury to View Premises: Permitting the jury to view the premises rests entirely in the discretion of the trial court, which will not be interfered with except in cases of manifest abuse. St. v. Allison, 122 M 120, 199 P2d 279 (1948).

Permitting Jury to View Cattle: Permitting the jury to view cattle charged to have been stolen by the defendant and recaptured was within the discretion of the trial court. St. v. Arnold, 84 M 348, 275 P 757 (1929).

DEFENDANT'S RIGHT TO BE PRESENT

Defendant's Right to Be Present at Jury View: A defendant's constitutional right to be present at all stages of the trial and to meet the witnesses against him face to face includes the right to be present at a jury view. St. v. Musgrove, 178 M 162, 582 P2d 1246 (1978).

Limitation on Waiver by Defendant: A waiver by the defendant through his counsel of his right to be present during the view by the jury did not include such a waiver as to a proceeding occurring at the jury view which amounted to a taking of testimony, unsworn testimony at that, in the absence of the defendant. St. v. Musgrove, 178 M 162, 582 P2d 1246 (1978).

Waiver of Defendant's Right to Be Present: Since the only purpose of a view by the jury of the place where a homicide was committed is to enable the jurors better to understand the evidence heard by them at the trial and testimony may not be taken there for any purpose, the defendant may waive his right to be present at the viewing, and when he did not make a request for permission to be present at the view of an automobile in and near which the shooting occurred, he will be held to have waived his right in that behalf. St. v. Cates, 97 M 173, 33 P2d 578 (1934).

Collateral References

Criminal Law *key* 651(1), (2).

23A C.J.S. Criminal Law §1568.

75 Am. Jur. 2d Trial §§195 through 197.

46-16-503. Conduct of jury after retirement — advice from court.

Commission Comments

1991 Comment: This statute retains the substance of 1987 MCA 46-16-503. Subsection (2) has been rewritten for clarity and to reflect established procedure. The court has discretion to offer such information after consultation with the parties. The 1987 code appeared to require any additional information requested by the jury to be given to them in open court. The statute does not retain that requirement and is intended to reflect the prevailing practice.

Source: See commission comments to 46-16-501.

Compiler's Comments

1991 Amendment: In (2), at end of first sentence, substituted "shall notify the officer appointed to keep them together, who shall then notify the court" for "must require the officer to conduct them into court", at beginning of second sentence deleted "When the jurors are brought into court" and at end inserted "after consultation with the parties", and deleted former last sentence that read: "If such information is given, it must be given in the presence of the county attorney and the defendant and his counsel".

Case Notes

Video Equipment Supplied by Bailiff in Jury Room Without Court Approval — Harmless Error: After the jury retired for deliberations and while the presiding judge was unavailable, the jury asked the bailiff for video equipment to watch a patrol car DVD that had been entered into evidence. Rather than following protocol and obtaining permission of the judge, the bailiff took the requested equipment into the jury room and cued up one of the DVDs. Within minutes, the judge ordered the DVD and equipment removed. Hart moved for a mistrial on grounds that the jury's access to the evidence placed an undue emphasis on it in violation of due process. The motion was denied, and Hart appealed. Applying the analysis in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), the Supreme Court concluded that the state established that any error was harmless. The DVDs could not have contributed to Hart's conviction because other evidence was introduced to establish the same facts, and the DVDs actually supported both the state's and Hart's case theories and were used by both sides at trial. Thus, although the bailiff erred in supplying the video equipment without court approval, the error did not contribute to Hart's conviction and was harmless. Denial of the mistrial motion was affirmed. St. v. Hart, 2009 MT 268, 352 M 92, 214 P3d 1273 (2009).

No Abuse of Discretion in Denying Mistrial for Ordering Continued Jury Deliberations: Doyle moved for a mistrial after the trial court ordered the jury to continue deliberating after the jurors notified the court that they were at an impasse. Doyle contended that the trial court improperly pressured the jury to reach a decision and created the impression that the jury could return only a unanimous verdict rather than a hung jury and that the court failed to explain to the jurors that they should never give up their honest opinion concerning Doyle's guilt or innocence. The motion was denied. On appeal, the Supreme Court affirmed. The transcript showed that the jury was in fact instructed that it should not surrender an honest opinion as to the weight or effect of the evidence or the guilt or innocence of the defendant. The court sent the jury home the first day after 10 hours of deliberations when the jury informed the court that it could not reach a decision. At the end of the second day, the jury sent a note to the court informing the judge that the jury was at an impasse. The court asked the jury if it wished to go home or continue deliberations, and the jury opted to go home. The third day, the jury returned a unanimous guilty verdict. Based on the transcript, the trial court never forced deliberations, and the court did not abuse its discretion in denying Doyle's mistrial motion. St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Bailiff's Instructions to Split Jury to Continue Deliberations Not Reversible Error: Steele was charged with eight offenses and conceded guilt on all but one charge. During deliberations on the remaining charge, the jury became deadlocked and notified the bailiff. Outside the presence of the parties and without the court's approval, the bailiff told the jury that they needed to keep working on it and needed to find common ground. Steele contended that the bailiff's action denied the parties and counsel the opportunity to consult with the court in violation of this section and moved for mistrial. The motion was denied, and Steele appealed. It is not the prerogative of any court officer except the trial judge to give instructions to the jury regarding deliberations. However, without condoning the bailiff's actions, the Supreme Court held that the bailiff's instructions did not misadvise the jury but merely asked the jury to continue deliberating, the same instruction that the District Court would have offered, so a mistrial was not warranted on those grounds. Further, the jury did not disagree as to any testimony received or desire any information regarding the law, so this section was not triggered. Although not given or condoned by the trial judge, the bailiff's instructions did not attempt to pressure the jurors into reaching a verdict or assert to the minority jurors that their positions should change, as was the case in St. v. Randall, 137 M 534, 353 P2d 1054 (1960), so denial of the mistrial motion was proper. St. v. Steele, 2004 MT 275, 323 M 204, 99 P3d 210 (2004), distinguishing St. v. Herron, 169 M 193, 545 P2d 678 (1976). See also St. v. George, 219 M 377, 711 P2d 1379 (1986).

Original Jury Instruction Constituting Law of Case Absent Objection — Erroneous Supplemental Jury Instruction Allowing Finding of Guilt When Only Portion of Property Subject to Forfeiture Composed of Drug Sale Proceeds — Abuse of Discretion in Allowing Conviction Based on Lesser Amount Than Charged: The state charged and prosecuted Crawford for

possession of $1,025 in proceeds from an illegal drug sale, thus assuming the burden of proving that Crawford possessed approximately that amount and that it came from drug sales and refuting Crawford's alleged legitimate sources for any portion of that amount. At no time did the state offer evidence that only a portion of the amount came from drug sales or accept that possibility in its closing remarks. In jury instructions, the District Court informed the jury that the state had to prove the elements charged, that Crawford possessed $1,025 derived from drug sales, and that Crawford acted knowingly. During deliberations, the jury became confused as to how the instruction should be applied and sought clarification as to whether Crawford could still be convicted if the jury found that only a portion of the money came from drug sales. The District Court provided a supplemental instruction stating that Crawford could still be convicted on a lesser amount and supplied the jury with a special interrogatory allowing the jury to state the portion of the amount that was considered to be drug proceeds. The jury found that $225 of the $1,025 derived from drug sales, and Crawford was convicted. On appeal, Crawford argued that once given, the initial instruction became the law of the case absent objection and that giving the supplemental instruction was therefore an abuse of discretion. Crawford further contended that allowing the jury to find that only a portion of the amount charged was considered to be drug proceeds constituted an amendment to the information, which prejudiced Crawford by disallowing an adjustment to his defense strategy to rebut the state's reduced burden of proof. The Supreme Court agreed. When the state fails to object to a jury instruction, the instruction becomes the law of the case, whether it includes an unnecessary element or not, and the jury is accordingly bound by it. A supplemental instruction that allowed deviation from the original instruction requiring a finding that Crawford possessed $1,025 in drug sale proceeds was therefore an abuse of discretion. Further, because the jury found that only $225 was attributable to drug sales, the state failed to prove the monetary element of the offense as defined by the original jury instruction, so Crawford's conviction on the count of possession of property subject to forfeiture was reversed. St. v. Crawford, 2002 MT 117, 310 M 18, 48 P3d 706 (2002). See also St. v. Cline, 170 M 520, 555 P2d 724 (1976), and St. v. Hickman, 954 P2d 900 (Wash. 1998).

Entry of Trial Court Judge Into Jury Room Without Counsel, Defendant, and Court Reporter — Automatic Reversible Error Absent Recorded Waiver by Defendant of Constitutional Rights: On the second full day of jury deliberations in Tapson's trial on charges of sexual intercourse without consent, aggravated kidnapping, and attempted deliberate homicide, the trial judge met with counsel, on the record, to notify them that the jury had a verdict on one of the three counts, but was unable to reach a verdict on the other two counts. With Tapson present, the state suggested substituting the existing verdict form, which listed all three charges, with six verdict forms—one "guilty" form and one "not guilty" form for each of the three charges—to avoid the problem of the jury switching its current verdict on one charge for some sort of last minute compromise. The state also suggested that the judge take the forms into the jury room, rather than moving the jury and handling the matter in open court. Tapson's counsel stated that the defense did not have any objection to the proposition, so the judge took the forms into the jury room, without counsel or Tapson present, and returned 11 minutes later. There was no record of whether the judge spent the entire time with the jury, what the judge told the jury, whether the jury had any questions, or whether the judge gave any responses. Tapson was subsequently convicted of attempted deliberate homicide, although the jury could not reach a verdict on the other charges. Tapson was sentenced to life imprisonment, but appealed the conviction and sentence. The Supreme Court noted Tapson's fundamental constitutional right to be present and defend in person and by counsel, and the fundamental right to a public trial, which extends to the entire trial, including the judge's instructions to the jury. The state contended that defense counsel waived Tapson's right to be present, but the Supreme Court declined to engage in presumptions of waiver, holding that if a defendant chooses to waive these constitutional rights, the trial court must obtain an on-the-record personal waiver, by the defendant, acknowledging that the defendant voluntarily, intelligently, and knowingly waives the rights. Thus, when there is some circumstance arguably making it necessary for a trial judge to enter the jury room while the jury is present, the court must contemporaneously explain to the defendant, on the record, the constitutional right to be present at all critical stages of the trial and the right to a public trial. The defendant may then choose to waive those rights. However, absent a contemporaneous, personal, knowing, voluntary, intelligent, on-the-record waiver by the defendant, if a judge enters a jury room while the jury is present and without counsel, the defendant, and the court reporter, reversal will be automatic. Tapson's constitutional rights were violated, so the case was reversed and remanded for further proceedings. St. v. Tapson, 2001 MT 292, 307 M 428, 41 P3d 305 (2001), following St. v. Reed, 65 M 51, 210 P 756 (1922), St. v. Allison, 116 M 352, 153 P2d 141 (1944), U.S. v. U.S. Gypsum Co., 438 US 422 (1978), and

Commonwealth v. Patry, 722 NE 2d 979 (Mass. App. Ct. 2000), and distinguishing St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881 (1999), and St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

Discretion of Trial Court to Allow Testimony to Be Read to Jury After Deliberations Begun — No Error: During deliberations in Thompson's trial on charges of sexually assaulting his child, the jury requested a copy of the child's testimony. The trial judge denied the request, explaining that the court could not repeat the testimony after deliberations had begun because it would place undue emphasis on the testimony. The jury explained that the child had spoken so softly during the hearing that several jury members were unable to hear the testimony. The judge reconsidered, determining that the child's testimony was both exculpatory and inculpatory, and discussed the jury's request with counsel for both parties. No objections were made, and after cautioning the jury not to give more weight to the child's testimony than any other testimony, the court allowed the child's testimony to be read to the jury. Thompson was convicted and appealed on grounds that allowing the testimony after jury deliberations had begun violated this section. The Supreme Court noted that it is within the discretion of the trial court whether to allow a jury to rehear testimony. In this case, the jury could not hear the child in the courtroom, and the child's testimony was an essential part of the case and included evidence favorable to both parties, so the trial court did not err in allowing the jury to hear the testimony during deliberations. St. v. Thompson, 2001 MT 119, 305 M 342, 28 P3d 1068 (2001). See also St. v. Harris, 247 M 405, 808 P2d 453 (1991).

Testimonial Tape-Recorded Interview Improperly Submitted to Jury — Error Harmless Because of Cumulative Nature of Evidence: Following an automobile accident in which his girlfriend was killed, Bales was interviewed by a highway patrol officer who taped the interview, during which Bales failed the HGN test and made allegedly prejudicial statements. Over Bales' objection, the District Court admitted the tape as an exhibit that the jury could listen to during deliberations. The Supreme Court noted that because the jury had not requested the playing of the tape, 46-16-504 applied, rather than this section. The Supreme Court found that the tape had a testimonial character and, citing St. v. Harris, 247 M 405, 808 P2d 453 (1991), for the common-law rule against submitting testimonial materials to the jury for unsupervised and unrestricted review during deliberations, held that the District Court abused its discretion in allowing the tape to go to the jury. However, allowing the jury to hear the tape did not unduly emphasize that testimony to the exclusion of other witnesses, nor were statements on the tape inconsistent with statements given by the witnesses at trial. Rather, the tape was merely cumulative of other evidence and did not prejudice Bales, so the error was harmless. St. v. Bales, 1999 MT 334, 297 M 402, 994 P2d 17, 56 St. Rep. 1334 (1999), distinguishing St. v. Morse, 229 M 222, 746 P2d 108, 44 St. Rep. 1919 (1987), and overruling it to the extent that it is inconsistent with St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991), regarding the submission of testimonial materials to a deliberating jury. See also St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992), and St. v. Evans, 261 M 508, 862 P2d 417, 50 St. Rep. 1431 (1993).

Court's Refusal to Replay Testimony to Jury — Not Error: The District Court did not err in denying the jury's request to review testimony when the court recognized the danger of emphasizing the testimony of one witness over another as well as the danger of repeating portions of testimony out of context. St. v. Graves, 272 M 451, 901 P2d 549, 52 St. Rep. 755 (1995).

Jury Request for Replay of Partial Testimony — Failure to Give Harris Instruction Not Prejudicial to Defendant: Henrich was charged with various crimes resulting from sexual assault upon his daughters. The jury requested that it be allowed to hear a recording of certain testimony, whereupon the District Court determined the relevant portion of the testimony and allowed part of a victim's testimony to be played to the jury during its deliberations. The Supreme Court noted that it was error for the District Court not to give the instruction required by St. v. Harris, 247 M 405, 808 P2d 453 (1991). However, the Supreme Court held that because the only testimony as to the issues concerned in the recording was given by the witness and the defendant, the jury's need to balance the statements in the recording against the defendant's denial of committing the offense was obvious and therefore the need for the Harris instruction was minimal. The Supreme Court therefore held that the defendant was not prejudiced by the playing of the recording. St. v. Henrich, 268 M 258, 886 P2d 402, 51 St. Rep. 1275 (1994). See also St. v. Bales, 1999 MT 334, 297 M 402, 994 P2d 17, 56 St. Rep. 1334 (1999).

Replay of Testimony as Prejudicial Reversible Error: In a case decided prior to the decision in St. v. Harris, 247 M 405, 808 P2d 453 (1991), the District Court committed reversible error when it allowed the jury to rehear the entire testimony of two witnesses who interviewed the child victim of alleged sexual abuse. Relying on the Harris standard, the Supreme Court remanded

this case for a new trial on the issue because the playing of the recorded testimony unduly emphasized the testimony of the alleged victims to the exclusion of the testimony of other witnesses. St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992). See also St. v. Bales, 1999 MT 334, 297 M 402, 994 P2d 17, 56 St. Rep. 1334 (1999).

Reading Entire Testimony at Jury's Request Improper:

Acting on the jury's written request to review a child abuse victim's testimony, the District Court overruled defendant's objection, escorted jury into the courtroom, and read victim's testimony in its entirety. In ruling that the District Court abused its discretion, the Supreme Court held that the reading of the testimony prejudiced the defendant by placing undue emphasis on the statement of the alleged victim to the exclusion of the testimony of other witnesses. St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991), followed in St. v. Evans, 261 M 508, 862 P2d 417, 50 St. Rep. 1431 (1993). See also St. v. Bales, 1999 MT 334, 297 M 402, 994 P2d 17, 56 St. Rep. 1334 (1999).

Shortly after the jury retired for deliberations, a request was made to the court regarding verification of conflicting testimony. Defense counsel requested that certain testimony be read back to the jury. The court refused, noting that: (1) it was unclear exactly which information the jury wanted; (2) counsel would not be allowed to decide which testimony to read back; and (3) the jury had heard the evidence and would have to resolve it. The refusal by the trial court was a proper exercise of its discretion in providing the jury with trial testimony. St. v. Ulstad, 246 M 102, 802 P2d 1260, 47 St. Rep. 2278 (1990).

Court Delay in Responding to Jury Question — No Error: Although the jury was not brought into court after a note from the jury was delivered to the judge by the bailiff inquiring whether a hung jury was possible in the case, there was no error in the manner in which the court responded to the inquiry during deliberations. A response was prepared by the court and approved by defendant and all counsel, but by the time the response was delivered to the jury, it had reached a verdict. St. v. Pambrun, 240 M 62, 783 P2d 374, 46 St. Rep. 1944 (1989).

Test Whether New Trial Warranted on Grounds of Newly Discovered Evidence: In determining whether a new trial was warranted based on newly discovered evidence, the District Court properly applied the test set out in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959), that: (1) the evidence must have come to the knowledge of the applicant since the trial; (2) it is not through want of diligence that it was not discovered earlier; and (3) it is so material that it would probably produce a different result upon retrial. St. v. DeMers, 234 M 273, 762 P2d 866, 45 St. Rep. 1901 (1988), followed in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992).

Alternate Juror — Conversation After Jury Retires: A jury alternate returned to the jury room with the jury after the case had been submitted for decision, which defendant contended was reversible error, since 46-16-503 requires an officer of the court to prevent conversations between the jurors and others after the jury retires. The Supreme Court held that an alternate, although excluded from deliberating and voting, is in every other respect a juror; therefore, an alternate does not fall within the statutory ban against conversations with others. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Verdict Not Invalid Per Se Because of Jurors' Drinking: An insurer maintained that the jury verdict was invalid per se because of "drinking by a jury after deliberations have begun". The Supreme Court, noting its decision in Wibaux Realty Co. v. N. Pac. Ry. Co., 101 M 126, 54 P2d 1175 (1935), held that unless a party litigant is culpable, the consumption of alcoholic beverages by a juror during deliberations, which consumption is not excessive and which is not shown to have led to a miscarriage of justice, is not grounds for reversal of a jury verdict. While cautioning judges and bailiffs that no persons serving on a jury should be allowed alcoholic beverages during deliberations, particularly at county expense, the court declined to adopt a per se rule invalidating jury verdicts on the record presented here. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Amendment of Instruction: The trial court's action constituted a material amendment of the information that substantially prejudiced the rights of the defendants when it amended a jury instruction in response to a question from the jury but did so in the absence of counsel. St. v. Bretz, 180 M 307, 590 P2d 614 (1979).

Court's Answer Proper: There was no abuse of discretion when the trial court answered a jury request after the matter was submitted to the jury. St. v. Stewart, 175 M 284, 573 P2d 1138 (1977).

Jury Misconduct — Police Report Not in Evidence: When jury deliberations were tainted by reading a police report that had not been admitted, to the material prejudice of the defendant's right to an impartial jury, to confront witnesses, and to assistance of counsel at every critical stage of the trial, a new trial was required. St. v. Davison, 173 M 510, 568 P2d 159 (1977).

Withdrawal of Instruction — Effect: A court may withdraw an instruction after submission to the jury if the instruction is not a required instruction. St. v. Buckley, 171 M 238, 557 P2d 283 (1976).

Oral Instructions by Bailiff: When the jury was confused as to whether or not to sign three of the charges the jury had voted unanimously to acquit defendant of and requested the bailiff to convey a question to the judge for clarification, the oral instructions to the jury by the bailiff to sign only one of the charges not only violated the proscription against oral jury instructions but was patently prejudicial error as the defendant's attorney was not notified or present and had no way to protect his client from the jury's confusion. St. v. Herron, 169 M 193, 545 P2d 678 (1976).

Use of Juror Affidavits to Show Misconduct: When the jury failed to reach a verdict and juror affidavits showed that, because of outside influences on the jury during its deliberations, a verdict of acquittal on three of the charges was actually rendered by the jury but not returned to the court due to confusion over jury instructions, justice compelled the use of the juror affidavits to prove what actually occurred and the rule that juror affidavits cannot be used to impeach jury verdicts did not apply as the jury did not return a verdict of any kind. St. v. Herron, 169 M 193, 545 P2d 678 (1976).

Refusal of Further Instructions: When the attorneys objected to the answering of written questions submitted by the jury after retirement, the court properly informed the jury that the answers to the questions were contained in the instructions previously given and that the court could make no further instructions. St. v. Hawkins, 165 M 456, 529 P2d 1377 (1974), followed in St. v. Brogan, 272 M 156, 900 P2d 284, 52 St. Rep. 636 (1995), and St. v. Dunfee, 2005 MT 147, 327 M 335, 114 P3d 217 (2005).

Rereading Testimony at Jury's Request: It is within the trial court's discretionary power to grant a jury's request to reread parts of the testimony, and such procedure was authorized by the former statute. St. v. Armstrong, 149 M 470, 428 P2d 611 (1967).

Improper Oral Instructions: After retiring to the jury room to deliberate, the jury returned, asking the court whether two instructions given were conflicting. The court, in the absence of the defendant though in the presence of his attorney, orally instructed the jury to disregard one of them and withdrew it. The Supreme Court held that withdrawing the instruction and directing the jury to disregard it was instructing the jury orally, constituting reversible error. St. v. Jackson, 88 M 420, 293 P 309 (1930), distinguished in St. v. Brogan, 272 M 156, 900 P2d 284, 52 St. Rep. 636 (1995).

Oral Advice Not Improper: When the jury was returned into court for information which had been excluded from the evidence and an affidavit which was admitted and the court orally advised them that the information had been excluded and that as to the affidavit they would have to determine for themselves, its action in not going further and instructing them orally as to what weight should be given the affidavit was proper since instructions, in the absence of a waiver by the parties, must be delivered in writing. St. v. Duncan, 82 M 170, 266 P 400 (1928).

Collateral References

Sympathy to accused as appropriate factor in jury consideration. 72 ALR 3d 842.

Insurance: discussion, during jury deliberation, of possible insurance coverage as prejudicial misconduct. 47 ALR 3d 1299.

46-16-504. Items that may be taken into jury room.

Commission Comments

Source: See commission comments to 46-16-501.

Compiler's Comments

1991 Amendment: Substituted present language concerning taking written instructions, notes, and exhibits for deliberations for former text that read: "Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in his possession. The jury may also take with them any exhibits which the court may deem proper and notes of the proceedings taken by themselves".

Case Notes

Videotape of Interview With Defendant Allowed Into Jury Room — No Error: The day after a murder, police interviewed Giddings twice. At trial, the District Court allowed an edited version of the tape into evidence, and the jury watched the tape aided by a corresponding transcript during the state's case. The court advised the jury that they would not have the transcript in the jury room, but the court did allow the tape to accompany the jury during deliberations after determining that the tape was not testimonial in nature and simply constituted Giddings'

voluntary statements the day after the homicide. Following conviction, Giddings appealed on grounds that allowing the tape into the jury room violated due process by unduly emphasizing his demeanor and statements to the exclusion of other witness testimony. The Supreme Court disagreed. The tape had limited evidentiary value due to its poor quality, and any evidentiary value that the jury derived from the tape came from watching the tape with the aid of the transcript during trial. Giddings was not prejudiced because his statements and demeanor on the tape did not conflict with testimony given by other witnesses at trial, nor was the tape critical to the state's case. Under the totality of the circumstances, the tape was at worst cumulative of other evidence, and the District Court did not abuse its discretion by allowing the tape into the jury room. St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009). See also St. v. Bales, 1999 MT 334, 297 M 402, 994 P2d 17 (1999).

Improper Extrinsic Evidence Delivered to Jury — Evidentiary Error Violative of Right to Confront Witnesses Warranting New Trial: At Parker's trial for assault with a weapon, the state introduced a tape of interviews with Parker's children containing the children's observations of the events in question. Unbeknownst to Parker, the tape also contained an interview with another party that implicated Parker. The tape was submitted to the jury during deliberations. Following conviction, Parker contended on appeal that the jury's exposure to the extrinsic evidence, which was never entered into evidence, violated Parker's right to confrontation. The Supreme Court agreed. The interview was of sufficient quality to prejudice Parker's defense and contribute to the conviction, so Parker's right to confront the witness against him was violated when the tape was delivered to the jury. The court remanded for a new trial. St. v. Parker, 2006 MT 258, 334 M 129, 144 P3d 831 (2006).

Taped Evidence Not Admitted at Trial Submitted to Jury — No Burden on Defendant to Object to Unknown Evidence: At Parker's trial for assault with a weapon, the state introduced a tape of interviews with Parker's children containing the children's observations of the events in question. Unbeknownst to Parker, the tape also contained an interview with another party that implicated Parker. The tape was submitted to the jury during deliberations. Following conviction, Parker contended on appeal that the jury's exposure to the extrinsic evidence, which was never entered into evidence, violated Parker's right to confrontation. The state asserted that Parker failed to preserve the issue for direct appeal because Parker did not object to delivery of the tape to the jury, that Parker could not establish that the jury actually heard the unintroduced interview and should pursue the claim through postconviction proceedings, and that delivery of the interview to the jury was harmless error, cumulative to other admissible evidence, and did not contribute to Parker's conviction. The Supreme Court disagreed. Parker could not object to evidence that he did not know existed, and it was illogical to saddle Parker with the burden of proving prejudice. Rather, when extrinsic evidence reaches a jury, the burden of disproving prejudice rests with the state. Parker's appeal was properly before the Supreme Court, and the state's invitation to dismiss the claim was declined. St. v. Parker, 2006 MT 258, 334 M 129, 144 P3d 831 (2006), distinguished in St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008).

Discretion of Trial Court to Determine Whether Items May Be Taken Into Jury Room: It is within the sound discretion of the District Court to determine whether particular items of physical evidence that have been properly admitted and that are not proscribed by statute may be taken into the jury room during deliberations. In the present case, the District Court did not err in allowing into the jury room an exhibit containing three bindles, only one of which had been tested as containing dangerous drugs, in light of the fact that the jury was instructed not to speculate that the untested bindles also contained dangerous drugs. St. v. Long, 2005 MT 130, 327 M 238, 113 P3d 290 (2005). See also St. v. Christenson, 250 M 351, 820 P2d 1303 (1991).

Testimonial Tape-Recorded Interview Improperly Submitted to Jury — Error Harmless Because of Cumulative Nature of Evidence: Following an automobile accident in which his girlfriend was killed, Bales was interviewed by a highway patrol officer who taped the interview, during which Bales failed the HGN test and made allegedly prejudicial statements. Over Bales' objection, the District Court admitted the tape as an exhibit that the jury could listen to during deliberations. The Supreme Court noted that because the jury had not requested the playing of the tape, this section applied, rather than 46-16-503. The Supreme Court found that the tape had a testimonial character and, citing St. v. Harris, 247 M 405, 808 P2d 453 (1991), for the common-law rule against submitting testimonial materials to the jury for unsupervised and unrestricted review during deliberations, held that the District Court abused its discretion in allowing the tape to go to the jury. However, allowing the jury to hear the tape did not unduly emphasize that testimony to the exclusion of other witnesses, nor were statements on the tape inconsistent with statements given by the witnesses at trial. Rather, the tape was merely

cumulative of other evidence and did not prejudice Bales, so the error was harmless. St. v. Bales, 1999 MT 334, 297 M 402, 994 P2d 17, 56 St. Rep. 1334 (1999), distinguishing St. v. Morse, 229 M 222, 746 P2d 108, 44 St. Rep. 1919 (1987), and overruling it to the extent that it is inconsistent with St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991), regarding the submission of testimonial materials to a deliberating jury. See also St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992), and St. v. Evans, 261 M 508, 862 P2d 417, 50 St. Rep. 1431 (1993).

Discretion of Court to Prohibit Jury From Taking Notes During Trial — Instruction Outside Presence of Counsel Not Error: Hage was convicted of deliberate homicide. During Hage's trial, the District Court Judge informed the jury members outside the presence of defendant and counsel that the jury would not be allowed to take notes during the trial. The Supreme Court held this section inapplicable because it concerns only the issue of whether notes that are taken by jury members may be taken with them for deliberations. Whether the taking of notes may be prohibited by the court in the first place is a matter left to the discretion of the court. The Supreme Court also held that it was not error for the District Court to give the instruction outside the presence of counsel because the subject of the judge's remarks was a matter within the discretion of the judge and no remark was made about any facts in evidence. St. v. Hage, 258 M 498, 853 P2d 1251, 50 St. Rep. 631 (1993).

Jury Allowed to Take Tape Recordings Into Deliberations: It was within the discretion of the District Court to allow the jury to take tape recordings into the jury room during deliberations. The tapes had been admitted into evidence, and the jury was properly instructed as to the weight to be given the tapes. St. v. Morse, 229 M 222, 746 P2d 108, 44 St. Rep. 1919 (1987), followed in St. v. Christenson, 250 M 351, 820 P2d 1303, 48 St. Rep. 1034 (1991), and distinguished, and overruled to the extent that it is inconsistent with St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991), regarding the submission of testimonial materials to a deliberating jury, in St. v. Bales, 1999 MT 334, 297 M 402, 994 P2d 17, 56 St. Rep. 1334 (1999).

Jury Misconduct — Police Report Not in Evidence: When jury deliberations were tainted by reading a police report that had not been admitted, to the material prejudice of the defendant's right to an impartial jury, to confront witnesses, and to assistance of counsel at every critical stage of the trial, a new trial was required. St. v. Davison, 173 M 510, 568 P2d 159 (1977).

Experimenting With Exhibit: The jury may have the privilege of examining a dangerous instrument provided that the jury does not use it in any different manner than that involved in the testimony and that no new fact is discovered from its experiment which is hurtful to the defendant. St. v. Thompson, 164 M 415, 524 P2d 1115 (1974).

Taking Photographs to Jury Room: In a criminal prosecution for involuntary manslaughter, photographs of the scene of the accident are "all papers" within the meaning of that phrase as it appears in the statute. Thus, the trial court properly sent the photographs along with the jury when they retired to the jury room for deliberations. St. v. Medicine Bull, 152 M 34, 445 P2d 916 (1968).

Taking Depositions to Jury Room: It was error for the trial court to send to the jury room as an exhibit an alleged confession headed "Affidavit", which to all intents and purposes was a deposition, in view of a former section which expressly prohibited the jury from taking depositions to the jury room for consideration during its deliberations. St. v. Crighton, 97 M 387, 34 P2d 511 (1934).

No Presumption of Prejudice: When exhibits consisting of photographs that had been admitted in evidence without objection by the defendant were taken to the jury room at the close of the trial, apparently without the affirmative consent of the defendant and without an order of the court permitting it to be done, but there was no showing that by the procedure the jury was given any other information than that obtained at the trial, it may not be presumed that the procedure resulted in prejudice to the defendant. St. v. Cates, 97 M 173, 33 P2d 578 (1934).

Consent to Taking Exhibits to Jury Room:

After the jury members had retired to the jury room for deliberation of their verdict, they requested certain exhibits be sent to them. While the defendant was not present in the courtroom, his counsel gave his consent. The Supreme Court held that the proceeding did not constitute a part of the trial and therefore the defendant's presence was not required. St. v. Olson, 87 M 389, 287 P 938 (1930).

Exhibits introduced in evidence in a prosecution for murder which are sent to the jury during its retirement will not be considered as having been received out of court when it is found on a motion for a new trial that counsel for the defendant consented to their being taken to the jury room during the jury's retirement. St. v. Allen, 23 M 118, 57 P 725 (1899).

Waiver of Objection: When on a motion for a new trial it is found that the counsel for the defendant consented to the taking of certain exhibits to the jury room previously admitted in

evidence on a prosecution for murder, such consent constitutes a waiver of any objection to the sending of the exhibits to the jury during retirement. St. v. Allen, 23 M 118, 57 P 725 (1899).

Taking Newspapers to Jury Room:

Under a former statute providing that a new trial shall be granted "when the jury has received any evidence, papers, or documents, not authorized by the court", the word "papers" referred to such written instruments as might be competent testimony when inspected by the court and found to be competent under the Rules of Evidence and does not include newspapers; and the reception by the jury of newspapers containing comments on the case does not in itself vitiate the verdict. St. v. Jackson, 9 M 508, 24 P 213 (1890).

Under a former statute providing that a new trial shall be granted "when the jury has been separated without leave of court, or been guilty of any misconduct, tending to prevent a fair and due consideration of the case", the reception by the jury of newspapers containing comments on the trial adverse to the defendant is misconduct tending to show injury to the defendant. St. v. Jackson, 9 M 508, 24 P 213 (1890). See also St. v. Pepo, 23 M 473, 59 P 721 (1900).

Collateral References

Taking and use of trial notes by jury. 36 ALR 5th 255.

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases. 35 ALR 4th 626.

Books, use of: permitting documents or tape recordings containing confessions of guilt or incriminating admissions to be taken into jury room in criminal case. 37 ALR 3d 238.

46-16-505. Activity of court during jury's absence.

Commission Comments

1991 Comment: This statute preserves the procedure established under 1987 MCA 46-16-505. The statute, although amended, still allows the court to conduct other business during deliberations, provided it remains open for matters related to the case being deliberated.

Source: R.C.M. 1947, section 94-7308.

Compiler's Comments

1991 Amendment: After adjourn substituted "or conduct" for "from time to time as to"; and made minor change in style.

Part 6
Verdict — Disposition of Defendant

Part Commission Comments

1991 Part Comments: This part retains the 1987 code provisions for the delivery of a verdict and the disposition of the defendant. See 1987 MCA 46-16-603 through 46-16-605. These statutes amend the 1987 code, but no change in established procedure is anticipated.

Part Case Notes

Findings and Conclusions — Incapacity to Consent: A District Court in a criminal bench trial is under no statutory duty, except in death penalty cases, to make findings. Absent findings, the conclusions of law reached by the court could be construed to mean that the court found lack of the victim's consent (to sexual contact) from his incapacity as a 10-year-old to consent or that in any event the boy did not consent. In that the conclusions of law reached by a trial court do not enjoy the level of inviolability that findings of fact are accorded on appeal, in that the State concedes the inapplicability of the incapacity statutes, and in that there was found sufficient evidence to support a conclusion that the boy did not in fact consent, the conviction on the sexual assault counts is sustained on the basis of the boy not having consented. St. v. Price, 191 M 1, 622 P2d 160, 37 St. Rep. 1926 (1980).

Part Collateral References

Criminal law: propriety of reassembling jury to amend, correct, clarify, or otherwise change verdict after jury has been discharged, or has reached or sealed its verdict and separated. 14 ALR 5th 89.

46-16-603. Form of verdict.

Commission Comments

1991 Comment: This statute preserves the substance of 1987 MCA 46-16-603. The 1987 code required the jury to return a general verdict for each charge; that statute was amended to direct the jury to return a verdict as instructed by the court. The statute permits flexibility in the type of verdict and the manner in which it is delivered. The amendment should not cause a significant change in practice.

Although a less-than-unanimous verdict is tolerated by the federal constitution, the state constitution requires a unanimous verdict. Compare Apodaca v. Oreg., 406 US 404, 410-12 (1972), and Art. II, sec. 26, Mont. Const.

Commission Comment Not Divided: This section is a recodification of part of section 95-1915, R.C.M. 1947. Section 46-16-604 is also derived from section 95-1915. The commission comments to section 95-1915 are printed in their entirety under 46-16-603.

Source: Colorado Rule 31(a)(3), 31(b), 31(c) and 31(d). [See also commission comments to 46-16-114.]

[Section 46-16-603(1)] requires that the verdict be unanimous in felony cases as does the present Montana law, (R.C.M. 1947, section 94-7403 [repealed], Article III, section 23 [1889 Mont. Const., revised by Art. II, sec. 26, 1972 Mont. Const.].)

[Section 46-16-603(2)] is self-explanatory and is in harmony with the present law. It makes it unnecessary to retry the case as to all defendants even though the jury may have been able to decide the guilt or innocence of some of them.

[Section 46-16-603(3)] makes no change in the present law.

[Section 46-16-604] raises the question whether a poll of the jury might be had after the return of a sealed verdict. If so, then it may be possible for the jury to be directed to return for further deliberations, even if they have been separated over a weekend or some other period of time.

[Section 46-16-604] provides for the polling of the jury by any party or upon motion of the court. The present law provides only that the jury may be polled at the request of either party.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1991 Amendment: In (1) substituted "verdict as instructed by the court" for "general verdict to each offense charged"; deleted (3) that read: "(3) The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense"; and made minor change in style.

Applicability of Commission Comments: The applicability of commission comments should be evaluated with reference to subsequent amendments.

Case Notes

Failure of Counsel to Request Unanimity Instructions on Two Counts of Criminal Endangerment Not Considered Ineffective Assistance: Gallagher was convicted of two counts of criminal endangerment and asserted on appeal that failure of defense counsel to request specific unanimity instructions on the two charges constituted ineffective assistance and denied Gallagher the right to a fair trial. Based on the record, the Supreme Court disagreed. Both defense and prosecution counsel argued each count to the jury in closing arguments, linking appropriate facts and specific victims to each count, so juror confusion was extremely unlikely, nor could the court conclude that the trial outcome was prejudiced by the lack of a specific unanimity instruction on the endangerment charges that denied Gallagher a fair trial. Gallagher's convictions were affirmed. St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

Entry of Trial Court Judge Into Jury Room Without Counsel, Defendant, and Court Reporter — Automatic Reversible Error Absent Recorded Waiver by Defendant of Constitutional Rights: On the second full day of jury deliberations in Tapson's trial on charges of sexual intercourse without consent, aggravated kidnapping, and attempted deliberate homicide, the trial judge met with counsel, on the record, to notify them that the jury had a verdict on one of the three counts, but was unable to reach a verdict on the other two counts. With Tapson present, the state suggested substituting the existing verdict form, which listed all three charges, with six verdict forms—one "guilty" form and one "not guilty" form for each of the three charges—to avoid the problem of the jury switching its current verdict on one charge for some sort of last minute compromise. The state also suggested that the judge take the forms into the jury room, rather than moving the jury and handling the matter in open court. Tapson's counsel stated that the defense did not have any objection to the proposition, so the judge took the forms into the jury room, without counsel or Tapson present, and returned 11 minutes later. There was no record of whether the judge spent the entire time with the jury, what the judge told the jury, whether the jury had any questions, or whether the judge gave any responses. Tapson was subsequently convicted of attempted deliberate homicide, although the jury could not reach a verdict on the other charges. Tapson was sentenced to life imprisonment, but appealed the conviction and

sentence. The Supreme Court noted Tapson's fundamental constitutional right to be present and defend in person and by counsel, and the fundamental right to a public trial, which extends to the entire trial, including the judge's instructions to the jury. The state contended that defense counsel waived Tapson's right to be present, but the Supreme Court declined to engage in presumptions of waiver, holding that if a defendant chooses to waive these constitutional rights, the trial court must obtain an on-the-record personal waiver, by the defendant, acknowledging that the defendant voluntarily, intelligently, and knowingly waives the rights. Thus, when there is some circumstance arguably making it necessary for a trial judge to enter the jury room while the jury is present, the court must contemporaneously explain to the defendant, on the record, the constitutional right to be present at all critical stages of the trial and the right to a public trial. The defendant may then choose to waive those rights. However, absent a contemporaneous, personal, knowing, voluntary, intelligent, on-the-record waiver by the defendant, if a judge enters a jury room while the jury is present and without counsel, the defendant, and the court reporter, reversal will be automatic. Tapson's constitutional rights were violated, so the case was reversed and remanded for further proceedings. St. v. Tapson, 2001 MT 292, 307 M 428, 41 P3d 305 (2001), following St. v. Reed, 65 M 51, 210 P 756 (1922), St. v. Allison, 116 M 352, 153 P2d 141 (1944), U.S. v. U.S. Gypsum Co., 438 US 422 (1978), and Commonwealth v. Patry, 722 NE 2d 979 (Mass. App. Ct. 2000), and distinguishing St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881 (1999), and St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

Jury Poll Indicating Lack of Unanimity of Verdict in Criminal Case — Error in Failing to Direct Further Deliberation or Discharge Jury: Following Pyatt's jury trial for felony stalking, the jury was polled in open court as to whether each juror agreed with the verdict. One juror said no, stating that he went along with the verdict because he was outnumbered. Recognizing that a unanimous verdict was required, the court then inquired whether the juror had voted yes in the jury room, and the juror said that he voted in favor of the majority in the end, so his vote was yes. The remainder of the jury also voted yes, so the court ruled that the verdict was unanimous, and Pyatt was convicted and sentenced to the Department of Corrections for 5 years. In polling a jury, the court is to inquire into the jurors' present states of mind as of the time of the poll. To fulfill the jury poll's purpose of safeguarding a defendant's right to a unanimous verdict, the jury poll must afford a juror an opportunity to make an unambiguous reply as to that juror's present state of mind. Here, the juror's response indicated disagreement with the verdict, and the court's further conversation was inappropriate. No juror should surrender an honest opinion as to the weight or effect of evidence or the innocence or guilt of a defendant because the majority of the jury feels otherwise or to return a unanimous verdict or prevent a mistrial. Once the juror indicated disagreement with the verdict, the court should have either directed the jury to deliberate further or discharged the jury, and failure to do so constituted reversible error. St. v. Pyatt, 2000 MT 136, 300 M 25, 1 P3d 953, 57 St. Rep. 555 (2000), following St. v. Holloway, 740 P2d 711 (N. Mex. App. 1987).

Return of Blank Verdict Form — No General Rule: Turner was charged under the felony-murder rule for complicity in a prison riot that led to the deaths of several other inmates. The jury reached an inconclusive verdict on the underlying burglary charge, returning a blank verdict form. Turner contended that under St. v. Weinberger, 206 M 110, 671 P2d 567 (1983), a blank verdict form is a not guilty verdict. Distinguishing Weinberger, the Supreme Court declined to define the meaning of a blank verdict form in any given case or to state a general rule, noting the jury's intent from the record and holding that the jury's blank verdict had no impact on the ultimate issue of whether the state sustained its burden of proof. St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994).

Defendant Alleging Inconsistent Verdict: The jury returned a verdict finding the defendant guilty of aggravated burglary, aggravated kidnapping, and felony assault (now assault with a weapon) and not guilty of robbery and theft. The defendant argued that the verdict was inconsistent because if the jury found him innocent of robbery, it could not find him guilty of aggravated burglary and kidnapping. The Supreme Court held that the verdict was not inconsistent because the jury could find that the defendant had inflicted bodily injury while acting with the purpose to commit a robbery but had not completed the robbery. St. v. LaPier, 242 M 335, 790 P2d 983, 47 St. Rep. 760 (1990).

Initial Verdict Not Unanimous — No Mistrial: In considering the criminal charge against the defendant, the jury returned to the courtroom and disclosed its vote of 10 to 2 in favor of conviction. The judge did not make a prohibited inquiry of the jury as to its numerical division, nor was it reversible error for the judge to ask the jury to return to the jury room for a reasonable time to attempt to reach a unanimous decision when he emphasized that no juror should think

any pressure was being placed on him to reach a unanimous decision. Given the manner in which the jury disclosed its initial vote, the trial court was correct in refusing to grant a mistrial because of the initial verdict. St. v. George, 219 M 377, 711 P2d 1379, 43 St. Rep. 26 (1986).

Jury Not to Consider Sentence: District Court properly refused to give and avoided prejudicial error by refusing to give defendant's requested instruction that there is a mandatory 2-year sentence for each verdict of guilty of kidnapping which may not be suspended or deferred by the court. Sentencing is solely for the court, and the jury is not to consider possible punishment upon conviction. St. v. Herrera, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

Use of Juror Affidavits to Show Misconduct: When the jury failed to reach a verdict and juror affidavits showed that, because of outside influences on the jury during its deliberations, a verdict of acquittal on three of the charges was actually rendered by the jury but not returned to the court due to confusion over jury instructions, justice compelled the use of the juror affidavits to prove what actually occurred and the rule that juror affidavits cannot be used to impeach jury verdicts did not apply as the jury did not return a verdict of any kind. St. v. Herron, 169 M 193, 545 P2d 678 (1976), distinguished in St. v. White Clay, 1998 MT 244, 291 M 147, 967 P2d 370, 55 St. Rep. 1014 (1998).

Manslaughter Included in Murder:

When the defendant was charged under former law with murder in the second degree, it was permissible for the jury to find him guilty of involuntary manslaughter. St. v. Allison, 122 M 120, 199 P2d 279 (1948).

An information under former law charging murder, when stripped of the terms conveying the idea of deliberation, premeditation, and malice, sufficiently charged manslaughter, and the accused could be found guilty of the lesser offense. St. v. Crean, 43 M 47, 114 P 603 (1911).

When under former law there was evidence tending to show that the defendant was guilty of murder in the first degree, murder in the second degree, and manslaughter, it was the duty of the court to instruct that a verdict for manslaughter could be returned since manslaughter was not a degree of murder. St. v. Shadwell, 26 M 52, 66 P 508 (1901).

Failure to Object to Instructions — Verdict Reviewable: The failure of the defendant to object to instructions under former law on first degree murder did not deprive him of the right to ask for a new trial on the ground that the evidence did not justify a verdict of murder in that degree. St. v. Gunn, 85 M 553, 281 P 757 (1929).

Technical Pleading Rules Inapplicable: A verdict is not subject to the technical rules that govern pleadings. Tripp v. Silver Dyke Min. Co., 70 M 120, 224 P 272 (1924); Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910).

Offense Found Independent of Offense Charged:

A party cannot be charged with one crime and be convicted of another independent offense. Thus, under former law a verdict of guilty of malicious destruction of property was insufficient under a charge of the malicious burning of property. The offense found did not include the offense charged. In such a case it was the right and duty of the trial court to require the jury to return some form of verdict authorized by law or to report a disagreement. St. v. Sieff, 54 M 165, 168 P 524 (1917).

Under former law, when the defendant was specifically charged with burglary in the nighttime, constituting the first degree of the offense of burglary, the jury could not convict him of the crime in the second degree, as having been committed in the daytime, since the former did not include the latter; the defendant needed only meet the accusation as made and not another and a different one, and the prosecution was held to proof of the charge as set out in the information. St. v. Copenhaver, 35 M 342, 89 P 61 (1907).

Court's Charge — Restricting Consideration of Lesser Offense: While under former law the offense of kidnapping included the minor offenses of false imprisonment and assault in the third degree, the court did not need to so formulate the charge that the jury could find the defendant guilty of a lower offense or of an included offense when the evidence was such as to show that the defendant was guilty of the offense charged or was entitled to an acquittal. St. v. McDonald, 51 M 1, 149 P 279 (1915).

Verdict Upon Finding of Insanity: Under former law when the defendant, charged with assault in the first degree, relied wholly upon the defense of insanity, the court's instruction that the jury might find the defendant guilty of assault in the first, second, or third degree or not guilty was inaccurate; the jury should have been told that, if they found him not guilty because insane, their verdict should be "not guilty by reason of insanity". St. v. Crowe, 39 M 174, 102 P 579 (1909).

Presence of Jurors When Verdict Delivered: When the record did not show that the jurors were not all present when the verdict was delivered and from the minutes no other fair inference

could be drawn than that they were actually present at the time, the omission from the minutes of a statement that their names were called prior to delivery of the verdict was not an error that prejudiced the defendant in his substantial rights. St. v. DeLea, 36 M 531, 93 P 814 (1908).

Jury's Misunderstanding of Instructions: The affidavits of two jurors, filed in aid of a motion for a new trial by the defendant in a prosecution for murder, in which both stated that they had misunderstood the instructions of the court, which clearly charged the jury that it could find the accused guilty of any grade of unlawful homicide or acquit him, in that from a reading of the instructions the two jurors were under the impression that the jury was required to either find the defendant guilty of murder in the first degree or acquit him, and that being unwilling to acquit they voted for murder in the first degree rather than declare him innocent, did not show such misconduct on the part of the jury as to entitle the defendant to a new trial. St. v. Beesskove, 34 M 41, 85 P 376 (1906).

Law Review Articles

Something Upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases, Morris, 62 Mont. L. Rev. 1 (2001).

Collateral References

Criminal Law *key* 870, 872, 877, 881(1), 883, 889, 1202(5); Indictment and Information *key* 189(1), 190, 191.

17 C.J.S. Contempt §24; 23A C.J.S. Criminal Law §1878; 42 C.J.S. Indictments and Informations §§290 through 293.

75B Am. Jur. 2d Trials §§1543, 1572.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed. 75 ALR 4th 91.

Validity and efficacy of accused's waiver of unanimous verdict. 97 ALR 3d 1253.

Inconsistency of criminal verdict as between different counts of indictment and information. 18 ALR 3d 259.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time. 16 ALR 3d 866.

Quotient verdicts. 8 ALR 3d 335.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR 3d 1461.

46-16-604. Poll of jury.

Commission Comments

Source: See commission comments to 46-16-603.

Case Notes

Jury Poll Indicating Lack of Unanimity of Verdict in Criminal Case — Error in Failing to Direct Further Deliberation or Discharge Jury: Following Pyatt's jury trial for felony stalking, the jury was polled in open court as to whether each juror agreed with the verdict. One juror said no, stating that he went along with the verdict because he was outnumbered. Recognizing that a unanimous verdict was required, the court then inquired whether the juror had voted yes in the jury room, and the juror said that he voted in favor of the majority in the end, so his vote was yes. The remainder of the jury also voted yes, so the court ruled that the verdict was unanimous, and Pyatt was convicted and sentenced to the Department of Corrections for 5 years. In polling a jury, the court is to inquire into the jurors' present states of mind as of the time of the poll. To fulfill the jury poll's purpose of safeguarding a defendant's right to a unanimous verdict, the jury poll must afford a juror an opportunity to make an unambiguous reply as to that juror's present state of mind. Here, the juror's response indicated disagreement with the verdict, and the court's further conversation was inappropriate. No juror should surrender an honest opinion as to the weight or effect of evidence or the innocence or guilt of a defendant because the majority of the jury feels otherwise or to return a unanimous verdict or prevent a mistrial. Once the juror indicated disagreement with the verdict, the court should have either directed the jury to deliberate further or discharged the jury, and failure to do so constituted reversible error. St. v. Pyatt, 2000 MT 136, 300 M 25, 1 P3d 953, 57 St. Rep. 555 (2000), following St. v. Holloway, 740 P2d 711 (N. Mex. App. 1987).

Initial Verdict Not Unanimous — No Mistrial: In considering the criminal charge against the defendant, the jury returned to the courtroom and disclosed its vote of 10 to 2 in favor of conviction. The judge did not make a prohibited inquiry of the jury as to its numerical division, nor was it reversible error for the judge to ask the jury to return to the jury room for a reasonable time to attempt to reach a unanimous decision when he emphasized that no juror should think

any pressure was being placed on him to reach a unanimous decision. Given the manner in which the jury disclosed its initial vote, the trial court was correct in refusing to grant a mistrial because of the initial verdict. St. v. George, 219 M 377, 711 P2d 1379, 43 St. Rep. 26 (1986).

Verdict by Full Panel: When on the poll of the jury one juror answered that the verdict of guilty of burglary was his verdict provided that the sentence was suspended but thereafter, upon inquiry by the court, unqualifiedly answered that it was his verdict, a motion for dismissal of the information on the ground that the verdict had not been rendered by a full panel was properly denied. St. v. Asher, 63 M 302, 206 P 1091 (1922).

Collateral References

Criminal Law *key* 874.

75B Am. Jur. 2d Trial §1523.

46-16-605. Verdict of not guilty — when defendant discharged.

Commission Comments

1991 Comment: This statute retains the principal portion of 1987 MCA 46-16-605. The exception stated in that section is not retained in this statute because the Commission felt it was covered by other statutes.

Source: R.C.M. 1947, section 94-7418.

No significant change.

Compiler's Comments

1991 Amendment: At beginning substituted "a verdict of not guilty is returned" for "judgment of acquittal is given on a general verdict" and at end, after "given", deleted "except, where the acquittal is because of a variance between the pleading and proof which may be obviated by a new indictment or information, the court may order his detention to the end that a new indictment or information may be filed by the county attorney"; and made minor change in style.

Case Notes

Jury Disregarding the Law: The jury has the power to disregard the law as declared and acquit the defendant, however convincing the evidence may be, and the court has no power to punish the jury for such conduct. St. v. Koch, 33 M 490, 85 P 272 (1906).

46-16-606. Reasonable doubt as to which offense convicts only of least offense.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Value of Stolen Property at Issue — Error in Refusal of Instruction on Lesser Included Offense: Where the defendant had been charged with the felony theft of a guitar alleged to have a value of more than $150, the District Court erred in refusing an instruction requiring the jury to convict the defendant of the lesser included offense of misdemeanor theft if they found the value of the guitar to be less than $150 (raised to $300 by 1983 amendment). Under the rationale of St. v. Taylor, 163 M 106, 515 P2d 695 (1973), the instruction should have been given because the weight of the evidence of value of the guitar was a question for the jury. St. v. Young, 206 M 19, 669 P2d 239, 40 St. Rep. 1474 (1983).

Modification of Verdict Without New Trial: Under a former statute providing that when the verdict is contrary to the law or evidence but the evidence shows the accused to be guilty only of a lesser degree or a lesser included offense rather than the degree of which he was convicted, the court could modify the judgment without granting a new trial. The expression "the verdict is contrary to the evidence" meant the same thing as the expression "insufficiency of the evidence to justify the verdict". St. v. Schoenborn, 55 M 517, 178 P 294 (1919); Flaherty v. Butte Elec. Ry., 42 M 89, 111 P 348 (1910).

Collateral References

Criminal Law *key* 571.

46-16-607. Conviction of lesser included offense.

Commission Comments

1991 Comment: This statute is a newly developed provision intended to regulate a jury's consideration of lesser included offenses. The statute allows a lesser included offense instruction only upon a party's request and only if the evidence warrants it. The Commission recognized that the statute makes significant changes in established procedure. The statute has been drafted to comport with a recent Ninth Circuit Court decision. See U.S. v. Jackson, 726 F2d 1466 (9th Cir. 1984).

Case Notes

No Possibility of Lesser Plea Instruction — No Error in Denial of Motion to Withdraw Guilty Plea: As part of a plea agreement, Swensen pleaded guilty to felony assault and signed a waiver of rights, including the right to a jury instruction on a lesser included offense. Swensen subsequently moved to withdraw the guilty plea on grounds that the District Court failed to specifically advise him about the lesser included offense of misdemeanor assault during the change of plea hearing. The District Court denied the motion and Swensen was sentenced pursuant to the terms of the plea agreement. Swensen appealed, but the Supreme Court affirmed. A court may at any time before judgment and within 1 year after final judgment allow a defendant to withdraw a guilty plea upon a showing of good cause, which includes the minimal constitutional requirement that a guilty plea be voluntary and intelligent and may include additional criteria such as the discovery of new exculpatory evidence. In this case, Swensen's guilty plea to aggravated assault was voluntary, and the District Court's interrogation during the change of plea hearing was adequate. Additionally, Swensen's admissions on the record about the nature of the injuries inflicted on the victim effectively eliminated the possibility that Swensen was entitled to a lesser included offense instruction. Absent good cause, the District Court did not err in denying Swensen's motion to withdraw the guilty plea. St. v. Swensen, 2009 MT 42, 349 M 268, 203 P3d 786 (2009). See also St. v. Martinez, 1998 MT 265, 291 M 265, 968 P2d 705 (1998).

No Prejudice Arising From Lesser Included Offense Instruction — Reversal Unwarranted: Potter was charged with aggravated assault. At trial, the District Court included two lesser included offense instructions for attempted aggravated assault and assault, and Potter objected to including the attempted aggravated assault instruction. The jury returned a guilty verdict on the aggravated assault charge. On appeal, Potter contended that the court erred by instructing the jury on attempted aggravated assault because attempted aggravated assault is not a lesser included offense of aggravated assault. However, the jury never reached the question of whether Potter committed the lesser offense, so Potter was not prejudiced by inclusion of the attempted aggravated assault instruction. Absent prejudice, the Supreme Court declined to reverse the conviction. St. v. Potter, 2008 MT 381, 347 M 38, 197 P3d 471 (2008).

Lesser Misdemeanor Assault Instruction Properly Refused Absent Evidentiary Support: At Johnson's trial for aggravated assault, Johnson contended that the trial court improperly refused to give the jury an instruction on the lesser offense of misdemeanor assault. The trial court held that the evidence did not warrant a lesser offense instruction, and on appeal, the Supreme Court agreed. The victim suffered two dislocated shoulders representing very severe trauma, with the possibility of injuries to the heart and lungs. One shoulder was permanently impaired, limiting the victim's range of motion and preventing the victim from returning to preinjury employment. Thus, the victim suffered more than pain, impairment, or reasonable apprehension of bodily injury characterizing misdemeanor assault. The evidence did not support a lesser misdemeanor offense instruction, and the trial court did not abuse its discretion in refusing to give one. St. v. Johnson, 2008 MT 227, 344 M 313, 187 P3d 662 (2008).

No Right to Be Informed of Possibility of Lesser Included Offense When No Such Possibility Exists: Defendant was charged with felony attempted sexual assault, but ultimately pleaded nolo contendere to a charge of felony attempted kidnapping. After being sentenced to 10 years in prison, defendant appealed the conviction on grounds that the trial court erred by failing to inform defendant that he could have been convicted on a lesser charge of unlawful restraint and by failing to allow withdrawal of the guilty plea. However, only those lesser included offenses applicable to the charge of felony attempted sexual assault were relevant to defendant's decision to plead nolo contendere. The court and the state could not be faulted for failing to inform defendant of any lesser included offense that was not relevant to defendant's decision, and defendant had no right to be informed of the possibility of submitting a lesser included offense instruction to the jury when no such possibility existed. Absent anything in the record that an omission, misinformation, or mental incapacity hindered defendant's ability to enter knowingly and intelligently into a plea agreement, the trial court did not err in holding that defendant failed to establish good cause to withdraw the plea, and the Supreme Court affirmed. St. v. Iafornaro, 2007 MT 77, 336 M 489, 155 P3d 1238 (2007).

Jury Instruction Regarding Effect of Intoxication on Mens Rea Properly Rejected: Following conviction for deliberate homicide, Smith asserted that the trial court erred in refusing to instruct the jury regarding evidence of Smith's intoxication when considering whether Smith acted with intent to commit the crime. Smith contended that 45-2-203 unconstitutionally violated due process by excluding evidence of intoxication in determining mental state. The Supreme Court noted that the due process issue had been decided contrary to Smith's argument

in Mont. v. Egelhoff, 518 US 37 (1996), so declining Smith's intoxication instruction was not error. Viewed as a whole, the jury instructions fully and fairly instructed the jury on the applicable law, and Smith's conviction was affirmed. St. v. Smith, 2005 MT 325, 329 M 526, 127 P3d 353 (2005), distinguishing U.S. v. Burdeau, 168 F3d 352 (9th Cir. 1999).

Failure to Give Jury Instruction on Lesser Included Offense of Unlawful Restraint in Aggravated Kidnapping Trial — Reversible Error: In Meyer's aggravated kidnapping trial, Meyer requested a jury instruction allowing the jury to consider unlawful restraint as a lesser included offense, but the instruction was denied. The Supreme Court noted that what constitutes isolation in terms of kidnapping and unlawful restraint is an issue for the trier of fact to decide, as long as there is some basis in the evidence for its conclusion. The jury as trier of fact in this case did not receive full and fair instructions on the applicable law and thus was not allowed to consider whether Meyer was guilty of the lesser included offense of unlawful restraint in light of the evidence. The judgment was reversed, and the case was remanded for a new trial. St. v. Meyer, 2005 MT 215, 328 M 247, 119 P3d 1214 (2005).

Misinformation in Plea Agreement and Incomplete Information Provided by District Court Raising Doubt as to Intelligent Guilty Plea — Denial of Withdrawal of Plea Reversed: Rave was charged with sexual assault with bodily injury. Following advice of counsel, Rave accepted a plea agreement and pleaded guilty. Prior to sentencing, Rave moved to withdraw the guilty plea, but the motion was denied, and Rave was sentenced pursuant to the plea agreement. On appeal, the Supreme Court found that the plea agreement erroneously advised Rave that sexual assault may be a lesser included felony offense and that the penalty was the same as for sexual assault with bodily injury when, in fact, the lesser included offense was a misdemeanor. In addition, the District Court did not correct the misinformation in the plea agreement when accepting the guilty plea, so Rave could not have made a knowing, intelligent, and voluntary plea. Thus, the Supreme Court reversed the denial of Rave's motion to withdraw the guilty plea and remanded for further proceedings. St. v. Rave, 2005 MT 78, 326 M 398, 109 P3d 753 (2005).

Lesser Included Offense Instruction on Resisting Arrest Not Warranted When Defendant Under Arrest at Time of Assault: Pittman was arrested for disorderly conduct, and Pittman assaulted an officer and attempted to assault other officers while at the detention center. At the trial for felony assault and felony attempted assault, Pittman contended that the jury should be given an instruction on the lesser included offense of resisting arrest, but the instruction was denied. On appeal, the Supreme Court affirmed. Pittman was already under arrest when the felony assaults took place. Absent evidence in the record that would permit the jury to find Pittman guilty of resisting arrest and acquit on the felony charges, it was not error to deny Pittman's request for the lesser included offense instruction. St. v. Pittman, 2005 MT 70, 326 M 324, 109 P3d 237 (2005).

Misdemeanor Assault Not Lesser Included Offense of Sexual Assault — Denial of Lesser Included Offense Instruction Not Error: In a sexual assault trial, Cameron requested a jury instruction that misdemeanor assault was a lesser included offense of sexual assault. The request was denied. On appeal, Cameron raised several arguments regarding the lesser included offense and claimed error in denial of the instruction. The Supreme Court noted that under St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705 (1998), two criteria must be met before a defendant is entitled to a lesser offense instruction: (1) the offense must actually constitute a lesser included offense of the offense charged; and (2) there must be sufficient evidence to support the lesser included offense instruction. The court examined the elements of both offenses and concluded that the elements of misdemeanor assault and sexual assault are not similar and do not overlap. Thus, misdemeanor assault is not a lesser included offense of sexual assault. The jury was therefore properly instructed, and the sexual assault conviction was affirmed. St. v. Cameron, 2005 MT 32, 326 M 51, 106 P3d 1189 (2005), followed in St. v. Gerstner, 2009 MT 303, 353 M 86, 219 P3d 866 (2009).

No Prejudice to Defendant When Assistance of Counsel Not Deficient: Following conviction for deliberate homicide, Sellner filed a petition for postconviction relief based on ineffective assistance of counsel, contending that counsel was deficient in: (1) failing to investigate and present a case for justifiable use of force; (2) abandoning an attempted mitigated deliberate homicide defense; (3) pursuing a defense based on a civil suit filed against defendant; (4) failing to offer a "failure to agree" instruction to the jury; and (5) making other errors. The Supreme Court applied the Strickland test to determine whether counsel's performance was deficient and prejudicial, addressing each argument in turn, and concluded that Sellner's contentions of deficient counsel were unfounded. Absent a showing of deficient counsel, Sellner could not show prejudice, and the denial of the petition for postconviction relief was affirmed. Sellner v. St., 2004

MT 205, 322 M 310, 95 P3d 708 (2004), following St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

No Error in Failure to Give Instruction Citing Statutory Language Regarding Value When Adequately Covered in Another Instruction: In a trial for attempted theft, Maloney offered a jury instruction, drawing from the statutory definition of value in 45-2-101, which included language that if value cannot be determined beyond a reasonable doubt, the value must be considered to be less than $1,000. The District Court rejected that instruction and gave an instruction that adequately informed the jury that value was an element of attempted theft and that the jury had to find that the value in question exceeded $1,000 to find Maloney guilty of felony theft. Although Maloney's proposed instruction followed more closely the statutory definition, citing exact statutory language in an instruction is not necessary if the instructions given explain the crime. Maloney's instruction would have added little to the jury's understanding of the law, and the District Court did not err in rejecting Maloney's instruction when the element of value was adequately covered in another instruction. St. v. Maloney, 2003 MT 288, 318 M 66, 78 P3d 1214 (2003).

Criminal Endangerment, Negligent Endangerment, and Partner or Family Member Assault Not Considered Lesser Included Offenses of Aggravated Assault: At trial for aggravated assault, the District Court refused Hoffman's request of lesser included offense instructions on the offenses of criminal endangerment, negligent endangerment, and partner or family member assault, and Hoffman appealed. The Supreme Court affirmed. Under 46-1-202(8)(a), a lesser included offense is one that is established by proof of the same or less than all the facts required to establish commission of the offense charged, while under 46-1-202(8)(c), a lesser included offense is one that differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission. Although Hoffman made prefatory reference to both subsections, the substance of Hoffman's argument focused entirely on subsection (8)(c), and the Supreme Court declined to address arguments related to subsection (8)(a) that were raised for the first time on appeal. It is incumbent on counsel to specify at trial which subsection is being relied upon. Subsection (8)(c) does not support a conclusion that criminal endangerment, negligent endangerment, or partner or family member assault is a lesser included offense of aggravated assault. The District Court's properly concluded that the offenses were too dissimilar to warrant a lesser included offense instruction. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), following St. v. Fisch, 266 M 520, 881 P2d 626 (1994).

Improper Jury Instructions — Mitigated Deliberate Homicide Verdict Without First Finding Guilt of Deliberate Homicide — Reversible Error: Demontiney was charged with deliberate homicide. On the first morning of trial, counsel exchanged jury instructions, and neither party's instructions included mitigated deliberate homicide. Following 3 days of testimony, the state proposed an instruction on mitigated deliberate homicide, arguing that evidence introduced at trial obligated the state to offer the instruction. The trial court agreed and stated that the jury would be instructed on mitigated deliberate homicide. Consistent with St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202 (2000), the state prepared instructions and a verdict form incorporating the "failure to agree" concept, directing the jury to consider all evidence relating to both the greater and lesser charges before considering the verdict on the greater charge. Nevertheless, the trial court's instructions and verdict form did not match those offered by either party. Rather, the trial court instructed the jury that it should first consider the deliberate homicide charge, and if it reached a not guilty verdict or was unable to reach a verdict on that charge, it was then to consider the mitigated deliberate homicide charge. The jury found Demontiney not guilty of deliberate homicide, but guilty of mitigated deliberate homicide. The Supreme Court found that the jury instructions were not a full and fair instruction on the applicable law. The District Court was bound by Scarborough, whether the court agreed with that decision or not. A finding of guilt on mitigated deliberate homicide requires a finding of every element of deliberate homicide, plus an additional finding of extreme mental or emotional stress. Thus, the jury's verdict was logically impossible, prejudicing Demontiney, and the jury instructions constituted reversible error. The verdict was vacated, and Demontiney was immediately discharged. (See 2003 amendment to 45-5-103.) Demontiney v. District Court, 2002 MT 161, 310 M 406, 51 P3d 476 (2002).

Ineffective Assistance of Counsel in Failure to Offer "Failure to Agree" Instruction — Prejudice Warranting Remand for New Trial: At Rogers' trial for attempted sexual intercourse without consent and felony assault, the District Court provided jury instructions with misdemeanor sexual assault and misdemeanor assault as lesser included offenses. Rogers' attorney requested the "acquittal first" instruction, which provided that the jury was not to consider the lesser included offenses unless they first acquitted on the greater offenses. Rogers contended that the

failure of the attorney to request the "failure to agree" instruction allowed under this section, which provides that the jury may consider a lesser included offense if it is unable to reach a verdict on the greater offense, constituted ineffective assistance of counsel. The Supreme Court agreed. The "failure to agree" instruction was drafted to protect against the serious risk identified in U.S. v. Jackson, 726 F2d 1466 (9th Cir. 1984), which arises when jurors harboring a doubt as to defendant's guilt of the greater offense, but at the same time convinced that defendant had committed some offense, might wrongly yield to the majority and convict of the greater offense rather than not convict at all. The failure to offer this potentially beneficial instruction, when that failure is not part of counsel's trial strategy, is an error so serious that it falls outside the range of competence required of attorneys in criminal cases. Thus, when sufficient facts exist to support a conviction for a lesser included offense, defense counsel must offer the "failure to agree" instruction unless there is a tactical reason for not doing so, and failure to offer the instruction in such cases is prejudicial error. St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

No Abuse of Discretion in Refusing to Instruct Jury on Lesser Included Offense of Negligent Homicide Absent Supporting Evidence: German was convicted of attempted felony assault and deliberate homicide. At trial, the court instructed the jury on German's defense of justifiable use of force and gave a mitigated deliberate homicide instruction but refused to give a jury instruction regarding the lesser included offense of negligent homicide, finding no evidence to support the instruction. German appealed on grounds that the trial court erred in failing to give the negligent homicide instruction. The Supreme Court affirmed. District Courts have broad discretion in formulating jury instructions, including the authority to reject instructions that are not supported by evidence. A lesser included offense instruction must be given when properly requested and when the jury could be warranted in finding defendant guilty of the lesser included offense, based on the evidence, but the instruction need not be given if there is no evidence to support it. A lesser included offense instruction is not supported by the evidence when defendant's evidence or theory, if believed, would require an acquittal. Here, German's justifiable use of force defense, if proved, would have required an acquittal. German cited St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705 (1998), for the proposition that a defendant is generally entitled to a lesser included offense instruction and that the District Court may usurp the jury's function by factually deciding the merits of the lesser included offense. The Supreme Court disagreed. Martinez neither overruled nor was inconsistent with cases entitling defendant to a lesser included offense instruction when evidence supports the instruction, and in both civil and criminal proceedings, the determination of whether there is sufficient evidence to raise an issue of fact for a jury is a question of law for the trial court. Only when the trial court determines as a matter of law that factual disputes exist are those disputes turned over to the jury. In this case, German's own testimony was that he consciously made the decision to shoot the victim, so there was no support for a negligent homicide instruction and the trial court did not err in refusing to give one. St. v. German, 2001 MT 156, 306 M 92, 30 P3d 360 (2001), following St. v. Swan, 279 M 483, 928 P2d 933 (1996).

Failure of Counsel to Exercise Right to Lesser Included Offense Instruction — Presumption of Effective Assistance — Failure to Provide Evidence of Ineffectiveness: This section provides that upon a defendant's request, the court shall instruct the jury that the jury may consider a lesser included offense if the jury cannot reach a verdict on the greater offense after reasonable effort. Because of the strong presumption that counsel acted reasonably and defendant's failure to provide any evidence to the contrary, the court would not find that counsel provided ineffective assistance by failing to request the instruction. St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Negligent Endangerment Not Lesser Included Offense of Assault of Peace Officer: Section 45-5-210 provides that criminal endangerment, negligent endangerment, and assault are not included as offenses of assault on a peace officer. Fuqua was convicted of assault on a peace officer and argued that 45-5-210 unconstitutionally eliminated consideration of his claim of negligent endangerment as a lesser included offense. The Supreme Court noted that negligent endangerment differs from assault on a peace officer by requiring a lesser kind of culpability and by requiring proof of different conduct; thus, negligent endangerment is not a lesser included offense of assault on a peace officer. Having so concluded, the court declined to address the constitutional question of whether the Legislature can specifically eliminate consideration of an offense as a lesser included offense. St. v. Fuqua, 2000 MT 273, 302 M 99, 13 P3d 34, 57 St. Rep. 1141 (2000).

Criteria Required Before Lesser Included Offense Instruction Required: Two criteria must be met before a defendant is entitled to a lesser included offense instruction: (1) the offense must

actually constitute a lesser included offense of the offense charged; and (2) there must be sufficient evidence to support the lesser included offense instruction. In regard to the second criterion, a lesser included offense instruction is not supported by the evidence when the defendant's evidence or theory, if believed, would require an acquittal. In this case, Hamby was charged with felony sexual assault on a 10-year-old girl with Down syndrome. Hamby contended that he was wrestling with the girl rather than sexually assaulting her and thus was entitled to a lesser included instruction for misdemeanor assault. However, if the evidence supported Hamby's theory that he was merely wrestling, there would not be sufficient evidence to establish that he knowingly made physical contact of an insulting or provoking nature to constitute a misdemeanor assault, so an acquittal would result. The evidence did not support Hamby's proposed jury instruction, and the District Court did not err in refusing to give it. St. v. Hamby, 1999 MT 319, 297 M 274, 992 P2d 1266, 56 St. Rep. 1272 (1999). See also St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705, 55 St. Rep. 1093 (1998).

Sufficient Evidence of Criminal Endangerment — Instruction on Negligent Endangerment Not Required: Martinosky was charged with felony criminal endangerment. During settlement of jury instructions, Martinosky offered a proposed instruction on negligent endangerment as a lesser included offense of criminal endangerment, but the instruction was refused. On appeal, without reaching the question of whether negligent endangerment was a lesser included offense of criminal endangerment, the Supreme Court found that the evidence established that Martinosky was fully aware of his actions and the probable outcome of those actions and thus acted knowingly, so an instruction on negligent endangerment was not warranted. St. v. Martinosky, 1999 MT 122, 294 M 427, 982 P2d 440, 56 St. Rep. 495 (1999), following St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705, 55 St. Rep. 1093 (1998).

"Failure to Agree" Instruction — When Corrective Instruction Required: Generally, when a claimed error concerns jury instructions that were not objected to at the time that the instructions were settled, the alleged error may not be raised for the first time on appeal; however, the Supreme Court will review jury instructions in certain circumstances even in the absence of an objection to determine whether the jury was properly instructed. In the present case, there was significant confusion among the court, the prosecutor, and the defense counsel concerning the correct procedural sequence for the jury to consider greater and lesser offenses during deliberations, given a timely request by defendant. If a judge is of the opinion that instructions already given fully advise the jury on the procedures that it is to follow in deliberations, the judge's refusal to answer a jury's question already answered in the instruction is not error. However, when the instruction fails to fully advise, the judge should provide a corrective instruction. The withdrawal of defendant's timely request for an instruction at settlement was due to the mistaken representation of the court and the prosecutor that the law did not allow an instruction that the jury may consider a lesser offense if it fails to agree on a verdict for the greater offense, so the Supreme Court chose to review defendant's claim of error in a jury instruction. Under subsection (3) of this section, as long as a criminal defendant requests a "failure to agree" instruction at the settling of jury instructions, a District Court must instruct the jury that it may consider the lesser offense without first reaching a unanimous verdict on the greater offense. St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998), following U.S. v. Jackson, 726 F2d 1466 (9th Cir. 1984).

Counsel Failure to Request Lesser Included Offense Instruction Based on Defense That No Rational Jury Would Believe: In a prosecution for attempted deliberate homicide, defendant's counsel did not render ineffective assistance by failing to request a jury instruction on the lesser included offense of aggravated assault. Therefore, counsel's performance was not outside the range of competence demanded of attorneys under similar circumstances. Defendant admitted that he shot a peace officer in the chest with a .41 caliber magnum pistol while running from the officer, who only wanted to talk to him. His defense was that he thought that the officer was part of a hit team hired by the government to get him and that a voice in his head told him that the officer had a flak jacket on and that if defendant shot the officer in the chest, he would not hurt the officer. The evidence did not support the instruction, and from the evidence, it would be irrational to conclude that defendant shot the officer with any intent other than to kill him. No jury could have rationally accepted the defense and have found defendant guilty of aggravated assault and not of attempted deliberate homicide. St. v. Sellner, 286 M 397, 951 P2d 996, 54 St. Rep. 1464 (1997), followed in St. v. Howell, 1998 MT 20, 287 M 268, 954 P2d 1102, 55 St. Rep. 72 (1998).

Assault Lesser Included Offense of Deliberate Homicide — Error to Refuse Instruction on Lesser Included Offense: The defendant was convicted of deliberate homicide. At trial, the court refused the defendant's proposed jury instruction on the offense of assault. The Supreme Court

determined that as a matter of law, under the express terms of 46-1-202, assault is an included offense of the crime of deliberate homicide. When there was some evidence supporting a defendant's theory that the defendant was guilty of assault but not murder, the District Court erred in refusing the proposed jury instruction on assault as a lesser included offense of deliberate homicide. St. v. Castle, 285 M 363, 948 P2d 688, 54 St. Rep. 1194 (1997). However, see St. v. Flores, 1998 MT 328, 292 M 255, 974 P2d 124, 55 St. Rep. 1329 (1998).

Deliberate Homicide Charged — Insufficient Evidence to Support Instruction on Negligent Homicide — No Purpose to Instruction on Definition of "Negligently": Goulet, Nelson, and Running Crane became intoxicated after drinking at several bars, and Goulet, after pushing Running Crane away when he tried to borrow a cigarette, stabbed Running Crane in the stomach, then in the chest, and finally in the back. During trial on charges of deliberate homicide, Goulet requested an instruction on negligent homicide, but the instruction was refused by the District Court. The Supreme Court held that the District Court did not err in refusing the requested instruction. The Supreme Court noted that a defendant is entitled to an instruction on a lesser included offense when the jury would be warranted in convicting on the lesser offense and acquitting on the greater offense. However, the Supreme Court noted that the only evidence that even approached evidence of negligence was that as he was stabbing Running Crane, Goulet was thinking that he hoped that he wasn't hurting Running Crane too badly. The Supreme Court called this evidence self-serving and insufficient to support the requested instruction. The Supreme Court also affirmed the District Court in its refusal to give an instruction on the definition of "negligently", saying that the District Court refused the instruction on the definition for the same reason that it refused the instruction on negligent homicide and that an instruction on the definition of a word standing alone, that is, not used in the instruction, would serve no purpose. St. v. Goulet, 283 M 38, 938 P2d 1330, 54 St. Rep. 482 (1997), followed in St. v. Fuqua, 2000 MT 273, 302 M 99, 13 P3d 34, 57 St. Rep. 1141 (2000).

Motion for New Trial Properly Denied — Attorney Assistance Not Ineffective: Swan argued that he was ineffectively represented because his attorney failed to request an instruction on a lesser included offense, neglected to ensure Swan's presence at an in camera hearing at which the trial court considered and answered a note from the jury inquiring whether an assault instruction applied to a felony aggravated assault charge as well as a felony assault (now assault with a weapon) charge, and allowed joinder of felony assault (now assault with a weapon) and felony aggravated assault charges. Finding that Swan failed to meet the first prong of the Strickland test, the Supreme Court held that Swan was effectively represented because counsel's performance was within the range of competence demanded of counsel in such cases and did not prejudice Swan in a manner that would have resulted in a different trial result. St. v. Swan, 279 M 483, 928 P2d 933, 53 St. Rep. 1246 (1996).

Assumption of Sexual Assault as Lesser Included Offense of Sexual Intercourse Without Consent — No Due Process Violation: Black was charged with sexual intercourse without consent. The court found insufficient evidence to convict on that charge but instead found him guilty of felony sexual assault. Black appealed on the grounds that he was convicted of an offense with which he was not charged, relying on St. v. Copenhaver, 35 M 342, 89 P 61 (1907). Neither Black nor the state raised the issue of whether sexual assault was a lesser included offense of sexual intercourse without consent, either at trial or directly on appeal. Although the issue was not properly before the Supreme Court on appeal and the court specifically declined to address it, the court nevertheless assumed for purposes of this opinion that sexual assault is a lesser included offense of sexual intercourse without consent. The court distinguished Copenhaver, in which defendant was convicted of a separate, independent offense that was not a lesser included offense. In this case, pursuant to the court's assumption and subsection(1) of this section, the court found that the charging document provided a sufficient basis for Black's conviction of sexual assault. Black's arguments that he was convicted of a crime with which he was not charged, that the charging document did not provide notice of the crime of which he was convicted, and that his due process rights were violated were thus rendered ineffective. St. v. Black, 270 M 329, 891 P2d 1162, 52 St. Rep. 215 (1995).

Endangering Welfare of Child Not Lesser Included Offense of Deviate Sexual Conduct: As evidenced by the plain language of 45-5-505, the offense of deviate sexual conduct requires proof that the persons were of the same sex, while endangering the welfare of a child, 45-5-622, plainly requires proof of the ages of the offender and the victim. Each crime requires proof of additional facts that the other does not. Therefore, applying the test in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), the crime of endangering the welfare of a child is not a lesser included offense of deviate sexual conduct. St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994).

Included Offense Based Upon Less Risk, Injury, or Culpability — Negligent Endangerment Not Lesser Included Offense of Aggravated Assault: Fisch was convicted of aggravated assault after the District Court refused to accept a jury instruction on negligent endangerment, which Fisch argued was a lesser included offense of aggravated assault. Citing St. v. Sheppard, 253 M 118, 832 P2d 370 (1992), the Supreme Court held that a person is entitled to an instruction on a lesser included offense only if, based upon the evidence, the jury could rationally find the person guilty of the lesser offense and if that entitlement is based upon one offense being, in law, an included offense of the other. Because the definition of "included offense" is written in the disjunctive with the qualifier "only", a lesser included offense may differ in one and only one way from that of the offense charged. Fisch's argument fails because at least two of the variations in degree exist between the offense charged and negligent endangerment. Moreover, Fisch's "less serious risk", "less serious injury", and "lesser kind of culpability" arguments under 46-1-202(8)(c) also fail. As a result, the Supreme Court held that no amount of evidence as to negligent endangerment would entitle Fisch to the instruction he sought. St. v. Fisch, 266 M 520, 881 P2d 626, 51 St. Rep. 907 (1994), followed in St. v. Greywater, 282 M 28, 939 P2d 975, 54 St. Rep. 16 (1997), and St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705, 55 St. Rep. 1093 (1998).

Included Offense Based Upon Similar Proof — Failure to Raise in District Court: Fisch was convicted of aggravated assault after the District Court refused to accept a jury instruction on negligent endangerment, which Fisch argued was a lesser included offense of aggravated assault. Citing St. v. Henderson, 265 M 454, 877 P2d 1013, 51 St. Rep. 606 (1994), the Supreme Court noted that Fisch's argument for a lesser included offense based upon 46-1-202(8)(a) was not raised in the District Court and that Fisch could not change his theory on appeal from that argued in the District Court. St. v. Fisch, 266 M 520, 881 P2d 626, 51 St. Rep. 907 (1994).

Part 7
Motion for a New Trial

Part Commission Comments

1991 Part Comments: This part is a restatement of the 1987 code. The definition of "new trial" is preserved in the general definition section. See 46-1-202.

Part Case Notes

General 745
Insufficient Evidence 747
Jury Misconduct. 747
Newly Discovered Evidence 749

GENERAL

Prosecutor's Inaccurate Description of DNA Evidence — Curative Jury Instruction — No Error Requiring New Trial: Defendant contended that a new trial was warranted because the prosecutor inaccurately stated that the victim's and defendant's DNA were found together at the scene of an alleged sexual assault. The trial court agreed that the evidence was mischaracterized and gave a curative instruction that the jury was to disregard any statement that mixed DNA was found and denied defendant's motion for a new trial. On appeal, the Supreme Court affirmed on this point. Given the curative instruction, defendant did not demonstrate that the trial court acted arbitrarily without conscientious judgment or exceeded the bounds of reason in denying the new trial motion. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007).

Trial Court's Sua Sponte Objection to Testimony Not Violative of Court's Duty to Ensure Fairness of Trial: Price was charged with assault with a weapon, and his defense was based upon the assertion that his roommate committed the crime. On the opening day of trial, both the prosecution and the defense elicited testimony regarding the roommate's propensity for violence. At the beginning of the second day of trial, outside the presence of the jury, the trial judge objected sua sponte to the admission of the character testimony and heard arguments from both parties regarding the objection before ruling that the testimony was inadmissible. The judge then instructed the jury to disregard the testimony and limited testimony on the subject by a future witness. Following conviction, Price appealed on grounds that the judge's actions constituted an abuse of discretion that impaired Price's defense and entitled Price to a new trial. The Supreme Court noted that although a trial judge should avoid officious interference in proceedings and remain impartial, the judge is not a mere figurehead or umpire at a trial who must remain silent and passive throughout a jury trial, speaking only to rule on motions and objections. Rather, the judge's duty is to ensure fairness, avoid waste of time, keep from the jury extraneous, potentially confusing matters, and facilitate the ascertainment of truth, which does

not preclude a judge from excluding inadmissible evidence on the judge's own motion if the judge believes exclusion is in the interests of justice. Here, the judge did not cross the line between arbiter and advocate. The judge's objection pertained to testimony elicited by both parties and thus was not partial to the prosecution. The purpose of the objection was to prevent the jury from being misled by extraneous matters or basing the verdict on incompetence evidence, and the judge's action was in the nature of regulating the proceedings to ensure a fair trial. In addition, limiting the testimony by a future witness to the extent that the state opened the door regarding the roommate's character was not an abuse of discretion because the ruling was proportional to that testimony. St. v. Price, 2006 MT 79, 331 M 502, 134 P3d 45 (2006).

Prosecutor's Comments Improper — References to Unrelated Cases, Attempting to Define Reasonable Doubt, and Personal Opinions Regarding Guilt and Appropriateness of Sentence: In closing arguments in a case in which defendant was charged with attempting to fraudulently obtain dangerous drugs by altering a prescription, the prosecutor attempted to define reasonable doubt by referring to a rape case that he tried several years earlier and by citing the need for a new county jail as evidence that the state proved reasonable doubt every day. The comments were not only irrelevant but also misrepresented the state's burden of proof. Arguments attempting to define reasonable doubt will cause reversible error. The prosecutor also told the jury that defendant's denials were so commonplace that prosecutors had named it the "some dude" defense, as in "Blame it on somebody, some dude, some dude sitting out there". The "some dude" remarks were essentially the prosecutor's personal opinion on the strength of the state's case, referred to matters outside the record and to the prosecutor's own experience, and were similar to a prosecutor commenting on the believability of a witness. Closing arguments that reflect the prosecutor's personal opinions as to guilt are improper. Lastly, the prosecutor assured the jury that even if it found defendant guilty, the judge had the authority to order treatment rather than jail time. The comments were meant to reassure the jury that a guilty verdict would not hurt defendant, but would actually be a benefit in the long run. However, sentencing is solely the duty of the trial court, and in a noncapital case, the verdict should not be influenced in any way by sentencing considerations. It is impermissible for a jury to give weight to possible punishment when reaching a verdict. Although the case was remanded on other grounds, the Supreme Court admonished the prosecution not to make such comments on retrial. St. v. Stewart, 2000 MT 379, 303 M 507, 16 P3d 391, 57 St. Rep. 1615 (2000).

Prosecutor's Assertion of Personal Opinion — Motion for Mistrial Denied: Defendant moved for mistrial, asserting that the state's attorney's closing arguments constituted improper prosecutorial comment and misconduct. During closing, the state had argued that its office was too busy to prosecute innocent persons, stating: "We don't have time to do that, ladies and gentlemen. We do have 1,450 cases a year in the county attorney's office. We don't have time to spend chasing people that we believe are innocent or [have time] to frame people." The Supreme Court affirmed its disapproval of an attorney's assertion of a personal opinion and cautioned the state to refrain from such a tactic. However, since defendant had no evidence that these statements resulted in undue prejudice, the motion for mistrial was properly denied. St. v. Statczar, 228 M 446, 743 P2d 606, 44 St. Rep. 1668 (1987), followed in St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827, 56 St. Rep. 1 (1999). See also St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999).

Statement That Armed Officer Is Guarding Defendant: Defendant contended that the prosecutor's statement before the jury that an armed deputy was "in charge and keeping the defendant" warranted a new trial. During cross-examination, defense counsel drew the jury's attention to the fact that the officer guarding the defendant was armed in order to demonstrate that the witness had limited powers of observation. A short time later, the prosecutor made the statement which defendant complained prejudiced him before the jury and which he claimed should have been the subject of a cautionary instruction. The court found that defense counsel obviously had drawn the jury's attention to the armed officer, and that if defendant thought a cautionary instruction was necessary he should have offered one. The defendant failed to show any error affecting his substantial rights or resulting in prejudice. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Testimony of Expert Witness — Testimony Stricken and Cautionary Instruction Given — No Abuse of Discretion in Refusing to Grant Mistrial: The state added an expert witness to the witness list just prior to trial. His testimony was later stricken from the record because a similar expert could not be procured for the defense. It was not an abuse of discretion by the District Court to refuse to grant defendant a mistrial based upon his testimony. The District Court was in the best position to determine if the testimony adversely affected the proceedings and properly

found no prejudice once the testimony was stricken and a cautionary instruction given. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986).

Prisoner Handcuffed in Jury Presence:

If there were no showing of prejudice to the defendant resulting from a momentary viewing of him in handcuffs by the jury outside the courtroom, he was not denied a fair trial and hence is not entitled to a mistrial. St. v. Schatz, 194 M 59, 634 P2d 1193, 38 St. Rep. 1687 (1981).

In the absence of an indication of prejudicial consequences, the momentary and inadvertent observation of the defendant in handcuffs by the jury members does not warrant the granting of a new trial. St. v. Baugh, 174 M 456, 571 P2d 779 (1977).

Suppression of Evidence — Motion for New Trial: In a prosecution for attempted deliberate homicide, the defendant moved for a new trial, alleging that his counsel did not hear testimony offered by a state witness concerning an exculpatory item not admitted into evidence, claiming the prosecution had suppressed the evidence. The State did not take possession of the evidence during the trial or consider it evidence, and the defendant did not seek a continuance even when he gained knowledge of the evidence. There is no suppression of evidence if the defendant has knowledge of the facts and circumstances of the evidence. The court, therefore, did not err in denying the motion for a new trial. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979), followed in Harris v. St., 234 M 482, 765 P2d 706, 45 St. Rep. 2067 (1988), and in St. v. Henry, 241 M 524, 788 P2d 316, 47 St. Rep. 476 (1990).

Prosecutorial Misconduct: It is not the duty of the prosecuting attorney to make independent determinations concerning the admissibility of evidence once the court rules such evidence is inadmissible. Willful attempts by the prosecutor in this case to place excluded evidence before the jury resulted in a reversal of the conviction because of its prejudicial effect. St. v. Bain, 176 M 23, 575 P2d 919 (1978).

Defendant's Admission Not Prejudicial: The trial judge was correct in refusing to grant the defendant's motion for a mistrial because the admission made by the defendant to the arresting officer on another charge in another state and introduced in the instant case was not prejudicial or a denial of the right to a fair trial. St. v. LaVe, 174 M 401, 571 P2d 97 (1977).

Erroneous Admission of Collateral Evidence: It was reversible error for the court to admit collateral, irrelevant, and prejudicial evidence as the underlying reason for a debt, payment of which was coerced by the defendant's intimidating acts. St. v. Williams, 174 M 288, 570 P2d 578 (1977).

Quotient Verdict: A quotient verdict is not a lot verdict. St. v. Moorman, 133 M 148, 321 P2d 236 (1958).

Perfecting Appeal While New Trial Motion Pending: The act of the defendant in a criminal prosecution in perfecting an appeal from the judgment of conviction while his motion for a new trial was pending did not deprive the trial court of jurisdiction thereafter to pass upon the motion, nor the Supreme Court of jurisdiction to consider the subsequent appeal from the order denying the new trial. St. v. Harkins, 85 M 585, 281 P 551 (1929).

Failure to Object to Instructions — Verdict Reviewable: The failure of the defendant to object to instructions under former law on first degree murder did not deprive him of the right to ask for a new trial on the ground that the evidence did not justify a verdict of murder in that degree. St. v. Gunn, 85 M 553, 281 P 757 (1929).

Different Judge: The District Court has authority to grant a motion for a new trial upon the ground that the verdict is contrary to the evidence without reference to the fact that the judge who presides at the hearing of the motion may not be the one who presided at the trial. St. v. Schoenborn, 55 M 517, 178 P 294 (1919).

INSUFFICIENT EVIDENCE

Verdict Contrary to Law and Evidence: A motion for a new trial in a criminal case upon the ground that the verdict is contrary to the law and the evidence presents for the court's determination the question of the sufficiency of the evidence to sustain the verdict. St. v. Hughes, 76 M 421, 246 P 956 (1926).

Insufficient Evidence — Showing Required: A defendant is not required to show an entire absence of evidence of some fact necessary to make out a case in order to secure a new trial. If he can convince the District Court that the evidence in its entirety is insufficient in weight to justify the verdict, he is entitled to a new trial. St. v. Schoenborn, 55 M 517, 178 P 294 (1919).

JURY MISCONDUCT

New Trial — General Rule Prohibiting Admission of Juror Testimony — Exception for Extraneous Prejudicial Information: Following Lawlor's conviction for felony DUI, Lawlor moved for a new trial, alleging that during deliberations a juror improperly offered to other

jurors an opinion relating to Lawlor's prior DUI convictions, references to which had been precluded by a motion in limine. The District Court denied the new trial motion, and Lawlor appealed. Rule 606, M.R.Ev. (Title 26, ch. 10), generally forbids the admission of juror testimony for purposes of ordering a new trial, but one exception hinges on whether extraneous prejudicial information was improperly brought to the jury's attention. Examples of impermissible extraneous information and external influence include: (1) telephoning a relative with regard to previous litigation by the plaintiff; (2) visiting the scene of an accident; (3) conducting experiments and informing the jury of the findings; (4) receiving evidence outside of court; (5) bringing a newspaper article into the jury room and showing it to the jury; (6) the jury's use of demonstrative evidence and experimentation with evidence; (7) pressure from other jurors; and (8) knowledge and information shared from one juror to another. In this case, comments by the juror in question derived from that juror's general knowledge of the criminal justice system when the juror mentioned that felony DUI cases are tried in District Court. The comment was internal and not an external influence subject to the exception in Rule 606, M.R.Ev., so the District Court properly denied Lawlor's motion for a new trial based on the juror affidavit. St. v. Lawlor, 2002 MT 235, 311 M 493, 56 P3d 863 (2002). See also St. v. Kelman, 276 M 253, 915 P2d 854 (1996).

Jurors' Notes to Court During Deliberations Not Grounds for Mistrial: During deliberations, the jury sent several notes and questions to the court regarding one of the jurors, who was felt to be obstructing deliberations. Defendant's motion for mistrial based on breakdown in the deliberative process was denied. Following conviction, the juror in question prepared an affidavit alleging that he was unaware of the notes and would not have voted for a guilty verdict had he known about them. The District Court struck the affidavit, finding no juror misconduct, in effect denying defendant's motion for a new trial. The Supreme Court held that the notes constituted an entirely internal process and did not introduce an extraneous or outside element into deliberations, signal a breakdown in deliberations, or have any bearing on defendant's guilt or innocence. Even assuming that the notes had somehow affected the juror's vote, introduction of such testimony is prohibited under Rule 606(b), M.R.Ev. (Title 26, ch. 10), and the affidavit was properly stricken. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Interrogation of Jurors as Basis for Mistrial — Motion Properly Denied: In a prosecution for attempted deliberate homicide in which the jury was exposed to publicity about the defendant, the court denied the defendant's motion on the fourth day of trial to interrogate the jurors on the effects of the publicity. In this state, the court is under no mandatory duty to question jurors on prejudicial effects of publicity. Rather, such a matter is within the discretion of the court, and each case must be decided on a case-by-case basis. As there were cautionary instructions given to the jury and the defendant produced no evidence of prejudice, the court did not abuse its discretion in denying defendant's motion. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Use of Jurors' Affidavits: Although jurors' affidavits were admissible to show the existence of juror misconduct, they were not admissible to show the jurors were not actually influenced by the unauthorized evidence. St. v. Davison, 173 M 510, 568 P2d 159 (1977).

Confession of Error by Attorney General — Juror Bias: The court set aside a conviction of first degree burglary and remanded the case for a new trial for error committed by the trial court, confessed by the Attorney General and shown by the record, in refusing the defendant's motion for retrial based on the ground that a juror was biased and prejudiced. St. v. Summers, 107 M 34, 79 P2d 560 (1938).

Jurors Impeaching Own Verdict: The fact that jurors may impeach their own verdict when it has been decided by lot excludes all other exceptions to the general rule that jurors will not be heard to impeach their own verdict. St. v. Lewis, 52 M 495, 159 P 415 (1916); St. v. Wakely, 43 M 427, 117 P 95 (1911); Sutton v. Lowry, 39 M 462, 104 P 545 (1909); St. v. O'Brien, 35 M 482, 90 P 514 (1907); St. v. Beesskove, 34 M 41, 85 P 376 (1906).

Jury's Misunderstanding of Instructions: The affidavits of two jurors, filed in aid of a motion for a new trial by the defendant in a prosecution for murder, in which both stated that they had misunderstood the instructions of the court, which clearly charged the jury that it could find the accused guilty of any grade of unlawful homicide or acquit him, in that from a reading of the instructions the two jurors were under the impression that the jury was required to either find the defendant guilty of murder in the first degree or acquit him, and that being unwilling to acquit they voted for murder in the first degree rather than declare him innocent, did not show such misconduct on the part of the jury as to entitle the defendant to a new trial. St. v. Beesskove, 34 M 41, 85 P 376 (1906).

Bias Concealed by Juror: Under a former statute providing for a new trial when the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of all the jurors, the fact that a juror, when sworn, was biased and prejudiced against the defendant,

which fact he concealed upon his voir dire examination and which neither the defendant nor his counsel discovered until after the verdict, was ground for a new trial. St. v. Mott, 29 M 292, 74 P 728 (1903).

Incompetent Juror — Showing Necessary: While it is imperative that the accused shall have a trial by an impartial jury, after the verdict error will not be presumed and it is incumbent on the accused to make it appear affirmatively that he is entitled to a new trial by reason of having been deprived of this constitutional right. Mere possibility or even probability that one of the jurors was incompetent is not sufficient to overthrow the verdict. St. v. Mott, 29 M 292, 74 P 728 (1903).

Consent to Taking Exhibits to Jury Room: Exhibits introduced in evidence in a prosecution for murder which are sent to the jury during its retirement will not be considered as having been received out of court when it is found on a motion for a new trial that counsel for the defendant consented to their being taken to the jury room during the jury's retirement. St. v. Allen, 23 M 118, 57 P 725 (1899).

Newspapers Received by Jury out of Court:

Under a former statute providing that a new trial shall be granted "when the jury has received any evidence, papers, or documents, not authorized by the court", the word "papers" referred to such written instruments as might be competent testimony when inspected by the court and found to be competent under the Rules of Evidence and did not include newspapers; and the reception by the jury of newspapers containing comments on the case did not in itself vitiate the verdict. St. v. Jackson, 9 M 508, 24 P 213 (1890).

Under a former statute providing that a new trial shall be granted "when the jury has been separated without leave of court, or been guilty of any misconduct, tending to prevent a fair and due consideration of the case", the reception by the jury of newspapers containing comments on the trial adverse to the defendant is misconduct tending to show injury to the defendant. St. v. Jackson, 9 M 508, 24 P 213 (1890). See also St. v. Pepo, 23 M 473, 59 P 721 (1900).

NEWLY DISCOVERED EVIDENCE

Postconviction Letter From Lead Detective Not Considered Newly Discovered Evidence Warranting New Trial: Following DuBray's conviction for robbery, theft, and deliberate homicide, DuBray received a letter from the lead detective in the case indicating that the detective thought that there was more to the case and wanted to hear DuBray's story. DuBray contended that the letter indicated that the detective wanted the real story because he only got part of it right, which impeached the detective's trial testimony, constituting new evidence that entitled DuBray to a new trial. The Supreme Court applied the test in St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), to determine whether the letter constituted newly discovered evidence. Given that DuBray's trial counsel conducted a lengthy attack on the detective's objectivity at trial and advanced a theory that DuBray was charged based on rumor and innuendo, the letter would have been merely cumulative. Additionally, nothing in the letter indicated that a new trial in which the letter was admitted would have a reasonable probability of resulting in a different outcome. Thus, the letter failed to satisfy the *Clark* test, and the District Court did not abuse its discretion in denying DuBray's motion for a new trial based on new evidence. DuBray v. St., 2008 MT 121, 342 M 520, 182 P3d 753 (2008).

Alleged New Evidence Not Extending Statutory Time Bar for Postconviction Relief:

Raugust contended that the period for filing for postconviction relief should be extended based on newly discovered evidence that the state mishandled a weapon found at the crime scene and that a key eyewitness confessed to the offense while waiting in the County Attorney's office to testify in Raugust's trial and because of ineffective assistance of counsel at trial. The Supreme Court disagreed. Raugust could not establish that the evidence regarding the weapon was so material that it would probably produce a different result at trial or that the evidence could not have been discovered in a timely manner. Evidence regarding the eyewitness directly conflicted with other evidence given at trial that tended to preclude the possibility that the eyewitness could have committed the crime, nor could Raugust show that the evidence could not have been discovered in a timely manner. The claims of ineffective counsel were not newly discovered evidence because Raugust was aware of the asserted deficiencies at trial. Raugust v. St., 2003 MT 367, 319 M 97, 82 P3d 890 (2003), following St. v. Greeno, 135 M 580, 342 P2d 1052 (1959).

Abe was found guilty of accountability for deliberate homicide and was sentenced to 60 years in prison. One year and 14 days after the deadline, Abe filed a petition for postconviction relief on grounds of newly discovered evidence. Allegedly, two jurors from Abe's trial sat in on the trial of Abe's coconspirator and heard two of the state's witnesses testify differently than they did in Abe's trial. The Supreme Court applied the factors to be considered when a District Court evaluates a motion for a new trial based on newly discovered evidence as set out in St. v.

Sullivan, 285 M 235, 948 P2d 215 (1997) (see also St. v. Greeno, 135 M 580, 342 P2d 1052 (1959)), including the requirement that the evidence must have come to the knowledge of the defendant since trial and the requirement that the evidence must not be such as will tend only to impeach the character or credit of a witness. Here, Abe's counsel knew about the alleged discrepancies after Abe's trial but prior to Abe's appeal, so the discrepancies in testimony could have been raised on direct appeal. Further, the petition for postconviction relief alleged that the discrepancies undermined the credibility of the witnesses but did not establish that Abe did not engage in the criminal conduct for which he was convicted. Thus, the District Court concluded, and the Supreme Court agreed, that the alleged new evidence did not serve to extend the statutory bar for filing a petition for postconviction relief beyond the 1-year period in 46-21-102. Although Abe correctly pointed out that the state did not raise the issue of the statutory bar in District Court and that the District Court did not rule on the issue, the general rule that the Supreme Court will not address issues raised for the first time on appeal did not apply in this case because that rule does not apply when the issue is jurisdictional. The 1-year statute of limitations for postconviction relief is a jurisdictional limit, and lack of subject matter jurisdiction may be raised at any time under Rule 12(h), M.R.Civ.P. (Title 25, ch. 20). Dismissal of Abe's petition for postconviction relief was affirmed as procedurally barred. St. v. Abe, 2001 MT 260, 307 M 233, 37 P3d 77 (2001).

Evidence of Victim's Failure to Repair Car Not Grounds for New Trial Because Evidence Not Relevant to Amount of Pecuniary Loss Suffered by Victim: Allen argued that the trial court erred in not granting him a new trial in his felony mischief case, based on newly discovered evidence that his sister had not had her car repaired after he shot bullet holes in it. The Supreme Court stated that a new trial based on newly discovered evidence could be granted only if the evidence is so material that it would probably produce a different result upon a new trial. The Supreme Court ruled that in the case before it, evidence of failure to make repairs did not affect the amount of pecuniary loss suffered by the victim and therefore Allen's conviction for felony mischief was proper and he was not entitled to a new trial. St. v. Allen, 2001 MT 17, 304 M 129, 18 P3d 1006 (2001).

Alleged Failure by State to Disclose Medical Report Until After Trial — Inability to Assess Prejudice Absent Record: Defendant contended that he was entitled to a new trial based on the alleged failure of the state to disclose a medical report until after trial, but defendant did not provide a copy of the report or a detailed account of the report in the motion for a new trial. Lacking sufficient information upon which to assess claims of prejudice and ineffective assistance of counsel, the District Court properly denied the motion for new trial. St. v. Ahto, 1998 MT 200, 290 M 338, 965 P2d 240, 55 St. Rep. 851 (1998).

New Evidence Tending to Be Exculpatory — Greeno Test Met — New Trial Warranted: The District Court examined newly discovered evidence, found that three elements of the test set out in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959), were not met, and denied a motion for a new trial. The Supreme Court disagreed, finding that the new evidence, discovered well after trial due to no lack of due diligence on defendant's part, was more than cumulative, tended to exculpate defendant, and spoke to facts that were not evident at trial. The new evidence, including a purported confession and other evidence pointing to a different person as the criminal, was distinct from any evidence presented at trial and was so material that it would probably, albeit not necessarily, produce a different result at another trial. Because all the Greeno criteria were met, it was an abuse of discretion for the District Court to deny a motion for a new trial and remand was warranted. St. v. Cline, 275 M 46, 909 P2d 1171, 53 St. Rep. 32 (1996), followed in St. v. Sullivan, 285 M 235, 948 P2d 215, 54 St. Rep. 1128 (1997).

Test Whether New Trial Warranted on Grounds of Newly Discovered Evidence: In determining whether a new trial was warranted based on newly discovered evidence, the District Court properly applied the test set out in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959), that: (1) the evidence must have come to the knowledge of the applicant since the trial; (2) it is not through want of diligence that it was not discovered earlier; and (3) it is so material that it would probably produce a different result upon retrial. St. v. DeMers, 234 M 273, 762 P2d 866, 45 St. Rep. 1901 (1988), followed in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992). See also St. v. Sullivan, 285 M 235, 948 P2d 215, 54 St. Rep. 1128 (1997).

Confrontation of Witnesses — Motion Properly Denied: The District Court did not err in denying defendant's motion for new trial based on newly discovered evidence when the evidence, a tape recording of an Oregon attorney's interview with a prosecution witness, was not so material that it would have produced a different result, the evidence was cumulative as to other impeachment evidence, and there was other substantial evidence of defendant's guilt. Defendant was not entitled to a new trial on the basis that he was denied full confrontation and

impeachment of witnesses when the District Court did not abuse its discretion in limiting extensive cross-examination on pending charges against a witness. St. v. Short, 217 M 62, 702 P2d 979, 42 St. Rep. 1026 (1985), followed in St. v. Flores, 1998 MT 328, 292 M 255, 974 P2d 124, 55 St. Rep. 1329 (1998).

Character Witness: The defendant's motion for a new trial based on newly discovered evidence was properly denied because the defendant's newly discovered evidence, a witness who knew of the defendant's good conduct and character, would only go to discredit a prosecution witness's testimony and would not make the difference between the defendant's being or not being convicted in a new trial. St. v. Coleman, 177 M 1, 579 P2d 732 (1978).

Alibi Witnesses: When the defendant moved for a new trial based on newly discovered evidence supported by affidavits of purported alibi witnesses and an investigator who knew of and tried to locate one alibi witness before the trial, the court did not abuse its discretion in denying the motion in light of St. v. Gallagher, 162 M 155, 509 P2d 852 (1973), which sets forth requirements for this motion. St. v. Briner, 173 M 185, 567 P2d 35 (1977).

Statements of Witnesses: The trial court did not err in denying the defendant's motion for a new trial based on newly discovered evidence in the form of statements taken from two witnesses subsequent to the trial. St. v. Quigg, 155 M 119, 467 P2d 692 (1970), distinguished in St. v. Nanoff, 160 M 344, 502 P2d 1138 (1972).

Perjury of State's Witness:

When the key witness at the trial in which the defendant was convicted of larceny made statements after the trial demonstrating that the testimony he gave was false and perjurious and, at the hearing on the defendant's motion for a new trial, the witness refused to give any testimony, the requirements for the granting of a new trial on the ground of newly discovered evidence were met, and the defendant should have been granted a new trial. St. v. Greeno, 135 M 580, 342 P2d 1052 (1959).

When newly discovered evidence may demonstrate perjury in the state's witness upon whose evidence the verdict of guilty was founded and, but for which, conviction could not have been had, and may probably produce a different result, a new trial should be granted on that ground. St. v. Hamilton, 87 M 353, 287 P 933 (1930).

Motion After Appeal Perfected: When the defendant had perfected an appeal to the Supreme Court and then discovered new evidence, the Supreme Court had no jurisdiction to grant a new trial. However, upon the defendant's prima facie showing of matters sufficient to warrant consideration, the court would instruct the District Court to entertain the defendant's motion for a new trial and would stay further proceedings pending such motion. St. v. Nicks, 131 M 567, 312 P2d 519 (1957).

Showing of Diligence Required: Motions for new trials on the ground of newly discovered evidence in criminal cases are not favored, and regardless of the facts set up in affidavits filed in support thereof, the defendant is not entitled to a retrial unless it is shown that he could not with reasonable diligence have discovered and produced the new evidence at the trial. St. v. Hamilton, 87 M 353, 287 P 933 (1930).

Cumulative Evidence:

Applications for new trials on the ground of newly discovered evidence are not favored by the courts and will not be granted when the new evidence is merely cumulative. St. v. Broell, 87 M 284, 286 P 1108 (1930).

Alleged newly discovered evidence that is cumulative only does not warrant the granting of a new trial, nor may the court be put in error for refusing a retrial on that ground when the movant made no attempt to show due diligence on his part to produce the newly discovered witness at the trial. St. v. Gies, 77 M 62, 249 P 573 (1926).

Lack of Due Diligence: When the defendant and his counsel accepted the statement of the County Attorney that a witness, then in the county jail, whose name was endorsed on the information had refused to testify, without verifying the prosecutor's statement by an interview with the witness, whereas after the trial they ascertained that if he had been called he would have testified that he and another committed the offense for which the defendant was convicted, they were lacking in due diligence in discovering and producing the alleged newly discovered evidence. St. v. Broell, 87 M 284, 286 P 1108 (1930).

Judgment Unsupported by Evidence: When no evidence of the fitness or unfitness of the parents of an accused delinquent minor to control or take care of him was heard by the court, a judgment that they were not unfit was unsupported by the evidence and refusal of a new trial on the ground of new evidence was error. State ex rel. Palagi v. Freeman, 81 M 132, 262 P 168 (1927).

Mistake of Prosecution Witness: When the owner of an animal that the defendant was charged with stealing testified that it was his property at the time it was taken and remained so until after the defendant's arrest when it was paid for by the latter, and such owner was fully cross-examined as to the transaction, a motion for a new trial on the ground of newly discovered evidence based upon the witness's affidavit to the effect that he was mistaken in so testifying was properly refused. St. v. Hughes, 78 M 87, 252 P 320 (1926).

Consideration of Motion: Though a motion for a new trial in a criminal case on the ground of newly discovered evidence is not generally viewed with favor by the courts, it was authorized by the former statutes and, when the prescribed conditions were met, entitled to the same consideration as a motion upon any other statutory ground; and while a broad discretion is lodged in the trial court in disposing of it, an order denying it is subject to review. St. v. Gangner, 73 M 187, 235 P 703 (1925).

Statements by Prosecuting Witness: An affidavit in support of a motion for a new trial following a conviction for attempted rape stating that the prosecuting witness, some 5 months before the trial, said to the affiant that, if the defendant didn't "fork over", she "would send him over the road for the rest of his life" was not "newly discovered evidence", that expression meaning evidence discovered since the trial. St. v. Prouty, 60 M 310, 199 P 281 (1921).

Part Law Review Articles

Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision: This article discusses, in part, the options of resentencing or affording a new trial. Agata, 25 Mont. L. Rev. 1 (1963).

Criminal Law—Motion for Mistrial: This comment on Montana case decisions observes that the Montana Supreme Court has not adhered to the principle enunciated in St. v. Bosch, 125 M 566, 242 P2d 477 (1952), that the criminal code is exclusive in denominating procedures which may be used. Ryan, 21 Mont. L. Rev. 224 (1960).

46-16-701. Effect of new trial.

Commission Comments

Commission Comment Not Divided: This section is a recodification of part of section 95-2101, R.C.M. 1947. Section 46-16-702 is also derived from section 95-2101. The commission comments to section 95-2101 are printed in their entirety under 46-16-701.

Source: R.C.M. 1947, sections 94-7601 and 94-7602; Illinois Code of Criminal Procedure, [Chapter] 38, [section] 116-1.

[Section 46-16-701] defines a new trial and states the effect of granting such a motion. It is basically the same as existing law.

[Section 46-16-702] does not specify the grounds which may be the basis for a motion for a new trial. The present Montana law follows a different format. [Section 46-16-702] encompasses the various grounds set forth in the existing Montana law plus it permits the granting of a motion for a new trial for any other reason the court may find to be in the interest of justice. At the same time it does not provide defense counsel with a list of reasons to be considered on making the motion for a new trial.

[Section 46-16-702(2)] provides, as does the existing law, that the motion be in writing. It requires also that the motion be made within thirty days following the entry of a finding or the return of a verdict. This is a slight change from the existing law which requires notice of certain motions to be made within thirty days after discovery of the facts upon which the moving party relied to support his motion and that in all other cases notice of motion be filed within ten days after rendition of the verdict. This particular limitation should be viewed in conjunction with the post-conviction remedies that are made available.

[Section 46-16-702] also provides that reasonable notice of the motion be given to the state.

[Section 46-16-702] provides that the motion for a new trial specify the grounds therefor. Some specific examples are: the trial of a felony charge in the absence of the defendant, jury misconduct, the court has erred in the decision of any question of law arising during trial, the verdict is contrary to law or evidence or new evidence is discovered. This section does not require the motion to be upon affidavits as do some subsections of R.C.M. 1947, section 94-7605 [now repealed].

[Section 46-16-702(3)] is not found specifically in the Revised Codes of Montana, 1947, or the codes of any other state which have been used for source material. However, it does not represent any great innovation in the law. It merely lists the alternative decisions available to the judge in deciding a motion for a new trial. He may either grant or deny the motion, or modify or change the verdict which is provided to a limited extent in the specific context of R.C.M. 1947, section 94-7603(6) [now repealed].

Compiler's Comments

1991 Amendment: Deleted definition of new trial that read: "A "new trial" is a reexamination of the issue in the same court before another jury after a verdict or finding has been rendered".

Case Notes

Trial Court's Improper Determination of Veracity of Recanted Testimony —Remand: In ruling on Crosby's motion for a new trial based on the recanted testimony of a witness, the District Court erroneously concluded that Crosby was entitled to a new trial only when the trial judge was satisfied that the recantation was untrue, which improperly placed the court in the role of factfinder. Instead, the court should have applied the test in St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), to determine whether a new trial should be granted based on newly discovered evidence. The Supreme Court remanded for application of the Clark standard in determining whether Crosby was entitled to postconviction relief and a new trial. Crosby v. St., 2006 MT 155, 332 M 460, 139 P3d 832 (2006).

Recantation of Sexual Assault Victim's Testimony — Remand for Consideration of New Trial — Perry Partially Overruled: Following Clark's conviction of sexual assault against his stepdaughter, she recanted her testimony and Clark moved for a new trial, citing St. v. Perry, 232 M 455, 758 P2d 268 (1988). The Supreme Court overruled Perry to the extent that it stands for the proposition that a trial judge is required to grant a new trial only when satisfied that the recantation of the witness is true. However, the Perry proposition that the weight to be given to recanted testimony is for the trial judge to determine was retained as authoritative precedent to be considered as part of the analysis set out in Berry v. St., 10 Ga. 511 (Ga. 1851), describing when it is proper to grant a new trial based on newly discovered evidence, as adopted in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959). In applying the restated Berry test, a District Court is not to make factual determinations as to the veracity of the recantation, but should evaluate the recantation for materiality and its tendency to be cumulative or impeaching and should determine whether there is a reasonable probability that a new trial would produce a different outcome, keeping in mind the aspects of recantations that make them inherently suspect. If the Berry elements are met, a new trial is warranted; if not, the prior judgment stands. Here, the record was not clear as to the District Court's reasons for denying a new trial and whether the court correctly applied the law, so the case was remanded to allow the District Court to readdress Clark's motion for a new trial. St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), followed in Crosby v. St., 2006 MT 155, 332 M 460, 139 P3d 832 (2006).

On remand, the District Court found that evidence of the victim's recanted testimony was neither cumulative nor impeaching and that a new trial based on the testimony had no reasonable probability of resulting in a different outcome, so Clark's motion for a new trial was denied. Clark appealed, but the Supreme Court affirmed. In the first trial, the jury had already heard Clark's theory, which was essentially confirmed by the recanted testimony, but had rejected the theory and convicted Clark. Thus, there was no probability that a new trial based on the same theory would result in a different outcome, so a new trial was unwarranted. St. v. Clark, 2008 MT 391, 347 M 113, 197 P3d 977 (2008), following Crosby v. St., 2006 MT 155, 332 M 460, 139 P3d 832 (2006).

Use of Testimony From Prior Trial in Retrial Not Precluded: Ingraham was convicted of negligent homicide, criminal endangerment, and criminal trespass to property in relation to an automobile accident. Admission of certain evidence was found to constitute reversible prejudicial error, and the case was remanded for a new trial. On remand, Ingraham moved to preclude the state from using his testimony from the first trial during its case in chief at the second trial, based on this section and his constitutional right not to be compelled to testify against himself. The District Court granted Ingraham's motion, based in part on Harrison v. U.S., 392 US 219 (1968), as interpreted in People v. Armentero, 384 NW 2d 98 (Mich. App. 1986), and the state appealed. The Supreme Court examined the legislative history of this section, noting that prior to amendment in 1967, the statute expressly required that testimony must be produced anew in a new trial—i.e., testimony from an earlier trial could not be used in a new trial of the same case. However, the 1967 amendment deleted that requirement. When the Legislature amends a statute, it is presumed that some change to existing law is intended; thus, the presumption is that since 1967, the use of testimony from a prior trial in a new trial is not precluded by statute. With regard to the alleged constitutional issue of self-incrimination, the Supreme Court noted that under Harrison and subsequent federal cases, in order to preclude the use of prior testimony in a subsequent trial, the testimony must have been compelled by the admission of evidence both illegally obtained and improperly admitted at trial, but when testimony is compelled as a result of evidence that was improperly admitted rather than unconstitutionally obtained, Harrison does not preclude use of the testimony in a later trial. The District Court abused its discretion in

granting Ingraham's motion excluding his prior testimony. State ex rel. Mazurek v. District Court, 2000 MT 266, 302 M 39, 22 P3d 166, 57 St. Rep. 1111 (2000).

Prosecution Presenting New Evidence at Second Trial: The defendant argued that the prosecution's introduction of new evidence at the second trial constituted double jeopardy. The Supreme Court ruled that a mistrial placed the parties in the same position as if there had been no trial in the first instance and that therefore the introduction of new evidence was proper. St. v. Van Dyken, 242 M 415, 791 P2d 1350, 47 St. Rep. 835 (1990).

Admissibility in Second Trial of Testimony Given in First Trial: After having testified in his first trial, which ended in a mistrial, defendant declined to testify in his second trial. Defendant argued that his testimony given in the first trial was inadmissible in the second because this section places the parties in a new trial in the same position as if there had been no trial and that the first trial was therefore a nullity. The court found that under this section and 46-16-702 there must be a "finding" or a "verdict of guilty" in the first trial in order for these sections to apply, that since the first trial resulted in a hung jury and mistrial there was no "finding or verdict", and that therefore defendant did not fit under these sections. Admission of defendant's testimony from the first trial was not error. St. v. Hall, 234 M 57, 761 P2d 1283, 45 St. Rep. 1726 (1988).

Mention of Prior Trial: This section does not compel automatic reversal if anyone other than defendant or his witnesses mentions to the jury that there has been another trial. However, the judge and counsel for both sides should carefully guard the record to ensure that none of the parties loses or gains any rights because of the result of the previous trial. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982).

Justice's Court — Authority to Grant New Trial: A Justice's Court is not a "court" for the purposes of 46-16-701, and a Justice of the Peace may not dismiss charges against a defendant upon a motion for a new trial. Forsythe v. Wenholz, 170 M 496, 554 P2d 1333 (1976).

Attacking Charge on New Trial: When a first conviction is set aside, the defendant is not precluded upon a remand for a new trial from attacking the indictment or information. St. v. Hale, 129 M 449, 291 P2d 229 (1955), overruled on another point in St. v. Bogue, 142 M 459, 384 P2d 749 (1963).

New Trial Not Double Jeopardy: When one convicted of crime is granted a new trial, he is not placed in new jeopardy by the second trial but is in the same jeopardy he was in when the first trial was had. St. v. Aus, 105 M 82, 69 P2d 584 (1937).

46-16-702. Motion for a new trial.

Commission Comments

[See commission comments to 46-16-701.]

Compiler's Comments

1999 Amendment: Chapter 301 in (1) inserted second sentence concerning ordering new trial without motion or after motion and hearing. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 301, L. 1999, provided: "WHEREAS, in State v. Brummer, 1998 MT 11, [287] Mont. [168], 953 P.2d 250, 55 St. Rep. 30 (1998), the Montana Supreme Court determined that section 46-16-702, MCA, created an ambiguity as to whether a court could order a new trial sua sponte."

1991 Amendment: In (2), after "guilty", deleted "reasonable notice of the motion" and at end substituted "state" for "prosecution"; and made minor changes in style.

Case Notes

State's Alleged Failure to Reveal Exculpatory Evidence Unfounded — New Trial Not Warranted: Jackson asserted that a new trial was warranted because the state committed a Brady violation by failing to disclose exculpatory statements made to a professional counselor by a deputy who was wounded during an altercation with Jackson in which another deputy was killed, in which the wounded deputy stated that he felt responsible for the other officer's death. The District Court denied Jackson's motion for a new trial, and on appeal the Supreme Court found no reversible error. The state disclosed the name of the counselor well before trial, identifying the counselor as a person with whom the deputy had discussed the shooting, and the jury heard evidence from other witnesses that the deputy felt guilty about the incident. Thus, the record did not support Jackson's claim that exculpatory evidence was withheld, and denial of Jackson's motion was not an abuse of discretion. St. v. Jackson, 2009 MT 427, 354 M 63, 221 P3d 1213 (2009).

Court's Sua Sponte Withdrawal of Defendant's Guilty Plea Following Judgment Considered Mistake of Law: Friedt pleaded guilty to a stop sign violation and to a charge of failing to carry proof of insurance in the vehicle and was sentenced in Municipal Court. During sentencing, the

County Attorney failed to raise any issues of restitution. After judgment was entered, the court was advised by a victim of a claim of damages associated with Friedt's offenses. The court, sua sponte, withdrew Friedt's guilty pleas, appointed counsel, and set an omnibus hearing. Friedt then petitioned the Supreme Court for supervisory control, asserting that the Municipal Court lacked jurisdiction to vacate or modify the sentence once a valid sentence was pronounced and thus proceeded under a mistake of law in withdrawing the guilty pleas, which would result in a gross injustice and unnecessary expense if Friedt was required to stand trial on charges to which she knowingly and voluntarily pleaded guilty and on which she had been sentenced. The County Attorney argued that the Municipal Court retained jurisdiction under 46-16-702 and that the interests of justice to the victim and the mandatory restitution provision in 46-18-201 required the Municipal Court to remedy the situation sua sponte. The Supreme Court noted that 46-16-702 allows a new trial, following judgment, for a defendant in the interests of justice, but that the statute does not authorize a new proceeding to benefit a victim or a prosecutor who fails to timely raise a sentencing matter. Further, although 46-16-105 allows a court for good cause to allow withdrawal of a guilty plea within 1 year after judgment if evidence supports a fundamental miscarriage of justice, nothing in the statute allows a court to forcibly withdraw a defendant's guilty plea sua sponte under any circumstances. Therefore, the Supreme Court agreed that the Municipal Court's action constituted a mistake of law. Friedt's petition for supervisory control was granted, and the Municipal Court was instructed to vacate the order withdrawing Friedt's guilty pleas. Friedt v. Billings Municipal Court, 2008 MT 174, 343 M 386, 184 P3d 1032 (2008).

Failure to Timely Object to Opening Statement — Waiver of Appeal: Paoni moved for a mistrial based on allegedly impermissible statements by the prosecutor during opening statements, but failed to timely object when the statements were made. The mistrial motion was denied, and Paoni appealed. The Supreme Court noted that a defendant must make a timely objection to properly preserve an issue for appeal. Although unproved facts asserted in an opening statement may constitute grounds for a mistrial if there is a reasonable possibility that the unproved facts contributed to a conviction, in this case, even if the objection had been timely, the state later established a proper foundation for the statement, so denial of the motion for mistrial was proper, and Paoni's conviction was affirmed. St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006), following St. v. Gardner, 2003 MT 338, 318 M 436, 80 P3d 1262 (2003), and followed, with regard to the necessity for timeliness of an objection to the prosecutor's statements, in St. v. McWilliams, 2008 MT 59, 341 M 517, 178 P3d 121 (2008).

No Prejudice Warranting New Trial on Grounds of Cumulative Error: Larson contended that he was denied a fair trial and was entitled to a new trial because of the cumulative errors argued in his appeal. The doctrine of cumulative error requires reversal of a conviction when a number of errors taken together prejudice a defendant's right to a fair trial. However, in this case, the Supreme Court declined to apply the doctrine after reviewing all the issues on appeal. There was no prejudice shown, there was no abuse of judicial discretion, none of the evidentiary rulings were erroneous, and there was sufficient evidence to support the conviction. Larson's mere allegations of error without proof of prejudice were insufficient to satisfy the doctrine, and Larson's conviction was affirmed. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

Motion Filed Seventy-Nine Days After Verdict Untimely — Denial Proper: McCarthy filed a pro se motion for a new trial 79 days after being found guilty of intimidation. The District Court denied the motion as untimely, and on appeal, the Supreme Court affirmed. Under this section, a motion for a new trial must be filed within 30 days following a verdict or finding of guilty. St. v. McCarthy, 2004 MT 312, 324 M 1, 101 P3d 288 (2004).

Sufficient Evidence of Sexual Contact to Preclude New Trial on Incest Charge: After the jury convicted Bailey of two counts of incest, Bailey moved for a new trial on grounds that there was insufficient evidence to support the verdict on one count, but the motion was denied. The child victim had been ruled incompetent to testify, and none of the expert witnesses testified regarding any specific incident of sexual contact between Bailey and the child. However, the child's mother did testify regarding an incident when she found Bailey and the victim in bed, which provided sufficient evidence for the jury to conclude that sexual contact occurred during the time in question, so denial of Bailey's motion for a new trial was not an abuse of discretion. St. v. Bailey, 2004 MT 87, 320 M 501, 87 P3d 1032 (2004).

Alleged New Evidence Not Extending Statutory Time Bar for Postconviction Relief:

Raugust contended that the period for filing for postconviction relief should be extended based on newly discovered evidence that the state mishandled a weapon found at the crime scene and that a key eyewitness confessed to the offense while waiting in the County Attorney's office to testify in Raugust's trial and because of ineffective assistance of counsel at trial. The Supreme

Court disagreed. Raugust could not establish that the evidence regarding the weapon was so material that it would probably produce a different result at trial or that the evidence could not have been discovered in a timely manner. Evidence regarding the eyewitness directly conflicted with other evidence given at trial that tended to preclude the possibility that the eyewitness could have committed the crime, nor could Raugust show that the evidence could not have been discovered in a timely manner. The claims of ineffective counsel were not newly discovered evidence because Raugust was aware of the asserted deficiencies at trial. Raugust v. St., 2003 MT 367, 319 M 97, 82 P3d 890 (2003), following St. v. Greeno, 135 M 580, 342 P2d 1052 (1959).

Abe was found guilty of accountability for deliberate homicide and was sentenced to 60 years in prison. One year and 14 days after the deadline, Abe filed a petition for postconviction relief on grounds of newly discovered evidence. Allegedly, two jurors from Abe's trial sat in on the trial of Abe's coconspirator and heard two of the state's witnesses testify differently than they did in Abe's trial. The Supreme Court applied the factors to be considered when a District Court evaluates a motion for a new trial based on newly discovered evidence as set out in St. v. Sullivan, 285 M 235, 948 P2d 215 (1997) (see also St. v. Greeno, 135 M 580, 342 P2d 1052 (1959)), including the requirement that the evidence must have come to the knowledge of the defendant since trial and the requirement that the evidence must not be such as will tend only to impeach the character or credit of a witness. Here, Abe's counsel knew about the alleged discrepancies after Abe's trial but prior to Abe's appeal, so the discrepancies in testimony could have been raised on direct appeal. Further, the petition for postconviction relief alleged that the discrepancies undermined the credibility of the witnesses but did not establish that Abe did not engage in the criminal conduct for which he was convicted. Thus, the District Court concluded, and the Supreme Court agreed, that the alleged new evidence did not serve to extend the statutory bar for filing a petition for postconviction relief beyond the 1-year period in 46-21-102. Although Abe correctly pointed out that the state did not raise the issue of the statutory bar in District Court and that the District Court did not rule on the issue, the general rule that the Supreme Court will not address issues raised for the first time on appeal did not apply in this case because that rule does not apply when the issue is jurisdictional. The 1-year statute of limitations for postconviction relief is a jurisdictional limit, and lack of subject matter jurisdiction may be raised at any time under Rule 12(h), M.R.Civ.P. (Title 25, ch. 20). Dismissal of Abe's petition for postconviction relief was affirmed as procedurally barred. St. v. Abe, 2001 MT 260, 307 M 233, 37 P3d 77 (2001).

When Sexual Assault Occurred Question for Jury — Sufficient Evidence to Show That Incident Occurred When Alleged to Preclude New Trial: Longhorn was convicted of a sexual assault that allegedly occurred in 1992. He moved for a new trial based on testimony by the victim and witnesses at trial that seemed to indicate that the assault occurred in 1991. In denying the motion, the District Court noted that the jury was properly instructed that the incident occurred in 1992 or not at all and that a reasonable juror could easily find beyond a reasonable doubt that the incident occurred in 1992. The Supreme Court examined the record and agreed. The question of when the incident occurred was one for the jury, and there was substantial evidence for the jury to conclude that the assault happened in 1992. The Supreme Court declined to second-guess the jury, holding that denial of the motion for a new trial was not an abuse of discretion. St. v. Longhorn, 2002 MT 135, 310 M 172, 49 P3d 48 (2002).

Motion for New Trial and Recusal Based on Occasional Professional Relationship Between Court and Witness Properly Denied: Following conviction of theft and deceptive practices, Landis moved for a new trial and requested the District Court to recuse itself in order to avoid an appearance of impropriety, because one of the state's witnesses was a counselor occasionally used by the court to provide psychosexual and mental health evaluations, and because the professional relationship between the court and the witness was not disclosed. However, Landis failed to present any authority that such an occasional professional relationship constituted an appearance of impropriety giving rise to the necessity of recusal or a right to a new trial. The Supreme Court noted that it was the jury, not the District Court, that determined the witness's credibility, so any undisclosed occasional relationship had no bearing on the ultimate resolution of Landis's case by the jury. St. v. Landis, 2002 MT 45, 308 M 354, 43 P3d 298 (2002).

Jurors' Notes to Court During Deliberations Not Grounds for Mistrial: During deliberations, the jury sent several notes and questions to the court regarding one of the jurors, who was felt to be obstructing deliberations. Defendant's motion for mistrial based on breakdown in the deliberative process was denied. Following conviction, the juror in question prepared an affidavit alleging that he was unaware of the notes and would not have voted for a guilty verdict had he known about them. The District Court struck the affidavit, finding no juror misconduct, in effect denying defendant's motion for a new trial. The Supreme Court held that the notes

constituted an entirely internal process and did not introduce an extraneous or outside element into deliberations, signal a breakdown in deliberations, or have any bearing on defendant's guilt or innocence. Even assuming that the notes had somehow affected the juror's vote, introduction of such testimony is prohibited under Rule 606(b), M.R.Ev. (Title 26, ch. 10), and the affidavit was properly stricken. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Alleged Failure by State to Disclose Medical Report Until After Trial — Inability to Assess Prejudice Absent Record: Defendant contended that he was entitled to a new trial based on the alleged failure of the state to disclose a medical report until after trial, but defendant did not provide a copy of the report or a detailed account of the report in the motion for a new trial. Lacking sufficient information upon which to assess claims of prejudice and ineffective assistance of counsel, the District Court properly denied the motion for new trial. St. v. Ahto, 1998 MT 200, 290 M 338, 965 P2d 240, 55 St. Rep. 851 (1998).

Authority of District Court to Order New Criminal Trial Sua Sponte: Absent a lawful enactment by the Legislature withholding a trial court's inherent power to grant a new trial sua sponte, the court's authority to do so stands. Addressing the ambiguity in the statutory language while giving effect to all provisions of this section, the Supreme Court held that the right of a defendant to move for a new trial does not affect the court's inherent power to order a new trial sua sponte when required in the interests of justice. Given the circumstances of the court's concern for the state's "selective prosecution", the violation of the court's pretrial order precluding the giving of instructions on lesser included offenses unless presented prior to trial, the overwhelmingly contradictory witness testimony, and the court's fear that the jury was deprived of an option more supportable by the facts, the interests of justice demanded a new trial and the District Court did not err in ordering one sua sponte. St. v. Brummer, 1998 MT 11, 287 M 168, 953 P2d 250, 55 St. Rep. 30 (1998), followed in St. v. Marker, 2000 MT 303, 302 M 380, 15 P3d 373, 57 St. Rep. 1282 (2000).

Motion for Judgment Notwithstanding Verdict — Effect and Treatment: The statutes governing criminal procedure do not provide for judgment notwithstanding the verdict, but that motion is considered a motion for a new trial under this section, and the standard for review is whether the lower court abused its discretion. St. v. Bell, 277 M 482, 923 P2d 524, 53 St. Rep. 792 (1996).

New Evidence Tending to Be Exculpatory — Greeno Test Met — New Trial Warranted: The District Court examined newly discovered evidence, found that three elements of the test set out in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959), were not met, and denied a motion for a new trial. The Supreme Court disagreed, finding that the new evidence, discovered well after trial due to no lack of due diligence on defendant's part, was more than cumulative, tended to exculpate defendant, and spoke to facts that were not evident at trial. The new evidence, including a purported confession and other evidence pointing to a different person as the criminal, was distinct from any evidence presented at trial and was so material that it would probably, albeit not necessarily, produce a different result at another trial. Because all the Greeno criteria were met, it was an abuse of discretion for the District Court to deny a motion for a new trial and remand was warranted. St. v. Cline, 275 M 46, 909 P2d 1171, 53 St. Rep. 32 (1996), followed in St. v. Sullivan, 285 M 235, 948 P2d 215, 54 St. Rep. 1128 (1997).

Motion After Thirty Days — Judicial Exceptions Distinguished: The defendant filed a motion for a new trial 3 ½ years after conviction. The Supreme Court distinguished several of its past decisions and held that the defendant's motion was time-barred. The defendant has the opportunity to raise postverdict claims through a petition for postconviction relief. There are no "reasonable time" or "serious case" exceptions to the 30-day filing requirement under this section. St. v. Gollehon, 274 M 116, 906 P2d 697, 52 St. Rep. 1182 (1995), followed in St. v. Belgarde, 1998 MT 152, 289 M 287, 962 P2d 571, 55 St. Rep. 590 (1998).

Alleged Juror Prejudice Caused by Defendant's Voluntary Ex Parte Contact With Juror: Defendant, whose ex parte contact with a juror was caused by his own actions in going to an airport cafe where she worked and ordering coffee, could not wait until he was found guilty and then seek a new trial based on alleged juror prejudice. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Failure to File Motion Within Thirty Days — Motion Considered: Although defendant did not file a new trial motion within 30 days after the guilty verdict, as required by this section, the Supreme Court considered the merits of the motion and its denial because the District Court gave extensive consideration to the motion and it was a serious case (deliberate homicide). St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994), distinguished in St. v. Gollehon, 274 M 116, 906 P2d 697, 52 St. Rep. 1182 (1995).

Proof of Actual Prejudice Required — No Presumption of Prejudice: Defendant seeking a new trial because of defendant's ex parte contact with a juror must prove actual prejudice; there is no presumption of prejudice. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Lower Court's Ruling on Untimely Motion Upheld: The state argued that the trial court should have summarily dismissed Barrack's motion for a new trial because it was filed late and that the trial court should not have treated the motion as a petition for postconviction relief. The Supreme Court noted that at the time that the trial court incorrectly treated the untimely motion for a new trial as a petition for postconviction relief, Barrack could still have filed a timely appeal and may have been lulled into a position in which he did not timely pursue his appeal rights. The Supreme Court held that under the unique facts of the case, it would affirm the lower court's decision to rule on the untimely motion but that its decision could not be read as enlarging the scope of postconviction relief or as diminishing a defendant's obligation to timely file any motions. St. v. Barrack, 267 M 154, 882 P2d 1028, 51 St. Rep. 983 (1994), Redcrow was distinguished in St. v. Gollehon, 274 M 116, 906 P2d 697, 52 St. Rep. 1182 (1995).

Failure to Meet Second Prong of Strickland Test — No Prejudice Shown — Claim of Ineffective Counsel Denied: Denny's counsel neglected to investigate and interview several witnesses in her case, which satisfied the first prong of the Strickland test for ineffective counsel. However, because the potential witnesses were never interviewed, it was impossible to determine whether their testimony would have produced a different result. The second prong of Strickland was not satisfied because Denny could not demonstrate that counsel's omission prejudiced the case to such a degree as to deprive Denny of a fair trial. Denny's motion for a new trial on grounds of ineffective assistance of counsel was properly denied. St. v. Denny, 262 M 248, 865 P2d 226, 50 St. Rep. 1537 (1993), following Nealy v. Cabana, 764 F2d 1173 (5th Cir. 1985), United States ex rel. Cross v. DeRobertis, 811 F2d 1008 (7th Cir. 1987), and Lawrence v. Armontrout, 900 F2d 127 (8th Cir. 1990), and cited in St. v. Hagen, 273 M 432, 903 P2d 1381, 52 St. Rep. 1048 (1995). Hagen was followed in St. v. Boucher, 1999 MT 102, 294 M 296, 980 P2d 1058, 56 St. Rep. 431 (1999), and St. v. Cady, 2000 MT 353, 303 M 258, 15 P3d 479, 57 St. Rep. 1491 (2000).

Grant of New Trial at Discretion of Trial Court: As stated in this section, the grant or denial of a motion for a new trial is within the discretion of the trial court. Absent an abuse of that discretion, the court's decision will be affirmed. St. v. Gambrel, 246 M 84, 803 P2d 1071, 47 St. Rep. 2270 (1990). See also St. v. Goettle, 253 M 111, 831 P2d 595, 49 St. Rep. 438 (1992).

Failure to File Supporting Brief — New Trial Denied: Defendant maintained that he was entitled to a new trial pursuant to 46-16-701 and this section. The state contended that a summary ruling was proper under Rule 2, M.U.D.C.R. (Title 25, ch. 19), because defendant failed to file a supporting brief within 5 days. Defendant argued that Rule 2 did not apply to criminal cases. The state contended that the decision to deny the motion for a new trial was a matter of trial court discretion. The Supreme Court held that the District Court did not abuse its discretion in denying the motion when defendant failed to provide sufficient information to support his motion for a new trial. St. v. Sor-Lokken, 246 M 70, 803 P2d 638, 47 St. Rep. 2264 (1990).

Test Whether New Trial Warranted on Grounds of Newly Discovered Evidence: In determining whether a new trial was warranted based on newly discovered evidence, the District Court properly applied the test set out in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959), that: (1) the evidence must have come to the knowledge of the applicant since the trial; (2) it is not through want of diligence that it was not discovered earlier; and (3) it is so material that it would probably produce a different result upon retrial. St. v. DeMers, 234 M 273, 762 P2d 866, 45 St. Rep. 1901 (1988), followed in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992). See also St. v. Sullivan, 285 M 235, 948 P2d 215, 54 St. Rep. 1128 (1997).

Admissibility in Second Trial of Testimony Given in First Trial: After having testified in his first trial, which ended in a mistrial, defendant declined to testify in his second trial. Defendant argued that his testimony given in the first trial was inadmissible in the second because 46-16-701 places the parties in a new trial in the same position as if there had been no trial and that the first trial was therefore a nullity. The court found that under 46-16-701 and this section there must be a "finding" or a "verdict of guilty" in the first trial in order for these sections to apply, that since the first trial resulted in a hung jury and mistrial there was no "finding or verdict", and that therefore defendant did not fit under these sections. Admission of defendant's testimony from the first trial was not error. St. v. Hall, 234 M 57, 761 P2d 1283, 45 St. Rep. 1726 (1988).

Statement of Codefendant After Trial Not So Material as to Produce Different Result: Statements made by a codefendant exculpating defendant from crimes were not sufficient to warrant a new trial. The lack of veracity of both defendants, plus the fact that the evidence presented an additional inconsistency for jury consideration, justified refusal of a new trial

because the new evidence was not so material as to produce a different result upon another trial. St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988), citing St. v. Greeno, 135 M 580, 342 P2d 1052 (1959).

Motion Based on Cumulative Evidence Properly Denied: It was not error to deny a motion for a new trial based on alleged newly discovered evidence when such evidence was cumulative. St. v. Lamping, 231 M 288, 752 P2d 742, 45 St. Rep. 616 (1988), citing St. v. Matkins, 45 M 58, 121 P 881 (1912).

Rules for Granting New Trial Based on Newly Discovered Evidence: In order for newly discovered evidence to be sufficient to warrant granting a new trial, it must be determined that: (1) the evidence came to the knowledge of the applicant since the trial; (2) it was not through want of diligence that it was not discovered earlier; (3) it is so material that it would probably produce a different result upon another trial; (4) it is not merely cumulative—that is, does not speak to facts in relation to which there was evidence at the trial; (5) the application is supported by the affidavit of the witness whose evidence is alleged to have been newly discovered or its absence accounted for; and (6) the evidence is not such as will only tend to impeach the character or credit of a witness. St. v. Greeno, 135 M 580, 342 P2d 1052 (1959), followed in St. v. Kutnyak, 211 M 155, 685 P2d 901, 41 St. Rep. 1277 (1984); St. v Short, 217 M 62, 702 P2d 979, 42 St. Rep. 1026 (1985); St. v. Cyr, 229 M 337, 746 P2d 120, 44 St. Rep. 2013 (1987); St. v. Redcrow, 242 M 254, 790 P2d 449, 47 St. Rep. 672 (1990); St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991); In re J.R.T., 258 M 520, 853 P2d 710, 50 St. Rep. 642 (1993); St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994); St. v. Hatfield, 269 M 307, 888 P2d 899, 52 St. Rep. 1 (1995); St. v. Fina, 273 M 171, 902 P2d 30, 52 St. Rep. 887 (1995); St. v. Sullivan, 285 M 235, 948 P2d 215, 54 St. Rep. 1128 (1997); St. v. Whitlow, 285 M 430, 949 P2d 239, 54 St. Rep. 1227 (1997); St. v. Berger, 1998 MT 170, 290 M 78, 964 P2d 725, 55 St. Rep. 686 (1998), and St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929, 56 St. Rep. 1190 (1999). Redcrow was distinguished in St. v. Gollehon, 274 M 116, 906 P2d 697, 52 St. Rep. 1182 (1995). The rules were also applied in St. v. Abe, 2001 MT 260, 307 M 233, 37 P3d 77 (2001).

Newly Discovered Evidence — Material Cumulative — Different Result at New Trial Not Probable: An "intelligence" file relating to problems involving the deceased was kept by the Sheriff's office. For the homicide trial, defense demanded all materials held by the Sheriff's office concerning the case, but through apparent inadvertence, the file was not turned over to the defense. It was not discovered until 5 months after the trial during a search of the Sheriff's files by defense counsel and an assistant County Attorney. The District Court did not abuse its discretion in denying a new trial after it had determined: that the file was not deliberately suppressed; that the material in the file was testified to at the trial and the material would have been cumulative; and that the material was not germane to the defendant's defense of use of justifiable force. The Supreme Court held that under the rules set forth in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959), a new trial was not necessary because the file was not so material that it would probably produce a different result upon another trial. St. v. Kutnyak, 211 M 155, 685 P2d 901, 41 St. Rep. 1277 (1984).

Inclusion of Grounds Not Necessary in Order Denying Motion for New Trial: The Supreme Court refused to extend the ruling of St. v. Williams, 193 M 432, 632 P2d 328, 38 St. Rep. 1253 (1981) (annotated below), to denial of a motion for a new trial under this section. The court also observed that in this case comments made by the trial judge did set forth the reason he denied the motion. St. v. Hall, 203 M 528, 662 P2d 1306, 40 St. Rep. 621 (1983).

Conviction of Lesser Included Offense — Lack of Mental State as Defense — No Mental State Verdict Form: The trial court refused defendant's request for a verdict form that stated that the defendant was found not guilty of attempted deliberate homicide due to mental disease or defect. The jury found him not guilty of that offense but did find him guilty of the lesser included offense of aggravated assault. The defendant alleged that due to his drugged state he lacked the necessary mental state to commit the offense charged and that the jury finding of not guilty of the charged offense on that basis yet guilty of the lesser offense constituted inconsistent and irreconcilable verdicts. The Supreme Court held that although a mental state verdict form would have been preferable in determining whether the trial court abused its discretion in refusing a new trial, it must look at every fact that the jury reasonably could have deduced from all the evidence, and in this case the basis for the conviction for the lesser included offense could have been based on several grounds. St. v. Doney, 194 M 22, 636 P2d 1377, 38 St. Rep. 1707 (1981).

Order for New Trial to Include Grounds: Rule 59(f), M.R.Civ.P., which requires that an order of the District Court granting a new trial must include a statement of the grounds for the trial, is applicable to motions for new trial in criminal actions. Therefore, when the trial court grants a

new trial under this section, there must be a statement of the grounds for the order contained in that order. St. v. Williams, 193 M 432, 632 P2d 328, 38 St. Rep. 1253 (1981).

Unreasonable Notice: Ten minutes before the sentencing hearing, counsel for the defendant moved the court for a new trial. The County Attorney had not been given advance notice of the motion or an opportunity to brief the question. Clearly, such action denied the state "reasonable notice". St. v. Williams, 193 M 432, 632 P2d 328, 38 St. Rep. 1253 (1981).

Insufficient Evidence — Acquittal Required: The defendant was convicted of tampering with or fabricating evidence. The defendant moved the court for a judgment notwithstanding the verdict and for a new trial. A new trial was granted. The Supreme Court found that there was insufficient evidence to support the conviction, and therefore the District Court should have entered a judgment of acquittal rather than granting a new trial. St. v. Warren, 192 M 436, 628 P2d 292, 38 St. Rep. 773 (1981).

Examination After Trial — New Evidence on Mental Defect: Application for new trial based on a psychiatric examination that could have been conducted prior to trial but was not conducted until after was properly denied. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980). See also St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987). As applied to newly discovered battered women's syndrome, see St. v. Redcrow, 242 M 254, 790 P2d 449, 47 St. Rep. 672 (1990), distinguished in St. v. Gollehon, 274 M 116, 906 P2d 697, 52 St. Rep. 1182 (1995).

Jury Instructions on Lesser Included Offenses — No Error When Omitted Instruction Not Offered by Appellant: On appeal, the defendant in a deliberate homicide case alleged error in the failure to give jury instructions on mitigated deliberate homicide and negligent homicide. The general rule is that an instruction is required where there is some evidence to support the lesser included offense. Both negligent homicide and mitigated deliberate homicide are to be considered lesser included offenses of deliberate homicide. Here, a lesser included offense instruction was offered by the State and objected to by the defense. The Montana Supreme Court reiterated its position that error may not be predicated upon the failure to give an instruction when the party alleging the error failed to offer the instruction. Failure to offer an instruction removes the cause of error, particularly when the defense counsel has objected to the instruction upon the ground that the defendant was either guilty of deliberate homicide or not guilty. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Evidence Impeached at Hearing — No Abuse of Discretion for Denial: When evidence presented at hearing on motion for new trial was impeached to the point that the trial judge felt that he had been lied to, the motion was properly denied. St. v. Rose, 187 M 74, 608 P2d 1074 (1980).

Intimidation of Witnesses: When protection was immediately provided for two witnesses upon the discovery that they were being intimidated, and the jury had all the facts before it to weigh those witnesses' credibility, the District Court sufficiently guarded the defendant's rights and a mistrial was not warranted. St. v. Booke, 178 M 225, 583 P2d 405 (1978).

Motion After Thirty Days: A motion for a new trial on the basis of newly discovered evidence filed in the District Court after the 30-day period for filing with the District Court was untimely and filed in the wrong court. If the grounds for seeking a new trial do not arise until after the 30-day period or until after the appeal is filed, the proper procedure is to stay the appeal, remand the case to the District Court, file the motion, secure the District Court's decision thereon, and continue with the appeal. St. v. Best, 161 M 20, 503 P2d 997 (1972), distinguished in St. v. Gollehon, 274 M 116, 906 P2d 697, 52 St. Rep. 1182 (1995).

Improper Denial of Bail: The trial court abused its authority in denying bail to a defendant whose conviction for first degree murder was reversed and remanded for a new trial. St. v. Campbell, 160 M 111, 500 P2d 801 (1972).

Motion After Appeal Perfected: Once an appeal has been perfected to the Supreme Court, the District Court loses jurisdiction of the case, except that if a motion for a new trial is then pending, the District Court retains jurisdiction thereof with power to rule thereon. St. v. Nicks, 131 M 567, 312 P2d 519 (1957).

Assignment of Error in Denying New Trial — No Record, Not Argued: When an alleged error in denying the defendant's motion for a new trial was not argued and nothing appeared in the record to sustain it, the assignment did not merit consideration. St. v. Wong Sun, 114 M 185, 133 P2d 761 (1943).

Newspaperman's Bias: After conviction of first degree murder, the defendant moved for a new trial on the ground, among others, that a juror had been guilty of misconduct in concealing from the court, while under examination on his voir dire, the fact that after the arrest of the defendant he, as correspondent for the newspaper published at the county seat, had furnished it articles, which were published, in effect complimenting the officers for their quick action in

apprehending the "murderer", whose "worthless carcass will lie to rot deeply buried when the wheels of justice cease to grind". The motion was denied. The court held, in answer to the contention that the trial court abused its discretion in denying the motion, that in view of the explanation of his conduct by the juror on the hearing of the motion that the articles were not intended to be personal as applied to the defendant, whom he did not know, but applicable to anyone who committed homicide, and the advantageous position of the trial judge in passing upon the sincerity and truth of the statements of the juror on his examination touching his competency as well as on the hearing of the motion, the court did not err in its ruling. St. v. Hoffman, 94 M 573, 23 P2d 972 (1933). See also St. v. Huffman, 89 M 194, 296 P 789 (1931).

Verdict Contrary to Law and Evidence: A motion for a new trial in a criminal case upon the ground that the verdict is contrary to the law and the evidence presents for the court's determination the question of the sufficiency of the evidence to sustain the verdict. St. v. Hughes, 76 M 421, 246 P 956 (1926).

Appeal: Rulings upon the admission or rejection of testimony and upon giving or refusing instructions may be reviewed either upon appeal from the judgment or on appeal from an order refusing a new trial, but any other questions arising from this section may be reviewed only upon appeal from an order denying a new trial. St. v. Brantingham, 66 M 1, 212 P 499 (1923).

Modification of Verdict Without New Trial: Under a former statute providing that when the verdict is contrary to the law or evidence but the evidence shows the accused to be guilty only of a lesser degree or a lesser included offense rather than the degree of which he was convicted, the court could modify the judgment without granting a new trial and the expression "the verdict is contrary to the evidence" meant the same thing as the expression "insufficiency of the evidence to justify the verdict". St. v. Schoenborn, 55 M 517, 178 P 294 (1919); Flaherty v. Butte Elec. Ry., 42 M 89, 111 P 348 (1910).

Scope of Appeal of Ruling on Motion: Upon an appeal from an order granting or denying a motion for a new trial, the Supreme Court sits as a court of error and review, not as a court of original jurisdiction or as an appellate court that is clothed with authority to try the motion de novo. St. v. Schoenborn, 55 M 517, 178 P 294 (1919).

Content of Notice of Motion: The notice of a motion for a new trial in a criminal case need not state whether the motion will be based on affidavits or a bill of exceptions, and the statement therein of the grounds on which the motion will be made is notice of what will be the basis of the motion. St. v. Landry, 29 M 218, 74 P 418 (1903).

Waiver of Objection: When on a motion for a new trial it is found that the counsel for the defendant consented to the taking of certain exhibits to the jury room previously admitted in evidence on a prosecution for murder, such consent constitutes a waiver of any objection to the sending of the exhibits to the jury during retirement. St. v. Allen, 23 M 118, 57 P 725 (1899).

Collateral References

Criminal Law *key* 905, 913, et seq., 949, 965.

23A C.J.S. Criminal Law §§1923 through 1931.

58 Am. Jur. 2d New Trial §231, et seq.

Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities. 10 ALR 5th 700.

Threats of violence against juror in criminal trial as ground for mistrial or dismissal of juror. 3 ALR 5th 963.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case. 74 ALR 4th 705.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases. 70 ALR 4th 664.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial. 57 ALR 4th 1049.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal. 46 ALR 4th 11.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal. 38 ALR 4th 1170.

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases. 35 ALR 4th 626.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial. 31 ALR 4th 229.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief. 16 ALR 4th 810.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that judge believes defendant guilty. 90 ALR 3d 822.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused—modern state cases. 88 ALR 3d 449.

Filing of motion: amendment, after expiration of time for filing motion for new trial in criminal case, of motion made in due time. 69 ALR 3d 933.

Parole, prejudicial effect of statement of prosecutor as to possibility of pardon or. 16 ALR 3d 1137.

Increased punishment on new trial for same offense, propriety of. 12 ALR 3d 978.

Parole or pardon, prejudicial effect of statement or instruction of court as to possibility of. 12 ALR 3d 832.

Communications between witnesses and jurors, prejudicial effect, in criminal case, of. 9 ALR 3d 1275.

Court's statement that if jury makes mistake in convicting it can be corrected by other authorities, prejudicial effect of. 5 ALR 3d 975.

CHAPTER 17
LOWER COURT PROCEEDINGS

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

Chapter Case Notes

Limited Jurisdiction: Police courts (now City Courts), like Justices' Courts, are courts of limited jurisdiction and have only such authority as is expressly conferred upon them. State ex rel. Marquette v. Police Court, 86 M 297, 283 P 430 (1929).

Nature of Action for Ordinance Violation: The nature of an action for the violation of a city ordinance, whether civil or criminal, must be determined by the relief sought in the proceeding without regard to the question of whether some other proceeding may or may not be brought under the state statutes. State ex rel. Marquette v. Police Court, 86 M 297, 283 P 430 (1929).

Chapter Law Review Articles

Montana Justices' Courts—According to the Law: Discusses, in part, criminal proceedings. Mason & Kimball, 23 Mont. L. Rev. 77 (1961).

Part 1
Preliminary Matters — Justices' and City Courts

Part Case Notes

Remedy for Criminal Prosecution of Public Nuisance: Panasuk, convicted in City Court of misdemeanor criminal public nuisance charges under 45-8-111, contended that because 3-10-301, 25-31-102, and Rule 4(B), M.R.Civ.P. (Title 25, ch. 20), preclude a nonrecord court from

hearing actions involving the title to or possession of real property, jurisdiction for prosecution of the public nuisance charge must lie with the District Court. He cited 45-8-112 as authority that any action to abate a nuisance must be brought in the name of the state and that because abatement is a form of injunctive relief, the District Court has exclusive jurisdiction. He also argued that 27-30-202 provides the exclusive civil and criminal remedies for public nuisance. His claims were dismissed for the following reasons: (1) charges filed under 45-8-111 were criminal rather than related to a civil action involving title to or possession of real property, which is regulated by the sections cited by Panasuk; (2) the remedy created by 27-30-202 has been supplemented by subsequent legislative action regarding a City Court's jurisdiction over misdemeanors and by the enactment of 46-17-101 (now repealed), which requires that all prosecutions brought in City Court be commenced by a sworn complaint; and (3) because Panasuk's interpretation would result in a direct contradiction between 27-30-202 and statutes subsequently enacted, the argument that 27-30-202 provides the exclusive remedies for public nuisance is erroneous. Billings v. Panasuk, 253 M 403, 833 P2d 1050, 49 St. Rep. 499 (1992).

Disqualification of Justice of the Peace: Under former law, the word "judge" did not include "justice of the peace", and a Justice of the Peace could not be disqualified on a simple affidavit for substitution of judge. Bailey v. St., 163 M 380, 517 P2d 708 (1973).

Procedure for Requesting Speedy Trial — Justice's Court: An inmate of the state prison who sought a speedy trial upon a Justice's Court complaint, by virtue of which a detainer had been filed at the prison, should have petitioned the District Court setting forth the facts of the complaint against him and requested a speedy trial rather than directing such a request to the County Attorney or petitioning the Supreme Court. Petition of Ditton, 145 M 594, 403 P2d 205 (1965).

Pleading City Ordinance: In a criminal proceeding, it is sufficient to plead a city ordinance by reference to its title, section, and subdivision of section. Philipsburg v. Weinstein, 21 M 146, 53 P 272 (1898).

46-17-102. Record of proceedings.

Commission Comments

Source: [R.C.M. 1947, section] 94-100-3.

No change.

Part 2
The Trial — Justices' and City Courts

Part Collateral References

Criminal Law *key* 247, 251, 254; Jury *key* 4, 29(2), (3).

50A C.J.S. Juries §§335 through 341.

46-17-201. Juries in misdemeanor cases.

Commission Comments

1991 Comment: This statute is an adaptation of 1987 MCA 46-17-201. The statute recognizes the defendant's right to a jury of six members but allows that a jury of less than six may be agreed upon. Subsection (2) deletes the requirement for both parties' approval before a jury trial may be waived. The statute permits such a waiver upon the defendant's written request. The change recognizes that waiver of the jury trial is an exclusive right of the defendant.

Commission Comment Not Divided: This section is a recodification of part of section 95-2004, R.C.M. 1947. Sections 46-17-203 through 46-17-205 [46-17-204 and 46-17-205 now repealed] are also derived from section 95-2004. The commission comments to section 95-2004 are printed in their entirety under 46-17-201.

Source: [R.C.M. 1947, sections] 94-100-11, 94-100-12, 94-100-19, 94-1206, 94-7004, 94-7008; [1889] Montana Constitution, Article III, section 23 [modified by Art. II, sec. 26, 1972 Mont. Const.]; Illinois Code of Criminal Procedure, [Chapter] 38, [section] 115-2.

Compiler's Comments

1999 Amendment: Chapter 346 in (1) at beginning deleted "Subject to subsection (3)"; deleted former (3) that read: "(3) A defendant in a misdemeanor case filed in justice's or city court is limited to one jury trial, either in justice's or city court or on appeal to the district court. The defendant shall either elect a jury trial in justice's or city court or reserve jury trial for the district court in the event of conviction and subsequent appeal to the district court. The defendant's election or reservation must be noted by the court on the face of the charging document"; and made minor changes in style. Amendment effective April 19, 1999.

Preamble: The preamble attached to Ch. 346, L. 1999, provided: "WHEREAS, in Woirhaye v. Montana Fourth Judicial District Court, 1998 MT 320, [292] Mont. [185], [972] P.2d [800] (1998), the Montana Supreme Court found that Chapter 129, Laws of 1997, impinges upon rights to a jury trial guaranteed by Article II, section 26, of the Montana Constitution."

1997 Amendment: Chapter 129 at beginning of (1) inserted reference to subsection (3); and inserted (3) limiting defendants to one jury trial in misdemeanor criminal cases filed in a Justice's or City Court and requiring election or reservation of jury trial. Amendment effective March 24, 1997.

Applicability: Section 5, Ch. 129, L. 1997, provided: "[This act] applies to criminal charges filed on or after [the effective date of this act]." Effective March 24, 1997.

1995 Amendment: Chapter 7 in (1) and (2) substituted reference to parties for reference to defendant; and made minor changes in style.

1991 Amendment: In (1), after "defendant", inserted "in a misdemeanor case" and at end inserted "at any time before the verdict"; substituted (2) concerning waiver of jury trial by defendant for former text that read: "(2) A trial by jury may be waived by the consent of both parties expressed in open court and entered in the docket"; and deleted (3) that read: "(3) Questions of law shall be decided by the court and questions of fact by the jury except that, when a jury trial is waived, the court shall determine both questions of law and questions of fact".

Case Notes

Constitutionality of Waiver of Jury Trial by Defendant Over State's Objection — Writ of Supervisory Control Granted: Defendant Courville was charged in Justice's Court with speeding, DUI, and possession of an open container. Courville requested a waiver of a jury trial, and the state objected. The Justice's Court granted the waiver, finding that the statute violated Art. II, sec. 24, Mont. Const. The state filed an application for a writ of supervisory control and a motion for stay of proceedings pending the Supreme Court's review of the application. Courville argued that only a defendant, and not the state, has the constitutional right to a jury trial and the corresponding ability to waive the right despite statutory language to the contrary in this section. The Supreme Court vacated the waiver of a jury trial, holding that Art. II, sec. 26, Mont. Const., provides a right of a jury trial to the state and that both parties in a criminal trial must consent to waiver. State ex rel. Long v. Justice's Court, 2007 MT 3, 335 M 219, 156 P3d 5 (2007), overruling State ex rel. Nelson v. District Court, 262 M 70, 863 P2d 1027 (1993).

Purpose of Act — Declaratory Judgment Properly Used to Test Constitutionality of Criminal Jurisdictional Statute — Previous Opinion Applied by Remand: Defendants in criminal proceedings in several different Justices' Courts filed actions under the Uniform Declaratory Judgments Act (UDJA) to have declared unconstitutional statutes requiring a criminal defendant in a Justice's Court proceeding to choose between a jury trial in Justice's Court or in District Court. Several civil actions requesting the same relief under the UDJA were consolidated for the purposes of appeal. The state argued that the UDJA was not intended to be used for this purpose and that the various criminal defendants could obtain the same relief by raising the unconstitutionality of the underlying statute as a defense in their individual criminal prosecutions. The Supreme Court noted that acceptance of the state's position would require each criminal defendant to litigate the constitutionality of the pertinent sections of law both in the District Courts and in the Montana Supreme Court. Citing Goff v. St., 141 M 605, 374 P2d 862 (1962), St. v. Wilson, 160 M 473, 503 P2d 522 (1972), and Gryczan v. St., 283 M 433, 942 P2d 112 (1997), and noting that the issue of the constitutionality of the pertinent statutes could be raised, but not finally decided, in the District Courts, the Supreme Court held that it was proper to use the UDJA to determine the constitutionality of the statutes requiring the election of a jury trial in one court and not both courts. On this substantive issue, the Supreme Court cited its recent decision in Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998), holding that the statute requiring the election was unconstitutional, and remanded the cases to the District Courts with directions to enter declaratory judgments in favor of the plaintiffs and appellants. McGillivray v. St., 1999 MT 3, 293 M 19, 972 P2d 804, 56 St. Rep. 11 (1999).

Limitation to One Jury Trial Held Unconstitutional: In 1997, the Legislature enacted the provisions codified at 46-7-102(1)(g), 46-17-311(1), and former subsection (3) of this section providing that a person tried for a misdemeanor in Justice's or City Court who appeals to the District Court has the right to only one jury trial. (See 1999 amendment.) Woirhaye was charged with misdemeanor DUI and requested a jury trial in Missoula County Justice's Court. Upon his conviction by the Justice's Court jury, Woirhaye appealed to the District Court for a trial de novo pursuant to Art. VII, sec. 4(2), Mont. Const., and 46-17-311. Woirhaye asked that the District Court declare subsection (3) of this section unconstitutional, but the District Court denied his

motion. Woirhaye then petitioned the Supreme Court for a writ of supervisory control, which was granted on the grounds that Woirhaye would otherwise be denied a fundamental right. The Supreme Court held that Woirhaye's right to a jury trial in both the Justice's Court or City Court and the District Court was a fundamental right guaranteed by Art. II, sec. 24 and 26, Mont. Const. The Supreme Court pointed out that the right to a jury trial is guaranteed by Art. III, sec. 2, clause 3, of the U.S. Constitution and the sixth amendment to the U.S. Constitution and also that even if that were not the case, Montana may, under the rationale of St. v. Bullock, 272 M 361, 901 P2d 61 (1995), provide rights in excess of those guaranteed by the U.S. Constitution. The Supreme Court noted, in response to the state's argument that Art. II, sec. 24, Mont. Const., guarantees "a" jury trial, that the state's argument was not persuasive against the language of Art. II, sec. 26, Mont. Const. The Supreme Court also distinguished Ludwig v. Mass., 427 US 618 (1976), holding that Art. VII, sec. 4(2), Mont. Const., was not implicated in the case, and stated that any language in N. Cent. Serv., Inc. v. Hafdahl, 191 M 440, 625 P2d 56 (1981), indicating that a requirement for a jury trial applicable to Small Claims Court was satisfied if the right was granted at the District Court level, was dicta and could not be relied upon to support the state's case that only one jury trial was required. Consequently, the Supreme Court held 46-7-102(1)(g), 46-17-311(1), and former subsection (3) of this section to be unconstitutional as violating Woirhaye's right to a jury trial. (See 1999 amendment.) Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998), followed in McGillivray v. St., 1999 MT 3, 293 M 19, 972 P2d 804, 56 St. Rep. 11 (1999), and Balyeat Law, P.C. v. Harrison, 1999 MT 144, 295 M 13, 983 P2d 902, 56 St. Rep. 566 (1999), and followed and clarified in St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

City Court Error to Refuse Waiver of Jury Trial — Error Waived by De Novo Appeal: McCarvel was charged with DUI within the city limits of Billings and scheduled for trial in the City Court. The city demanded a jury trial, but McCarvel waived his right to trial by jury. The City Court refused to accept the waiver, and the jury convicted McCarvel. On appeal to the District Court, McCarvel moved to dismiss on the grounds that the City Court committed error. The District Court refused to dismiss, and McCarvel changed his plea to guilty. Citing St. v. O'Brien, 35 M 482, 90 P 514 (1907), the Supreme Court held that because the trial in District Court is a trial de novo, in which a defendant has an opportunity for a trial without a jury, the opportunity for a District Court trial cured whatever prejudice resulted from the City Court's refusal to grant the right to a waiver provided under the provisions of this section. Billings v. McCarvel, 262 M 96, 863 P2d 441, 50 St. Rep. 1460 (1993).

Guilty Plea Not to Be in Writing: Both 46-12-201, regarding the arraignment of an accused, and this section, regarding the procedure applicable to a plea in Justice's Court, require that a defendant appear in open court, that there be actual communication between the judge and defendant, that the judge first make the requisite inquiries of and provide mandated information to the defendant, and that a plea be accepted as part of that communicative process. There is no provision in either statute that allows a judge to accept a guilty plea from a defendant in either a felony or misdemeanor case through the expedient of the defendant or defendant's counsel simply filing a written plea with the court. The Supreme Court expressed its disapproval of the practice and admonished state courts to comply with the statutory mandates. However, in this case, defendant was at all times represented by counsel, who was personally involved in the written plea. Because defendant's substantive rights were not affected, acceptance of the written guilty plea by the trial court was allowed to stand. St. v. Schneiderhan, 261 M 161, 862 P2d 37, 50 St. Rep. 1242 (1993).

Waiver of Jury Trial When Only Questions of Law Raised: Where defendant raised only legal questions in his challenge to the constitutionality of 61-3-301, his waiver of jury trial was effective regardless of whether or not the court advised him that only legal issues were involved and that the judge, not a jury, decides all legal issues, since only the court can decide questions of law. St. v. Turk, 197 M 311, 643 P2d 224, 39 St. Rep. 584 (1982).

Questions of Law — Questions of Fact: The provision that the court shall decide questions of law but can give no charge with respect to matters of fact was the statement in legislative form of an ancient legal maxim which has been enacted in many statutes and has been deemed so vital to the rights and liberties of the people that it has been engrafted upon the constitutions of states. St. v. Sullivan, 9 M 174, 22 P 1088 (1890).

46-17-202. Formation of trial jury for justices', municipal, and city courts.

Commission Comments

1991 Comment: This statute preserves the first two subsections of 1987 MCA 46-17-202. Subsection (1) governs the formation of a list of potential jurors for lower courts. Subsection (2)

retains the provision allowing oral notice that a juror has been summoned. The remainder of the 1987 code provision is not retained because the conduct of voir dire and other matters concerning actual jury selection are governed by other statutes.

Source: [1889] Montana Constitution, Article III, section 23 [modified by Art. II, sec. 26, 1972 Mont. Const.].

Compiler's Comments

2007 Amendment: Chapter 133 in (1) in fifth sentence after "must be" substituted "filed" for "kept on file". Amendment effective April 5, 2007.

Extension of Effective Date: Section 1, Ch. 99, L. 2005, amended sec. 9, Ch. 441, L. 2003, by extending the effective date imposed by Ch. 441 to October 1, 2007. Effective March 24, 2005.

Applicability Date Extended: Section 2, Ch. 99, L. 2005, amended sec. 10, Ch. 441, L. 2003, to read: "[This act] applies to combined jury lists compiled partly from the lists submitted under [section 1] [61-5-127] by the department of justice to the clerks of the district courts on and after the second Monday of May 2008." Amendment effective March 24, 2005.

2003 Amendment: Chapter 441 in (1) in first sentence near beginning after "jury list" inserted "under 3-15-404(6)" and near middle before "shall prepare" substituted "clerk of the district court" for "county commissioners and clerk and recorder" and in fifth sentence near beginning after "must be" substituted "kept on file" for "filed" and at end inserted "as provided in 3-15-403". Amendment effective October 1, 2005.

Applicability: Section 10, Ch. 441, L. 2003, provided: "[This act] applies to combined jury lists compiled partly from the lists submitted under [section 1] [61-5-127] by the department of justice to the clerks of the district courts on and after the second Monday of May 2006."

1991 Amendment: In (1), in first sentence after "justice's", inserted "municipal"; deleted (3) and (4) that read: "(3) The prosecuting attorney and the defendant or his attorney shall conduct the examination of prospective jurors. The court may conduct an additional examination. The court may limit the examination by the defendant, his attorney, or the prosecuting attorney if the court believes such examination to be improper.

(4) Each party may challenge jurors for cause, and each challenge must be tried by the court. The challenge may be for any cause enumerated in 46-16-304(2) (renumbered 46-16-115). Each defendant shall be allowed three peremptory challenges, and the state shall be allowed the same number of peremptory challenges as all of the defendants"; and made minor changes in style.

1983 Amendment: In (1), after "the county" substituted "commissioners and clerk and recorder" for "jury commission".

Case Notes

Impartial Jury — No Change of Venue: Notwithstanding the pretrial publicity and the judge's comment that transfer of the case would cause expense to the county, if each juror seated could render an impartial verdict based upon the evidence, there was no error in not transferring the case. St. v. Buckley, 171 M 238, 557 P2d 283 (1976).

How Challenges Taken — Waiver: When the State waived its fourth peremptory challenge and the defendant exhausted his peremptory challenges, it was not error, on the panel's being filled and passed for cause, to permit the State to peremptorily challenge a juror who was in the box when the State waived its fourth challenge; the State's waiver of its fourth challenge was not a waiver of any subsequent challenge to which it was entitled. St. v. Peel, 23 M 358, 59 P 169 (1899).

46-17-203. Plea of guilty — use of two-way electronic audio-video communication.

Commission Comments

Source: See commission comments to 46-17-201.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (2)(b) in third sentence after "may" deleted "appoint" and inserted reference to ordering office of state public defender to assign counsel and after "counsel" inserted reference to Montana Public Defender Act. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2003 Amendment: Chapter 354 in (2)(a) inserted "Subject to subsection (2)(b)"; inserted (2)(b) relating to direct district court appeals on voluntariness of guilty plea; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 354, L. 2003, provided: "WHEREAS, the concurring opinion in State v. Boucher, 2002 MT 114, 309 Mont. 114, 48 P.3d 21 (2002), urges the

Legislature to give the District Courts authority to entertain direct appeals from courts of limited jurisdiction in cases in which the defendant claims that a guilty plea was not voluntary."

Applicability: Section 4, Ch. 354, L. 2003, provided: "[This act] applies to denial of motions to withdraw pleas of guilty or nolo contendere entered on or after [the effective date of this act]." Effective April 16, 2003.

1999 Amendment: Chapter 395 throughout section after "plea of guilty" inserted "or nolo contendere". Amendment effective October 1, 1999.

1997 Amendment: Chapter 163 in (1)(a), at beginning, inserted "subject to the provisions of subsection (3)"; inserted (3) regarding the acceptability of a guilty plea disclosed through audio-video communications; and made minor changes in style. Amendment effective March 26, 1997.

Applicability: Section 6, Ch. 163, L. 1997, provided: "[This act] [46-12-211, 46-16-105, 46-17-203, 46-18-102, and 46-18-115] applies to guilty pleas entered and sentences pronounced after [the effective date of this act]." Effective March 26, 1997.

1989 Amendment: Inserted (2) relating to waiver of trial de novo; and made minor changes in form and phraseology.

Case Notes

Person Pleading Guilty in Justice's Court Not Entitled to Appeal to District Court for Trial De Novo: Fyant pleaded guilty in Justice's Court to failure to provide proof of insurance and received a suspended sentence and a $350 fine with the understanding that all or part of the fine would be suspended upon a finding by the court of an inability to pay on the part of Fyant. Fyant offered proof of the inability to pay, but the Justice's Court made no finding regarding her ability to pay and refused to suspend the fines. Fyant filed an appeal with the District Court on the grounds that the sentence was illegal. The Supreme Court held that according to this section, a person who pleads guilty in Justice's Court waives the right of trial de novo and that Fyant failed to take advantage of the other methods of postconviction relief available to her. St. v. Fyant, 2004 MT 298, 323 M 408, 104 P3d 434 (2004).

Contrary Instructions Regarding Appeal Process From Justice's Court — Appeal to District Court Considered Petition for Postconviction Relief: Boucher pleaded guilty to DUI in Justice's Court, signing a form stating that the plea was voluntary and constituted waiver of the right to appeal to District Court. Despite the waiver, the written judgment stated that Boucher could appeal to the District Court within 10 days. Boucher subsequently learned that his driving privileges would be revoked in Washington as a result of the guilty plea, so he moved to withdraw the guilty plea following conviction. The motion was denied, and Boucher appealed to District Court, but that court held that the guilty plea was voluntary and dismissed the appeal for lack of subject matter jurisdiction because under this section, entry of a guilty plea in Justice's Court waives a defendant's right to a trial de novo in District Court. Further, 46-17-311 procedurally requires adjudication of a matter by trial in a Justice's Court or City Court as a prerequisite to an appeal in District Court. Boucher then appealed to the Supreme Court, which exercised subject matter jurisdiction by considering Boucher's appeal to District Court as a petition for postconviction relief. Under 46-21-101, a defendant who asserts the illegality of a sentence and has exhausted all appeal remedies provided by law may petition for postconviction relief with the District Court in the county where the court of limited jurisdiction is located. A petition for postconviction relief is not another form of appeal from a criminal case, but a separate civil proceeding aimed at vacating, setting aside, or correcting a sentence, and is available to a defendant whose sentence is imposed by a court of limited jurisdiction. Here, the District Court correctly determined that Boucher had no right to appeal the Justice's Court's denial of the motion to withdraw the guilty plea. However, given the contrary instructions concerning the appeals process issued by the Justice of the Peace, the fact that the Justice's Court is not a court of record, and the nature of Boucher's constitutional challenge to the validity of his plea, the District Court held an evidentiary hearing to establish a factual basis for ruling on the issues, and those proceedings constituted the functional equivalent of a postconviction hearing. Boucher was eligible to pursue postconviction relief given the absence of an appellate remedy and the constitutional claims asserted, and the District Court erred in finding that it had a lack of subject matter jurisdiction. (See 2003 amendment.) St. v. Boucher, 2002 MT 114, 309 M 514, 48 P3d 21 (2002), following St. v. Christensen, 265 M 374, 877 P2d 468 (1994), and St. v. Liefert, 2002 MT 48, 309 M 19, 43 P3d 329 (2002).

Question of Adequacy of Advisement Regarding Waiver of Appeal Rights Resolved in Favor of Defendant: The first factor in determining whether good cause existed in allowing the withdrawal of a guilty plea and whether a court abused its discretion in denying a motion to withdraw the guilty plea, as set out in St. v. Bowley, 282 M 298, 938 P2d 592 (1997), is the

adequacy of the court's interrogation at the time that the plea was entered regarding the defendant's understanding of the consequences of the plea. The plea must be a voluntary, knowing, and intelligent choice among the alternative courses of action open to the defendant. In the present case, Boucher was charged with DUI, and at his initial appearance, the Justice's Court had Boucher acknowledge in writing that he understood the waivers that he would make if he pleaded guilty. Boucher pleaded not guilty and waived no rights. Five months later, the state amended the complaint, and Boucher changed his plea to guilty, but at the time that the plea was entered, the Justice's Court did not reiterate the information provided at the initial appearance and failed to question Boucher regarding his understanding of the waiver of his constitutional rights. The Supreme Court concluded that the court's colloquy was inadequate and that good cause existed to permit Boucher to withdraw his guilty plea. Any doubt about the voluntariness of Boucher's plea was resolved in his favor, and the Supreme Court remanded to Justice's Court for further proceedings. (See 2003 amendment.) St. v. Boucher, 2002 MT 114, 309 M 514, 48 P3d 21 (2002).

Appeal to District Court Allowed Only After Trial in Lower Court, Not After Forfeiture of Bond — Exclusive Statutory Remedy for Appeals From Courts of Limited Jurisdiction: Kempin was charged in Justice's Court with seven fish and game violations but failed to appear for trial, so the appearance bonds that Kempin had posted were forfeited and Kempin's hunting, fishing, and trapping privileges were suspended for 10 years. Kempin appealed to the District Court within 10 days of the Justice's Court judgment, but the appeal was dismissed for lack of jurisdiction and because Kempin had no statutory right to appeal the forfeitures as a matter of law, so Kempin appealed to the Supreme Court. Under Art. VII, sec. 4, Mont. Const., District Courts must hear appeals from inferior courts as trials de novo unless otherwise provided by law, and appeal of a criminal conviction from a court of limited jurisdiction is governed exclusively by 46-17-311, which provides three circumstances under which a criminal defendant may appeal to District Court for a trial de novo: (1) when a defendant pleads guilty or nolo contendere but preserves legal issues raised by pretrial motion for appeal; (2) when a defendant files written notice of intention to appeal within 10 days after a judgment is rendered following a trial; and (3) when a defendant appeals revocation of a suspended sentence. Here, Kempin claimed that denial of a District Court trial by jury following forfeiture in Justice's Court violated his due process rights. However, Kempin raised no appealable pretrial issues, nor was the case an appeal of a suspended sentence, so the first and third circumstances did not apply. Kempin did appeal the judgment within 10 days, but there was no trial, so Kempin was not constitutionally entitled to a trial de novo when there had been no trial initially, nor is 46-17-311 unconstitutionally vague for not explicitly proscribing an appeal following a forfeiture. The Supreme Court agreed with the District Court's explanation in declining jurisdiction—that if a defendant was automatically entitled to a trial de novo on appeal without first having a trial in Justice's Court, a defendant could avoid Justice's Court altogether by not appearing and forfeiting the Justice's Court bonds and then pursuing a trial in District Court, which would render the Justice's Court system meaningless. Kempin's other due process arguments were also not compelling because Kempin waived his trial rights by failing to appear in Justice's Court to assert any constitutional rights and in light of his stated intention to forfeit the bonds and the advance notice of the suspension of the hunting, fishing, and trapping privileges. Absent any statutory basis for an appeal, dismissal of the appeal by the District Court was affirmed. St. v. Kempin, 2001 MT 313, 308 M 17, 38 P3d 859 (2001). See also St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), and St. v. Schulke, 2005 MT 77, 326 M 390, 109 P3d 744 (2005).

No Authority to Appeal Justice's Court Order Denying Motion to Withdraw Guilty Plea: The Feights got into a fight with a highway patrol officer at a high school basketball game and were charged with misdemeanor assault. They were informed of their rights in Justice's Court, waived their right to counsel, and pleaded guilty. More than a month later, they moved through counsel to withdraw their guilty pleas, claiming good cause under 46-16-105. The Justice's Court denied the motion, holding that the Feights had been given due process and had voluntarily, knowingly, and willingly entered guilty pleas. The Feights appealed the denial of their motion to withdraw their guilty pleas to District Court. The state moved to dismiss the appeal, contending that the District Court lacked jurisdiction to review denial of the motion to withdraw a plea. The District Court dismissed the appeal but remanded to Justice's Court with a recommendation that the Feights be allowed to withdraw their pleas. Instead, the Justice's Court reinstated judgment, and the Feights appealed to the Supreme Court. The Supreme Court affirmed. The statutes that provide for and determine the jurisdiction of a District Court to entertain an appeal from a Justice's Court include 3-5-303, 46-12-204, 46-17-311, and this section. However, none of these statutes provide authority for appeal to the District Court from the denial of a motion to

withdraw a guilty plea. Further, the specific language of these sections prevails over the general language in 46-20-104 defining the scope of appeal by a criminal defendant. The Legislature has not created a statutory right of appeal from a Justice's Court denial of a motion to withdraw a guilty plea, and the Supreme Court refrained from creating one. St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), distinguishing St. v. Rogers, 267 M 190, 883 P2d 115 (1994), and followed in St. v. Fox, 2001 MT 209, 306 M 353, 34 P3d 484 (2001).

Part 3
Procedure After Trial — Justices' and City Courts

Part Case Notes

Justice's Court — Authority to Grant New Trial: A Justice's Court is not a "court" for the purposes of 46-16-701, and a Justice of the Peace may not dismiss charges against a defendant upon a motion for a new trial. Forsythe v. Wenholz, 170 M 496, 554 P2d 1333 (1976).

46-17-302. Execution of judgment.

Commission Comments

Commission Comment Not Divided: This section is a recodification of part of section 95-2008, R.C.M. 1947. Section 46-17-303 is also derived from section 95-2008. The commission comments to section 95-2008 are printed in their entirety under 46-17-302.

Source: [R.C.M. 1947, sections] 94-100-25, 94-100-28, 94-100-39, 94-100-40, 94-100-45 and 94-100-46.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 335 in (4) near end of first sentence increased from $25 to $75 the dollar rate at which fines are satisfied based on each day of imprisonment; and made minor changes in style. Amendment effective July 1, 2009.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

1989 Amendment: In (4), near end of first sentence, increased rate at which fine is paid off by imprisonment to $25 from $10 per day; and made minor changes in phraseology.

Case Notes

Fine With or Without Imprisonment: The Legislature recognized a distinction between a judgment for a fine and one for a fine with imprisonment until the fine is paid. State ex rel. Hodgdon v. District Court, 33 M 119, 82 P 663 (1905).

Imprisonment for Full Period — Judgment Discharged: When a defendant was imprisoned under a predecessor section for the full period prescribed in a judgment rendered in a Justice's Court, such imprisonment operated ipso facto to satisfy and discharge the judgment. Petelin v. Kennedy, 29 M 466, 75 P 82 (1904).

Attorney General's Opinions

Indigents Unable to Pay Fines: A person who has been sentenced to a term of imprisonment and has also been fined cannot be imprisoned beyond the maximum term of imprisonment set by statute for the crime in question if he is indigent and financially unable to pay the fine at the time of sentencing. When an offense is punishable by fine only, a court cannot initially imprison an indigent because he is financially unable to pay the fine. If an indigent is unable to pay a fine it would not be unreasonable to require him to pay on a predetermined installment basis. 34 A.G. Op. 17 (1971).

Collateral References

Criminal Law *key* 257 through 259; Fines *key* 10, 18 through 20.

24 C.J.S. Criminal Law §§2167 through 2194; 36A C.J.S. Fines §§6, 16.

46-17-303. Deposit of fines — collection.

Commission Comments

Commission Comment Not Divided: This section is a recodification of part of section 95-2008, R.C.M. 1947. Section 46-17-303 is also derived from section 95-2008. The commission comments to section 95-2008 are printed in their entirety under 46-17-302.

Source: See commission comments to 46-17-302.

Compiler's Comments

2003 Amendment: Chapter 510 in (1), in (2)(a) in two places, and in (2)(c) before "court" deleted "city"; in (1) at beginning of second sentence before "judge" deleted "city"; in (2)(c)

inserted second sentence requiring fee incurred by court to be added to judgment amount; inserted (3) allowing execution to issue on judgment for unpaid interest accrued on judgment, costs, and fees in collecting fine in civil case if judgment is for fine alone; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 515 in (2)(a) at beginning deleted "If a final judgment is entered for a fine and the fine is immediately due" and at end after "collection of" substituted "any final judgment that requires a payment to the city court" for "the fine"; in (2)(b) near beginning after "collect a" substituted "judgment" for "fine", near middle after "judgment" deleted "for the fine", and near end after "collection procedure" inserted "and other postjudgment remedies"; at end of (2)(c) after "collecting the" substituted "judgment" for "fine"; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 63 at beginning of (1) inserted exception clause and in second sentence substituted "shall file copy of any receipt given for a collected fine" for "must take duplicate receipts therefor, one of which he must deposit"; inserted (2)(a) authorizing city court to contract for collection of fine if final judgment entered and fine immediately due; inserted (2)(b) authorizing assignment to and collection of fine by private person or entity if retained by city court; inserted (2)(c) authorizing city court to pay private person or entity for fine collection after deduction of charges; and made minor changes in style. Amendment effective October 1, 1999.

1987 Amendment: Before "city court" and "city judge" deleted references to Justice's Court and Justice of the Peace, respectively.

Attorney General's Opinions

Disposition of Fees in City Court: Fines imposed and collected by a City Judge for any offenses occurring in the city limits must be paid to the City Treasurer. 37 A.G. Op. 62 (1977).

46-17-311. Appeal from justices', municipal, and city courts.

Commission Comments

Source: [R.C.M. 1947, sections] 94-100-33, 94-100-34 and 94-100-38.

Under the bail section, the bail bond will be sufficient to cover the fine.

Compiler's Comments

2005 Amendment: Chapter 557 in (1) in last sentence after "justice's" deleted "court established as a"; in (3) in first sentence before "filing" inserted "timely" and inserted second and third sentences related to failure to timely file notice; and in (4) in first sentence after "justice's" deleted "court established as a". Amendment effective July 1, 2005.

2003 Amendments — Composite Section: Chapter 13 inserted (5) clarifying the procedure for dismissal of a defendant's appeal of a conviction to the district court. Amendment effective October 1, 2003.

Chapter 354 in (1) inserted reference to 46-17-203(2)(b); in (2) at end of first sentence inserted "or the denial of the motion to withdraw a plea as provided in 46-17-203(2)(b)"; and made minor changes in style. Amendment effective April 16, 2003.

Chapter 389 in (1) at end of second sentence after "3-6-110" inserted "and an appeal from a justice's court established as a court of record is governed by 3-10-115"; in (4) near middle of first sentence after "justice's court" inserted "other than a justice's court established as a court of record"; and made minor changes in style. Amendment effective July 1, 2003.

Preamble: The preamble attached to Ch. 354, L. 2003, provided: "WHEREAS, the concurring opinion in State v. Boucher, 2002 MT 114, 309 Mont. 114, 48 P.3d 21 (2002), urges the Legislature to give the District Courts authority to entertain direct appeals from courts of limited jurisdiction in cases in which the defendant claims that a guilty plea was not voluntary."

Applicability: Section 4, Ch. 354, L. 2003, provided: "[This act] applies to denial of motions to withdraw pleas of guilty or nolo contendere entered on or after [the effective date of this act]." Effective April 16, 2003.

1999 Amendment: Chapter 346 in (1) after "other criminal cases" deleted "if the defendant has not previously exercised the right of jury trial in a justice's or city court, as provided in 46-17-201. If the defendant received a jury trial in justice's or city court, the case must be tried anew in the district court without a jury." Amendment effective April 19, 1999.

Preamble: The preamble attached to Ch. 346, L. 1999, provided: "WHEREAS, in Woirhaye v. Montana Fourth Judicial District Court, 1998 MT 320, [292] Mont. [185], [972] P.2d [800] (1998), the Montana Supreme Court found that Chapter 129, Laws of 1997, impinges upon rights to a jury trial guaranteed by Article II, section 26, of the Montana Constitution."

1997 Amendments: Chapter 129 in (1), at end of first sentence after "criminal cases", inserted "if the defendant has not previously exercised the right of jury trial in a justice's or city court, as

provided in 46-17-201" and inserted second sentence requiring new trial in District Court without a jury; and made minor changes in style. Amendment effective March 24, 1997.

Chapter 149 at beginning of (1) inserted reference to subsection (4); inserted (4) establishing procedure for use on appeal to District Court of a Justice's or City Court's revocation of suspended sentence; and made minor changes in style. Amendment effective March 25, 1997.

Preamble: The preamble attached to Ch. 149, L. 1997, provided: "WHEREAS, in State v. Rogers, 267 Mont. 190 (1994), the Montana Supreme Court held that an appeal de novo was available for a Justice's Court revocation of a suspended sentence and also held that a jury trial was not available."

Applicability: Section 5, Ch. 129, L. 1997, provided: "[This act] applies to criminal charges filed on or after [the effective date of this act]." Effective March 24, 1997.

Section 2, Ch. 149, L. 1997, provided: "Because [section 1] [46-17-311] codifies existing case law, [section 1] [46-17-311] applies to all suspended sentence revocation proceedings regardless of when the sentence was entered." Effective March 25, 1997.

1993 Amendment: Chapter 262 in first sentence of (1), after "justice's", deleted "municipal" and inserted second sentence regarding appeal from Municipal Court to District Court.

1991 Amendment: In (1), at beginning, substituted "for cases in which legal issues are preserved for appeal pursuant to 46-12-204" for "as provided in 46-17-203", after "justice's" inserted "municipal", and at end substituted "for other criminal cases" for "a trial jury in a civil action, except that the total number of jurors drawn shall be at least six plus the total number of peremptory challenges"; in (2), at beginning of first sentence, substituted "The defendant" for "A party", substituted "filing" for "giving", and after "judgment" deleted "except that the state" and inserted "is rendered following trial" and inserted second sentence concerning notice of appeal by prosecution; in (3), after "days", inserted "of filing the notice of appeal, the court shall transfer", after "record of the" substituted "court of limited jurisdiction to the district court" for "justice's or city court proceedings must be transferred to the district court or the appeal must be dismissed", and deleted last sentence that read: "It is the duty of the appellant to perfect the appeal"; and made minor changes in style.

Coordination Instruction — Amendment Void: Section 2, Ch. 470, L. 1991, provided: "If Senate Bill No. 51 is passed and approved and if Senate Bill No. 51 contains a section amending 46-17-311, then [this act] is void." Senate Bill No. 51 was approved May 23, 1991, as Ch. 800, L. 1991, and included an amendment to 46-17-311. Therefore, the amendment to 46-17-311 contained in sec. 1, Ch. 470, L. 1991, is void.

1989 Amendment: At beginning inserted exception clause.

1985 Amendment: In (2) at beginning substituted "A party" for "The defendant" and at end inserted "except that the state may only appeal in the cases provided for in 46-20-103"; and near end of (3) substituted "appellant" for "defendant".

Case Notes

Trial De Novo Rather Than Hearing Appropriate Absent Evidence of Prosecutor Conduct Warranting Mistrial: On an appeal from City Court on a DUI conviction, Whittinghill contended that the District Court should have held an evidentiary hearing on whether the prosecutor goaded Whittinghill into moving for a mistrial. However, Whittinghill did not present any cogent argument or statement of available evidence indicating that the situation was a product of prosecutor misconduct and only speculated about why the prosecution's only witness gave offending testimony. Absent a showing that the prosecutor did anything to goad the defense into moving for a mistrial, the District Court properly denied an evidentiary hearing and granted a trial de novo. Helena v. Whittinghill, 2009 MT 343, 353 M 131, 219 P3d 1244 (2009).

Date Defendant Sentenced In Absentia Considered Date of Legally Effective Sentence for Appeal Purposes: Clark was charged with a misdemeanor traffic violation but failed to appear for trial and was tried, convicted, and sentenced by the Municipal Court in absentia pursuant to 46-16-123 on June 12, 2006. A warrant was issued for failure to appear, and Clark appeared before a different Municipal Court on July 14, 2006, and was informed of the June sentence. Clark sought to appeal to District Court, but the District Court dismissed the appeal on grounds that it was untimely. On appeal to the Supreme Court, Clark argued that dismissal of the appeal by the District Court was in error because the period for filing a Municipal Court appeal should have begun on July 14 when he was informed of the June sentence, rather than June 12 when the sentence was actually imposed. The Supreme Court disagreed. A valid sentence was imposed on June 12 and was not subject to postponement or modification until Clark appeared on the bench warrant. By Municipal Court Rule, Clark had until June 26 to file an appeal, but the appeal was not filed until July 28 and was therefore untimely and was properly dismissed by the District

Court. St. v. Clark, 2008 MT 317, 346 M 80, 193 P3d 934 (2008). See also St. v. Bonamarte, 2006 MT 291, 334 M 376, 147 P3d 220 (2006).

Improper Denial of State's Right to Appeal Justice's Court Suppression Motion: A Justice's Court granted Willis's motion to suppress that precluded the state from presenting statements made by Willis on the day of an accident on grounds that the state had unlawfully obtained the statements in violation of constitutional guarantees against self-incrimination. The state appealed the Justice's Court's ruling to the District Court, and the District Court granted Willis's motion to dismiss on grounds that the District Court lacked jurisdiction. On appeal, the Supreme Court reversed. Regardless of whether the Justice's Court order suppressed evidence or a confession or admission, the state had a statutory right under 46-20-103 to appeal the Justice's Court's ruling. Trial de novo in District Court was the proper proceeding for the state's appeal pursuant to St. v. Yarns, 252 M 45, 826 P2d 543, 49 St. Rep. 132 (1992), and St. v. Kesler, 228 M 242, 741 P2d 791, 44 St. Rep. 1490 (1987). St. v. Willis, 2008 MT 293, 345 M 402, 192 P3d 691 (2008). See also St. v. Strizich, 286 M 1, 952 P2d 1365, 54 St. Rep. 1241 (1997).

Interim Appeal, Rather Than Trial De Novo, Appropriate for Consideration of Double Jeopardy Challenge: Barron appealed a Justice's Court decision to the District Court for trial de novo, then moved to dismiss the case on double jeopardy grounds. The motion was denied, and Barron appealed to the Supreme Court. Normally, the Supreme Court will not consider appeals from District Court unless a final judgment of conviction has been rendered. However, as set out in Three Forks v. Schillinger, 2007 MT 331, 340 M 211, 173 P3d 681 (2007), there is no trial de novo if a second trial in District Court would violate the provision against double jeopardy. Thus, notwithstanding the fact that the District Court had not rendered final judgment, the Supreme Court accepted Barron's interim appeal to consider the merits of the double jeopardy claim. St. v. Barron, 2008 MT 69, 342 M 100, 179 P3d 519 (2008).

Appeal of City Court Ruling — Trial De Novo in District Court Proper Remedy: Defendant was charged in Three Forks City Court with four counts of endangering the welfare of a minor. The City Court determined that a fair trial could not be had in Three Forks and, upon motion by the city for a change of venue, ordered the case and jurisdiction transferred to Madison County. A Madison County Justice's Court jury convicted defendant of one count and acquitted on three counts. Defendant appealed to Gallatin County District Court, requesting that the case be dismissed because the Three Forks City Court improperly granted the change of venue. The District Court denied the motion to dismiss, but concluded that the change of venue was an abuse of discretion and remanded to the Three Forks City Court for a new trial. The city appealed, and the Supreme Court reversed. The general rule is that, with few exceptions, District Courts must try appeals from Justices' Courts and City Courts de novo, rather than acting as courts of review. In this case, none of the statutory or case law exceptions to the general rule applied, so the District Court was limited to the remedy of conducting a de novo trial as required by this section, regardless whether the City Court's change of venue was erroneous. A trial de novo in District Court also cured any prejudice that might have been suffered by defendant occasioned by the change of venue. The case was remanded for a trial de novo in Gallatin County District Court. Three Forks v. Schillinger, 2007 MT 331, 340 M 211, 173 P3d 681 (2007), distinguishing Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800 (1998), and St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

Counsel Present but Defendant Not in Attendance for District Court Appeal in Misdemeanor Case — No Authority of District Court to Dismiss Appeal When Defendant Not Required to Be Present: Clark appealed a Justice's Court judgment for issuing a bad check, and the District Court set a trial de novo. On the day of trial, Clark's counsel was present, but Clark did not appear in person. Because Clark was not present, the District Court dismissed the appeal pursuant to this section and reinstated the Justice's Court judgment. Clark appealed to the Supreme Court, which reversed and remanded. Under 46-16-120, a defendant may appear by counsel only in all misdemeanor cases unless the court requires the defendant's personal appearance. Because Clark's counsel was present and ready to proceed and because the District Court did not require Clark's personal presence, the District Court did not have authority to dismiss the appeal and should have proceeded with the trial pursuant to 46-16-122. St. v. Clark, 2006 MT 313, 335 M 39, 149 P3d 551 (2006).

Concurrent Justice's Court and District Court Jurisdiction Over Misdemeanor Family Assault No Right to Trial De Novo From Court of Record: Brockway was charged with two misdemeanor and two felony counts of family member assault. Brockway moved to sever the misdemeanor counts and have them tried first in Justice's Court so that he would have the opportunity to appeal to District Court. The District Court concluded that it lacked jurisdiction to try the misdemeanor charges, so the misdemeanor charges were severed and remanded for

trial in Justice's Court. The state appealed. The Supreme Court held that the District Court's conclusion that it did not have jurisdiction to try the misdemeanors was erroneous. Under 3-10-303, District Courts have concurrent jurisdiction with Justices' Courts over misdemeanor charges of partner or family member assault. Additionally, under this section, there is no right to a trial de novo from District Court or from a Justice's Court that is a court of record, so Brockway was entitled to one jury trial in a court of record—in this case, the District Court—and if convicted, Brockway could then appeal to the Supreme Court. The case was remanded for trial in District Court on all charges. St. v. Brockway, 2005 MT 179, 328 M 5, 116 P3d 788 (2005).

Failure to Provide Notice That Arresting Officer Would Appear as Witness — No Error: At Boettiger's DUI bench trial in Justice's Court, the arresting officer testified regarding Boettiger's actions on the day in question. Boettiger was convicted and appealed to District Court, but the state did not provide Boettiger with written notice that the officer would again be a witness. Nevertheless, the District Court allowed the officer to testify over Boettiger's objection, and Boettiger's counsel subjected the officer to extensive cross-examination. Boettiger was again convicted and on appeal alleged error in the state's failure to list the officer as a potential witness. The Supreme Court did not condone the failure to provide notice but found that Boettiger knew that the officer would testify again and failed to demonstrate prejudice as a result of the officer's testimony. The Supreme Court disregarded the irregularity because it did not affect Boettiger's substantive rights, and the conviction was affirmed. St. v. Boettiger, 2004 MT 313, 324 M 20, 101 P3d 285 (2004), following St. v. Sol, 282 M 69, 936 P2d 307 (1997).

Contrary Instructions Regarding Appeal Process From Justice's Court — Appeal to District Court Considered Petition for Postconviction Relief: Boucher pleaded guilty to DUI in Justice's Court, signing a form stating that the plea was voluntary and constituted waiver of the right to appeal to District Court. Despite the waiver, the written judgment stated that Boucher could appeal to the District Court within 10 days. Boucher subsequently learned that his driving privileges would be revoked in Washington as a result of the guilty plea, so he moved to withdraw the guilty plea following conviction. The motion was denied, and Boucher appealed to District Court, but that court held that the guilty plea was voluntary and dismissed the appeal for lack of subject matter jurisdiction because under 46-17-203, entry of a guilty plea in Justice's Court waives a defendant's right to a trial de novo in District Court. Further, this section procedurally requires adjudication of a matter by trial in a Justice's Court or City Court as a prerequisite to an appeal in District Court. Boucher then appealed to the Supreme Court, which exercised subject matter jurisdiction by considering Boucher's appeal to District Court as a petition for postconviction relief. Under 46-21-101, a defendant who asserts the illegality of a sentence and has exhausted all appeal remedies provided by law may petition for postconviction relief with the District Court in the county where the court of limited jurisdiction is located. A petition for postconviction relief is not another form of appeal from a criminal case, but a separate civil proceeding aimed at vacating, setting aside, or correcting a sentence, and is available to a defendant whose sentence is imposed by a court of limited jurisdiction. Here, the District Court correctly determined that Boucher had no right to appeal the Justice's Court's denial of the motion to withdraw the guilty plea. However, given the contrary instructions concerning the appeals process issued by the Justice of the Peace, the fact that the Justice's Court is not a court of record, and the nature of Boucher's constitutional challenge to the validity of his plea, the District Court held an evidentiary hearing to establish a factual basis for ruling on the issues, and those proceedings constituted the functional equivalent of a postconviction hearing. Boucher was eligible to pursue postconviction relief given the absence of an appellate remedy and the constitutional claims asserted, and the District Court erred in finding that it had a lack of subject matter jurisdiction. (See 2003 amendment.) St. v. Boucher, 2002 MT 114, 309 M 514, 48 P3d 21 (2002), following St. v. Christensen, 265 M 374, 877 P2d 468 (1994), and St. v. Liefert, 2002 MT 48, 309 M 19, 43 P3d 329 (2002).

Appeal to District Court Allowed Only After Trial in Lower Court, Not After Forfeiture of Bond — Exclusive Statutory Remedy for Appeals From Courts of Limited Jurisdiction: Kempin was charged in Justice's Court with seven fish and game violations but failed to appear for trial, so the appearance bonds that Kempin had posted were forfeited and Kempin's hunting, fishing, and trapping privileges were suspended for 10 years. Kempin appealed to the District Court within 10 days of the Justice's Court judgment, but the appeal was dismissed for lack of jurisdiction and because Kempin had no statutory right to appeal the forfeitures as a matter of law, so Kempin appealed to the Supreme Court. Under Art. VII, sec. 4, Mont. Const., District Courts must hear appeals from inferior courts as trials de novo unless otherwise provided by law, and appeal of a criminal conviction from a court of limited jurisdiction is governed exclusively by this section, which provides three circumstances under which a criminal defendant may appeal to District

Court for a trial de novo: (1) when a defendant pleads guilty or nolo contendere but preserves legal issues raised by pretrial motion for appeal; (2) when a defendant files written notice of intention to appeal within 10 days after a judgment is rendered following a trial; and (3) when a defendant appeals revocation of a suspended sentence. Here, Kempin claimed that denial of a District Court trial by jury following forfeiture in Justice's Court violated his due process rights. However, Kempin raised no appealable pretrial issues, nor was the case an appeal of a suspended sentence, so the first and third circumstances did not apply. Kempin did appeal the judgment within 10 days, but there was no trial, so Kempin was not constitutionally entitled to a trial de novo when there had been no trial initially, nor is this section unconstitutionally vague for not explicitly proscribing an appeal following a forfeiture. The Supreme Court agreed with the District Court's explanation in declining jurisdiction—that if a defendant was automatically entitled to a trial de novo on appeal without first having a trial in Justice's Court, a defendant could avoid Justice's Court altogether by not appearing and forfeiting the Justice's Court bonds and then pursuing a trial in District Court, which would render the Justice's Court system meaningless. Kempin's other due process arguments were also not compelling because Kempin waived his trial rights by failing to appear in Justice's Court to assert any constitutional rights and in light of his stated intention to forfeit the bonds and the advance notice of the suspension of the hunting, fishing, and trapping privileges. Absent any statutory basis for an appeal, dismissal of the appeal by the District Court was affirmed. St. v. Kempin, 2001 MT 313, 308 M 17, 38 P3d 859 (2001). See also St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), and St. v. Schulke, 2005 MT 77, 326 M 390, 109 P3d 744 (2005).

No District Court Error in Failing to Hold Trial De Novo in Municipal Court Appeal: Campbell was charged in Missoula Municipal Court with criminal trespass, disorderly conduct, and obstructing a police officer. Campbell failed to appear for trial and was tried in absentia and convicted on all charges. Campbell appealed to District Court, was notified of the appropriate Municipal Court appeal procedure in 3-6-110, and was given 10 days to file a brief. Campbell failed to file a brief, so the District Court dismissed the appeal and remanded to Municipal Court for further proceedings. Campbell appealed to the Supreme Court on grounds that the District Court should have conducted a trial de novo pursuant to this section. The Supreme Court disagreed. Campbell's appeal was from a Municipal Court and thus was governed by 3-6-110, rather than this section, so the appeal was confined to review of the record and questions of law. The District Court did not err in failing to conduct a trial de novo, and dismissal of Campbell's appeal for failure to file a brief was affirmed. Missoula v. Campbell, 2001 MT 271, 307 M 286, 37 P3d 670 (2001).

No Authority to Appeal Justice's Court Order Denying Motion to Withdraw Guilty Plea: The Feights got into a fight with a highway patrol officer at a high school basketball game and were charged with misdemeanor assault. They were informed of their rights in Justice's Court, waived their right to counsel, and pleaded guilty. More than a month later, they moved through counsel to withdraw their guilty pleas, claiming good cause under 46-16-105. The Justice's Court denied the motion, holding that the Feights had been given due process and had voluntarily, knowingly, and willingly entered guilty pleas. The Feights appealed the denial of their motion to withdraw their guilty pleas to District Court. The state moved to dismiss the appeal, contending that the District Court lacked jurisdiction to review denial of the motion to withdraw a plea. The District Court dismissed the appeal but remanded to Justice's Court with a recommendation that the Feights be allowed to withdraw their pleas. Instead, the Justice's Court reinstated judgment, and the Feights appealed to the Supreme Court. The Supreme Court affirmed. The statutes that provide for and determine the jurisdiction of a District Court to entertain an appeal from a Justice's Court include 3-5-303, 46-12-204, 46-17-203, and this section. However, none of these statutes provide authority for appeal to the District Court from the denial of a motion to withdraw a guilty plea. Further, the specific language of these sections prevails over the general language in 46-20-104 defining the scope of appeal by a criminal defendant. The Legislature has not created a statutory right of appeal from a Justice's Court denial of a motion to withdraw a guilty plea, and the Supreme Court refrained from creating one. St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), distinguishing St. v. Rogers, 267 M 190, 883 P2d 115 (1994), and followed in St. v. Fox, 2001 MT 209, 306 M 353, 34 P3d 484 (2001).

Improper Reliance by District Court on Justice's Court Proceeding Constituting Denial of Right to Trial De Novo — Reversal Warranted: Stedman was convicted in Justice's Court of criminal mischief and appealed to District Court for a trial de novo. During the District Court trial, the judge referenced the Justice's Court proceedings in several instances, which strongly suggested that the judge was unduly influenced by the Justice's Court proceedings, denying

Stedman of the constitutional and statutory right to a trial de novo. The Supreme Court remanded for a trial de novo. St. v. Stedman, 2001 MT 150, 306 M 65, 30 P3d 353 (2001).

Purpose of Act — Declaratory Judgment Properly Used to Test Constitutionality of Criminal Jurisdictional Statute — Previous Opinion Applied by Remand: Defendants in criminal proceedings in several different Justices' Courts filed actions under the Uniform Declaratory Judgments Act (UDJA) to have declared unconstitutional statutes requiring a criminal defendant in a Justice's Court proceeding to choose between a jury trial in Justice's Court or in District Court. Several civil actions requesting the same relief under the UDJA were consolidated for the purposes of appeal. The state argued that the UDJA was not intended to be used for this purpose and that the various criminal defendants could obtain the same relief by raising the unconstitutionality of the underlying statute as a defense in their individual criminal prosecutions. The Supreme Court noted that acceptance of the state's position would require each criminal defendant to litigate the constitutionality of the pertinent sections of law both in the District Courts and in the Montana Supreme Court. Citing Goff v. St., 141 M 605, 374 P2d 862 (1962), St. v. Wilson, 160 M 473, 503 P2d 522 (1972), and Gryczan v. St., 283 M 433, 942 P2d 112 (1997), and noting that the issue of the constitutionality of the pertinent statutes could be raised, but not finally decided, in the District Courts, the Supreme Court held that it was proper to use the UDJA to determine the constitutionality of the statutes requiring the election of a jury trial in one court and not both courts. On this substantive issue, the Supreme Court cited its recent decision in Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998), holding that the statute requiring the election was unconstitutional, and remanded the cases to the District Courts with directions to enter declaratory judgments in favor of the plaintiffs and appellants. McGillivray v. St., 1999 MT 3, 293 M 19, 972 P2d 804, 56 St. Rep. 11 (1999).

Limitation to One Jury Trial Held Unconstitutional: In 1997, the Legislature enacted the provisions codified at 46-7-102(1)(g), 46-17-201(3), and former subsection (1) of this section, providing that a person tried for a misdemeanor in Justice's or City Court who appeals to the District Court has the right to only one jury trial. Woirhaye was charged with misdemeanor DUI and requested a jury trial in Missoula County Justice's Court. Upon his conviction by the Justice's Court jury, Woirhaye appealed to the District Court for a trial de novo pursuant to Art. VII, sec. 4(2), Mont. Const., and this section. Woirhaye asked that the District Court declare 46-17-201(3) unconstitutional, but the District Court denied his motion. Woirhaye then petitioned the Supreme Court for a writ of supervisory control, which was granted on the grounds that Woirhaye would otherwise be denied a fundamental right. The Supreme Court held that Woirhaye's right to a jury trial in both the Justice's Court or City Court and the District Court was a fundamental right guaranteed by Art. II, sec. 24 and 26, Mont. Const. The Supreme Court pointed out that the right to a jury trial is guaranteed by Art. III, sec. 2, clause 3, of the U.S. Constitution and the sixth amendment to the U.S. Constitution and also that even if that were not the case, Montana may, under the rationale of St. v. Bullock, 272 M 361, 901 P2d 61 (1995), provide rights in excess of those guaranteed by the U.S. Constitution. The Supreme Court noted, in response to the state's argument that Art. II, sec. 24, Mont. Const., guarantees "a" jury trial, that the state's argument was not persuasive against the language of Art. II, sec. 26, Mont. Const. The Supreme Court also distinguished Ludwig v. Mass., 427 US 618 (1976), holding that Art. VII, sec. 4(2), Mont. Const., was not implicated in the case, and stated that any language in N. Cent. Serv., Inc. v. Hafdahl, 191 M 440, 625 P2d 56 (1981), indicating that a requirement for a jury trial applicable to Small Claims Court was satisfied if the right was granted at the District Court level, was dicta and could not be relied upon to support the state's case that only one jury trial was required. Consequently, the Supreme Court held 46-7-102(1)(g), 46-17-201(3), and former subsection (1) of this section to be unconstitutional as violating Woirhaye's right to a jury trial. (See 1999 amendment.) Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998), followed in McGillivray v. St., 1999 MT 3, 293 M 19, 972 P2d 804, 56 St. Rep. 11 (1999), and Balyeat Law, P.C. v. Harrison, 1999 MT 144, 295 M 13, 983 P2d 902, 56 St. Rep. 566 (1999), and followed and clarified in St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

Trial De Novo — Exclusive District Court Remedy for Alleged Denial of Jury Trial in City Court — No Right to District Court Review: The exclusive remedy of defendant convicted of traffic violations in City Court, who claimed that he was forced into a bench trial in City Court and denied the exercise of his right to a jury trial, was a trial de novo in the District Court. The District Court could not sit as a court of review. Therefore, the District Court properly denied his motion to dismiss for failure to allow a jury trial in City Court. St. v. McKee, 1998 MT 110, 288 M 454, 958 P2d 700, 55 St. Rep. 433 (1998).

Payment of Justice's Court Cost Imposed as Judgment of District Court Held Improper — Smith Reaffirmed: Morales was charged with assaulting a sports official, in violation of 45-5-211, after striking a basketball referee. Upon his conviction in Justice's Court, Morales appealed to District Court. Upon his conviction, the District Court ordered Morales to pay the costs of the trial in Justice's Court. The Supreme Court reaffirmed its holding in Billings v. Smith, 281 M 133, 932 P2d 1058 (1997), and held that a trial de novo in District Court has the effect of erasing any debt for costs in Justice's Court incurred before the appeal to District Court. St. v. Morales, 284 M 238, 943 P2d 1286, 54 St. Rep. 862 (1997).

Appeal From Justice's Court to District Court — Failure to Include Citation of Authority for Lack of Jurisdiction — Jurisdictional Argument Not Addressed on Appeal: Sol appealed his DUI conviction in Justice's Court to the District Court. In the Supreme Court, Sol argued that the failure of the Justice's Court Clerk to timely transmit the file to the District Court within the time provided by this section deprived the District Court of jurisdiction. The Supreme Court noted that Sol had failed to cite any authority, as required by former Rule 23, M.R.App.P. (now superseded), for his assertion that the clerk's failure deprived the District Court of jurisdiction. For this reason, the Supreme Court declined to address the issue of the District Court's jurisdiction. St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Failure of Justice's Court Clerk to Timely Transmit Case File to District Court — No Speedy Trial Violation: Sol appealed his DUI conviction in the Justice's Court to the District Court. The Justice's Court Clerk failed to transmit the case file within the time provided by this section. The District Court Clerk scheduled the trial 110 days after Sol filed his notice of appeal from Justice's Court. Sol argued that the clerk's failure caused a violation of his right to a speedy trial. The Supreme Court noted that the 1-day delay in transmittal of the file probably resulted in the District Court Clerk's scheduling the trial 1 day later, in 110 days rather than in 109 days. Because a delay must be presumptively prejudicial before other speedy trial factors will be analyzed and because a delay of less than 6 months is not presumptively prejudicial, the Supreme Court held that it would not apply the other speedy trial criteria and held that Sol's right to a speedy trial had not been violated. St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Justice's Court Clerk Delay Not Attributable to Prosecution: After Sol appealed his DUI conviction in Justice's Court to the District Court, the Justice's Court Clerk failed to transmit the case file to the District Court within the 30-day time limit required by this section. Sol argued that the requirements of the statute should be strictly construed against the state. The Supreme Court held that the duty to transmit the file was only the duty of the clerk and neither Sol nor the prosecution was responsible for the transmittal. Citing the reasoning in St. v. Dubray, 201 M 327, 654 P2d 970 (1982), the Supreme Court refused to attribute to the prosecution the Justice's Court Clerk's failure to strictly comply with the statute. St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Objection to Dismissal Not Prerequisite to State's Right to Appeal Dismissal: The state did not have to object in Justice's Court to the defendant's motion to dismiss in order to preserve the state's right to appeal the grant of the motion to the District Court. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996).

Appeal of Misdemeanor Conviction From Justice's Court to District Court — No Record of Oral Pronouncement of Sentence in Justice's Court — District Court Jurisdiction Upheld: Tweedy was convicted by a Justice's Court jury of misdemeanor assault and was scheduled for sentencing on April 18, 1989. On April 19, Tweedy filed a notice of appeal to the District Court. The Justice's Court filed its sentencing order on May 3. Later, in response to a motion by Tweedy to dismiss the underlying charge, the state contended that the District Court had not acquired jurisdiction over Tweedy. The Supreme Court held that since there was no evidence in the record that the sentencing hearing scheduled for April 18 did not, in fact, take place and since, under St. v. Mortenson, 175 M 403, 574 P2d 581 (1978), appeal may be taken within 10 days after sentence is orally pronounced in open court, Tweedy's notice of appeal was timely filed and the District Court had jurisdiction over the case. The Supreme Court also noted that the later enactment of 46-18-116, which applies to Justices' Courts by virtue of 46-1-103, requiring a signed judgment on the record, should eliminate confusion in the future regarding when the statutory time for appeal begins to run. St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996).

Appeal to District Court — Burden on State to Ensure Speedy Trial: Tweedy perfected the appeal of his misdemeanor conviction to the District Court. After Tweedy asked for and received a continuance and was substituted for his counsel, to act pro se, nothing further happened in the case until 5 years later, when the state moved to dismiss Tweedy's appeal because of his lack of diligence in pursuing it. The District Court granted the state's motion. The Supreme Court held

that the burden was not upon Tweedy to pursue the appeal, but was upon the state to ensure that the constitutional requirements for a speedy trial were complied with. The Supreme Court reasoned that any other decision would ignore the de novo nature of the appeal to District Court and would penalize a defendant exercising a statutory right of appeal. St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996).

Notice of Appeal Timely Filed: Defendant was convicted by a City Court jury of driving under the influence of alcohol and resisting arrest. Defendant's notice of appeal was filed 14 days after conviction and sentencing. The appeal was dismissed on the basis that the appeal was not timely filed. The District Court erred in dismissing the appeal because it failed to exclude intermediate weekend days and legal holidays as required by rule. St. v. Price, 271 M 409, 897 P2d 1084, 52 St. Rep. 527 (1995), followed in St. v. Pizzola, 283 M 522, 942 P2d 709, 54 St. Rep. 774 (1997).

Period of Time Prescribed or Allowed — Ten Days or Less: The Justice's Court sentenced Schindler on March 4, 1994. On appeal, the state contended that Schindler's notice of appeal filed by fax on March 14, 1994, was untimely. The Supreme Court applied Rule 21, M.U.R.J.C.C. (Title 25, ch. 24), in interpreting this section to mean that when the period of time prescribed or allowed is 10 days or less, intermediate Saturdays, Sundays, and legal holidays are excluded from the calculations. St. v. Schindler, 268 M 489, 886 P2d 978, 51 St. Rep. 1421 (1994), distinguishing St. v. Arthur, 234 M 75, 761 P2d 806 (1988), and followed in St. v. Pizzola, 283 M 522, 942 P2d 709, 54 St. Rep. 774 (1997).

Revocation of Suspended Sentence — Right to Trial De Novo in District Court Based on Similarities to Criminal Proceedings — Legislative Intent: Defendant pleaded guilty and received a suspended sentence in Justice's Court. Upon defendant's arrest again on additional charges, the state filed a petition in Justice's Court to revoke the suspended sentence. The Justice's Court found that defendant had violated the conditions of the suspended sentence and again suspended sentence, adding additional conditions. Defendant appealed to the District Court for a trial de novo on the petition for revocation of suspended sentence. The state moved to dismiss the appeal, arguing that no appeal is available under this section because a suspended sentence revocation is an administrative rather than a criminal proceeding. The District Court agreed and granted the state's motion. On appeal, the Supreme Court held that based on cogent and numerous similarities between criminal and revocation proceedings, appeals de novo from Justice's Court revocations of suspended sentences are available under and governed by this section. Any other holding would foreclose any appeal to or review by any court from a Justice's Court's revocation of a suspended sentence and would fail to take into account the Legislature's intent to provide for appeals de novo to the District Court from all final Justice's Court proceedings, criminal or civil. (See 1997 amendment.) St. v. Rogers, 267 M 190, 883 P2d 115, 51 St. Rep. 1037 (1994).

Dismissal of Appeal Based on Failure to Post Bond — Reversible Error: On appeal of a City Court conviction of misdemeanor assault, defendant moved for a stay of execution pending appeal and requested that the record be transferred to the District Court. The District Court informed defendant that a $1,000 appearance bond must be filed within 10 days or the appeal would be dismissed and the City Court judgment reinstated. Upon defendant's failure to post the bond, the appeal was dismissed. The right to appeal a criminal conviction from Justice's Court or City Court is purely statutory. Nothing in this section requires that an appeal bond or appearance bond be posted to perfect an appeal, and in the absence of such a requirement, the District Court may not impose one. The District Court's requirement of an appearance bond and subsequent dismissal based on the failure to post the bond constituted reversible error. St. v. Ward, 266 M 424, 880 P2d 1343, 51 St. Rep. 885 (1994), following State ex rel. Abbitt v. Justice Court, 220 M 210, 714 P2d 140 (1986).

Municipality Not Liable for Municipal Judge's Violation of Defendants' Civil Rights: Under state law, a Municipal Court Judge's failure to advise indigent defendants of their right to appointed counsel occurred under the state's judicial authority rather than under the municipality's authority, precluding imposition of civil rights liability against the city. Eggar v. Livingston, 40 F3d 312 (1994).

Premature Appeal of Judgment Not Including Sentence — De Novo Appeal Only — Appeal Not Perfected Properly Dismissed: Todd was convicted of assault in Justice's Court and, before he was sentenced, filed a notice of intention to appeal. The Justice's Court nevertheless proceeded to sentencing, and Todd was sentenced to pay a $250 fine or to perform community service, to pay costs, and to a 6-month deferred sentence. Several months after fulfilling the community service, Todd was informed that he had not paid the costs, whereupon the state moved for imposition of sentence and for dismissal of the earlier appeal. The court granted the state's motion, and Todd subsequently filed a notice of appeal from the Justice's Court's order dismissing the first appeal.

The District Court held that it had no jurisdiction to review the Justice's Court's order and dismissed the appeal. Citing St. v. Hegeman, 248 M 49, 808 P2d 509 (1991), and St. v. Wilson, 252 M 264, 827 P2d 1286 (1992), the Supreme Court held that the right to appeal from a judgment was a right to appeal from a judgment that includes a sentence and that because sentence had not been pronounced at the time that Todd filed his first notice, the notice was premature and ineffective. The Supreme Court held that the second notice of appeal was also ineffective in that it was filed months after sentencing and not within the time required by statute. The District Court was correct in holding that it had no jurisdiction to review the Justice's Court's order dismissing the first appeal, both because the appeal to District Court is a trial de novo and not a review of lower court orders and because the notice of appeal was untimely filed. St. v. Todd, 262 M 108, 863 P2d 423, 50 St. Rep. 1466 (1993), followed in St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996), followed in St. v. Mora, 277 M 411, 922 P2d 516, 53 St. Rep. 736 (1996).

Retrial of Unconvicted Offense Prohibited — Dismissal of Conviction for Uncharged Offense Affirmed: Barker was charged with DUI but was convicted of reckless driving by the Ravalli County Justice of the Peace. Barker appealed to the District Court and filed a motion to dismiss, which the District Court granted. On appeal by the state, the Supreme Court affirmed, holding that the reckless driving charge and the DUI charge were inapposite charges and that reckless driving was not a lesser included offense of DUI. The Supreme Court also held that while a defendant's statutory remedy for appealing a Justice's Court decision is a trial de novo in the District Court, it would be a violation of the prohibition against double jeopardy to try Barker again on the DUI charge because Barker was originally charged with that offense and jeopardy had attached when the first witness was sworn. When Barker appealed from the erroneous conviction of an uncharged offense, he did not waive his constitutional protection against double jeopardy for charges of which he was acquitted. St. v. Barker, 260 M 85, 858 P2d 360, 50 St. Rep. 970 (1993).

Oral Pronouncement of Guilt and Delayed Sentencing — Appeal Improper Pending Final Judgment: Following a nonjury trial on February 5, the Justice of the Peace orally pronounced defendant guilty of DUI and driving while the privilege to do so was suspended or revoked and ordered defendant to obtain an alcohol evaluation and return for sentencing February 26. On February 7, the Justice's Court issued a written order and mailed it to the prospective parties. On February 11, defendant filed a notice of appeal with the District Court, and the case was transferred on March 11. On March 28, the state filed a motion to dismiss on the basis that the appeal was premature because defendant had not been sentenced. On April 1, the District Court dismissed and remanded the case back to Justice's Court for sentencing before defendant had an opportunity to respond with a brief. An appeal cannot be utilized until judgment has been fully rendered. Dismissal was proper because the District Court lacked subject matter jurisdiction absent final judgment by the Justice's Court. St. v. Wilson, 252 M 264, 827 P2d 1286, 49 St. Rep. 243 (1992), distinguished in St. v. Caldwell, 1998 MT 261, 291 M 272, 968 P2d 711, 55 St. Rep. 1076 (1998).

Judgment and Sentence Prerequisite to Appeal to District Court — Misdemeanors: Except for misdemeanors listed in 3-5-302(2), a District Court is limited to appellate jurisdiction of misdemeanor cases. Imposition of sentence and entry of a final judgment by a Justice's Court or City Court are prerequisites to appeal to a District Court, and a party may not consent to subject matter jurisdiction or waive the want of jurisdiction. St. v. Hegeman, 248 M 49, 808 P2d 509, 48 St. Rep. 318 (1991), followed in St. v. Todd, 262 M 108, 863 P2d 423, 50 St. Rep. 1466 (1993), St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996), and St. v. Diesen, 1998 MT 163, 290 M 55, 964 P2d 712, 55 St. Rep. 655 (1998), and distinguished in St. v. Caldwell, 1998 MT 261, 291 M 272, 968 P2d 711, 55 St. Rep. 1076 (1998).

Dismissal of Appeal From City Court to District Court — No Final Judgment: Appellant sought to appeal from City Court to District Court a decision made at a show cause hearing regarding forfeiture of bail bonds. However, because no order or final judgment issued out of the hearing, there was no right of appeal from that hearing. Helena v. Buck, 247 M 313, 806 P2d 27, 48 St. Rep. 213 (1991).

Duty to Perfect Appeal Rests With Appellant: The defendant filed a notice of appeal with the City Court after being convicted of his fourth DUI. The defendant's attorney failed to complete and return a praecipe to transmit the record to District Court within the 30-day time limit. The Supreme Court held that no right to a trial de novo existed. The duty to perfect the appeal lay with the appellant, and there was no assertion by the defendant that the request for transmittal had been made within the 30-day period. St. v. Speith, 244 M 392, 797 P2d 221, 47 St. Rep. 1630

(1990), followed in St. v. Todd, 262 M 108, 863 P2d 423, 50 St. Rep. 1466 (1993), and distinguished in St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Physical Filing Required: "Giving written notice" of intention to appeal requires that notice must be actually received and filed by the court, not that it simply has been mailed. St. v. Arthur, 234 M 75, 761 P2d 806, 45 St. Rep. 1741 (1988), following St. v. Mortenson, 175 M 403, 574 P2d 581 (1978). Arthur was distinguished in St. v. Price, 271 M 409, 897 P2d 1084, 52 St. Rep. 527 (1995).

Waiver of Jury Trial in Justice Court — Right to Jury Trial on Appeal: Defendant waived the right to jury trial in Justice Court and was convicted in a bench trial. It was his right, after making a timely request, to a trial by jury on appeal to the District Court. St. v. Bender, 232 M 424, 756 P2d 1157, 45 St. Rep. 1165 (1988).

Notice of Appeal Not Timely Filed — Appeal Properly Dismissed: The right to appeal a criminal conviction from Justice's Court to District Court is purely statutory, and compliance with this section is required to perfect an appeal. Unless a party has made timely compliance by giving written notice of intention to appeal within 10 days after judgment, the District Court does not acquire jurisdiction. Therefore, where 21 days elapsed from judgment to filing of notice of appeal, the District Court had no other course but to dismiss the appeal. St. v. Hartford, 228 M 254, 741 P2d 1337, 44 St. Rep. 1500 (1987), distinguished in St. v. Price, 271 M 409, 897 P2d 1084, 52 St. Rep. 527 (1995), and St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Trial De Novo of Criminal Case on Appeal From Justice's Court to District Court — No District Court Jurisdiction to Review Justice's Court Order Suppressing Evidence: A criminal case on appeal from Justice's Court to District Court must be tried anew in the District Court pursuant to this section, regardless of which party appeals. Accordingly, a District Court does not have appellate jurisdiction to review a Justice's Court order suppressing evidence. St. v. Kesler, 228 M 242, 741 P2d 791, 44 St. Rep. 1490 (1987), followed in St. v. Yarns, 252 M 45, 826 P2d 543, 49 St. Rep. 132 (1992), and in St. v. Todd, 262 M 108, 863 P2d 423, 50 St. Rep. 1466 (1993).

Notice to Defendant: Giving notice of an intention to appeal under this section requires that the defendant receive notice. St. v. Province, 226 M 425, 735 P2d 1128, 44 St. Rep. 775 (1987), distinguished in St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Appeal of Guilty Plea in Justice's or City Court: From the standpoint of reason, justice, and public policy, an appeal of a guilty plea in Justice's Court or City Court may be tried anew in District Court provided it is properly perfected. However, this holding does not give the District Court original jurisdiction of a DUI case in violation of 3-5-302. St. v. Waymire, 226 M 406, 736 P2d 106, 44 St. Rep. 759 (1987).

Necessity of Posting Bond: An appeal bond is not required to perfect an appeal from a Justice Court to a District Court in a criminal matter. St. v. Bush, 164 M 81, 518 P2d 1406 (1974), holding that an appeal bond is required, is expressly overruled. State ex rel. Abbitt v. Justice Court, 220 M 210, 714 P2d 140, 43 St. Rep. 300 (1986).

Timely Notice of Appeal to Wrong Court: Tecca was convicted in City Court, and his attorney filed a timely notice of appeal in City Court 5 days after judgment specifying that the appeal would be to Justice Court. The appeal should have been to District Court. On August 7, 11 working days after judgment, a correct notice of appeal was filed. However, since 46-17-311 requires that a notice of intent to appeal a judgment of a City Court or Justice Court be filed within 10 days of the judgment, the trial judge dismissed the appeal for failure to file a timely notice of appeal. The Supreme Court agreed with the trial judge that the August 7 notice was not timely but found that the original notice, though in error, was timely filed in the proper court. Noting a similar decision in Adair v. Justice Court, 213 M 466, 692 P2d 13, 41 St. Rep. 2241 (1984), the court reversed the trial judge, holding that where error occurs in a notice of appeal which is timely filed, the defendant should be granted 10 days from the date of remittitur to file a statutorily correct notice of appeal pursuant to 46-17-311. St. v. Tecca, 220 M 68, 713 P2d 541, 43 St. Rep. 180 (1986).

Appeal Perfected if, Inter Alia, Transmission of Record Requested: Defendant appealed a City Court D.U.I. conviction to District Court. The Supreme Court vacated District Court's dismissal of appeal and remanded for a determination of whether defendant had requested transmission of the record within the 30-day statutory period for perfecting appeal. The court rejected the District Court conclusion that regardless of when defendant initially requested transmission of the record, he had failed to perfect the appeal because he failed to see that the record was actually transmitted. This conclusion was erroneous in light of St. v. Main, 191 M 304, 623 P2d 1382, 38 St. Rep. 205 (1981), and St. v. Dubray, 201 M 327, 654 P2d 970, 39 St. Rep. 2142 (1982),

followed in St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997). Billings v. Seiffert, 215 M 381, 697 P2d 1342, 42 St. Rep. 448 (1985).

Jurisdiction Over Appeals From Justices' Courts: The Supreme Court does not have appellate jurisdiction to review the judgments or orders of the Justices' Courts. Adair v. Lake County Justice Court, 213 M 466, 692 P2d 13, 41 St. Rep. 2241 (1984); State ex rel. Estes v. Justice Court, 129 M 136, 284 P2d 249 (1955).

When Appeal Perfected: Defendant was convicted in Justice's Court of driving under the influence of intoxicating liquor. Within 6 days after trial, defendant's attorney mailed a notice of appeal. Within 5 days, the Justice's Court signed the stay of execution but failed to transmit the record to District Court as the defendant had requested. Four months later the defendant learned that the record had not been transmitted when the County Attorney filed a motion to dismiss. The District Court ordered the appeal dismissed because the record had not been transmitted within 30 days of judgment. On appeal, the Supreme Court ordered the appeal reinstated, holding that a defendant perfects on appeal from a Justice's Court to a District Court when he requests the Justice's Court to transmit the record and fulfills the other criteria of this section. To hold otherwise would be to hold that the appeals statutes are a trap for the unwary, rather than a device to assume timely review of a lower court judgment. A defendant has the right to expect a Justice's Court to timely honor his request. St. v. Dubray, 201 M 327, 654 P2d 970, 39 St. Rep. 2142 (1982), followed in St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Effect of Failure to Transfer Record: Where after filing notice of appeal to District Court defendant failed to have record of Justice's Court proceedings transferred to the District Court within the statutory time limit, he did not perfect his appeal and thus waived his right to appeal. St. v. Crane, 196 M 305, 639 P2d 514, 39 St. Rep. 126 (1982).

District Court Not Appellate Court for City or Justice's Court:

A District Court may not sit as a court of review. Therefore, on appeal from a Justice's or City Court, the District Court must try a case de novo and may not remand it. Hardin v. Myers, 194 M 248, 633 P2d 677, 38 St. Rep. 1512 (1981).

The District Court does not, on appeal from a police court (now City Court), sit as a court of review, but it tries the cause de novo. White Sulphur Springs v. Voise, 136 M 1, 343 P2d 855 (1959).

Burden of Appellant to Ensure Timely Appeal — Ineffective Counsel Not Reason to Excuse Untimely Appeal: Where the defendants were convicted in City Court of disorderly conduct on December 14 and judgment and sentence were orally pronounced in court on that date, the defendants' telephone call to the city magistrate on January 23 requesting the transmission of the City Court record could not prevent an untimely appeal, when the records were actually transmitted on January 28. The duty to perfect the appeal lies with the defendants. Their failure to ensure the timely transmission of the records mandates dismissal of the appeal. Nor should the defendants be entitled to an appeal because the appeal was not perfected due solely to the ineffectiveness of counsel. The decision to allow an appeal for such a reason rested, if at all, with the District Court. St. v. Main, 191 M 304, 623 P2d 1382, 38 St. Rep. 205 (1981).

Time for Appeal Not Dependent on Written Judgment or Decision on Appointment of Counsel: Where the defendants were convicted of disorderly conduct in City Court on December 14 and judgment and sentence were orally imposed on that date, the transmission of the City Court record to District Court on January 28 came too late to perfect an appeal and the District Court's dismissal of the appeal was therefore proper. The time allowable for transmission of the record on appeal is not dependent upon service of a written judgment when judgment has been pronounced orally in open court; nor, as the defendants claimed, is the time limit tolled during any time spent in determining whether the defendants are entitled to appointed counsel. Timely transmission of the record is in no way hampered by the preliminary inquiry into defendants' indigence. St. v. Main, 191 M 304, 623 P2d 1382, 38 St. Rep. 205 (1981).

State Not to Appeal Justice's Court Dismissal: When a criminal cause in Justice's Court was dismissed because a witness subpoenaed by both parties testified for the prosecution and failed to appear for the defendant, the State had no right to appeal because 46-20-103 applies only to appeals from District Court and 46-17-311 allows appeals from Justice's Court only for the defendant. (See 1985 amendment note.) St. v. Sanchez, 187 M 434, 610 P2d 162 (1980).

Duty to Perfect Appeal — Filing With Wrong Court: When the defendant inadvertently filed his notice of appeal with the wrong court, the District Court, he did not perfect his appeal in the manner required by law and the Justice of the Peace had no duty to transmit the record to the District Court. State ex rel. Ross v. Mallory, 184 M 29, 601 P2d 385 (1979).

Time for Appeal: The time for appeal from a Justice's Court conviction runs from the date of verbal pronouncement of judgment in open court, and written notice of appeal must be filed with

the Justice's Court within the 10-day period. St. v. Mortenson, 175 M 403, 574 P2d 581 (1978), followed in St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996).

Exclusive Remedy for New Trial: An appeal to the District Court for a trial de novo is the exclusive remedy for obtaining a new trial in Justice's Court proceedings. Forsythe v. Wenholz, 170 M 496, 554 P2d 1333 (1976), followed in Rickett v. Billings, 262 M 339, 864 P2d 762, 50 St. Rep. 1586 (1993), and affirming Hardin v. Myers, 194 M 248, 633 P2d 677 (1981).

Interlocutory Orders: Viewing this act as a whole, it is clear that the State may appeal from interlocutory orders; this section was meant only to define and delimit the defendant's right to appeal. (But see 1985 amendment note.) St. v. Bergum, 164 M 155, 520 P2d 653 (1974).

Mandamus: Since this section provides a plain, speedy, and adequate remedy at law, mandamus did not lie to compel a Justice of the Peace to honor an affidavit of disqualification. Bailey v. St., 163 M 380, 517 P2d 708 (1973).

Increased Sentence: The District Court may increase the sentence or punishment imposed by a Justice of the Peace after a trial de novo on a misdemeanor charge. St. v. Fissette, 159 M 501, 498 P2d 1208 (1972), following Colten v. Ky., 405 US 913, 32 L Ed 2d 584, 92 S Ct 1953 (1971).

Objection to Form of Undertaking: When the defendant sought to appeal the decision of the Justice of the Peace and his undertaking was not in proper form but was approved by the Justice, it was improper for the court to dismiss the appeal for insufficiency of the form of the undertaking when no objection to the form was made in the Justice's Court of original jurisdiction. Clark v. District Court, 142 M 56, 381 P2d 472 (1963); Reidelbach v. District Court, 142 M 52, 381 P2d 470 (1963).

Effect of Payment of Fine After Appeal: When the defendant was convicted in a police court (now City Court) of the violation of a town ordinance and appealed to the District Court and served notice of his appeal while in jail serving a sentence imposed for his nonpayment of the fine, the fact that the defendant had paid the fine before the hearing of the appeal did not effect an abandonment of his appeal. White Sulphur Springs v. Voise, 136 M 1, 343 P2d 855 (1959).

Dismissal for Want of Prosecution Void: When an appeal was taken to the District Court from a conviction in a police court (now City Court) for a liquor law violation but neither the city nor the defendant requested the cause be set for trial, the judge of the court could not order the appeal dismissed "for want of prosecution" without giving notice to the defendant. State ex rel. Healy v. District Court, 125 M 77, 230 P2d 763 (1951).

Amended Pleadings: On appeal from a Justice's Court in a misdemeanor case, the case must be tried de novo in the District Court on the papers and files in the former, unless the latter court allows other or amended pleadings and each party has the benefit of all legal objections made in the Justice's Court. St. v. Benson, 91 M 109, 5 P2d 1045 (1931).

No Right of Appeal by Cities: The defendant, charged with wrongfully obstructing an alley, was proceeded against under the former statutes governing criminal procedure in police courts (now City Courts), was convicted, and appealed to the District Court where the complaint was dismissed. The court held on appeal by the city that since the statute did not grant the right of appeal to cities in criminal causes tried in Justices' Courts or police courts, the appeal did not lie. (See 1985 amendment note.) Miles City v. Drum, 60 M 451, 199 P 719 (1921).

Waiver of Certain Irregularities:

The result of an appeal from a judgment of a Justice of the Peace in a prosecution for a misdemeanor is to abrogate that judgment and to hold the defendant under the original warrant of arrest for a trial de novo in the District Court, and the defendant cannot complain, on habeas corpus, of any irregularity committed by the Justice in rendering the judgment. Hosoda v. Neville, 45 M 310, 123 P 20 (1912).

A party cannot, under the guise of an application for a trial de novo, insist that irregularities to which he made no objection shall be taken note of or that the judgment, which is abrogated by the appeal, be reversed on account of them. It is therefore immaterial, on the trial of the case appealed, whether the Justice lost jurisdiction by conducting the trial in part on a legal holiday or failed to comply with the statute in giving judgment or pronouncing sentence. In re Graye, 36 M 394, 93 P 66 (1907).

Since the District Court does not, on appeal from a Justice's Court, sit as a court of review but tries the case de novo, any irregularities attending the rendition of the judgment in a case in which the Justice had jurisdiction of the offense charged and of the defendant are waived by taking the appeal. St. v. O'Brien, 35 M 482, 90 P 514 (1907), followed in Billings v. McCarvel, 262 M 96, 863 P2d 441, 50 St. Rep. 1460 (1993).

Record on Appeal: In the absence of a specific statutory provision on the subject, the original files, together with a copy of the docket minutes, constitute the record on appeal in a criminal case from a Justice's to a District Court. In re Graye, 36 M 394, 93 P 66 (1907).

Collateral References
Criminal Law *key* 260.
4 Am. Jur. 2d Appellate Review §20, et seq.

Part 4
Procedure in Municipal Court

Part Case Notes
Appeal Bond to Perfect Criminal Appeal: Because there is no statutory basis or court rule requiring an appeal bond to perfect an appeal in a criminal case from Municipal Court, the Municipal Court may not require one. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

46-17-401. Applicability of district court rules.

Case Notes
Remand or Order to Lift Stay Unnecessary Upon Affirmation by Appellate Court — Supreme Court Jurisdiction of Municipal Court Appeal Affirmed but Remanded by District Court: A Municipal Court sentenced Costa for misdemeanor traffic offenses, then stayed imposition of sentence pending Costa's appeal to District Court. The District Court affirmed judgment and remanded to the Municipal Court for imposition of sentence. The question then arose as to whether the Supreme Court had jurisdiction to address the District Court's decision. The Supreme Court noted that the definition of remand is to send something back for further action; however, the Legislature did not intend to require an appellate court to formally remand in cases involving affirmed criminal judgments. In addition, it is unnecessary for an appellate court to direct that a stay pending appeal be lifted once a defendant has exhausted the right to appeal and the underlying judgment and sentence have been affirmed. Therefore, the District Court's remand was premature, unnecessary, and of no immediate consequence and had no effect on the Municipal Court's final judgment and sentence. The Municipal Court stayed Costa's sentence pending appeal, which presumably encompassed an appeal to the Supreme Court, so because the District Court's remand was unnecessary, the Supreme Court had jurisdiction over Costa's appeal. Billings v. Costa, 2006 MT 181, 333 M 84, 140 P3d 1070 (2006).

Collateral References
Courts *key* 188(1).

46-17-402. Fees and fines — collection.

Compiler's Comments
2005 Amendment: Chapter 232 in (1) near middle after "provided in" inserted "61-8-726 and"; and made minor changes in style. Amendment effective October 1, 2005.
2001 Amendment: Chapter 515 in (2)(a) at beginning deleted "If a final judgment is entered for a fine and the fine is immediately due" and at end after "collection of" substituted "any final judgment that requires a payment to the municipal court" for "the fine"; in (2)(b) near beginning after "collect a" substituted "judgment" for "fine", near middle after "judgment" deleted "for the fine", and near end after "collection procedure" inserted "and other postjudgment remedies"; at end of (2)(c) after "collecting the" substituted "judgment" for "fine"; and made minor changes in style. Amendment effective October 1, 2001.
1999 Amendment: Chapter 63 in (1) inserted "except as provided in subsection (2)"; inserted (2)(a) authorizing municipal court to contract for collection of fine if final judgment entered and fine immediately due; inserted (2)(b) authorizing assignment to and collection of fine by private person or entity if retained by municipal court; inserted (2)(c) authorizing municipal court to pay private person or entity for fine collection after deduction of charges; and made minor changes in style. Amendment effective October 1, 1999.

Collateral References
Jury *key* 11(1).
50A C.J.S. Juries §§4 through 16.

46-17-403. Jury trial.

Case Notes
Municipal Court Criminal Defendants — Six-Person Jury: Under this section, a criminal defendant in Municipal Court is afforded the same jury trial rights as a defendant in Justice Court, including the right to only a six-person jury as provided to a Justice Court defendant under 46-17-201 and 46-17-311. Missoula v. Prinkki, 239 M 331, 779 P2d 921, 46 St. Rep. 1724 (1989).

Collateral References
Courts *key* 190(1), (2).

46-17-404. Appeals.

Case Notes
Appeal Bond to Perfect Criminal Appeal: Because there is no statutory basis or court rule requiring an appeal bond to perfect an appeal in a criminal case from Municipal Court, the Municipal Court may not require one. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

CHAPTER 18
SENTENCE AND JUDGMENT

Chapter Commission Comments
Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

Chapter Case Notes
Presumption of Punishment for Going to Trial Based on Difference Between Pretrial Offer and Actual Sentence — Remand: As set out in St. v. Baldwin, 192 M 521, 629 P2d 222 (1981), when a District Court becomes involved in plea negotiations and an offer is made, any difference in the sentencing after trial must point out the factors justifying an increased sentence, and failure to enumerate the factors leads to the presumption that a greater sentence has been imposed for a vindictive purpose. Here, when the District Court failed to justify having an 11-year sentence run consecutively rather than concurrently with another sentence, the Baldwin standard requiring an explanation for imposing a harsher sentence than that offered in plea negotiations was not met, constituting reversible error. The case was remanded for resentencing. St. v. Hall, 2003 MT 253, 317 M 356, 77 P3d 239 (2003).

Absence of Facts Indicating Unconstitutional Sentence — Maximum Sentence Affirmed: Brown cited St. v. Baldwin, 192 M 521, 629 P2d 222 (1981), and St. v. Tate, 196 M 248, 639 P2d 1149 (1982), in arguing that a disparity between his sentence for deliberate homicide and a plea bargain offered by the state indicated that his due process rights were violated. The Supreme Court distinguished Baldwin and Tate because in Brown's case, the District Court was not directly involved with the plea negotiation process. Rather, the District Court enumerated a lengthy list of factors that were considered in imposing the maximum sentence on Brown. Absent anything in the record to support Brown's claim that his sentence was unconstitutional, the Supreme Court affirmed the sentence. St. v. Brown, 2003 MT 166, 316 M 310, 71 P3d 1215 (2003).

Defendant's Affirmation of Correctness of Information in Presentence Investigation Constituting Waiver of Due Process Challenge: McLeod challenged the legality of his dangerous drug sentence on due process grounds because the sentencing court relied on a presentence investigation (PSI) report that indicated that McLeod had five previous felony drug convictions

instead of the actual four previous convictions. A convicted defendant has a due process guarantee against a sentence predicated on misinformation. Here, McLeod was given proper notice of the information in the PSI, availed himself of the opportunity to extensively review the information, was represented by counsel at the time that the PSI was made known to him and reviewed the information with counsel, and was given repeated opportunities to rebut the information but chose instead to affirm the accuracy of the PSI. Thus, pursuant to St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), McLeod was afforded the process due to a criminal defendant at sentencing. McLeod's affirmation of the correctness of the PSI constituted a waiver of a due process challenge, and the sentence was affirmed. St. v. McLeod, 2002 MT 348, 313 M 358, 61 P3d 126 (2002).

Failure of District Court Judge to Abide by Plea Agreement Entered With Previous District Court Judge — Doubt Regarding Plea Resolved in Favor of New Trial: At a change of plea hearing in December 2000, Tweed pleaded guilty to two counts of sexual intercourse without consent pursuant to a plea agreement in which the state agreed to drop two counts of felony sexual assault and recommended 30-year concurrent sentences on each count with 20 years suspended. In March 2001, Tweed appeared for sentencing before a new District Court Judge. The new judge called the probation officer who conducted the presentence investigation, and pursuant to the probation officer's recommendations, the new judge rejected the terms of the plea agreement and sentenced Tweed to concurrent 30-year sentences with only 10 years suspended. Tweed moved to withdraw the guilty pleas, but the motion was denied, and Tweed appealed. The Supreme Court held that the District Court's contradictory statements gave credence to Tweed's claim that he held a mistaken understanding of the binding effect upon the court of the pretrial agreement's sentencing recommendations. In view of the irregularities in the interrogation at the change of plea hearing, any doubt about whether Tweed was precluded from entering a knowing, voluntary, and intelligent plea should be resolved in favor of a trial on the merits. The denial of Tweed's motion to withdraw the guilty pleas was an abuse of discretion, and the case was reversed and remanded for a new trial. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

Reliance of Sentencing Judge on Other Conviction Valid at Time of Sentencing but Later Found Invalid — Inability of Defendant to Address Vacation of Prior Convictions as Due Process Violation: In 1983, Bauer was charged with and convicted of two felonies in Silver Bow County and sentenced to terms in the state prison. Bauer challenged the convictions. About 8 years later, Bauer was charged with felony intimidation in Powell County and was sentenced to an additional 5 years in prison. Following the 1991 prison riots, Bauer was moved to Blaine County, where he was later charged with three felonies arising out of an incident with a female inmate at the Blaine County jail. The presentence investigation report (PSI) referred to the Silver Bow County convictions, and the sentencing court expressly referred to the PSI in sentencing Bauer. The court held that if Bauer was successful in challenging the 1983 convictions, the sentences for the Blaine County offenses would run from the date of judgment and sentence and Bauer would be credited with any time served from the date of filing of the information to the date of imposition of the Blaine County sentences. Bauer's 1983 sentences were subsequently voided based on newly discovered DNA evidence that exonerated Bauer. Bauer then sought postconviction relief on grounds that his due process rights had been violated when the sentencing court in Blaine County relied on the now incorrect information in the PSI regarding the Silver Bow County convictions. Under both the federal and state constitutions, a defendant is protected from a sentence predicated on misinformation about that defendant's criminal history and must be given an opportunity to explain, argue, and rebut any information, including presentencing information, that may lead to a deprivation of life, liberty, or property. Bauer could not be said to have been given that opportunity because the 1983 convictions were still valid at the time of sentencing in Blaine County, nor did the sentencing court have a full opportunity to consider the procedural and substantive consequences of the actual vacation of the 1983 convictions or the specific grounds upon which postconviction relief was granted by the Silver Bow County court. What was correct information at the time of sentencing became misinformation after the fact. Notwithstanding that the sentencing court specifically stated that it did not rely on the 1983 convictions, the Supreme Court reversed on grounds of fundamental fairness, refusing to allow the misinformation to go unchallenged before the District Court by denying Bauer the opportunity to be resentenced on the basis of materially accurate information. The case was remanded for resentencing before a new District Court Judge. Bauer v. St., 1999 MT 185, 295 M 306, 983 P2d 955, 56 St. Rep. 715 (1999), following St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), and Bishop v. St., 254 M 100, 835 P2d 732, 49 St. Rep. 650 (1992).

Different Sentencing Judge — No Presumption of Vindictiveness When Sentence Increased on Remand: Due process rights on resentencing create a presumption of vindictiveness when a sentence is increased on remand. However, when a different judge performs resentencing, there is no presumption of vindictiveness; rather, the defense must show actual vindictiveness. St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988).

Due Process at Sentencing — Protection of Community Versus Defendant's Liberty Interest: At the sentencing stage, due process requires that a convicted person's liberty interest and the risk of unjust deprivation of that interest be balanced against the state's interest in protecting the community. Due process must be observed and defendant's rights protected, but it is clear that his liberty interest does not rise to the level of an accused's at trial. St. v. Nichols, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986), followed in St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990).

No Right to Second Psychiatric Examination: Defendant was convicted of aggravated kidnapping and deliberate homicide, pursuant to pleas of guilty, and was sentenced to death. Judgment was affirmed by the Supreme Court. Subsequently, defendant filed a motion for an additional psychiatric evaluation based on the case of Ake v. Okla., 470 US 68, 84 L Ed 2d 53, 105 S Ct 1087 (1985), which was decided after arguments in defendant's case. The Supreme Court distinguished the facts of defendant's case from the facts in Ake and denied defendant's motion. The Supreme Court found that defendant had already been afforded his right to access to a competent psychiatrist for the preparation of a defense based on his mental condition and was not entitled to an additional psychiatric examination. The Ake decision lacks direct application to Montana's capital sentencing proceedings and defendant's case. St. v. Smith, 217 M 453, 705 P2d 1110, 42 St. Rep. 1348 (1985).

Capital Sentence Requested by Defendant — No Basis for Resentencing: Defendant pleaded guilty to two counts of aggravated kidnapping and two counts of deliberate homicide. Defendant requested the death penalty. After sentencing, defendant had second thoughts and on appeal sought a resentencing. The Supreme Court held there was no basis for resentencing because: (1) sentencing was not tainted by reliance on prior Canadian convictions obtained without counsel; (2) inclusion of juvenile offenses as adult offenses in presentence report was not error; (3) a court-ordered presentence interview was not violative of the fifth amendment; (4) recommendation for the death penalty in the presentence report was not improper; (5) no judicial error was committed in the extent of review of mitigating factors and no unconstitutional limit was placed on the court's consideration of mitigating circumstances; (6) no error was found in the court's denial of defendant's motion for additional psychiatric evaluation; (7) defendant was not required to be present at proceedings occurring after the verdict; (8) jury participation is not constitutionally required in capital sentencing procedures; (9) no indication was found that the trial court imposed the death penalty out of passion or prejudice; and (10) the sentence was not excessive or disproportionate. St. v. Smith, 217 M 461, 705 P2d 1087, 42 St. Rep. 463 (1985) (Smith I). A habeas corpus petition was conditionally granted in Smith v. McCormick, 917 F2d 1153 (9th Cir. 1990), a subsequent resentencing of death was reversed and remanded for preparation of a new presentence investigation, St. v. Smith, 261 M 419, 863 P2d 1000 (1993) (Smith II), and following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

Jail Sentence for DUI Not Cruel and Unusual Punishment: The defendant, who has an extensive record of driving under the influence of alcohol, was convicted on three counts of driving under the influence (DUI) and sentenced to serve 10 months in the county jail. The defendant contends her sentence is cruel and unusual punishment and a denial of equal protection because it may be greater than would be served in the state prison for a more serious offense since county jail inmates are not entitled to statutory good time allowance or parole eligibility as are prison inmates. However, the sentence falls within the maximum authorized by statute and is not so disproportionate to the crime that it shocks the conscience and outrages the moral sense of the community or of justice. Therefore, the sentence imposed is not cruel and unusual punishment that would render it unconstitutional. St. v. Bruns, 213 M 372, 691 P2d 817, 41 St. Rep. 2178 (1984).

No Jury Finding of Previous Conviction Necessary for Increased Penalty: The defendant was convicted of carrying a concealed weapon, and after stipulating to his prior conviction and being sentenced to an increased penalty because of that conviction, argued on appeal that the District Court had no jurisdiction to sentence him to an increased penalty under subsection (2) of 45-8-316 because the jury had not found the fact of his previous felony. On appeal the Supreme Court held, under the rationale of St. v. Nelson, 178 M 280, 583 P2d 435 (1978), that the prerequisites for the heavier sentence were not an element of the crime and that no finding by

the jury on the issue of the defendant's previous conviction was therefore necessary. St. v. Sanders, 208 M 283, 676 P2d 1312, 41 St. Rep. 338 (1984).

Out-of-Court Conference Between Sentencing Judge and Probation Officer — Denial of Due Process: The defendant was denied due process when the sentencing judge conferred with the presentence investigation officer behind closed doors where no opportunity was provided for argument, rebuttal, or explanation. St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), distinguished in St. v. Pease, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

Rules of Evidence Not Applicable to Sentencing: The Montana Rules of Evidence do not apply to sentencing hearings. The court correctly used relaxed rules of evidence during the sentencing hearing. St. v. Holmes, 207 M 176, 674 P2d 1071, 40 St. Rep. 1973 (1983).

State Responsible for Medical Costs Incurred After Defendant Sentenced to State Prison — State as Defendant's Legal Custodian: At the time of defendant's sentencing, she was pregnant and her child was due to be born within a few weeks. She was sentenced to 10 years' imprisonment in state prison with 2 years suspended. Rather than ordering defendant's transfer to the state prison immediately upon sentencing, the District Court ordered that defendant remain in the county jail until the baby's birth so that defendant could be attended by her personal physician. In a dispute between the county and the state Department of Institutions (now Department of Corrections) concerning who bore the responsibility for defendant's medical costs, the Supreme Court ruled that the responsibility was that of the state. The Supreme Court reasoned that since once the District Court has imposed a valid sentence, it lacks jurisdiction to modify it, the defendant became the legal responsibility of the Department of Institutions (now Department of Corrections) as soon as the judgment was filed. Wilkinson v. St., 205 M 237, 667 P2d 413, 40 St. Rep. 1239 (1983).

Disparity Between Sentence Offered in Plea Bargaining and Sentence Actually Rendered After Trial:

Because of the difficulty of distinguishing between situations where leniency is offered in exchange for a plea and situations where the defendant is punished for exercising his right to trial by jury, a sentencing court that becomes involved in the plea bargaining process and imposes a harsher sentence after trial than was offered in exchange for a guilty plea must specifically point out the factors that justify the increased sentence. (Citing St. v. Baldwin, 192 M 521, 629 P2d 222 (1981).) St. v. Tate, 196 M 248, 639 P2d 1149, 39 St. Rep. 69 (1982). Baldwin was distinguished in St. v. Smith, 276 M 434, 916 P2d 773, 53 St. Rep. 459 (1996).

To protect a criminal defendant's constitutional rights in plea bargaining situations and to help preserve public confidence in the judicial process, we today adopt ABA Standard 14-sec. 1.8(b). To implement that standard and to facilitate judicial review, a sentencing court that becomes involved in the plea bargaining process and imposes a harsher sentence after trial than was offered in exchange for a guilty plea must specifically point out the factors that justify the increased sentence. In this case, we cannot tell from the record why the trial court offered a very lenient sentence (45 days' jail time) in exchange for a plea of guilty. Nor can we tell why the court found imposition of a harsher sentence appropriate after jury trial (10 years' jail time). We have no assurance that the trial court did not increase the sentence in retaliation for defendant's insistence on a trial by jury. St. v. Baldwin, 192 M 521, 629 P2d 222, 38 St. Rep. 882 (1981), distinguished in St. v. Smith, 276 M 434, 916 P2d 773, 53 St. Rep. 459 (1996).

Defendant Sane at Time of Crime — Insane at Other Times: Defendant, convicted of aggravated assault, contended that sentencing a man suffering from severe mental illness to prison violates the constitutional ban against cruel and unusual punishment as well as 53-21-101. When a defendant is convicted and claims that he was suffering at the time of the crime from a mental disease or defect that rendered him incapable of conforming his conduct to the requirements of the law, the sentencing judge is to consider the relevant evidence of the defendant's disorder. If the judge finds the defendant did not suffer mental illness at the time of the crime, he is to be sentenced according to the guidelines in this chapter. If the finding is to the contrary, the defendant must be sentenced to Warm Springs. Despite the lack of provisions in Title 46, ch. 14, for sentencing a defendant who was sane at the time of the crime but may be insane at other times, Title 53, ch. 21, relating to treatment for mental illness, does not apply to criminal defendants. The defendant's claim that he is covered by Title 53, ch. 21, is in error. Without a finding of insanity followed by sentencing to a penal institution without provision for adequate treatment, defendant has suffered no statutory or constitutional violation. St. v. Mercer, 191 M 418, 625 P2d 44, 38 St. Rep. 312 (1981).

Increase of Sentence After New Trial — Due Process: The defendant, who had been sentenced to 100 years' imprisonment for deliberate homicide, was not denied due process of law when, after a new trial on the same charge, he was sentenced to death. The due process clause is not

offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of vindictiveness. When the District Court Judge was replaced for the new trial and sentencing and the new judge stated his reasons for imposing the death penalty with clarity, the threat of vindictiveness was not a realistic likelihood. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Chapter Law Review Articles

Sentencing, Everly & Mullowney, 42 Mont. L. Rev. 400 (1981).

Chapter Collateral References

Corrections Policy and Facility Needs, Mont. Legislative Council, 1980.

Part 1
Policy and Preliminary Procedure

Part Case Notes

Sentencing Judge Aware of Other Conviction That Was Overturned on Appeal — No Error: As a result of his involvement in one incident, defendant was convicted at separate trials of criminal possession of dangerous drugs and of aggravated assault. His drug possession conviction was reversed on appeal. Prior to this reversal, he was sentenced on the aggravated assault charge. The sentencing judge alluded to the drug conviction. Defendant claimed, in an appeal of the aggravated assault conviction, that the District Court erred by considering a conviction that had later been overturned. The Supreme Court upheld the sentencing, stating that if it is obvious from the record that the judge did not rely on the infirm conviction and the sentence would not have been different had the judge disregarded the prior conviction, the Supreme Court will find no prejudice to the defendant. St. v. Van Haele, 207 M 162, 675 P2d 79, 40 St. Rep. 1964 (1983).

Sentencing Judge's Private Out-of-Court Contact — Violation of Defendant's Right to Due Process: Private out-of-court contact by the sentencing judge with defendant's former employer affected the sentencing process and defendant's right to due process. Defendant was entitled to be resentenced by a different judge. St. v. Baker, 205 M 244, 667 P2d 416, 40 St. Rep. 1244 (1983).

Plea Bargain Nonbinding on Court: Defendant was charged with two counts of felony theft in a welfare fraud case. In conjunction with a plea bargain, she pleaded guilty to both counts and the State recommended a 3-year suspended sentence. The District Court ordered defendant to serve 3 years in prison with all but 30 days suspended and ordered restitution. Defendant contended the court erred by not imposing the sentence recommended by the State. The Supreme Court, relying on St. v. Mann, 169 M 306, 546 P2d 515 (1976), said that where the defendant was informed by the court that the recommendation of the State is not binding upon it and defendant stated she understood, she is bound by the sentence. St. v. Gray, 204 M 153, 665 P2d 781, 40 St. Rep. 735 (1983).

Factors in Sentencing — Reference to Retracted Psychiatric Report: At presentence hearing psychiatrist testified that his prior psychiatric report diagnosing defendant as antisocial was inaccurate. The judge's order stated that the report had been considered in passing sentence. The mere reference to the retracted report was not sufficient grounds for reversal, as the judge heard the retraction by the psychiatrist and there was no indication that he did not abide by the retraction. St. v. Hubbard, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982).

Sentencing Prerequisites — Reading of Entire Transcript: The fact that the judge sentencing defendant following negligent homicide conviction did not read the entire trial transcript prior to passing sentence did not mandate reversal. St. v. Hubbard, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982).

State's Introduction of Testimony and Exhibits at Sentencing Hearing: Petitioner alleged that the State's introduction of testimony and exhibits at his sentencing breached the plea agreement in which the State agreed to make "no sentencing recommendation". In view of the fact that there is no positive point in law on the State's introduction of evidence at the sentencing, as here, the State requested in fairness that a more equitable solution than granting request to withdraw the plea would be to allow petitioner to be resentenced, pursuant to the express terms of the plea agreement without any testimony or evidence introduced by the State or any statement by the prosecutor, and the Supreme Court so ordered. Gardipee v. Blodgett, 193 M 314, 631 P2d 1270, 38 St. Rep. 909 (1981).

Part Collateral References

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 ALR 4th 1069.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial. 34 ALR 4th 888.

46-18-101. Correctional and sentencing policy.

Commission Comments

Source: Model Sentencing Act, section 1.

This statement expresses the purpose of sentencing which is not merely to punish but is oriented toward rehabilitation. It recognizes the necessity of focusing attention on the particular offender and that in many cases the best method of dealing with a particular offender is not incarceration.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (3)(h) in second sentence before "counsel" deleted "court-appointed" and inserted "assigned"; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2001 Amendment: Chapter 581 in (2)(a) at end inserted "and to hold an offender accountable"; in (2)(b) after "public" inserted "reduce crime, and increase the public sense of safety"; in (2)(d) at end inserted "to provide rehabilitation and reintegration of offenders back into the community"; inserted (3)(i) providing that sentencing practices should promote and support restorative justice principles; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendments: Chapter 189 in (3)(a)(v), at end, substituted "a state prison" for "the state prison or the women's correctional system" (voided by Ch. 474 amendment); and made minor changes in style.

Chapter 474 in first sentence in (1) and at beginning of (2), after "correctional", inserted "and sentencing"; in second sentence in (1), after "crime", deleted "and for the rehabilitation of the convicted"; in first sentence in (2), after "is to", substituted language outlining state policy and (3) outlining sentencing principles for "protect society by preventing crime through punishment and rehabilitation of the convicted. The legislature finds that an individual is responsible for and must be held accountable for the individual's actions, including, whenever possible, the restoration of all pecuniary losses sustained by a victim of the offense. Corrections laws and programs must be implemented to impress upon each individual the responsibility for obeying the law. To achieve this end, it is the policy of the state to assure that prosecution of criminal offenses occurs whenever probable cause exists and that punishment of the convicted is certain, timely, and consistent. Furthermore, it is the state's policy that persons convicted of a crime be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities. Finally, it is the policy of the state to recognize that the interests of crime victims should be considered so that, to the extent possible, victims of crime may be protected from threat of future harm by the offender.

(3) (a) Sentences imposed upon those convicted of crime must be based primarily on the following:

(i) the crime committed;

(ii) the prospects of rehabilitation of the offender;

(iii) the circumstances under which the crime was committed;

(iv) the criminal history of the offender; and

(v) consideration of alternatives to imprisonment of the offender in the state prison or the women's correctional system.

(b) Dangerous offenders who habitually violate the law and victimize the public must be removed from society and correctively treated in custody for long terms, as needed. Other offenders must be dealt with by probation, suspended sentence, community corrections, community service, or fine whenever the disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual. Whenever possible, sentences for offenders must include restitution to the victim, payment of costs as provided in 46-18-232, and payment of costs of court-appointed counsel as provided in 46-8-113.

(4) It is also the policy of the state that alternatives to imprisonment, such as community corrections, should be used whenever appropriate for nonviolent felony offenders in order to provide them opportunities to gain work experience, to learn life skills, to obtain education and training, or to participate in other activities that will reduce recidivism and enable offenders to become productive members of society"; and made minor changes in style.

1995 Amendments: Chapter 125 in (2), at end of second sentence, inserted phrase relating to restoration of pecuniary losses by victim and inserted last sentence relating to interests and protection of crime victims.

Chapter 546 in (3)(a)(v) substituted "women's correctional system" for "women's correctional center"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 10 in (3)(a)(v) substituted reference to the Women's Correctional Center for reference to a women's correctional facility; and made minor changes in style.

1991 Amendment: Inserted (3)(a)(v) concerning sentencing alternatives; in (3)(b), near middle of first sentence after "suspended sentence", inserted "community corrections, community service"; inserted (4) concerning alternative sentencing for nonviolent felony offenders; and made minor changes in style. Amendment effective July 1, 1991.

1983 Amendment: Substituted a new, three-subsection policy relating to protection of society; acceptance of responsibility for one's actions; certain, timely, and consistent punishment; individual treatment in fashioning punishments; what sentences must be primarily based on; and payment of restitution or costs for former text that read: "This chapter shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual."

Case Notes

Cases Under Current Law 789
Cases Under Former "Nondangerous Offender" Designation Law 795

CASES UNDER CURRENT LAW

Failure of Defendant to Admit Incest — Sentence Not Considered More Harsh Given Relevant Sentencing Factors: Bullman consistently maintained that he was not guilty of incest with his stepdaughter because he was never married to her mother. Because Bullman refused to admit guilt and was thus ineligible for community-based treatment, he asserted that he was sentenced more harshly by being sentenced to prison. The Supreme Court examined the record and disagreed. The sentencing court was aware of the prohibition against sentencing a defendant to prison because the defendant does not admit guilt, but the court also considered numerous other relevant factors in sentencing Bullman to prison in addition to the expert opinion that Bullman was not a candidate for community-based treatment, including: (1) the significant impact of the crime on the victim; (2) the need to protect society; (3) Bullman's need for appropriate treatment; (4) Bullman's criminal history; and (5) Bullman's long history of substance abuse. Given these sentencing factors, the Supreme Court could not conclude that Bullman was sentenced to prison for failure to admit guilt, and the conviction was affirmed. St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

Forty-Year Sentence for Two Counts of Vehicular Homicide Legal and Affirmed: Following conviction for two counts of vehicular homicide while under the influence, Baker was sentenced to 15 years suspended on the first count and 25 years with 5 years suspended on the second count. Baker contended that the 40-year sentence violated Montana's correctional and sentencing policies because the length of the sentence was not understandable, commensurate with punishment imposed on other persons committing the same offense, or neutral with respect to Baker's race. The Supreme Court concluded that the sentence was well within the statutory parameters as to length and therefore legal. Baker's sentence was affirmed. St. v. Baker, 2008 MT 396, 347 M 159, 197 P3d 1001 (2008).

No Error in Treating Retribution as Component of Punishment: Rickman asserted that the sentencing court improperly considered retribution as a factor in sentencing Rickman to life with no parole eligibility for 55 years for deliberate homicide under the felony-murder rule. The Supreme Court disagreed, noting that retribution has repeatedly been held to be a component of punishment. It was appropriate for the sentencing court to consider that the victim was innocent and to consider the impact of the homicide on the victim's family. The judgment and commitment of the sentencing judge indicated that retribution was only the third basis for the sentence, and in light of Rickman's minimal potential for rehabilitation and Rickman's significant threat to the public, the sentencing court's use of the word "retribution" comported with state sentencing policies and procedures. Rickman's sentence was affirmed. St. v. Rickman, 2008 MT 142, 343 M 120, 183 P3d 49 (2008). See also St. v. Kirkbride, 2008 MT 178, 343 M 409, 185 P3d 340 (2008).

Partial Parole Restrictions Affirmed: Rickman was sentenced to life with no parole eligibility for 55 years for deliberate homicide under the felony-murder rule. Rickman appealed the sentence on grounds that the sentencing court had no authority to restrict parole eligibility for only part of the sentence. Noting that challenges to partial parole restriction have been upheld

since at least 1988, the Supreme Court disagreed with Rickman's assertion. A sentencing court has discretion to impose parole restrictions, and if a sentencing court has discretion to impose a restriction of no parole eligibility, then a sentencing court can likewise impose a restriction of limited parole eligibility. St. v. Rickman, 2008 MT 142, 343 M 120, 183 P3d 49 (2008). See also St. v. Kirkbride, 2008 MT 178, 343 M 409, 185 P3d 340 (2008), and St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

Negligent Homicide Considered Crime of Violence — Consideration of Sentencing Alternatives to Prison Not Required: English asserted that because negligent homicide is not a crime of violence, the trial court erred by failing to consider sentencing alternatives to prison pursuant to subsection (3)(f) of this section when sentencing English to 20 years in prison for negligent homicide. The Supreme Court found the argument unpersuasive. Under 46-18-104, a crime in which the offender causes serious bodily injury or death to a person other than the offender is defined as a violent crime. English negligently caused the death of another person, and the trial court did not err in ruling that the negligent homicide was a crime of violence or by failing to consider sentencing alternatives to prison. St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Sentence for Negligent Homicide Not Considered "Trial Tax" in Violation of Due Process: English contended that a sentence of 20 years with 10 suspended for negligent homicide constituted a "trial tax" imposed for taking the case to trial rather than pleading guilty, in view of the disparity between his sentence and cases cited by the trial court in which defendants pleaded guilty or nolo contendere. The Supreme Court disagreed. The trial court focused on the aggravating circumstances in English's case, not on the sentences imposed in prior negligent homicide cases, and there was no indication that the trial court imposed a "trial tax" on English for proceeding to trial. There may be appropriate differences between sentences imposed on defendants who have pleaded guilty and those who have proceeded to trial for the same offense. The sentence was within statutory parameters, did not violate English's due process rights, and was affirmed. St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Lack of Remorse Not Sole Sentence Enhancement Factor — Incest Sentence Affirmed: Defendant contended that the sentencing court erred in augmenting a sentence for incest simply because defendant did not show remorse or admit guilt. The Supreme Court noted that St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), prohibits enhancement of a sentence solely because a defendant is not remorseful or refuses to be accountable for the defendant's conduct. However, in this case, the sentencing court did not rely solely on defendant's attitude in enhancing the incest sentence but also considered defendant's risk of reoffending, risk to society, prospects for rehabilitation, character, background, history, and mental and physical functioning. Thus, Shreves was distinguishable, and the sentence was affirmed. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

Challenge to Equity of Sentence Properly With Sentence Review Division, Not Supreme Court: A challenge to the equity of a sentence, as opposed to the legality of a sentence, properly lies with the Sentence Review Division, not the Supreme Court, which does not review a sentence on appeal for mere inequity or disparity. In this case, defendant cloaked an equity challenge in the vestiges of a constitutional argument in seeking Supreme Court review, but the court declined to address it, leaving the matter to the Sentence Review Division. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004), following St. v. DeSalvo, 273 M 343, 903 P2d 202 (1995), and followed in St. v. Baker, 2008 MT 396, 347 M 159, 197 P3d 1001 (2008).

Failure to Pay Debts Noted in Sentencing — Poverty and Social Status Not Improperly Considered: The District Court listed numerous reasons for sentencing Nolan for criminal endangerment and resisting arrest, including the violence of the offenses at issue, Nolan's 25 traffic-related convictions, his 2 prior felony convictions involving violence, and the numerous opportunities previously given to Nolan to be a responsible, law-abiding citizen. One of the court's additional considerations was that Nolan did not pay his debts, including child support, while employed. Nolan contended that the court's consideration of his poverty as a sentencing criteria was an unconstitutional infringement on his due process rights. However, failure to pay debts does not generally equate with poverty, and because indigency or poverty was not the touchstone for imposing the maximum allowable punishment, the District Court did not improperly rely on Nolan's poverty in sentencing Nolan to less than the maximum penalty allowed. Nolan's contention that the sentencing court relied on his social status was also unfounded, even though testimony was given regarding the number of Nolan's children who were born out of wedlock. Nolan did not object to the inquiries when they were made, and Nolan opened the door to the inquiries by presenting both witness testimony and his own statement regarding being a good father and loving his children. Nolan's due process rights were not

violated through mention of his failure to pay bills and father children out of wedlock, and the sentences were affirmed. St. v. Nolan, 2003 MT 13, 314 M 47, 62 P3d 1118 (2003), distinguishing St. v. Farrell, 207 M 483, 676 P2d 168 (1984), and St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000).

Sentence Based on Refusal to Admit Guilt Violative of Right Against Self-Incrimination: Shreves was convicted of deliberate homicide and sentenced to 100 years in prison, with no parole for 60 years. At trial, Shreves chose to testify on his own behalf and assert his innocence, and at sentencing, Shreves chose not to testify, but his counsel indicated that Shreves maintained his innocence. The District Court imposed the sentence based in significant part on Shreves' failure to show remorse or responsibility. Shreves appealed on grounds that it was improper to hold his refusal to admit to the crime against him in determining the sentence. The state contended that the sentencing court properly considered the lack of remorse as a factor relevant to Shreves' rehabilitation and the danger presented to the community and argued that the lack of remorse was based on trial testimony and evidence. The Supreme Court considered whether Shreves adequately invoked the right to maintain silence, the scope of the oral sentence that controlled over the subsequent written sentence as it related to the entire sentence, and the District Court's decision to base its sentence in large part on Shreves' refusal to admit to the crime. Although lack of remorse can be considered as a sentencing factor, a sentence that is based on a refusal to admit guilt cannot be upheld. Here, the Supreme Court was unable to find a sentencing distinction between punishing Shreves for remaining silent and the proper consideration of Shreves' failure to show remorse. A sentencing court may not draw a negative inference of lack of remorse from a defendant's silence at sentencing when the defendant has maintained innocence throughout the proceedings. Shreves was improperly penalized for maintaining his innocence pursuant to the constitutional right to remain silent. The sentence was therefore illegal. Shreves' conviction was reversed, and the case was remanded for resentencing. St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), distinguished in St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004), and St. v. Burkhart, 2004 MT 372, 325 M 27, 103 P3d 1037 (2004). See also St. v. Imlay, 249 M 82, 813 P2d 979 (1991), St. v. Kelly, 265 M 298, 876 P2d 641 (1994), St. v. Fuller, 276 M 155, 915 P2d 809 (1996), and St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

Mental Disease Not Affecting Ability to Appreciate Criminality of Behavior — Prison Sentence, Rather Than Hospitalization, Appropriate: Smith contended that the District Court erred in concluding that he did not suffer from a mental disease or defect that rendered him unable to appreciate the criminality of his behavior or to conform it to the requirements of law, pursuant to 46-14-311 and 46-14-312, and that because of his personality disorder, he should have been sentenced to the state hospital rather than the state prison for felony assault and assault on a peace officer in order to satisfy state principles of prevention and reformation in light of his unique and particular posture as a mentally ill person. However, even assuming that Smith had a mental disease or defect, the District Court found that Smith's mental condition did not have the effect of rendering him unable to appreciate the criminality of his behavior or to conform it to the requirements of law. Smith failed to satisfy this additional element of 46-14-311, so hospitalization was not required under 46-14-312. St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000).

Incorrect Sentences for Operating Vehicle Without Insurance and Accident Involving Damage to Vehicle Reversed: Clark was charged on two occasions with multiple misdemeanor traffic offenses. The District Court properly based its sentencing on the factors in this section, but incorrectly applied the 1995 version of 61-6-304 in sentencing Clark to 6 months in the county jail for operating a vehicle without valid liability insurance when the 1993 version of the statute in effect at the time that the crime was committed allowed a maximum sentence of 10 days. The court also sentenced Clark to 10 days' imprisonment and fined him $100 for a conviction under the 1995 version of 61-7-118 related to an accident involving damage to a vehicle, but the 1993 version in effect at the time that the crime was committed allowed for the imposition of imprisonment or a fine, but not both, upon a first conviction. These sentencing errors constituted reversible error as a matter of law, and the Supreme Court remanded for resentencing consistent with the applicable statutes. St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107, 57 St. Rep. 185 (2000).

Similar Purposes of Adult and Youth Sentencing Statutes Regarding Public Safety and Rehabilitation: In its transfer order, the Youth Court concluded that adult sentencing policies are similar to the sentencing purposes of the Montana Youth Court Act in that both are designed to ensure rehabilitation, accountability, and protection of the community. Spina contended that the conclusion was a misstatement of the law because the declaration of purpose in the Montana

Youth Court Act does not promote accountability. The Supreme Court held that, although not identical, the statutes have similar purposes, including holding individuals accountable for their actions through the imposition of restitutionary measures. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Prison Murder — Death Sentence Not Imposed Under Influence of Passion, Prejudice, or Arbitrary Factors: Johnson was convicted of killing another prison inmate and contended on appeal that the death sentence was imposed under the influence of passion, prejudice, or other arbitrary factors because the District Court predicated its sentence on Montana's correctional policy, as set forth in this section, but that the policy does not expressly provide for death as punishment for any crime. The Supreme Court agreed that the statute does not expressly discuss death as a punishment for criminal conduct, but noted that, being a general declaration of state correctional policy, the statute also does not discuss most of the sentencing options allowed by law. Notwithstanding the fact that the death sentence has been affirmed as constitutional, the District Court's findings reflected its consideration of the general statutory principles that a sentence be based primarily on the crime committed, the prospects of rehabilitation, the circumstances under which the crime was committed, and the offender's criminal history. The circumstances of this crime, coupled with Johnson's long history of assaultive and predatory behavior both in and out of prison, were reflected in the court's analysis and showed that the court carefully and dispassionately considered all the evidence before it concluded that the death penalty was appropriate. St. v. Johnson, 1998 MT 289, 291 M 501, 969 P2d 925, 55 St. Rep. 1186 (1998).

Application of Repealed Dangerous Offender Law to Offender Who Committed Crime Before Repeal and Was Sentenced After Repeal: The rule that the sentencing law in effect at the that time a crime is committed governs the sentence to be imposed applies to situations in which that law is amended after the crime is committed but before the sentence is imposed and in which the law still exists when the sentence is imposed. It is the law as it read prior to the amendment that governs the sentence. This rule does not apply to a situation in which a sentencing law in effect when a crime is committed is repealed before imposition of sentence. In this case, a dangerous offender statute in effect when Wilson committed his crimes was repealed before the judge sentenced him for the crimes, yet the judge used it to designate Wilson as a dangerous offender, thus increasing the punishment. In this type of situation, when the effect of the repeal is to lessen, not to increase, punishment and the repealer has no saving clause, the law in effect at the time of sentencing applies. Because the dangerous offender statute had been repealed before sentencing, it was not in effect at the time of sentencing and did not apply to the sentence. St. v. Wilson, 279 M 34, 926 P2d 712, 53 St. Rep. 1034 (1996).

Dangerous Offender Determination — Record Found to Show "Articulated Reasons": Hofman pleaded guilty to aggravated assault, felony assault (now assault with a weapon), misdemeanor assault, and criminal mischief. At the time of sentencing, the District Court designated Hofman a dangerous offender (See 1995 repeal of 46-18-404). Citing St. v. Ford, 218 M 215, 707 P2d 16 (1985), Hofman alleged that the District Court record lacked "articulated reasons" for the designation as dangerous offender. The Supreme Court reviewed the record and noted that the District Court Judge referred to facts demonstrating Hofman's propensity for violence and pointed out that Hofman had been given numerous opportunities to change. The Supreme Court held that the District Court adequately stated the reasons for the designation. St. v. Hofman, 275 M 455, 913 P2d 1256, 53 St. Rep. 223 (1996).

Alternative Sentencing for Nonviolent Offenders a Consideration, Not a Presumption: Stevens asserted that state law created a presumption that nonviolent felony offenders be alternatively sentenced rather than imprisoned and that the trial court's statement that the state had placed special emphasis on punishing sex offenders when the victims were under 16 years of age was contrary to the policy of alternative sentencing. The Supreme Court held that the record indicated that the trial court had considered alternative sentencing and found it inappropriate because of the nature of the crime and that the sentencing order was not error. St. v. Stevens, 273 M 452, 904 P2d 590, 52 St. Rep. 1078 (1995).

Prisoner Rehabilitation Not State Obligation: The plaintiffs sought recovery in tort from the state on the basis that the state was negligent in releasing a nonrehabilitated prisoner who killed their child. The Supreme Court held that the state is not a guarantor of its rehabilitation facilities and that the court would not impose that obligation on the state. VanLuchene v. St., 244 M 397, 797 P2d 932, 47 St. Rep. 1609 (1990), followed in King v. St., 259 M 393, 856 P2d 954, 50 St. Rep. 848 (1993).

Consecutive Terms Allowable for Sexual Assault: The District Court did not err in sentencing defendant to two consecutive terms upon conviction of sexual assault when the factors in this

section were considered and the sentence fell within the legal limits of 45-5-502. St. v. Gilpin, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988).

Inability to Pay Restitution — Not Violative of Equal Protection in Light of State Correctional Policy and Previous Offenses: A defendant convicted of felony theft was sentenced to 5 years in the state prison with 2 years suspended and, in addition, was ordered to pay restitution. The defendant asserted on appeal that he was sentenced to a prison term because of his indigency, in violation of his right to equal protection. However, the District Judge specifically noted the prison term was necessary to protect the property of others and that the defendant's criminal record contained three previous misdemeanor thefts. The Supreme Court found these to be sufficient reasons to support incarceration and upheld the state's correctional policy outlined in 46-18-101. The court noted that the sentence was well within the parameters of punishment for felony theft in 45-6-301. Finding no abuse of discretion or violation of the defendant's constitutional rights, the District Court was affirmed. St. v. Carroll, 220 M 466, 716 P2d 212, 43 St. Rep. 531 (1986).

Sentence of 100 Years — Based on Prevention of Future Crimes: On conviction of deliberate homicide the defendant received the maximum allowable sentence, 100 years, and was determined ineligible for designation as a nondangerous offender, or for parole. On appeal, he argued the sentence was not based on any credible evidence presented at the sentencing hearing or contained in the presentence report, but was motivated by the trial court's desire for vengeance on behalf of the victim's family. The court indicated it imposed the sentence because it believed defendant should be removed from society. The Supreme Court held that the sentence did not violate Art. II, sec. 28, Mont. Const., which requires that "laws for the punishment of crime shall be founded on the principles of prevention and reformation" (amended in 1998 to read "prevention, reformation, public safety, and restitution for victims"), nor did it violate 46-18-101, which provides that the policy behind sentencing is the rehabilitation, if possible, of convicts. Article II, sec. 28, Mont. Const., allows a trial court in its discretion to base a sentence on the principle of prevention of future crimes. This includes the power to remove a person from society, as the court found necessary in this case. Also, the sentence is within the permissible statutory range, and in the absence of clear abuse of discretion is properly reviewed by the Sentence Review Division. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), followed in St. v. Valcourt, 254 M 174, 835 P2d 753, 49 St. Rep. 686 (1992).

Constitutional Requirement Satisfied by Sentence Founded on Prevention and Reformation: The defendant, who has an extensive record of driving under the influence of alcohol, was convicted on three counts of driving under the influence (DUI). She was sentenced to serve time in the county jail. The defendant contends her sentence violates the constitution as it does not provide for her rehabilitation. Article II, sec. 28, Mont. Const., requires that laws for punishment of crime be founded on the principles of prevention and reformation (amended in 1998 to read "prevention, reformation, public safety, and restitution for victims"). The defendant's sentence furthers the prevention principle through her incarceration, addresses the reformation principle through ordering her to abstain from the use of alcohol, and provides the avoidance of further incarceration as an incentive to reform. Thus, the constitutional requirement is satisfied. St. v. Bruns, 213 M 372, 691 P2d 817, 41 St. Rep. 2178 (1984).

No Proof Erroneous Information Considered by Sentencing Court: The defendants were sentenced to lengthy prison terms for deliberate homicide. They contend the sentencing judge considered information from a psychiatrist that is not directly reflected in the record, but the record does not support their contention. The comments concerning the doctor's report were made by defense counsel during oral presentation to the sentencing court. The defendants have failed to show that any information furnished by the psychiatrist was considered improperly by the court; thus they have failed to show any erroneous information was considered by the court in passing sentence. St. v. Hintz, 213 M 364, 691 P2d 814, 41 St. Rep. 2172 (1984).

Objection to Sentence for Punishment Rather Than Prevention and Reformation — Lack of Proof: Objection that sentence was for punishment rather than for prevention of further crime and reformation of defendant was clearly without merit, as there was no evidence or authority cited by appellant to establish that the sentence would not deter him or others from future wrongful conduct or that the sentence would not lead to reformation. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Mention of "Setting an Example" at Sentencing — Not Error Viewed in Context: Although the trial court did mention "setting an example" when imposing sentence, that is not a reason for remanding for resentencing as a violation of Art. II, sec. 28, Mont. Const., because the judge's use of the presentencing report and his reasons for the length of the sentence indicate no impropriety in the sentencing. St. v. DeSilva, 209 M 169, 679 P2d 1237, 41 St. Rep. 620 (1984).

Consideration of Indigency in Sentencing — Violation of Due Process: Defendant was convicted of theft of public assistance funds in violation of 45-6-301 and sentenced to the maximum term of imprisonment, 10 years. The sentence was then suspended on the conditions that defendant seek alcohol treatment, make restitution of the funds, and pay the fees of his court-appointed attorney. The Supreme Court ruled that if the reason for defendant's receiving the maximum sentence was that he is indigent and will therefore make restitution slowly, the sentence is a violation of his right to due process. The court remanded the case for reconsideration of the sentence in view of the opinion. St. v. Farrell, 207 M 483, 676 P2d 168, 41 St. Rep. 91 (1984), followed in St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000).

Timing of Sentencing Required to Bring Defendant Within Operation of Statute: Where the defendant was convicted of two counts of negligent homicide following a previous conviction for burglary within 5 years prior to the negligent homicide convictions, the District Court did not err in sentencing the defendant under the persistent felony offender statute. The defendant's contention that he is not "presently being sentenced for a second felony" until after the court has determined to sentence him to a term of imprisonment for more than 1 year is a hypertechnical construction of the statute intended to avoid the clear intention of the Legislature. The defendant's case is covered by the legislative mandate (deleted by a 1983 amendment) that the chapter be liberally construed to the end that dangerous offenders be correctively treated in custody for long terms as needed. St. v. Ballard, 202 M 81, 655 P2d 986, 39 St. Rep. 2342 (1982).

Discretion of Court — Different Sentences for Co-Offenders: On appellate review, undermining the legality of a sentence requires a showing that the judge abused his discretion in the sentencing process. There was no abuse of discretion where defendant and another were separately convicted of the same burglary, the other person was offered and accepted a bargain for a 3-year deferred sentence, and defendant was offered a bargain for a 10-year sentence with 5 years suspended, refused it, and was tried, convicted, and sentenced to 10 years. There was a strong possibility that his alibi defense was frivolous, and he had a prior felony record. St. v. White, 200 M 123, 650 P2d 765, 39 St. Rep. 1619 (1982).

Codefendants — Disparate Sentences — Suspension Versus Twenty Years: Defendant, a 28-year-old male with a history of involvement with weapons, and his codefendant, a 58-year-old alcoholic with no record of violence, were each convicted of two counts of kidnapping and two counts of assault in regard to two girls 12 and 14 years old. Defendant was sentenced to two consecutive 10-year prison sentences on the kidnapping convictions and to 6 months on each assault charge, to run concurrently with each other and with the kidnapping sentences. Codefendant, defendant's natural father, received a 10-year sentence, all of which was suspended on the condition that he commit himself to alcohol treatment at a state institution and remain a law-abiding citizen. The Supreme Court ruled that there was no denial of equal protection as claimed by defendant. St. v. Herrera, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

Dangerous Offender Determination — Use of Defective Information: After defendant and his father kidnapped two minor girls and took them to the father's house, father told defendant to "go get the gun" and defendant did so and placed it between the two men on the couch where they were sitting. The girls were not threatened with the gun. The trial judge told defendant that "the reason you're designated a dangerous offender is that's about the fourth gun incident you were in". Review of the record on appeal showed: (1) a possible misapprehension of defendant's actual criminal background and apparent confusion as to the crimes involved; (2) no convincing evidence that this was defendant's fourth gun incident; and (3) an indication that one of the prior convictions considered by the judge was constitutionally defective because defendant did not have counsel. The sentencing court cannot rely upon a previous criminal record in sentencing if that record contains constitutionally infirm convictions. Defendant had a right to have his sentence based upon substantially correct information and was entitled to a rehearing on his designation as a dangerous offender. St. v. Herrera, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

Partially Disabled Defendant — Excessive Sentence: Ordinarily a sentence is not cruel and unusual punishment if it is within the maximum established by statute, and review properly lies with the Sentence Review Division. The fact that defendant is partially disabled does not automatically render him incapable of harming other persons or society, and the facts here are sufficient to justify the designation of dangerous offender. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982).

Reasonable Notice as to Witness — Remoteness of Evidence: The State, during sentencing, intentionally surprised the defendant by testimony of two women with whom the defendant had

allegedly had sexual contact without consent some 10 years earlier. The court ordered resentencing because of the State's denial of reasonable notice. The defendant did not waive his right to complain when he did not request a continuance at the time of sentencing. The question of admissibility of such evidence as having a bearing on the sentencing and as to whether it is remote and uncorroborated was left to the reasonable discretion of the trial court. St. v. Price, 191 M 1, 622 P2d 160, 37 St. Rep. 1926 (1980).

Presentencing Hearing — Cross-Examination: An in-chambers interview with the victim in order to determine her feelings as to an appropriate sentence, where defendant was absent, defense counsel was denied cross-examination, and no opportunity was afforded the defense to refute the information, violated defendant's right to be sentenced under circumstances free from misinformation. Sentence was vacated and the case remanded for resentencing. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Constitutionality of Death Sentence: Under the law at the time of the crime, which has since been amended and then repealed, there was discretion in the procedures for imposing the death sentence. The statutes were held to have met the three general criteria requisite to a valid death penalty statutory scheme: (1) at least one statutory aggravating circumstance before a death sentence may be considered; (2) allowance for consideration of mitigating circumstances relating to the individual defendant; and (3) prompt judicial review. The Montana statutory scheme afforded the defendant the procedural safeguards necessary to protect his substantive right to be sentenced without arbitrariness or caprice. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

CASES UNDER FORMER "NONDANGEROUS OFFENDER" DESIGNATION LAW

Designation as Dangerous Offender Supported by Record: Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged her designation as a dangerous offender for purposes of parole eligibility. The Supreme Court reviewed the findings of fact made by the District Court and noted that the District Court had made findings concerning her lack of remorse, the fact that she did not act with strong provocation, and the possibility of her committing the crime again. Because of these findings, the Supreme Court upheld the designation as a dangerous offender. St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

Error in Determining Offender Status When Statute Not in Effect: As set out in St. v. Stevens, 273 M 452, 904 P2d 590 (1995), the law in effect at the time of the commission of a crime, rather than the law at the time of sentencing, controls as to the possible sentence. Finley committed an offense on August 20, 1989. At that time, 46-18-404 (now repealed) did not grant a District Court the authority to determine dangerous or nondangerous offender status. The amendment that instituted that authority took effect October 1, 1989. Thus, the District Court had no authority to determine Finley's status, and its designation of Finley's offender status was reversible error. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), followed in Chandler v. Mahoney, 2000 MT 294, 302 M 309, 18 P3d 312, 57 St. Rep. 1247 (2000).

Designation Upheld: In a prosecution for kidnapping and assault, the District Court articulated numerous reasons for designating each defendant as a dangerous offender. These reasons included a chemical dependency problem, continuing to drink and engage in unlawful acts despite treatment, numerous misdemeanor convictions and a juvenile record, lack of remorse, disrespect for and a defiance of the law and its officers, a failure to recognize that the unlawful actions were wrong, and a finding that the defendant posed a threat to the public and the victims. When the District Court clearly articulated its reasons in support of its determination that the defendants presented a danger to society and the victims and its reasons were fully supported by the record, the court did not abuse its discretion when it designated the defendants dangerous offenders (see 1995 repeal of 46-18-404) for the purposes of parole. St. v. Eichenlaub, 272 M 332, 901 P2d 90, 52 St. Rep. 786 (1995).

Dangerousness to Others as Basis for Designation as Dangerous Offender: Henrich was convicted of several crimes stemming from the sexual abuse of his daughters and was designated a dangerous offender (see 1995 repeal of 46-18-404). Henrich appealed the designation, claiming that there was insufficient evidence of his dangerousness. The Supreme Court found that in making the designation, the District Court considered the evidence at trial, the presentence investigation report, and the sentencing hearing. The District Court found that Henrich was a danger to his daughters. Because dangerousness to others may serve as a basis for the designation, the Supreme Court upheld the designation. St. v. Henrich, 268 M 258, 886 P2d 402, 51 St. Rep. 1275 (1994).

No Statutory Requirement of Dangerous Offender Designation — Court's Discretion: The provisions of 46-18-404 (now repealed) are mandatory only when the circumstances require the court to sentence one as a nondangerous offender. If a defendant satisfies only one of the prerequisites of this section for designation as nondangerous, then the court may in its discretion designate the defendant either dangerous or nondangerous. The court must exercise its discretion, and when the court refused to do so because it erroneously interpreted statute and concluded that it had no discretion, its designation of the defendant as dangerous must be reversed. St. v. Lorenz, 267 M 186, 883 P2d 98, 51 St. Rep. 1027 (1994).

Failure to Articulate Reasons for Dangerous Offender Designation as Warranting Remand: The District Court designated defendant as a dangerous offender for parole purposes but failed to articulate why defendant represented a substantial danger to other persons or to society. Under the rationale of St. v. Morrison, 257 M 282, 848 P2d 514 (1993), the Supreme Court remanded for additional articulation of the District Court's reasons for a dangerous or nondangerous designation. St. v. Wing, 264 M 215, 870 P2d 1368, 51 St. Rep. 223 (1994), on remand, reversed and remanded for further proceedings in St. v. Lorenz, 267 M 186, 883 P2d 98, 51 St. Rep. 1027 (1994).

Defendant to Be Sentenced Under Statute Existing at Time of Original Sentencing: Suiste argued that the District Court had violated the ban against ex post facto legislation by designating him as a dangerous offender when it revoked his suspended sentence for a crime that he was originally convicted of in 1979. By so doing, Suiste argued that the court was subjecting him to a harsher penalty than he could have received at the time that he committed the offense. The Supreme Court held that the defendant was entitled to be sentenced under the statute in effect at the time of the original sentencing. St. v. Suiste, 261 M 251, 862 P2d 399, 50 St. Rep. 1309 (1993).

Convicted Felon Designated Nondangerous Offender for Purposes of Parole Eligibility Not Automatically Entitled to Bail Pending Appeal: Prior to his conviction for deliberate homicide, Moore was allowed bail, and following conviction, he was designated a nondangerous offender for purposes of parole eligibility. After conviction, Moore was denied bail pending appeal. Moore petitioned for a writ of habeas corpus, claiming that he is entitled to bail pending appeal as a matter of law pursuant to 46-18-404 (now repealed). The Supreme Court found that the criteria for admitting a defendant to bail pending appeal and the criteria for designating the defendant a nondangerous offender are not the same. Under 46-18-404(1)(b) (now repealed) the trial court is required to determine whether the defendant constitutes a "substantial danger to other persons or society", while under 46-9-107, the trial court may not allow bail pending appeal unless it finds that the defendant "is not likely to flee". The Supreme Court held that it could therefore be appropriate to designate a defendant such as Moore a nondangerous offender for the purposes of parole eligibility but also be appropriate to deny him bail pending appeal. Moore v. McCormick, 260 M 305, 858 P2d 1254, 50 St. Rep. 1054 (1993).

Dangerous Offender Designation Consistent With Defendant's Actions and Prior Record: Defendant asserted error in being designated a dangerous offender because the District Court miscounted his felony convictions. However, the court's misinterpretation of defendant's criminal record was not reversible error, and the dangerous offender designation was appropriate given defendant's five felony convictions and his obvious threat to society, evidenced by his longstanding serious drug problem and his current offenses, including a high-speed chase through downtown Billings while under the influence of drugs, which resulted in property damage and injuries to innocent persons. St. v. Willson, 250 M 241, 818 P2d 1199, 48 St. Rep. 907 (1991).

Designation as Dangerous Offender Not Error: It was not error to designate defendant as a dangerous offender after he was convicted of aggravated kidnapping, aggravated assault, felony assault (now assault with a weapon), and resisting arrest. Defendant had beaten his common-law wife over a period of at least 2 hours. St. v. Brady, 249 M 290, 816 P2d 413, 48 St. Rep. 667 (1991).

Nature of Crime Sufficient to Designate Person as Dangerous Offender — Reasons Required to Be in Findings: The defendant argued that the trial court erred in designating him a dangerous offender because he had never been convicted of a previous crime. The Supreme Court held that the vicious nature of the offense was sufficient to allow the trial court to designate the defendant a dangerous offender but remanded the case because the trial court is required to state in its findings the reasons for the designation. St. v. Belmarez, 248 M 378, 812 P2d 341, 48 St. Rep. 472 (1991), followed in St. v. Morrison, 257 M 282, 848 P2d 514, 50 St. Rep. 270 (1993), and St. v. Evans, 272 M 58, 899 P2d 1073, 52 St. Rep. 593 (1995).

Designation as Extremely Dangerous Person — Limitation of Eligibility of Parole: In its reasons for sentence, the District Court characterized defendant as "shrewd, self-serving, deceitful, extremely dangerous, a high risk for escape and for future crimes". This designation was sufficient to take defendant out of the category of nondangerous offender and to warrant limiting his eligibility for parole for 25 years. St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Defendant Designated Dangerous Offender — No Felony Convictions in Previous Five Years: The defendant appealed his sentencing as a dangerous offender on the basis that his prior felony convictions were of a nonviolent nature and occurred more than 5 years prior to his conviction. The Supreme Court held that the lower court had not abused its discretion in characterizing the defendant as a dangerous offender due to the serious nature of the present crime that the defendant had committed. St. v. Mazurkiewicz, 245 M 172, 799 P2d 1066, 47 St. Rep. 1962 (1990).

Dangerous Offender Designation With No Previous Convictions: The defender argued that the lower court had erred in designating him a dangerous offender for selling drugs when he had no previous convictions. The Supreme Court affirmed the decision on the basis that the lower court had found that the defendant had been involved in the operation for a long period of time on a large scale and therefore represented a substantial danger to society. St. v. Baldwin, 242 M 176, 789 P2d 1215, 47 St. Rep. 614 (1990).

Separate Crime Not Created by Dangerous Offender Provision — Due Process Considerations: Defendant argued that the restriction of parole eligibility under 46-18-404 (now repealed) was a distinct crime separate from the underlying offense or was an element of the underlying offense and as such the prosecution must charge dangerous offender status in the information or indictment and prove it beyond a reasonable doubt. The Supreme Court disagreed, holding that the dangerous offender status does not create a separate crime or element of a crime but rather is part of a sentencing scheme that does not circumvent due process. While federal due process imposes some limits beyond which states may not go, application of the reasonable doubt standard has always depended on how state legislatures choose to define a crime. St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990), followed in St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994), and St. v. Henrich, 268 M 258, 886 P2d 402, 51 St. Rep. 1275 (1994). Byers was overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995). See also McMillan v. Pa., 477 US 79, 91 L Ed 2d 67, 106 S Ct 2411 (1986), and Patterson v. N.Y., 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319 (1977).

Facts Supporting Dangerous Offender Status:

The sentencing court satisfied the articulation requirements of 46-18-404 (now repealed) when, among other factors, it considered: (1) the presentence report; (2) the defendant's prior criminal history; (3) the inability of defendant to live in the community for more than 3 years without being convicted of felony drug possession and felony assault (now assault with a weapon); and (4) the violence of the crimes and the danger to the victim. St. v. Hawkins, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989).

Designation as a dangerous offender was proper upon finding that defendant: (1) admitted daily use of "lots of cocaine" prior to arrest; (2) had intense anger for any kind of authority; (3) had a long history of misdemeanor arrests; (4) threatened to harm several witnesses or their families; and (5) committed a serious crime while still on parole. St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988).

Sufficiency of Reasons When Set Out in First Portion of Judgment: Although the list of findings articulating defendant a dangerous offender was set out in the first portion of a sentence and the dangerous offender designation in the latter portion, it was all part of the same judgment and therefore sufficient to meet the articulated reasons requirement. St. v. McPherson, 236 M 484, 771 P2d 120, 46 St. Rep. 525 (1989).

Consideration of Persistent Criminal Conduct in Designation as Dangerous Offender: The District Court properly exercised its discretion in designating defendant a dangerous offender after considering defendant's persistence in criminal conduct and the failure of earlier discipline to deter or reform him. St. v. Buckman, 236 M 37, 768 P2d 1361, 46 St. Rep. 163 (1989). See also St. v. Nichols, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986).

Statutory Conditions Mandatory Before Nondangerous Designation Required: Both conditions outlined in 46-18-404 (1) (now repealed) must be met before a court is required to designate an offender as nondangerous: (1) lack of a felony conviction in the preceding 5 years; and (2) a finding that defendant does not present a substantial danger to society. St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988).

Lengthy Sentence for Nondangerous Offender: Defendant pleaded guilty to charges of felony aggravated burglary and felony attempted mitigated deliberate homicide pursuant to 45-6-204 and 45-4-103. He was designated a nondangerous offender but sentenced to 30 concurrent years. The sentence is proper as it is within the legal limits set forth in the applicable statutes. The court considered the required factors listed in this statute in setting sentence. St. v. Almanza, 229 M 383, 746 P2d 1089, 44 St. Rep. 2064 (1987), followed in St. v. Losson, 262 M 342, 865 P2d 255, 50 St. Rep. 1588 (1993).

Questionable Presentence Report — Substantial Support for Dangerous Offender Designation: Defendant contended he was improperly designated a dangerous offender due to hearsay and inaccuracies in the presentence report, but the trial court did not appear to rely on any particular offense or incident, emphasizing instead the brutality of the assault, subsequent witness tampering, and a general inability to conform to the law. Even without the questionable presentence report, there was substantial support for the designation. St. v. Bingman, 229 M 101, 745 P2d 342, 44 St. Rep. 1813 (1987).

Reasons for Finding Set Forth by Court: The trial court adequately articulated its reasons for finding defendant a dangerous offender when it stated it had reviewed the presentence report, found the crime committed was particularly vicious, determined that the victims did not provoke defendant, and found that defendant's history and the facts of the case indicate he represents a substantial danger to society. St. v. Bell, 225 M 83, 731 P2d 336, 44 St. Rep. 56 (1987).

Defendant on Bail Designated Dangerous — Use of Juvenile Offenses in Sentencing: It was not an abuse of discretion to designate as a dangerous offender a defendant who argued on appeal that releasing him on bail after conviction and prior to sentencing was an implicit finding that he was not dangerous to society and that juvenile convictions were considered. The judge properly considered matters arising between conviction and sentencing in determining the dangerous offender designation, and evidence of juvenile offenses is prohibited only when the defendant was less than 18 when the offense for which he is currently being sentenced was committed. Defendant was 19 at that time. St. v. Nichols, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986).

Right to Notice That State Will Seek Dangerous Offender Designation: Because 46-18-404 (now repealed) states the substantive criteria upon which a nondangerous offender designation must be based, no notice other than notice of the sentencing hearing is needed to comport with due process and it is not a denial of due process that the state is not required to give notice that it will seek application of a dangerous offender designation and to state the factual basis for the requested designation. The statutes governing sentencing provide ample notice of matters that may come up at the sentencing hearing. These statutes, along with notice of the hearing date, the full disclosure of presentencing information in open court, and defendant's ability to propound evidence, confront witnesses, and participate in the hearing, provide a full panoply of due process safeguards for defendant's liberty interest. St. v. Nichols, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986).

Term "Substantial Danger" Not Void for Vagueness: As used in 46-18-404 (now repealed) requiring a court to find that a convicted person is a substantial danger to other persons or society before the court may designate him a dangerous offender, the term "substantial danger" is not so loose and uncertain that a court's discretion in defining the term is unfettered. The term does not violate due process for vagueness. St. v. Nichols, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986).

No Collateral Estoppel and Due Process Bars to Sentencing: Defendant argued that collateral estoppel and due process barred his status as both a persistent felony offender and dangerous offender because the designations served to sentence him twice for the same offense. The court found no merit to the argument. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

Prison's Custody Classification as Alleged Violation of Plea Bargaining Agreement — Withdrawal of Plea Denied: Under a plea bargain agreement, defendant was sentenced to 10 years as a nondangerous offender without parole. Upon entering prison, he was held in close custody for 24 months under prison rules calling for dangerous offenders and those sentenced without parole to serve 24 months in close custody prior to being considered for transfer to lower, more amenable custody levels. The prosecution, defense counsel, defendant, and judge were all unaware of those rules. Defendant was not entitled to withdraw his plea on the ground he was kept in close custody for 24 months in violation of his plea agreement. There was no violation of the agreement, nor was he entitled to the additional good time credits he would have received had he not been held so long in close custody. Prison officials take many factors into account in making custody reclassifications, and there was no guarantee he would have been held in close

custody only for the time he claimed he should have been upon entry to the prison. St. v. Mesler, 210 M 92, 682 P2d 714, 41 St. Rep. 939 (1984).

Dangerous Offender Determination — Use of Defective Information: After defendant and his father kidnapped two minor girls and took them to the father's house, father told defendant to "go get the gun" and defendant did so and placed it between the two men on the couch where they were sitting. The girls were not threatened with the gun. The trial judge told defendant that "the reason you're designated a dangerous offender is that's about the fourth gun incident you were in". Review of the record on appeal showed: (1) a possible misapprehension of defendant's actual criminal background and apparent confusion as to the crimes involved; (2) no convincing evidence that this was defendant's fourth gun incident; and (3) an indication that one of the prior convictions considered by the judge was constitutionally defective because defendant did not have counsel. The sentencing court cannot rely upon a previous criminal record in sentencing if that record contains constitutionally infirm convictions. Defendant had a right to have his sentence based upon substantially correct information and was entitled to a rehearing on his designation as a dangerous offender. St. v. Herrera, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

"Dangerous Offender" Designation — Findings Required — Mere Recitation of 46-18-404 (Now Repealed) Insufficient:

On appeal from his conviction for sexual intercourse without consent and sexual assault, the defendant alleged error in his designation as a "dangerous offender" for purposes of parole because the designation was conclusory. In the McFadden case, the Supreme Court held that a court must articulate its reasons for the designation and that a mere recitation of the statutory language was insufficient. The reason articulated in this case was that the defendant represented a substantial danger to other persons in society in the opinion of the court. That was found to be a mere recitation of 46-18-404 (now repealed). Because the record of the case revealed substantial evidence which could have led the District Judge to designate the defendant "dangerous", the case was remanded for findings to support the conclusion. Without having the reasons articulated in the judgment, it could not be determined whether there was an abuse of discretion by the judge. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981), following In re McFadden, 185 M 220, 605 P2d 599, 37 St. Rep. 55 (1980).

Under 46-18-404 (now repealed), an individual may be designated a dangerous offender if, in the discretion of the sentencing court, he is determined to represent a substantial danger to other persons or society; however, more than a mere recital of the statutory language is required. The sentencing court must articulate its reasons underlying its determination. The record revealed that the District Court never found that petitioner represented a substantial danger to other persons or society but rather concluded that petitioner was not able to be rehabilitated because he had not been truthful with the court and designated him a dangerous offender on that basis. The designation was not supported by substantial credible evidence. In re McFadden, 185 M 220, 605 P2d 599, 37 St. Rep. 55 (1980).

Delay in Determination as Nondangerous: Delay of 5 months from conviction until defendant was declared "nondangerous" because the judge wanted a psychological evaluation of the defendant did not constitute cruel and unusual punishment. Nor was the time taken unreasonable, in that it was in the interest of justice to obtain more information about the offender. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Dangerous Offender Designation — Prior Guilty Plea — With Conviction After Current Conviction: Defendant was convicted of robbery and designated a dangerous offender. The felony burglary conviction upon which the defendant's dangerous offender designation was based was not a conviction for these purposes because the burglary conviction did not occur until some time after he was found to be a dangerous offender. The fact that the defendant had pleaded guilty to burglary prior to the time of his designation as a dangerous offender was of no consequence because 46-18-404 (now repealed) required a felony conviction within the 5 years preceding the commission of the offense for which the defendant was being sentenced. St. v. Fisher, 190 M 295, 620 P2d 1215, 37 St. Rep. 1988 (1980).

Designation of Convict as Nondangerous Offender When Court Fails to Designate as Dangerous: In appealing his conviction for robbery, the defendant claimed that the trial court erred in determining that it was required as a matter of law to designate the defendant as a dangerous offender for purposes of parole eligibility. The Supreme Court agreed that the sentencing court was not statutorily required to designate him as a dangerous offender and thus could have designated him as nondangerous. The Supreme Court, in remanding for resentencing, specifically noted 46-18-404 (3) (now repealed), which covers the case when a trial court does not make a designation of dangerousness. To declare a defendant ineligible for parole

eligibility, the sentencing court is statutorily required to designate him as dangerous for that purpose as a part of the sentence. When a court fails to do so, 46-18-404 (now repealed) declares that the defendant is to be designated as a nondangerous offender for purposes of parole eligibility. St. v. Dahl, 190 M 207, 620 P2d 361, 37 St. Rep. 1852 (1980), followed in St. v. Buckman, 236 M 37, 768 P2d 1361, 46 St. Rep. 163 (1989), and St. v. Lorenz, 267 M 186, 883 P2d 98, 51 St. Rep. 1027 (1994).

Parole Eligibility — Ex Post Facto Application: Defendant committed a crime in 1975 for which he was tried and convicted in 1979. In sentencing defendant, the trial court declared him a dangerous offender under 46-18-404 (now repealed), and declared him ineligible for parole under 46-18-202. Both of these statutes became effective July 1, 1977. Application of a law which eliminates or delays a defendant's parole eligibility after the criminal offense has been committed is ex post facto as applied to that defendant and is therefore unconstitutional. St. v. Beachman, 189 M 400, 616 P2d 337 (1980).

Jurisdiction to Designate Dangerous Offenders: At a previous hearing on the State's petition to revoke defendant's probation, the trial court not only revoked his probation but erroneously designated him as a dangerous offender for purposes of parole eligibility, which function is reserved to the sentencing court. Neither 46-18-404(1) (now repealed) nor 46-18-203 gave the District Court authority to determine at the revocation hearing that the defendant was a dangerous offender for purposes of parole. In fact, when the sentencing court placed defendant on probation and suspended the 10-year sentence, the effect was to determine that defendant did not represent a substantial danger to society. Smith v. St., 186 M 52, 606 P2d 153 (1980).

Designation Mandatory: Under former law, designation of an offender as nondangerous for purposes of parole eligibility was mandatory if either of the conditions of 46-18-404(1) (now repealed) were met. Grifaldo v. St., 182 M 287, 596 P2d 847 (1979).

Law Review Articles

Doctors, Lawyers, and the Unabomber, Newman, 60 Mont. L. Rev. 67 (1999).

Ramifications of Jail-Based Probation Upon Suspended Imposition of Sentence, (Petition of Williams, 145 M 45, 399 P2d 732), 27 Mont. L. Rev. 98 (1965).

Collateral References

Factfinding Task Force on Corrections—Final Report, pp. 15-25, Montana Legislative Council, 1983.

46-18-102. Rendering judgment and pronouncing sentence — use of two-way electronic audio-video communication.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 118-1.

Compiler's Comments

2005 Amendment: Chapter 222 in (1) in second sentence near beginning after "section" deleted "in cases in which the defendant is charged with a misdemeanor offense", near middle after "to be" deleted "observed and", and after "present" inserted "and allowing the party speaking to be seen" and in third sentence at end inserted "and has informed the defendant that the defendant has the right to object to its use"; and made minor changes in style. Amendment effective July 1, 2005.

1997 Amendments — Composite Section: Chapter 163 in (1) inserted second through fourth sentences regarding the acceptability of a judgment rendered through audio-video communications; and made minor changes in style. Amendment effective March 26, 1997.

Chapter 378 at beginning of (3)(a) inserted exception clause; and made minor changes in style. Amendment effective April 24, 1997.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

Applicability: Section 6, Ch. 163, L. 1997, provided: "[This act] [46-12-211, 46-16-105, 46-17-203, 46-18-102, and 46-18-115] applies to guilty pleas entered and sentences pronounced after [the effective date of this act]." Effective March 26, 1997.

Severability: Section 8, Ch. 378, L. 1997, was a severability clause.

1983 Amendment: Inserted (3)(b) requiring the judge to clearly state his reasons for the sentence.

Case Notes

What Constitutes Similarly Situated Case for Purposes of Retroactive Application of New Rule — Issue Required to Be Raised in Trial Court: As a general principle, in order for a case to be similarly situated for purposes of retroactive application of a newly announced rule, the issue

addressed by the new rule should be raised by the movant at the trial court level and properly preserved for appeal. The only exception would be a challenge under the common-law plain error doctrine or if unique circumstances apply, such as those in St. v. Carter, 2005 MT 87, 326 M 427, 114 P3d 1001 (2005). Here, Foster-DeBerry contended that the new rule regarding suppression of telephone and transmission recordings announced in St. v. Goetz & St. v. Hamper, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), should retroactively apply to Foster-DeBerry's case, which was pending when the Goetz-Hamper rule was announced. However, Foster-DeBerry never filed a motion to suppress or raised the legal issues addressed in Goetz-Hamper in trial court, and thus did not preserve the issue for appeal, so Foster-DeBerry was not entitled to retroactive application of the Goetz-Hamper rule. Further, Foster-DeBerry did not argue for application of the plain error doctrine, so the Supreme Court declined to apply it. St. v. Foster-DeBerry, 2008 MT 397, 347 M 164, 197 P3d 1004 (2008), following Griffith v. Kentucky, 479 US 314 (1987), and St. v. Zivcic, 598 NW2d 565 (Wis. Ct. App. 1999).

Due Process Requirements of Written Statement for Revoking Deferred Sentence — Record of Factfinding and Basis of Review Adequate: The District Court revoked Baird's deferred sentence, but Baird asserted that his due process rights were violated because the court failed to advise him of the reasons for the revocation in a written statement as required in this section and Gagnon v. Scarpelli, 411 US 778 (1973). The Supreme Court found Baird's reliance of this section and Gagnon to be misplaced. Rather, the sentencing court's memorandum combined with the hearing transcript may provide the necessary written statement explaining the evidence relied on and the reason for the revocation decision. Due process is achieved when the oral and written record support accurate factfinding and appellate review. In Baird's case, when read as a whole, the oral and written records provided an adequate basis for review and were adequate to determine that the District Court's decision to revoke the sentence was based on permissible grounds supported by the evidence. Thus, Gagnon and its progeny were adequately addressed, and Baird's sentence revocation was affirmed. St. v. Baird, 2006 MT 266, 334 M 185, 145 P3d 995 (2006). See also Black v. Romano, 471 US 606 (1985), and St. v. Richardson, 2000 MT 72, 299 M 102, 997 P2d 786 (2000).

Adoption of Sentence Recommended in Presentence Investigation Report, With Variations — No Error in Disparity Between Oral and Written Sentence: As set out in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the oral pronouncement of sentence is the legally effective sentence, and the written judgment and commitment serves as evidence of the sentence orally pronounced. Wiedrich contended that because his written sentence contained terms and conditions that were not orally pronounced, the extra conditions were invalid and should be removed from the sentence. The Supreme Court disagreed. The transcript revealed that the sentencing court clearly adopted the sentence recommended in the presentence investigation report, with some variations—a fact that Wiedrich and his counsel were fully aware of—and the Supreme Court therefore declined to remand for resentencing. St. v. Wiedrich, 2005 MT 127, 327 M 214, 112 P3d 1054 (2005).

Addition of Written Sentencing Conditions Not Enunciated Orally at Hearing — Johnson Applied: Drube failed to complete a sex offender program, so the District Court revoked his suspended sentence and sentenced him to a 9-year term, with commitment to the Department of Corrections for the first 5 years and the remainder to be served at the state prison. The court specified that the prison portion of the sentence be suspended as long as Drube met sentencing conditions, including completion of a long-term aftercare program. Drube appealed the sentence on grounds that the court imposed a condition on the sentence that was impossible to fulfill and because the written revocation and sentencing order differed from the oral sentence enunciated at the sentencing hearing. Reviewing the sentence for legality, the Supreme Court affirmed. Drube presented nothing establishing that it would be impossible to complete the sex offender program within the reinstated 5-year commitment to the Department. Arguing that eight written conditions added to the suspended sentence by written order should be stricken, Drube cited St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), for the proposition that when written and oral sentences differ, the oral order prevails. The Supreme Court agreed with the general rule in Lane, but noted that the rule is not absolute. Under St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480 (2000), when deciding whether a subsequent written sentencing order is unlawful because it contains conditions not enunciated orally, the court first determines whether a defendant was afforded the opportunity to respond to the inclusion upon sufficient notice at hearing and second whether the portion of the written sentence substantively increases the defendant's loss of liberty and sacrifice of property. Here, all the conditions in the 2002 written revocation and sentencing order were contained either in Drube's original sentence or in a 2001 revocation and sentencing order and thus were not new or unknown to Drube, who had

the opportunity to respond to the conditions placed on the sentence, nor did Drube present any argument that the eight conditions substantively increased the loss of liberty or sacrifice of property. Thus, the 2002 sentencing order was not rendered unlawful by the addition of conditions not imposed orally at the sentencing hearing. St. v. Drube, 2003 MT 138, 316 M 156, 69 P3d 1182 (2003).

Extensive Statements of Sentencing Reasons Not Required: Flanagan contended that the District Court erred by giving inadequate reasons for imposing a 10-year suspended sentence for sexual assault. The Supreme Court disagreed. As established in St. v. Goulet, 277 M 308, 921 P2d 1245 (1996), extensive statements of sentencing reasons are not required. Here, the District Court stated that it suspended Flanagan's entire sentence because of mitigating circumstances, including Flanagan's age of 75 years, significant health problems, amenability to community treatment, and the fact that a 10-year supervision period could effectively extend for the remainder of Flanagan's natural life. This adequately satisfied the statutory requirements for a statement of sentencing reasons. St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003).

Suspended Sentence Properly Revoked — Remand for Entry of Findings to Support Resentence: The District Court revoked Anderson's suspended sentence and resentenced him to 10 years with 6 years suspended. Anderson appealed on grounds that his failure to comply with sentencing conditions requiring him to maintain employment and perform community service did not rise to a level to support revocation, and that the sentencing judge failed to clearly state the reasons for the sentence. The Supreme Court noted that a single violation of the terms of a suspended sentence is sufficient to support revocation of a suspended sentence. Anderson admitted that he had performed only 4 hours of the required 100 hours of community service since the original sentence was imposed, and had paid only $275 of a total of $1,805 due in restitution. Anderson also had a significant criminal history, was convicted of three additional felonies since beginning probation, and failed to comply with a number of terms and conditions of the suspended sentence. Thus, revocation of Anderson's suspended sentence was not an abuse of discretion. However, the sentencing court's stated reason for resentencing Anderson, namely that it was the state's recommendation, neither informed Anderson of the reasons underlying the sentence nor provided guidance for review. Therefore, the case was remanded for resentencing, and the entry of findings was to be sufficient to support the sentence. St. v. Anderson, 2002 MT 92, 309 M 352, 46 P3d 625 (2002), distinguishing St. v. Lundquist, 251 M 329, 825 P2d 204 (1992).

Question Whether Parole Denied for Failure to Satisfy Additional Treatment Conditions — Remand: Ringewold pleaded guilty to two counts of felony assault and was sentenced to a total of 14 years' commitment to the Department of Corrections. The next day, Ringewold was placed in the state hospital. The placement order allowed Ringewold to petition for a conditional release from the hospital, but did not specify any conditions. About 17 months later, Ringewold petitioned for release from the hospital. The state agreed that a hearing on the petition was proper, but argued that if it was found that Ringewold no longer suffered from a mental disease or defect that presented a risk to Ringewold or others, it was appropriate to remand Ringewold to the Department. The District Court ordered an independent mental evaluation, but it was never performed. Ringewold then filed another petition for release, but about the same time, the hospital staff determined that Ringewold would no longer benefit from active inpatient treatment and transferred him to the state prison pursuant to 46-14-312. At the request of counsel, Ringewold was transferred back to the state hospital, with the state conceding that hospital placement was proper and that Ringewold should be allowed to petition for release pursuant to 46-14-312. About 4 months later, the Department Director sought an order transferring Ringewold back to the prison on grounds that Ringewold continued to suffer from a dangerous mental disorder but would no longer benefit from active inpatient treatment for the disorder. At a conditional release hearing about 9 months later, the District Court orally resentenced Ringewold to 8 years in prison. The court specified that the total sentence not exceed more than the original sentence, but the court also conditioned Ringewold's parole on completion of an anger management course, moral reconation therapy, and chemical dependence treatment. In a written amended judgment about 1 month later, the District Court reimposed the original 14-year sentence and restated the parole conditions. Ringewold appealed. The Supreme Court held that under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the oral pronouncement of sentence was legally effective and constituted final judgment. However, it was not possible to determine from the record whether the additional conditions added to the sentence improperly lengthened Ringewold's sentence, so the case was remanded for supplementation of the factual record to determine if Ringewold was being denied consideration for parole because of failure to satisfy the additional treatment conditions and, if so, to strike the conditions from the amended

judgment, because under those circumstances, the practical effect of the conditions would be to lengthen the sentence in violation of 46-14-312. St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001).

Failure to Credit Inmate With Time Served Before Sentencing in Written Judgment After Allowing Credit in Oral Pronouncement of Sentence: At the sentencing hearing, Horton inquired as to whether he would get credit for time served between arrest and sentencing. The judge responded that credit would be granted automatically. However, in the written judgment entered 2 days later, the judge denied credit for time served because Horton was being held on a probation violation. Under 46-18-403, Horton was entitled to credit for each day of incarceration prior to or after sentencing, and pursuant to St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the court's oral pronouncement controlled over the written judgment. Thus, the Supreme Court directed that the provision in the written judgment denying Horton credit for time served be stricken. St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001).

Conditions Imposed in Written Judgment and Sentence Different From Those Imposed in Oral Sentence — Lane, Waters, and Simpson Reviewed — Test to Determine Which New Conditions Lawful or Unlawful — Payment of Restitution and Costs: Johnson was sentenced orally for writing bad checks and later contended that four of the conditions imposed in the written judgment and sentence by the District Court were unlawful under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), because they were not announced orally when she was sentenced in open court. The Supreme Court reviewed its decisions in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142 (1999), and St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361 (1999), and reasoned that a written sentence would be held unlawful only if it substantively increased the defendant's loss of liberty or the defendant's sacrifice of property. Under this test, the Supreme Court held that two of the four penalties not mentioned by the District Court in its oral pronouncement of Johnson's sentence were unlawful, those being the restitution ordered to the Missoula County jail of money expended for Johnson's medical care and the requirement that Johnson pay for the costs of her prosecution in District Court. The Supreme Court held that the other two parts of the written sentence, the requirement that Johnson make restitution from money earned in prison and the imposition of certain "civil" restrictions as conditions of Johnson's suspended sentence, such as the requirement that Johnson stay out of gambling casinos, were lawfully imposed because they did not increase the amount of money that Johnson was ordered to pay or increase Johnson's deprivation of liberty in addition to those penalties imposed orally. The requirement for payment from prison earnings only specified where the money was to come from, and the "civil" restrictions were largely mentioned by the District Court at Johnson's sentencing hearing. St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Extra Conditions in Sentencing Order Not Mentioned in Oral Sentence Stricken: The District Court that sentenced Waters imposed two extra conditions in the sentencing order that were not contained in the plea agreement or presentence investigation or contained in the oral sentence: (1) payment of supervision fees; and (2) submission to Texas authorities. Pursuant to St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), the oral pronouncement controls. Thus, Waters contended that only the conditions contained in the oral sentence could be imposed. The Supreme Court clarified Lane, noting that Waters was on notice of the conditions in the plea agreement and presentence investigation and that those terms applied despite the ambiguous sentencing conditions that were imposed orally. However, the court remanded for an amendment of the written sentence to strike the submission to Texas authorities, which was never mentioned, and to strike the payment of supervision fees as well, unless it was determined that payment of the fees would not impose a significant hardship on Waters, pursuant to 46-23-1031. St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999), followed in St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Retroactive Applicability of Judicial Rule Regarding Oral Pronouncement of Sentence: Retroactivity is a threshold matter that compels the evenhanded application of a new rule for the conduct of criminal prosecutions to all similarly situated cases that are pending on direct appeal or not yet final. Therefore, all defendants whose cases meet those criteria are entitled to the retroactive application of a new judicial rule of criminal procedure. This standard applies irrespective of whether the new judicial rule constitutes a clear break from existing precedent and without regard to whether the rule was available to the District Court at the time that it ruled. Thus in the present case, the rule in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), that oral pronouncement of sentence controls over the written sentence for purposes of finality applied retroactively to Waters' appeal, even though the District Court did not have the Lane rule at the time of sentencing. St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d

1142, 56 St. Rep. 901 (1999), following St. v. Egelhoff, 272 M 114, 900 P2d 260 (1995), and St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999), overruling St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), Peterson v. Mont. Bank of Bozeman, N.A., 212 M 37, 687 P2d 673 (1984), and their progeny, and followed in St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361, 56 St. Rep. 1032 (1999). See also Teague v. Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989).

Oral Pronouncement as Legally Effective Sentence — Correction of Error in Written Judgment by Nunc Pro Tunc Order — Due Process and Double Jeopardy Rights Not Violated: The oral pronouncement of sentence is the legally effective sentence. The written judgment and commitment serves as evidence of the sentence orally pronounced. In the event of a conflict between the oral and written sentence, the oral controls. The sentencing court may correct an error in a written judgment and commitment by a nunc pro tunc order, pursuant to 46-18-117 (now repealed), to accurately reflect what was orally pronounced at the sentencing hearing. Absent evidence of a tangible detriment or concrete injury to defendant, a clarifying nunc pro tunc order does not jeopardize a defendant's due process rights or constitute double jeopardy. St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), overruling St. v. Enfinger, 222 M 438, 722 P2d 1170 (1986), St. v. Wirtala, 231 M 264, 752 P2d 177 (1988), St. v. Mason, 253 M 419, 833 P2d 1058 (1992), and St. v. Graveley, 275 M 519, 915 P2d 184 (1996), to the extent that those cases held that the written judgment and commitment, rather than the oral pronouncement of sentence, was to be considered the final, valid order, and followed and applied retroactively in St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361, 56 St. Rep. 1032 (1999). The Supreme Court amended former Rule 5, M.R.App.P. (now superseded), to reflect the Lane decision in In re Amending Rule 5 of the Mont. Rules of Appellate Procedure, 55 St. Rep. 1267 (1998). The Lane rule was applied retroactively in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999). Lane was also followed in St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), and St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001). See also St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Court's Reference to Aryan Nations at Sentencing Held Not Denial of Freedom of Religion or Speech: Finney pleaded guilty to charges of burglary and theft and was sentenced to a total term of 50 years. In a written statement prepared for the presentence investigation, Finney made references to the Aryan Nations organization and also appeared at the sentencing hearing with the words "white power" tattooed across his forehead. Finney petitioned for postconviction relief, alleging that the District Court had violated his rights of freedom of religion and speech by considering his membership in the Aryan Nations for purposes of sentencing. The Supreme Court reviewed the federal court cases cited by Finney, noting that those cases also indicated that if there was an otherwise legitimate reason for references to constitutionally protected membership in similar organizations, it was not error for those references to be made during the course of the trial. The Supreme Court pointed out that Finney's sentence was within the range of sentences allowed for the crimes Finney had committed and that the references made in Finney's case were limited references to those organizations made because Finney brought up the subject himself by his words or actions, were made by the prosecutor in order to clarify Finney's past criminal behavior, or were limited to comments by the court on those words or actions. The Supreme Court held that for these reasons, the District Court did not deny Finney his constitutional rights and there was no plain error. St. v. Finney, 281 M 58, 931 P2d 1300, 54 St. Rep. 58 (1997).

Recommendation of Prosecutor and Probation Officer Adequate Statement of Sentencing Reason — No Improper Reliance on Pending Charge in Sentencing: The District Court's statements both orally and in its written sentence that Goulet's sentence was imposed at the recommendation of the prosecutor and the probation officer, plus the court's consideration of Goulet's prior record and long history of contact with the legal system, were sufficient statements of sentencing reasons to comply with St. v. Stumpf, 187 M 225, 609 P2d 298 (1980). Further, in the present case, nothing in the record indicated that the sentencing court improperly relied on a pending deliberate homicide charge against Goulet in sentencing him for escape. St. v. Goulet, 277 M 308, 921 P2d 1245, 53 St. Rep. 739 (1996), following St. v. Johnson, 221 M 503, 719 P2d 1248 (1986), St. v. Petroff, 232 M 20, 757 P2d 759 (1988), and St. v. Krantz, 241 M 501, 788 P2d 298 (1990).

Variance Between Oral and Written Sentence Held Harmless Error: Graveley was convicted of solicitation to commit deliberate homicide. At the sentencing hearing, the District Court announced Graveley's sentence of 40 years in the custody of the Department of Corrections, with the first 10 years in a prison environment. The District Court's written judgment omitted the reference to the first 10 years. The Supreme Court held that a review of the oral record showed

that the District Court intended the reference to 10 years to mean a minimum of 10 years and that because under the written judgment Graveley would be eligible for a supervised release program earlier than under the oral pronouncement, Graveley was not prejudiced by the written judgment. The Supreme Court held that absent a finding that a sentence is erroneous or illegal, the District Court could not alter its sentence. However, the difference in this case between the oral pronouncement and written judgment was harmless error. St. v. Graveley, 275 M 519, 915 P2d 184, 53 St. Rep. 239 (1996).

Evidence Viewed in Light Most Favorable to Prosecution: The trial court found the defendant guilty despite expert testimony favoring the defendant. The Supreme Court affirmed, holding that a conviction may not be overturned if the evidence presented, when viewed in the light most favorable to the prosecution, would permit a rational trier of fact to find the essential elements necessary to establish the offense. St. v. Holman, 241 M 238, 786 P2d 667, 47 St. Rep. 256 (1990).

Failure to Articulate Reasons for Sentence as Dangerous Offender — Harmless Error: Any failure to articulate the reasons for declaring defendant a dangerous offender (see 1995 repeal of 46-18-404) in pronouncing sentence constituted harmless error when the reasons were apparent in the transcript of the sentencing hearing. St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988).

Claim of Reliance on Incorrect Information in Sentencing — Sentencing Court Presumed Correct: Defendant contended the District Court wrongly assumed he had two prior probation violations and relied on this incorrect information in sentencing. Although a defendant has a right to a sentence based on substantially correct information, the Supreme Court will not strain at worst-case assumptions to find a mistake on review. Rather than finding two previous probation violations, the District Court correctly recognized defendant's two prior chances to avoid a more severe penalty. The sentencing court was presumed correct and judgment affirmed. St. v. Petroff, 232 M 20, 757 P2d 759, 45 St. Rep. 833 (1988).

Effect of Judge's Belief That Defendant Was Guilty of Charge for Which Acquitted: The judge did not abuse his discretion when he said that defendant was morally if not equally legally responsible for the death of a person defendant's father killed but that he could not sentence defendant for that. The judge then gave defendant the maximum sentence for each of the crimes of which he was convicted. Defendant was not convicted of homicide, and the judge's statement showed that the judge did not base the sentences on the homicide charge. St. v. Nichols, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986).

Capital Sentence Requested by Defendant — No Basis for Resentencing: Defendant pleaded guilty to two counts of aggravated kidnapping and two counts of deliberate homicide. Defendant requested the death penalty. After sentencing, defendant had second thoughts and on appeal sought a resentencing. The Supreme Court held there was no basis for resentencing because: (1) sentencing was not tainted by reliance on prior Canadian convictions obtained without counsel; (2) inclusion of juvenile offenses as adult offenses in presentence report was not error; (3) a court-ordered presentence interview was not violative of the fifth amendment; (4) recommendation for the death penalty in the presentence report was not improper; (5) no judicial error was committed in the extent of review of mitigating factors and no unconstitutional limit was placed on the court's consideration of mitigating circumstances; (6) no error was found in the court's denial of defendant's motion for additional psychiatric evaluation; (7) defendant was not required to be present at proceedings occurring after the verdict; (8) jury participation is not constitutionally required in capital sentencing procedures; (9) no indication was found that the trial court imposed the death penalty out of passion or prejudice; and (10) the sentence was not excessive or disproportionate. St. v. Smith, 217 M 461, 705 P2d 1087, 42 St. Rep. 463 (1985) (Smith I). A habeas corpus petition was conditionally granted in Smith v. McCormick, 917 F2d 1153 (9th Cir. 1990), a subsequent resentencing of death was reversed and remanded for preparation of a new presentence investigation, St. v. Smith, 261 M 419, 863 P2d 1000 (1993) (Smith II), and following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

Failure to Set Forth Detailed Findings Harmless Error: The two defendants pleaded guilty to deliberate homicide, and the sentencing court, after making limited findings, sentenced each defendant to 100 years in prison. When the reason for a sentence is apparent from the record, the failure of the sentencing court to set forth detailed findings or reasons for the sentence imposed does not result in prejudice to the defendant and thus is harmless error, as no substantial right of the defendant was denied. St. v. Hintz, 213 M 364, 691 P2d 814, 41 St. Rep. 2172 (1984).

No Proof Erroneous Information Considered by Sentencing Court: The defendants were sentenced to lengthy prison terms for deliberate homicide. They contend the sentencing judge considered information from a psychiatrist that is not directly reflected in the record, but the

record does not support their contention. The comments concerning the doctor's report were made by defense counsel during oral presentation to the sentencing court. The defendants have failed to show that any information furnished by the psychiatrist was considered improperly by the court; thus they have failed to show any erroneous information was considered by the court in passing sentence. St. v. Hintz, 213 M 364, 691 P2d 814, 41 St. Rep. 2172 (1984).

Failure to State Reasons for Sentence — Challenge to Revocation of Suspended Sentence: After the defendant was given a suspended prison sentence and ordered to pay restitution, the State moved to revoke the suspension because the defendant failed to make restitution. The defendant opposed the motion to revoke by arguing that the original sentence was invalid because the sentencing court failed to state the reason for the sentence, in violation of the requirements established in St. v. Stumpf, 187 M 225, 609 P2d 298, 37 St. Rep. 673 (1980). [A 1983 amendment required the judge to state reasons for the sentence.] On appeal, the Supreme Court held: (1) that despite the failure of the sentencing court to state its reasons, the sentencing court imposed exactly the sentence requested by the defendant; (2) that the reason for the sentence was apparent from the record; (3) that no prejudice resulted from the court's failure to state its reasons; and (4) that no purpose would be served in vacating the sentence or denying the petition to revoke. St. v. Carson, 208 M 320, 677 P2d 587, 41 St. Rep. 369 (1984).

Imposition of Sentence Without Stated Basis for Decision — Earlier Decision Prospective Only: The District Court did not abuse its discretion by imposing a sentence and judgment [prior to the 1983 amendment of this section] without first articulating the basis for its decision. Although St. v. Stumpf, 187 M 225, 609 P2d 298 (1980), does require a court to articulate the basis upon which its sentencing discretion is exercised, that case was decided after the appellant was sentenced and thus does not apply. St. v. Garrido, 190 M 525, 621 P2d 1105, 38 St. Rep. 78 (1981), followed in St. v. Hintz, 213 M 364, 691 P2d 814, 41 St. Rep. 2172 (1984).

Delay in Determination as Nondangerous: Delay of 5 months from conviction until defendant was declared "nondangerous" because the judge wanted a psychological evaluation of the defendant did not constitute cruel and unusual punishment. Nor was the time taken unreasonable, in that it was in the interest of justice to obtain more information about the offender. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Waiver of Postponement of Sentencing Date:

A defendant convicted in a Justice's Court of driving a vehicle on a highway while under the influence of intoxicating liquor waived postponement of the sentencing date when there was a stipulation to the sentencing date. Wilson v. Brodie, 148 M 235, 419 P2d 306 (1966).

When a person accused in a Justice's Court of a misdemeanor is convicted and the Justice immediately proceeds, upon the return of the verdict, to pronounce sentence without any objection from the defendant, his silence is a waiver of his right to a postponement of judgment. Hosoda v. Neville, 45 M 310, 123 P 20 (1912).

Delay in Sentencing Due to Motions of Defendant: While ordinarily the trial court in a criminal case should pass judgment without delay other than that provided by statute, in the absence of a statute declaring that sentence must be pronounced at the same term of court at which the verdict of guilty was returned, when the verdict was returned on Nov. 18, 1938, and sentence was not pronounced until Jan. 19, 1939, the delay being caused by the defendant's motions in arrest of judgment and for a new trial and the hearings thereof, the complaint may not be made that the court lost jurisdiction or that the judgment was not pronounced in the trial term. St. v. Heaston, 109 M 303, 97 P2d 330 (1939).

Collateral References

Criminal Law *key* 257 through 259, 977(3).

24 C.J.S. Criminal Law §§2036 through 2038.

21 Am. Jur. 2d Criminal Law §736, et seq.

Delay: loss of jurisdiction by delay in imposing sentence. 98 ALR 3d 605.

46-18-103. Sentence to be imposed by judge.

Commission Comments

Source: Model Sentencing Act, section 12.

There are only about 10 states which allow the jury to fix sentence as well as the verdict. Montana is among the states allowing the jury to fix sentence. (See [sections] 94-7411 and 94-7415 [repealed]). The intention of the above section is to eliminate the possibility of the jury assessing punishment. The jury has none of the information concerning the defendant that could be made available to a judge by a presentence investigation and in addition the jury lacks the training and experience of a judge.

Case Notes

Parole Officer's Sentence Recommendation Not Violation of Prosecutor's Plea Agreement: The defendant argued that the parole officer's sentence recommendation in the presentencing report was a violation of his plea agreement with the prosecutor and that he should have been allowed to withdraw his guilty plea. The Supreme Court held that the sentencing recommendation was provided for by statute, was merely one factor that the trial judge could consider, and was not a breach of the prosecutor's agreement. St. v. Milinovich, 248 M 373, 812 P2d 338, 48 St. Rep. 470 (1991), followed in St. v. Yother, 253 M 128, 831 P2d 1347, 49 St. Rep. 387 (1992). Yother was followed in St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015, 56 St. Rep. 551 (1999).

Judgment Containing Reasons for Sentence Sufficient — Oral and Written Reasoning Not Required: The rationale set out in St. v. Stumpf, 187 M 225, 609 P2d 298 (1980), acknowledging a defendant's right to be informed of the reasons underlying punishment, does not impose a duty on a District Court to set forth its reasoning orally in open court and in writing. It was sufficient when the reasons underlying a sentence were clearly stated in the judgment. St. v. Petroff, 232 M 20, 757 P2d 759, 45 St. Rep. 833 (1988). See also St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990).

Jury Not to Consider Sentence: District Court properly refused to give and avoided prejudicial error by refusing to give defendant's requested instruction that there is a mandatory 2-year sentence for each verdict of guilty of kidnapping which may not be suspended or deferred by the court. Sentencing is solely for the court, and the jury is not to consider possible punishment upon conviction. St. v. Herrera, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

Failure to Include Reasons for Sentence — Abuse of Discretion: Failure of trial court to specify the reasons behind the determination of the defendant's sentence is an abuse of discretion. It is not enough that the sentence be within the statutory maximum. The defendant is entitled to know why the sentencing judge chose the particular sentence involved. St. v. Stumpf, 187 M 225, 609 P2d 298 (1980), cited in St. v. Johnson, 221 M 503, 719 P2d 1248, 43 St. Rep. 1010 (1986).

Sentencing Guidelines: A criminal statute need not contain sentencing guidelines. St. v. Stumpf, 187 M 225, 609 P2d 298 (1980).

Correction of Error: An error made by the trial court in the imposition of a sentence for a crime may be corrected by it. In re Lewis, 51 M 539, 154 P 713 (1916).

Collateral References

Criminal Law *key* 884.

24 C.J.S. Criminal Law §2032, et seq.

21 Am. Jur. 2d Criminal Law §753.

Guilty plea: accused's right to sentencing by same judge who accepted guilty plea entered pursuant to plea bargain. 3 ALR 4th 1181.

46-18-104. Definitions.

Compiler's Comments

2001 Amendment: Chapter 509 in definition of crime of violence deleted former (c) that read: "(c) any sexual offense in which the offender causes bodily injury to the victim or uses threat, intimidation, or force against the victim", inserted (a)(iii) including certain offenses under 45-5-502, 45-5-503, and 45-5-507, and inserted (b) exempting certain offenses under 45-5-503; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 395 in (3) inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendment: Section 7(2), Ch. 794, L. 1991, a coordination instruction, provided: "If this bill and House Bill No. 272 are both passed and approved, then the definition of "community corrections" or "community corrections facility or program" contained in [section 1(1) of this act] [46-18-104(1)] is amended to read: "(1) "Community corrections" or "community corrections facility or program" means a community corrections facility or program as defined in [section 3 of House Bill No. 272] [53-30-303]."" House Bill No. 272 was passed and approved as Ch. 554, L. 1991.

Effective Date: Section 8, Ch. 794, L. 1991, provided: "[This act] is effective July 1, 1991."

Case Notes

Negligent Homicide Considered Crime of Violence — Consideration of Sentencing Alternatives to Prison Not Required: English asserted that because negligent homicide is not a crime of violence, the trial court erred by failing to consider sentencing alternatives to prison pursuant to 46-18-101(3)(f) when sentencing English to 20 years in prison for negligent homicide. The Supreme Court found the argument unpersuasive. Under this section, a crime in which the offender causes serious bodily injury or death to a person other than the offender is

defined as a violent crime. English negligently caused the death of another person, and the trial court did not err in ruling that the negligent homicide was a crime of violence or by failing to consider sentencing alternatives to prison. St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Use of Weapon by Person in Group Robbery but No Evidence That Defendant Used Weapon — Sentence as Violent Offender Reversed: Ferguson was one of a group of persons that attempted a robbery. It was uncontested that someone in the group brandished a knife, but testimony was conflicting whether it was Ferguson. Nevertheless, the trial court enhanced Ferguson's sentence because he was part of a crime of violence when a knife was used. However, the mere finding that someone in the group used a knife did not rise to the level of a finding that Ferguson used a knife. Thus, the Supreme Court reversed that part of Ferguson's sentence and remanded for sentencing Ferguson as a nonviolent offender. St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

No Evidence That Corporal Punishment Caused Mental Health Condition of Victim — Violent Felony Offender Designation Reversed: The sentencing court determined that Mason's excessive use of force in punishing a child with a belt constituted a violent offense and caused the child to develop a serious mental health condition, so Mason was designated a violent felony offender. However, the state produced no evidence that Mason caused the child's mental health condition or that the belt was used in a manner capable of producing death. Because the belt was not a deadly weapon, Mason's conduct did not satisfy the definition of crime of violence in this section. The violent felony offender designation was reversed. St. v. Mason, 2003 MT 371, 319 M 117, 82 P3d 903 (2003).

Error in Refusing to Classify Defendant as First-Time, Nonviolent Offender Following Conviction for Criminal Endangerment: Hocevar was convicted of criminal endangerment, which required a finding that her conduct created a substantial risk of death or serious bodily injury. The District Court refused Hocevar's request to be treated as a first-time, nonviolent felony offender because she committed a crime of violence. However, the definition of crime of violence in this section means a crime in which an offender causes a serious bodily injury or death. Given the various options that were available to the jury, it could not be determined on appeal whether the jury found that Hocevar actually caused a substantial risk of death or merely caused a risk of serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. In light of the uncertainty, the District Court committed reversible error in concluding that Hocevar committed an act of violence and in refusing to classify Hocevar as a first-time, nonviolent felony offender. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Misdemeanor Offender Not Entitled to Consideration of Mandatory Sentencing Requirement Applicable to Nonviolent Felony Offenders: Renee was sentenced to incarceration for three misdemeanor violations. On appeal, Renee contended that because the misdemeanors were nonviolent offenses, the District Court erred in not complying with 46-18-201 by considering alternatives to sentencing for Renee's nonviolent offenses. However, the plain language of subsection (3) of this section applies only to defendants who commit a particular kind of felony that is nonviolent. Therefore, a misdemeanor offender is not entitled to have a sentencing court consider the mandatory sentencing requirements of 46-18-201 and 46-18-225, which apply only to felony offenders. St. v. Renee, 1999 MT 135, 294 M 527, 983 P2d 893, 56 St. Rep. 545 (1999).

Nonviolent Felony Offenders Not Similarly Situated With Misdemeanor Offenders — No Equal Protection Violation in Different Felony and Misdemeanor Sentencing Schemes: Renee contended that Montana's nonviolent felony offender sentencing statutes violated his equal protection rights to physical liberty as a misdemeanor offender because both kinds of offenders may be subject to imprisonment, thus both felony and misdemeanor offenders are similarly situated classes dealt with unequally under the law. The Supreme Court disagreed. Relying on Tigner v. Tex., 310 US 141, 84 L Ed 1124, 60 S Ct 879 (1940), the court found that the constitution does not require that things that are different in fact or opinion be treated in law as though they were the same. Misdemeanor and felony offenders are not similarly situated because of differences in the quality and duration of punishment, as well as the long-term effects on an individual's liberty interest brought about by a felony conviction as compared to that for a misdemeanor conviction. Renee failed to make the necessary threshold showing that misdemeanor and nonviolent felony offenders are similarly situated, so the equal protection challenge failed. St. v. Renee, 1999 MT 135, 294 M 527, 983 P2d 893, 56 St. Rep. 545 (1999), distinguishing In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997).

Threat of Confinement to Extract Sexual Favors Held Crime of Violence: Anderson was convicted of various offenses involving sex with his stepdaughter. The District Court held in a

sentencing proceeding that Anderson committed a "crime of violence". The District Court's holding was based upon testimony taken in a mental examination of Anderson that Anderson had threatened his stepdaughter with confinement to her room unless she had sex with him. The Supreme Court affirmed, holding that Anderson's act of menacing his stepdaughter with confinement unless she had sex with him constituted a "crime of violence". St. v. Anderson, 282 M 41, 934 P2d 1037, 54 St. Rep. 232 (1997).

Violence and Use of Shotgun During Robbery Not Proved — Violent Offender Designation Not in Order: The state's assertions that defendant was charged with robbery and that the victim alleged in the presentence investigation that defendant used a shotgun did not make defendant a violent offender. Defendant pleaded guilty to a robbery charge, not including violence, and the victim's allegation was unproved. St. v. Pence, 273 M 223, 902 P2d 41, 52 St. Rep. 937 (1995).

46-18-105. Community corrections facilities or programs.

Compiler's Comments

1995 Amendment: Chapter 546 substituted "department of corrections" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Name Change: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Effective Date: Section 8, Ch. 794, L. 1991, provided: "[This act] is effective July 1, 1991."

46-18-111. Presentence investigation — when required.

Commission Comments

Source: Model Sentencing Act, section 2.

Compiler's Comments

2009 Amendment: Chapter 268 inserted (1)(c) requiring that a mental evaluation become part of the presentence investigation report, which must be available as provided in 46-18-113; in (2) in first sentence after "presentence" inserted "investigation"; and made minor changes in style. Amendment effective April 17, 2009.

Applicability: Section 4, Ch. 268, L. 2009, provided: "[This act] applies to a defendant convicted on a verdict of guilty or a plea of guilty or nolo contendere on or after [the effective date of this act]." Effective April 17, 2009.

2007 Amendment: Chapter 483 in (1) near middle of second sentence after "45-5-627" inserted "45-5-601(3), 45-5-602(3), or 45-5-603(2)(c) or if the defendant was convicted under 46-23-507 and the offender was convicted of failure to register as a sexual offender pursuant to Title 46, chapter 23, part 5"; in (3) at end of second sentence after "under" substituted "53-1-203(5)" for "53-1-203(4)"; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

2005 Amendment: Chapter 517 inserted (3) relating to the payment of the fee by defendant. Amendment effective July 1, 2005.

2001 Amendments — Composite Section: Chapter 483 in (1) at end of fourth sentence after "acceptable to" substituted "the department of labor and industry" for "the professional and occupational licensing bureau of the department of commerce"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 493 in (1) in third sentence in three places substituted references to defendant for references to offender; in (2) near end of second sentence after "probation" inserted "and parole" and at end substituted last sentence regarding presentence investigation for former sentence that read: "The district court may, in its discretion, order a presentence investigation for a defendant convicted of a misdemeanor"; and made minor changes in style. Amendment effective May 1, 2001.

Retroactive Applicability: Section 10, Ch. 493, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who are under the custody or supervision of the department of corrections on [the effective date of this act]." Effective May 1, 2001.

1997 Amendment: Chapter 189 in (1), in third sentence after "45-5-625", substituted "or 45-5-627" for "involving a victim who was less than 16 years of age when the offense was committed", after "include" inserted "a psychosexual", and after "considering" substituted "the risk the offender presents to the community" for "community safety", in fourth sentence, after

"completed by a", substituted "sex offender therapist who is a member of the Montana sex offender treatment association or has comparable credentials acceptable to the professional and occupational licensing bureau of the department of commerce" for "person who is determined to be qualified under guidelines established by the department of corrections", and inserted fifth sentence regarding availability of the evaluation; in (2) inserted first sentence concerning presentence report; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendments: Chapter 482 in version effective July 1, 1997, in (1), at end of third sentence, inserted "unless the defendant was sentenced under 46-18-219"; and made minor changes in style.

Chapter 546 in (1), in fourth sentence, substituted "department of corrections" for "department of corrections and human services". Amendment effective July 1, 1995.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 46-18-111, enacted as sec. 12 of Senate Bill No. 66, are effective July 1, 1997.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendments: Chapter 262 at beginning of third sentence of (1) inserted "If the defendant was convicted of an offense under 45-5-502, 45-5-503, 45-5-504, 45-5-505, 45-5-507, or 45-5-625 against a victim who was less than 16 years of age when the offense was committed" and near beginning of sixth sentence, before "court", inserted "district" and near end substituted "supreme court administrator" for "department of commerce"; and near beginning of (2), before "court", inserted "district". Pursuant to sec. 2, Ch. 347, L. 1993, a coordination instruction: in (1) changed "against a victim" to "involving a victim" and changed "supreme court administrator" to "county or the state, or both"; and in (2), near beginning of first sentence before "court", deleted "district".

Chapter 347 in (1), in second sentence after "court", substituted "shall consider the presentence investigation report prior to sentencing" for "may, in its discretion, order a presentence investigation for a defendant convicted of a misdemeanor", at beginning of third sentence inserted "If the defendant was convicted of an offense under 45-5-502, 45-5-503, 45-5-504, 45-5-505, 45-5-507, or 45-5-625 involving a victim who was less than 16 years of age when the offense was committed" and at end, after "treatment", inserted "of the offender in the least restrictive environment, considering community safety and offender needs", at beginning of fourth sentence inserted "The evaluation must be completed" and after "person" inserted "who is determined to be", and near end of sixth sentence substituted "county or the state, or both" for "department of commerce"; and substituted (2) requiring a presentence investigation report prior to sentencing for certain offenses for former language that read: "If the court finds that the record contains information sufficient to enable the meaningful exercise of discretion during sentencing, the defendant may waive a presentence investigation and report. Both the finding and the defendant's waiver must be made in open court on the record." Amendment effective April 16, 1993.

Coordination: Section 2, Ch. 347, L. 1993, provided: "If Senate Bill No. 125 is passed and approved and if it amends 46-18-111 by:

(1) inserting in subsection (1) the words "against a victim", then the word "against" is changed to "involved";

(2) substituting in subsection (1) the words "supreme court administrator" for the words "department of commerce", then the words "supreme court administrator" are changed to "county or the state, or both,";

(3) inserting the word "district" before the word "court" near the beginning of the first sentence of subsection (2), then the word "district" is stricken."

Senate Bill No. 125 was passed and approved as Ch. 262, L. 1993, and amended 46-18-111 in the manner indicated. The Code Commissioner subsequently revised the Ch. 262 version as directed, with the following exception: in subsection (1), "against a victim" was changed, pursuant to the Code Commissioner's authority in sec. 84, Ch. 10, L. 1993, to "involving a victim" to accurately reflect the amendment in Ch. 347, L. 1993.

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 800 substituted present language concerning presentence investigation and allowing waiver of investigation for former text that read: "No defendant convicted of an offense under 45-5-502 through 45-5-505, 45-5-507, or 45-5-625 against a victim who was less than 16 years old when the offense was committed may be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court. The investigation must include an evaluation of the defendant and a recommendation as to treatment by a person qualified by professional experience. No defendant convicted of any other offense that may result in commitment for 1 year or more in the state prison may be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court unless the court deems such report unnecessary. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense".

Coordination Instruction — Amendment Void: Section 2, Ch. 192, L. 1991, provided: "If Senate Bill No. 51 is passed and approved and if it includes a section amending 46-18-111, then 46-18-111 is amended by the insertion of the following language at the end of subsection (1) of 46-18-111 and [section 1 of this act] [amending 46-18-111] is void:

"The investigation must include an evaluation of the defendant and a recommendation as to treatment by a person qualified under guidelines established by the department of institutions [now department of corrections]. All costs related to the evaluation must be paid by the defendant. If the defendant is determined by the court to be indigent, all costs related to the evaluation are the responsibility of the district court and must be paid by the department of commerce under Title 3, chapter 5, part 9."" Senate Bill No. 51 was approved May 23, 1991, as Ch. 800, L. 1991, and included an amendment to 46-18-111. Therefore, the amendment to 46-18-111 contained in sec. 1, Ch. 192, L. 1991, is void. Amendment contained in coordination instruction effective July 1, 1991.

1985 Amendment: In first sentence substituted "an offense under 45-5-502 through 45-5-505, 45-5-507, or 45-5-625 against a victim who was less than 16 years old when the offense was committed may" for "a crime which may result in commitment for 1 year or more in the state prison shall", inserted second and third sentences requiring written report by probation officer to include an evaluation and a treatment recommendation and requiring the court to consider the report if it is possible defendant could be sent to the State Prison for a year or more, and transferred "unless the court deems such report unnecessary" to end of third sentence from end of first sentence.

Administrative Rules

Title 20, chapter 7, subchapter 3, ARM Sex offender evaluation and treatment provider guidelines and qualifications.

Case Notes

Sentencing Court's Consideration of Defendant's Background Information, Including Self-Reported Incidents of Sexual Contact With Children — No Error: While in sexual offender treatment, Hill admitted sexual contact with 12 or 13 other children. The District Court subsequently considered the self-reported acts in a psychosexual evaluation, which Hill maintained was a violation of the right against self-incrimination. The Supreme Court disagreed. In a classic penalty situation where an accused cannot elect to exercise the right to remain silent because of the possibility of substantial penalties if the person chooses not to speak, the state is prevented from using the compelled statements in later criminal proceedings. However, Hill was not in a classic penalty situation, but rather in a classic plea bargain situation. By consent decree, the state offered Hill treatment in exchange for an admission of misdemeanor assault and an agreement to undergo treatment. Hill was not faced with penalties by refusing to reveal prior sexual contacts, and the consent decree was never revoked even though Hill violated it. Absent a classic penalty situation, Hill's right against self-incrimination was not violated by the District Court's consideration of Hill's character, history, mental and physical condition, and background, including the self-reported acts in the psychosexual evaluation. St. v. Hill, 2009 MT 134, 350 M 296, 207 P3d 307 (2009). See also St. v. Fuller, 276 M 155, 915 P2d 809 (1996), and In re R.L.H., 2005 MT 177, 327 M 520, 116 P3d 791 (2005).

No Error in Ordering Second Psychosexual Evaluation in Incest Case to Provide Updated Information for Risk Assessment: Having been convicted of eight counts of incest, the state

requested that an independent second psychosexual evaluation be performed on Hamilton based on changed circumstances and because Hamilton's chosen evaluator opined that Hamilton could be designated a tier 1 low risk to reoffend. The District Court agreed and ordered a second evaluation with an independent evaluator, but Hamilton declined to participate. Without interviewing Hamilton personally, the second evaluator recommended a tier 2 risk designation, which the sentencing court applied. Hamilton appealed on grounds that there were no legal grounds for the state to seek a second evaluation because the first evaluation met the statutory requirements. The Supreme Court held that this section does not, by its plain language, provide that only one evaluator may be involved or that only one psychosexual evaluation report may be issued. Because of concerns that Hamilton's first evaluation was not independently conducted and that some of the factors in the first risk assessment had changed, the District Court did not abuse its discretion by ordering a second updated evaluation based on accurate information. St. v. Hamilton, 2007 MT 223, 339 M 92, 167 P3d 906 (2007).

No Error in Requiring Completion of Sexual Offender Course as Condition of Suspended Sentence for Burglary Conviction When Sexual Action Taken During Burglary: Following Marshall's conviction for burglary, the sentencing court imposed a 6-year deferred sentence with a number of conditions, including a requirement that Marshall complete a sexual offender course. Marshall argued that the court lacked authority to require the course because burglary was not a sexual crime. Nevertheless, the sentencing court designated Marshall as a level 1 sexual offender and required completion of the course, so Marshall appealed. The Supreme Court held that the condition was reasonably related to the crime because there was a nexus between sex offender treatment and the circumstances of the burglary. The presentence report revealed that during the burglary, Marshall became aroused after going through a woman's underwear drawer, took some underwear from the drawer, and masturbated on the woman's bed. Because the underlying factual situation included sexual actions taken by Marshall during the burglary, the sentencing court was not precluded from imposing sexual offender treatment as a condition designed to rehabilitate Marshall and to protect society, even though Marshall was not convicted of a sexual crime. St. v. Marshall, 2007 MT 218, 339 M 50, 170 P3d 923 (2007).

No Sentencing Error Based on Investigator's Alleged Bias in Preparing Accurate Presentence Report: Bar-Jonah contended that the trial court erred by not granting a motion to strike a presentence investigation (PSI) report prepared by an investigator who Bar-Jonah contended was biased and presented an incomplete report by failing to contact Bar-Jonah's family when preparing the social history. The Supreme Court noted that family contact is not statutorily required or implied, but that the report must be based on substantially correct information (see St. v. McPherson, 236 M 484, 771 P2d 120 (1989)). In this case, the trial court based its sentence on a PSI prepared by Bar-Jonah's probation officer, on psychological evaluations conducted by Bar-Jonah's own psychologists, and on a sexual offender report prepared by another doctor. These documents adequately substantiated the trial court's rationale that the documents were within the purview of substantially correct information. Additionally, Bar-Jonah was provided a copy of the report and the opportunity to rebut the information but failed to meet the burden of showing that the information was materially inaccurate or prejudicial to warrant overturning the sentence. The sentence was affirmed. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Community Risk by Sex Offender — Sentencing Court Consideration of Information in Presentence Report Unrelated to Crime Charged Not Erroneous: Legg pleaded not guilty to felony sexual assault of a 9-year-old girl. The initial mental examination revealed that Legg was severely depressed but competent to understand the charges and appreciate the consequences of possible incarceration. Legg's counsel then requested a psychosexual evaluation of Legg. The analyst categorized Legg as a low-level offender and suggested that community placement and outpatient sexual offender treatment would be appropriate. Legg then entered a plea bargain wherein the state agreed to recommend sentencing in accordance with the evaluations. Legg pleaded guilty, and the District Court ordered a presentence investigation (PSI). The investigator discovered information that Legg had not revealed previously, including the fact that Legg was permanently prohibited from contact with his ex-wife and children and that there were other secondary victims of Legg's sexual abuse. The analyst who performed Legg's psychosexual evaluation then reclassified Legg as a moderate risk offender and recommended confinement rather than community placement because the risk was too great to treat Legg as an outpatient. Legg filed a motion in limine to exclude any evidence from the PSI from persons other than the victim, her family, or her therapists. The motion was not ruled upon, so the challenged evidence was not excluded. The state recommended a 30-year sentence with 25 years suspended, and Legg consented to the recommendation. However, after hearing from the

victim's family, doctor, and counselor and from the analyst, the court sentenced Legg to 50 years with none suspended. Legg appealed, but the Supreme Court affirmed. Consideration of all materials in the PSI was required under this section, and the District Court did not abuse its discretion in doing so. Further, the statements by the sentencing court that the 50-year sentence was both to punish Legg and to protect society from Legg in the future were a sufficient explanation of the reasons for the sentence, as required under 46-18-115. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004).

No Requirement That Sentencing Court Consider and Rule on Each Treatment Recommendation in Presentence Report: Defendant contended that the sentencing court erred by failing to consider sentencing recommendations in a presentence investigation (PSI) report in the least restrictive environment, arguing that the court must review and analyze each PSI recommendation for sentence so that a defendant may receive treatment in the least restrictive environment. However, defendant provided no authority that a sentencing court must itemize each piece of evidence presented and either accept or reject it. In this case, the court did not explicitly state that it considered each PSI recommendation, but the court did question the analyst who prepared the report and considered the recommendations of the County Attorney and defense counsel before sentencing and thus adequately considered the PSI recommendations. Judgment was affirmed. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004).

Defendant's Affirmation of Correctness of Information in Presentence Investigation Constituting Waiver of Due Process Challenge: McLeod challenged the legality of his dangerous drug sentence on due process grounds because the sentencing court relied on a presentence investigation (PSI) report that indicated that McLeod had five previous felony drug convictions instead of the actual four previous convictions. A convicted defendant has a due process guarantee against a sentence predicated on misinformation. Here, McLeod was given proper notice of the information in the PSI, availed himself of the opportunity to extensively review the information, was represented by counsel at the time that the PSI was made known to him and reviewed the information with counsel, and was given repeated opportunities to rebut the information but chose instead to affirm the accuracy of the PSI. Thus, pursuant to St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), McLeod was afforded the process due to a criminal defendant at sentencing. McLeod's affirmation of the correctness of the PSI constituted a waiver of a due process challenge, and the sentence was affirmed. St. v. McLeod, 2002 MT 348, 313 M 358, 61 P3d 126 (2002).

Failure to Object to Conduct of Psychological Evaluation or to Continuation of Sentencing Hearing — Waiver of Right to Consideration on Appeal: Osterloth was convicted of felony sexual assault and was required to undergo a sexual offender evaluation by a therapist of his choice at county expense. His scheduled sentencing was continued to allow the evaluation. On appeal, Osterloth contended that the District Court erred by sentencing him without an evaluation prepared by a qualified therapist, pursuant to this section, and by continuing sentencing instead of conducting a sentencing hearing without delay, as required in 46-18-115. The Supreme Court noted that under 46-20-104, it is precluded from considering an alleged error unless a timely objection was made or the criteria of 46-20-701 are met. Osterloth did not object to the evaluation being conducted by his own evaluator or to the sentencing continuation, nor did he assert that he could satisfy any of the requirements of 46-20-701. Thus, Osterloth waived the right to have the Supreme Court consider these alleged errors on appeal. St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000).

Reliance of Sentencing Judge on Other Conviction Valid at Time of Sentencing but Later Found Invalid — Inability of Defendant to Address Vacation of Prior Convictions as Due Process Violation: In 1983, Bauer was charged with and convicted of two felonies in Silver Bow County and sentenced to terms in the state prison. Bauer challenged the convictions. About 8 years later, Bauer was charged with felony intimidation in Powell County and was sentenced to an additional 5 years in prison. Following the 1991 prison riots, Bauer was moved to Blaine County, where he was later charged with three felonies arising out of an incident with a female inmate at the Blaine County jail. The presentence investigation report (PSI) referred to the Silver Bow County convictions, and the sentencing court expressly referred to the PSI in sentencing Bauer. The court held that if Bauer was successful in challenging the 1983 convictions, the sentences for the Blaine County offenses would run from the date of judgment and sentence and Bauer would be credited with any time served from the date of filing of the information to the date of imposition of the Blaine County sentences. Bauer's 1983 sentences were subsequently voided based on newly discovered DNA evidence that exonerated Bauer. Bauer then sought postconviction relief on grounds that his due process rights had been violated when the

sentencing court in Blaine County relied on the now incorrect information in the PSI regarding the Silver Bow County convictions. Under both the federal and state constitutions, a defendant is protected from a sentence predicated on misinformation about that defendant's criminal history and must be given an opportunity to explain, argue, and rebut any information, including presentencing information, that may lead to a deprivation of life, liberty, or property. Bauer could not be said to have been given that opportunity because the 1983 convictions were still valid at the time of sentencing in Blaine County, nor did the sentencing court have a full opportunity to consider the procedural and substantive consequences of the actual vacation of the 1983 convictions or the specific grounds upon which postconviction relief was granted by the Silver Bow County court. What was correct information at the time of sentencing became misinformation after the fact. Notwithstanding that the sentencing court specifically stated that it did not rely on the 1983 convictions, the Supreme Court reversed on grounds of fundamental fairness, refusing to allow the misinformation to go unchallenged before the District Court by denying Bauer the opportunity to be resentenced on the basis of materially accurate information. The case was remanded for resentencing before a new District Court Judge. Bauer v. St., 1999 MT 185, 295 M 306, 983 P2d 955, 56 St. Rep. 715 (1999), following St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), and Bishop v. St., 254 M 100, 835 P2d 732, 49 St. Rep. 650 (1992).

Denial by Defendant of Sexual Crimes — Sentence Proper Absent Sex Offender Evaluation: Prior to sentencing McQuiston for convictions of incest and sexual intercourse without consent, the District Court ordered a presentence investigation report and ordered McQuiston to undergo a sex offender evaluation. No sex offender evaluation had been prepared at the time of sentencing, and McQuiston alleged error in imposing a sentence without the completed evaluation. Even though the evaluation was not mandatory because the victim was 19 years old when the offenses were committed, the record was clear that McQuiston denied the crimes and that sex offender treatment would be ineffective. Therefore, the court did not abuse its discretion in sentencing McQuiston without considering a sex offender evaluation. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Sentencing Without Consideration of Presentence Report — Reversible Error: The District Court's refusal to continue sentencing in order to allow inclusion in the presentencing investigation of a sex offender evaluation that had not been completed prior to the sentencing hearing, as required by this section, constituted reversible error warranting remand for resentencing in order that the report be considered. St. v. Alexander, 265 M 192, 875 P2d 345, 51 St. Rep. 474 (1994), followed in St. v. Barnhart, 283 M 518, 942 P2d 718, 54 St. Rep. 772 (1997).

Order and Waiver of Presentence Investigation Report: Absent certain circumstances, this section places an affirmative duty on the District Court to order a presentence investigation report in felony cases. A defendant is not under any obligation to request the report. The circumstances under which the court may decline to order the report require a finding by the court and a waiver by the defendant. Absent a finding and waiver, ordering the report as required by statute did not constitute error. The report must be official, be prepared by a probation officer, and contain the information mandated by 46-18-112. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993) (Smith II). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

No Requirement for Consideration of Prior Convictions: When defendant was sentenced for felony assault (now assault with a weapon) conviction and for sexual assault and incest conviction at the same sentencing hearing, the District Court was not required to wait until the convictions for felony assault (now assault with a weapon) were affirmed on appeal before considering them for the purpose of sentencing defendant for the sexual assault and incest convictions. St. v. Sor-Lokken, 247 M 343, 805 P2d 1367, 48 St. Rep. 142 (1991).

Consideration of Polygraph Test in Mental Health Evaluations — No Error in Sentencing: Defendant presented the sentencing court with three evaluations that were conducted at his request and submitted by him in support of his recommendation for sentencing. On appeal, he complained that the court improperly considered the report of a lie detector test referred to in two of the evaluations. The judge was not required to consider the evaluations, but under the relaxed standards of evidence in a sentencing situation, he was free to do so. Polygraph information is inadmissible as evidence at trial; however, the Montana Rules of Evidence do not apply to sentencing hearings. Defendant invited consideration of the evaluations and could not complain on appeal that it was in the record. Therefore, the court did not err in considering the evidence of the polygraph test at sentencing. St. v. McPherson, 236 M 484, 771 P2d 120, 46 St. Rep. 525 (1989).

Information Additional to That in Presentence Report Presented at Sentencing Hearing — No Due Process Violation: The presentence investigation report submitted to the District Court showed that defendant had had his parole on another conviction revoked for carrying a concealed weapon. At the sentencing hearing the court, over defendant's objection, received into evidence a written report and additional testimony by defendant's former parole officer about the reasons that parole was revoked. Defendant's due process rights were not violated by this procedure. He was represented by a lawyer at the sentencing hearing, had the opportunity to cross-examine the witness regarding the new material, had the opportunity to rebut the new material, and could have called for a continuance in order to call his own rebuttal witnesses. St. v. Elliott, 221 M 174, 717 P2d 572, 43 St. Rep. 723 (1986).

Habitual Traffic Offender — Presentence Investigation Proper: The sentencing judge did not err in ordering a presentence investigation of a defendant convicted of operating a motor vehicle while designated a habitual traffic offender. The judge, in his discretion, may order a presentence investigation when the potential penalty is less than 1 year in prison. (See 2001 amendment.) St. v. Grant, 217 M 357, 704 P2d 1064, 42 St. Rep. 1248 (1985).

Capital Sentence Requested by Defendant — No Basis for Resentencing: Defendant pleaded guilty to two counts of aggravated kidnapping and two counts of deliberate homicide. Defendant requested the death penalty. After sentencing, defendant had second thoughts and on appeal sought a resentencing. The Supreme Court held there was no basis for resentencing because: (1) sentencing was not tainted by reliance on prior Canadian convictions obtained without counsel; (2) inclusion of juvenile offenses as adult offenses in presentence report was not error; (3) a court-ordered presentence interview was not violative of the fifth amendment; (4) recommendation for the death penalty in the presentence report was not improper; (5) no judicial error was committed in the extent of review of mitigating factors and no unconstitutional limit was placed on the court's consideration of mitigating circumstances; (6) no error was found in the court's denial of defendant's motion for additional psychiatric evaluation; (7) defendant was not required to be present at proceedings occurring after the verdict; (8) jury participation is not constitutionally required in capital sentencing procedures; (9) no indication was found that the trial court imposed the death penalty out of passion or prejudice; and (10) the sentence was not excessive or disproportionate. St. v. Smith, 217 M 461, 705 P2d 1087, 42 St. Rep. 463 (1985) (Smith I). A habeas corpus petition was conditionally granted in Smith v. McCormick, 917 F2d 1153 (9th Cir. 1990), a subsequent resentencing of death was reversed and remanded for preparation of a new presentence investigation, St. v. Smith, 261 M 419, 863 P2d 1000 (1993) (Smith II), and following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

No Error in Trial Court's Failure to Order Presentence Investigation Report: The two defendants, both 19 years of age, pleaded guilty to deliberate homicide. Without a presentence report, the District Court sentenced each defendant to 100 years in prison. When, as in this case, the sentencing court is fully apprised of the defendants' backgrounds and any mitigating factors, it is not error for the court to sentence the defendants without ordering a presentence investigation. The statute gives the trial court discretion to conclude that a report is unnecessary. In the present case, counsel for the defendants were asked if there was any reason for postponing sentencing and they stated there was no reason, which suggests a waiver by counsel of any presentence report. St. v. Hintz, 213 M 364, 691 P2d 814, 41 St. Rep. 2172 (1984).

Judge's Off-Record Meeting With Probation Officer — Defense and Defendant Absent — No Due Process Violation — Inaccuracy in Sentence Report or Prejudice Not Shown: The rule in St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), that an off-the-record private meeting between the sentencing judge and the probation officer without the presence of defendant or his counsel violates due process is to be applied prospectively only, unless, with respect to a sentence rendered prior to the date of the decision in Redding, appellant alleges and shows inaccuracies in the presentence report or prejudice arising from its use by the judge. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Presentence Report Recommendation Not Binding on Judge: A presentence report recommended that a convicted robber receive a sentence of 15 years. The trial judge imposed a sentence of 30 years, detailing the reasons for the sentence. The sentence was proper since there is no requirement that the sentencing judge adopt the recommendation of a presentence report or that he state reasons for any discrepancy between the recommended sentence and the one actually imposed. He need only state the reasons why the sentence is imposed. St. v. Stephens, 198 M 140, 645 P2d 387, 39 St. Rep. 822 (1982), followed in St. v. McPherson, 236 M 484, 771 P2d 120, 46 St. Rep. 525 (1989), McPherson was cited in St. v. Long, 274 M 228, 907 P2d 945, 52 St. Rep. 1204 (1995).

Due Process — Sentencing Without Newly Prepared Report: The sentencing of the defendant without a presentence investigation when the court was familiar with the defendant and his crimes and had before it, among other things, a presentence report prepared in another trial of the defendant and a letter written by a victim in the case to another judge in another matter did not constitute a denial of due process when the defendant had seen a copy of the presentence report and had been furnished with a copy of the letter and had the opportunity to mitigate their effect, if any, but did not. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Persistent Felony Offender: Although the State proved the defendant's status as a persistent felony offender by means of a prior felony conviction pending appeal, the need for a presentence investigation report was not thereby eliminated. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

Private Interviews by Sentencing Judge: A sentencing judge may not conduct his own presentence investigation by privately interviewing persons he believes to know more than they told at trial. By doing this, he becomes a fact gatherer as well as a fact finder, and thereby subjects a defendant to an impossible burden. St. v. Stewart, 175 M 286, 573 P2d 1138 (1977), followed in St. v. Baker, 205 M 244, 667 P2d 416, 40 St. Rep. 1244 (1983).

Improper Matter Considered in Sentencing: A court cannot rely upon a prior felony conviction in sentencing if the defendant was not represented by counsel. When improper matters are brought before the sentencing court and are not disclosed and explained at the sentencing hearing, a defendant has a right to be resentenced. Ryan v. Crist, 172 M 411, 563 P2d 1145 (1977).

Reading Juvenile Record Into Record: The trial court did not err in considering and reading into the record in open court prior events of an 18-year-old defendant's life as disclosed by his juvenile record under a former statute directing the judge to have a written report by the probation officer or parole officer and to consider the same before sentencing a defendant, since the defendant did not object to the reading into the record and since after reading into the record the judge asked "Is there any legal excuse why judgment and sentence of court should not be pronounced against you?" St. v. Manning, 149 M 517, 429 P2d 625 (1967).

Unsigned, Privately Submitted Report of Investigator: When the trial judge requested a presentence investigation, unsworn representations and recommendations set forth in the investigator's unsigned report privately offered to and privately received and adopted by the trial judge were not evidence. Kuhl v. District Court, 139 M 536, 366 P2d 347 (1961).

Collateral References

Appeal and error: court's presentence inquiry as to, or consideration of, accused's intention to appeal, as error. 64 ALR 3d 1226.

46-18-112. Content of presentence investigation report.

Commission Comments

1991 Comment: Subsections (1) through (3) restate 1987 MCA 46-18-112. Subsection (4) authorizes the court to direct the probation officer to conduct a restitution report.

Source: Model Sentencing Act, section 3.

Compiler's Comments

2009 Amendment: Chapter 53 inserted (4) requiring the court to forward information in the presentence investigation report concerning the defendant's physical and mental health to the sheriff. Amendment effective October 1, 2009.

1995 Amendment: Chapter 125 inserted (1)(f) relating to victim's pecuniary loss; and deleted (4) that read: "(4) If applicable, the court may require the officer to inquire into the victim's pecuniary loss and make a restitution report to the court as provided by law."

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

1993 Amendment: Chapter 262 at beginning of (1)(e) deleted "except in capital cases in which the death penalty may be imposed".

1991 Amendment: In (1), at end, inserted "and report upon"; in (1)(d), at end, inserted "for the offense charged"; in (1)(e), at beginning, inserted exception clause and after "harm" inserted "caused, as a result of the offense"; in (2) substituted "law enforcement" for "police", after "furnish" deleted "the probation officer", and after "request" inserted "of the officer preparing a presentence investigation"; in (3), at beginning, inserted "court may, in its discretion, require that the presentence", after "investigation" inserted "report", and at end deleted "when it is desirable in the opinion of the court"; inserted (4) concerning inquiry into victim's loss and restitution report; and made minor changes in style.

Case Notes

No Error in Denial of Motion to Continue Sentencing Hearing for Further Review and Challenge of Accuracy of Presentence Investigation Report: Morrison was convicted of felony

partner or family member assault, a sixth offense, misdemeanor criminal mischief, and misdemeanor disorderly conduct. A charge of felony aggravated burglary was dismissed. Two days before sentencing, Morrison received the presentence investigation report. The following day, concerned that the report recited facts relevant to the dismissed felony aggravated burglary charge, Morrison moved for a continuance of the sentencing hearing in order to investigate and contest those provisions of the report. At sentencing, the District Court entertained Morrison's arguments concerning the accuracy of the "circumstances of the offense" section of the report and decided to strike that section, stating that the court would not rely on that information for sentencing. The motion for continuance was denied. The court also offered to allow Morrison to question the author of the report regarding the accuracy of the section of the report detailing Morrison's criminal history, but Morrison declined the offer and elected to proceed with sentencing. Following sentencing, Morrison appealed on grounds that the District Court erred by denying the motion for continuance. The Supreme Court disagreed. By striking the questioned section of the report, the sentencing court removed any reference to disputed information in the report, and by declining the chance to question the accuracy of the report, Morrison waived any objection to proceeding to sentencing. The District Court did not abuse its discretion by denying the continuance motion, and Morrison's sentence was affirmed. St. v. Morrison, 2009 MT 397, 353 M 407, 220 P3d 659 (2009).

Sentencing Court's Consideration of Defendant's Background Information, Including Self-Reported Incidents of Sexual Contact With Children — No Error: While in sexual offender treatment, Hill admitted sexual contact with 12 or 13 other children. The District Court subsequently considered the self-reported acts in a psychosexual evaluation, which Hill maintained was a violation of the right against self-incrimination. The Supreme Court disagreed. In a classic penalty situation where an accused cannot elect to exercise the right to remain silent because of the possibility of substantial penalties if the person chooses not to speak, the state is prevented from using the compelled statements in later criminal proceedings. However, Hill was not in a classic penalty situation, but rather in a classic plea bargain situation. By consent decree, the state offered Hill treatment in exchange for an admission of misdemeanor assault and an agreement to undergo treatment. Hill was not faced with penalties by refusing to reveal prior sexual contacts, and the consent decree was never revoked even though Hill violated it. Absent a classic penalty situation, Hill's right against self-incrimination was not violated by the District Court's consideration of Hill's character, history, mental and physical condition, and background, including the self-reported acts in the psychosexual evaluation. St. v. Hill, 2009 MT 134, 350 M 296, 207 P3d 307 (2009). See also St. v. Fuller, 276 M 155, 915 P2d 809 (1996), and In re R.L.H., 2005 MT 177, 327 M 520, 116 P3d 791 (2005).

Sufficient Accurate Information to Support Sentence for Distribution of Methamphetamine: Harper was sentenced to 20 years in prison with 10 years suspended and fined $12,000 after pleading guilty to possession of dangerous drugs with intent to distribute. Harper appealed on grounds that the sentencing court based the sentence on inaccurate and insufficient evidence that Harper was the center of the drug operation. Harper had a right to be sentenced based on correct evidence, but also had the affirmative duty to show, beyond mere unsupported contentions, that the alleged misinformation was materially inaccurate and to present information establishing inaccuracies in the presentence investigation report. In this case, the sentencing court did nothing more than consider relevant information relating to the nature and circumstances of the possession of drugs found during the search of Harper's home, including unrefuted information that Harper was at the center of a methamphetamine distribution business conducted from the home. Information in the presentence investigation report simply underscored Harper's involvement in drug distribution and supported that charge to which Harper pleaded guilty. The information was properly before the sentencing court, and the court did not err in imposing a sentence within the statutory parameters. The sentence was affirmed. St. v. Harper, 2006 MT 259, 334 M 138, 144 P3d 826 (2006), followed in St. v. Walker, 2007 MT 205, 338 M 529, 167 P3d 879 (2007), with respect to defendant's affirmative duty to show, beyond mere unsupported contentions, that alleged misinformation in a presentence investigation report was materially inaccurate and to present information establishing inaccuracies in the presentence investigation report.

No Sentencing Error Based on Investigator's Alleged Bias in Preparing Accurate Presentence Report: Bar-Jonah contended that the trial court erred by not granting a motion to strike a presentence investigation (PSI) report prepared by an investigator who Bar-Jonah contended was biased and presented an incomplete report by failing to contact Bar-Jonah's family when preparing the social history. The Supreme Court noted that family contact is not statutorily required or implied, but that the report must be based on substantially correct information (see

St. v. McPherson, 236 M 484, 771 P2d 120 (1989)). In this case, the trial court based its sentence on a PSI prepared by Bar-Jonah's probation officer, on psychological evaluations conducted by Bar-Jonah's own psychologists, and on a sexual offender report prepared by another doctor. These documents adequately substantiated the trial court's rationale that the documents were within the purview of substantially correct information. Additionally, Bar-Jonah was provided a copy of the report and the opportunity to rebut the information but failed to meet the burden of showing that the information was materially inaccurate or prejudicial to warrant overturning the sentence. The sentence was affirmed. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Community Risk by Sex Offender — Sentencing Court Consideration of Information in Presentence Report Unrelated to Crime Charged Not Erroneous: Legg pleaded not guilty to felony sexual assault of a 9-year-old girl. The initial mental examination revealed that Legg was severely depressed but competent to understand the charges and appreciate the consequences of possible incarceration. Legg's counsel then requested a psychosexual evaluation of Legg. The analyst categorized Legg as a low-level offender and suggested that community placement and outpatient sexual offender treatment would be appropriate. Legg then entered a plea bargain wherein the state agreed to recommend sentencing in accordance with the evaluations. Legg pleaded guilty, and the District Court ordered a presentence investigation (PSI). The investigator discovered information that Legg had not revealed previously, including the fact that Legg was permanently prohibited from contact with his ex-wife and children and that there were other secondary victims of Legg's sexual abuse. The analyst who performed Legg's psychosexual evaluation then reclassified Legg as a moderate risk offender and recommended confinement rather than community placement because the risk was too great to treat Legg as an outpatient. Legg filed a motion in limine to exclude any evidence from the PSI from persons other than the victim, her family, or her therapists. The motion was not ruled upon, so the challenged evidence was not excluded. The state recommended a 30-year sentence with 25 years suspended, and Legg consented to the recommendation. However, after hearing from the victim's family, doctor, and counselor and from the analyst, the court sentenced Legg to 50 years with none suspended. Legg appealed, but the Supreme Court affirmed. Consideration of all materials in the PSI was required under 46-18-111, and the District Court did not abuse its discretion in doing so. Further, the statements by the sentencing court that the 50-year sentence was both to punish Legg and to protect society from Legg in the future were a sufficient explanation of the reasons for the sentence, as required under 46-18-115. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004).

Consideration at Sentencing of Alleged Crimes Dismissed by Plea Bargain Not Violative of Due Process: At sentencing, the District Court considered allegations of other crimes for which Mason had been initially charged but that had been dismissed by plea agreement. Mason contended that consideration of statements related to unproved conduct violated the right to due process. The Supreme Court noted that due process protects a defendant from being sentenced based on misinformation and requires that a defendant be given an opportunity to rebut any information that may lead to deprivation of life, liberty, or property, but does not protect against all misinformation unless the sentence is premised on materially false misinformation. The court also noted that St. v. Collier, 277 M 46, 919 P2d 376 (1996), allows a sentencing court to consider any evidence that has probative force, including other acts that have been dismissed by plea agreement, as in St. v. Baldwin, 192 M 521, 629 P2d 222 (1981). Nothing in Mason's plea agreement prevented the state from presenting the facts of the case during the sentencing hearing, and in fact, that inquiry is required as part of the presentence investigation report under this section. Mason failed to show that the sentencing court relied on misinformation and thus was not entitled to resentencing on due process grounds. Further, the plea agreement required relinquishment of Mason's parental rights, so the sentencing court properly considered evidence of the danger Mason posed to the other children in order to approve that portion of the agreement. St. v. Mason, 2003 MT 371, 319 M 117, 82 P3d 903 (2003), followed in St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005), and St. v. Phillips, 2007 MT 117, 337 M 248, 159 P3d 1078 (2007).

Defendant's Affirmation of Correctness of Information in Presentence Investigation Constituting Waiver of Due Process Challenge: McLeod challenged the legality of his dangerous drug sentence on due process grounds because the sentencing court relied on a presentence investigation (PSI) report that indicated that McLeod had five previous felony drug convictions instead of the actual four previous convictions. A convicted defendant has a due process guarantee against a sentence predicated on misinformation. Here, McLeod was given proper notice of the information in the PSI, availed himself of the opportunity to extensively review the

information, was represented by counsel at the time that the PSI was made known to him and reviewed the information with counsel, and was given repeated opportunities to rebut the information but chose instead to affirm the accuracy of the PSI. Thus, pursuant to St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), McLeod was afforded the process due to a criminal defendant at sentencing. McLeod's affirmation of the correctness of the PSI constituted a waiver of a due process challenge, and the sentence was affirmed. St. v. McLeod, 2002 MT 348, 313 M 358, 61 P3d 126 (2002).

No Error in Refusal to Allow Withdrawal of Guilty Plea — Parents of Sexual Assault Victim Not Parties to Plea Agreement: Following a guilty plea and conviction of sexual assault, Knox moved to withdraw the guilty plea, arguing that the County Attorney violated the terms of a plea agreement, which had recommended a 30-year suspended sentence and dropping a second sexual assault charge in exchange for the guilty plea, and indicated that the parents of the 5-year-old victim would not recommend incarceration in the victim impact statement of the presentence investigation. During the colloquy required by 46-12-210, the District Court informed Knox that, like the court itself, the parents were not bound by the plea agreement and could change their minds at any time as far as recommending future imprisonment, adding that if the parents did change their minds, that fact would not suffice as grounds for withdrawal of a guilty plea. Nevertheless, Knox voluntarily accepted the possible consequences of the plea and pleaded guilty. The parents then recommended imprisonment, and Knox was sentenced to 40 years with 18 suspended. A District Court may permit the withdrawal of a guilty plea upon a showing of good cause, but the determination of good cause is discretionary, and each case is considered on its merits. Here, the District Court subsequently denied the withdrawal motion pursuant to the colloquy, and Knox appealed, but the Supreme Court affirmed. After applying the factors in St. v. Bowley, 282 M 298, 938 P2d 592 (1997), the Supreme Court found that there was no abuse of discretion in the denial of the motion to withdraw and that Knox's guilty plea thus met the constitutional standard of a voluntary, intelligent, and knowing choice among options. The District Court acted according to statutory requirements when it made clear that the parents could make known their opinion and change their minds regarding Knox's incarceration because they were not parties to the plea agreement, pursuant to the court's duties in 46-18-115. Further, other evidence in a psychological evaluation indicated that Knox had violent tendencies that presented complications to successful treatment, had high-risk factors for violent recidivism, and had resisted treatment for chemical dependency in the past, so the parents' incarceration request was not a determinative basis for the sentence. St. v. Knox, 2001 MT 232, 307 M 1, 36 P3d 383 (2001).

Use of Presentence Investigation Report at Resentencing Hearing — No Due Process Violation: At a resentencing hearing, the petitioner objected to the evaluation and recommendation contained in the presentence investigation report in that it was not based upon the factual information provided to the probation officer, was biased in favor of the state, and was based on hearsay in uninvestigated reports and in that his criminal history data was not verified. On appeal, the petitioner claimed prejudice by a biased probation officer who wrote the report. The Supreme Court held that when the petitioner was provided with the report prior to the sentencing hearing, the petitioner was provided with the opportunity to explain, argue, and rebut the information, and the petitioner's counsel extensively cross-examined the author of the report, the petitioner could not establish that the court relied on any misinformation in sentencing. The petitioner was not entitled to resentencing on due process grounds. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Due Process Violation in Failing to Afford Defendant Opportunity at Sentencing to Rebut Information Not in Presentence Investigation Report: In sentencing Hocevar for criminal endangerment of one child, the District Court denied Hocevar's due process rights by finding by a preponderance of the evidence that Hocevar smothered two other children without affording Hocevar the opportunity procedurally to challenge the accuracy of the information, which was not contained in the presentence investigation report. As determined in St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), a sentencing judge may rely on facts outside the presentence report if, in order to avoid misinformation in sentencing, the defendant is given an opportunity to explain or rebut the information at the presentence hearing. The Supreme Court remanded for resentencing. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Reliance of Sentencing Judge on Other Conviction Valid at Time of Sentencing but Later Found Invalid — Inability of Defendant to Address Vacation of Prior Convictions as Due Process Violation: In 1983, Bauer was charged with and convicted of two felonies in Silver Bow County and sentenced to terms in the state prison. Bauer challenged the convictions. About 8 years later, Bauer was charged with felony intimidation in Powell County and was sentenced to an

additional 5 years in prison. Following the 1991 prison riots, Bauer was moved to Blaine County, where he was later charged with three felonies arising out of an incident with a female inmate at the Blaine County jail. The presentence investigation report (PSI) referred to the Silver Bow County convictions, and the sentencing court expressly referred to the PSI in sentencing Bauer. The court held that if Bauer was successful in challenging the 1983 convictions, the sentences for the Blaine County offenses would run from the date of judgment and sentence and Bauer would be credited with any time served from the date of filing of the information to the date of imposition of the Blaine County sentences. Bauer's 1983 sentences were subsequently voided based on newly discovered DNA evidence that exonerated Bauer. Bauer then sought postconviction relief on grounds that his due process rights had been violated when the sentencing court in Blaine County relied on the now incorrect information in the PSI regarding the Silver Bow County convictions. Under both the federal and state constitutions, a defendant is protected from a sentence predicated on misinformation about that defendant's criminal history and must be given an opportunity to explain, argue, and rebut any information, including presentencing information, that may lead to a deprivation of life, liberty, or property. Bauer could not be said to have been given that opportunity because the 1983 convictions were still valid at the time of sentencing in Blaine County, nor did the sentencing court have a full opportunity to consider the procedural and substantive consequences of the actual vacation of the 1983 convictions or the specific grounds upon which postconviction relief was granted by the Silver Bow County court. What was correct information at the time of sentencing became misinformation after the fact. Notwithstanding that the sentencing court specifically stated that it did not rely on the 1983 convictions, the Supreme Court reversed on grounds of fundamental fairness, refusing to allow the misinformation to go unchallenged before the District Court by denying Bauer the opportunity to be resentenced on the basis of materially accurate information. The case was remanded for resentencing before a new District Court Judge. Bauer v. St., 1999 MT 185, 295 M 306, 983 P2d 955, 56 St. Rep. 715 (1999), following St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), and Bishop v. St., 254 M 100, 835 P2d 732, 49 St. Rep. 650 (1992).

Applicability of "Catchall" Mitigating Circumstance to Postoffense Conduct: The enormously broad "catchall" mitigating circumstance in 46-18-304(8) reflects the Legislature's intent to permit a defendant to raise any and all facts and evidence that might mitigate against the death penalty, including evidence of conduct during incarceration subsequent to the offense. Evidence may include any evidence required in a presentence investigation under this section relative to a defendant's characteristics, circumstances, needs, and potentialities. In this case, the sentencing court erred by failing to order a presentence investigation and report that included consideration of defendant's admission of guilt, contrition, commitment to rehabilitation, and conduct while incarcerated, which were all relevant as mitigating evidence. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993) (Smith II), following Lockett v. Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978), Skipper v. S.C., 476 US 1, 90 L Ed 2d 1, 106 S Ct 1669 (1986), and Smith v. McCormick, 914 F2d 1153 (9th Cir. 1990). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

Claim That Sentencing Based on Inaccuracies Unfounded — No Due Process Violation: Bishop claimed that his due process rights were violated in sentencing him for robbery, burglary, and use of a weapon because his sentencing was based on a presentence report that contained various inaccuracies. Under U.S. v. Wilson, 900 F2d 1350 (9th Cir. 1990), a court may not rely on materially false information when sentencing a defendant. On review, it was found that the alleged inaccuracies were primarily a matter of Bishop's interpretation of the facts rather than a material falsity. In light of the sentencing court's reliance on Bishop's criminal history in reviewing the presentence report, a 25-year sentence for robbery, a 10-year sentence for burglary, and a 5-year sentence for use of a weapon were affirmed. Bishop v. St., 254 M 100, 835 P2d 732, 49 St. Rep. 650 (1992).

Parole Officer's Sentence Recommendation Not Violation of Prosecutor's Plea Agreement: The defendant argued that the parole officer's sentence recommendation in the presentencing report was a violation of his plea agreement with the prosecutor and that he should have been allowed to withdraw his guilty plea. The Supreme Court held that the sentencing recommendation was provided for by statute, was merely one factor that the trial judge could consider, and was not a breach of the prosecutor's agreement. St. v. Milinovich, 248 M 373, 812 P2d 338, 48 St. Rep. 470 (1991), followed in St. v. Yother, 253 M 128, 831 P2d 1347, 49 St. Rep. 387 (1992). Yother was followed in St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015, 56 St. Rep. 551 (1999).

Reference to Victim Impact Information by Sentencing Judge Not Cruel and Unusual Punishment: Defendant claimed the death sentence was improper because the sentencing judge referred to the victim impact information contained in the presentence investigation report. Defendant cited the holding in Booth v. Maryland, 482 US 496, 96 L Ed 2d 440, 107 S Ct 2529 (1987), that it was a violation of the eighth amendment of the U.S. Constitution (similar to Art. II, sec. 22, Mont. Const.) for a sentencing jury to refer to information in a victim impact statement during the sentencing stage of a capital murder trial. The Montana Supreme Court held that Booth was factually distinguishable from Montana sentencing procedures, noting that a judge rather than a jury performs sentencing under Montana law. Furthermore, the judge may be allowed to hear and rule on the admissibility of evidence that the jury is not allowed to hear, yet he is still responsible for sentencing. Absent evidence that the judge was adversely affected by victim impact information, there was no constitutional violation. St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988), followed in St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988), and Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Court's Discretion to Disallow Second Evaluation: A defendant upset with an extremely negative presentence psychological evaluation requested a continuance so that he could obtain a second evaluation at his own expense. It was within the court's discretion to deny the request. St. v. Bradford, 228 M 438, 743 P2d 103, 44 St. Rep. 1661 (1987).

Hearsay and Probation Officer's Recommendation: Defendant's contention that hearsay tainted the presentence report was without merit. Section 46-18-112 authorizes a complete investigation into the background of the defendant and does not limit hearsay. The District Court's reliance upon the recommendation of the probation officer was not error. Section 46-18-302 authorizes the sentencing judge to consider the widest possible scope of inquiry when determining the sentence to be imposed. The court followed the position established in St. v. Smith, 217 M 461, 705 P2d 1087, 42 St. Rep. 463 (1985), regarding the sentencing judge's discretion to use the presentence report and sentencing recommendations. St. v. D.B.S., 216 M 234, 700 P2d 630, 42 St. Rep. 770 (1985).

Dismissed and Juvenile Charges Properly Included in Presentence Investigation Report: Where the defendant to a hit-and-run charge alleged he was prejudiced by the inclusion in a presentence investigation report of criminal charges made against him that were later dismissed and charges that were made while the defendant was a juvenile, the District Court did not err in considering both such charges. Under the rationale of St. v. Baldwin, 192 M 521, 629 P2d 222, 38 St. Rep. 882 (1981), the dismissed charges were properly included and considered, as were the juvenile charges under the rationale in St. v. Radi, 185 M 38, 604 P2d 318, 36 St. Rep. 2345 (1979). St. v. Henricks, 206 M 469, 672 P2d 20, 40 St. Rep. 1786 (1983).

Consideration of Prior Charge of Aggravated Assault: The sentencing court here relied neither on an erroneous criminal record nor on erroneous information. The trial court was not required to shut its eyes to the facts underlying a prior charge of aggravated assault of which defendant was acquitted. It relied only on information volunteered by the defendant, and if the defendant believed that the presentence report distorted any of the information he had furnished, he was under an affirmative burden to refute, correct, or deny the facts related in the report. St. v. Baldwin, 192 M 521, 629 P2d 222, 38 St. Rep. 882 (1981), followed in St. v. Dunfee, 2005 MT 147, 327 M 335, 114 P3d 217 (2005).

Burden on Defendant to Show Report Inaccurate: When matters contained in a presentence report are contested by the defendant, he has an affirmative duty to present evidence showing the inaccuracies contained in the report. St. v. Radi, 185 M 38, 604 P2d 318 (1979), followed in St. v. Long, 274 M 228, 907 P2d 945, 52 St. Rep. 1204 (1995).

Report Not Prejudicial: The entire report is consistent with the purposes and rationale for requiring a presentence investigation. The report was properly used by the sentencing judge, provided him with a fair, objective review of appellant's history, and provides no basis to remand for a further resentencing hearing. St. v. Radi, 185 M 38, 604 P2d 318 (1979).

Arrest Record Not a Presentence Investigation: A letter, which was an arrest record of the defendant while under the supervision of the probation and parole office, was held not to be in the proper form for a presentence investigation. Murphy v. St., 181 M 157, 592 P2d 935 (1979).

46-18-113. Availability of presentence investigation report.

Commission Comments

1991 Comment: The Commission felt that the defendant, as well as the prosecution, should have an absolute right to receive and review a copy of the presentence investigation report. This was made discretionary with the court under 1987 MCA 46-18-113. The Commission believed

that it was unfair and, in fact, potentially a denial of constitutional due process to deny the defendant the sources of information contained in the presentence investigation report, including the identity of persons who provided such information.

Source: Model Sentencing Act, section 4.

If a sentence is to meet the purposes of [46-18-113] the judge must be armed with a professionally prepared report containing the necessary information. A pre-sentence investigation is the best way to obtain this information.

More and more jurisdictions are requiring a pre-sentence investigation of felony convictions (e.g., U.S., California, Colorado, Connecticut, New Jersey, Indiana, Michigan and Rhode Island).

The pre-sentence investigation provided for by this provision would not substantially change the law as it now exists in Montana.

The existing law as to the use of pre-sentence investigations was set forth in Kuhl v. District Court, 139 Mont. 536, 366 P.2d 347 (1961), in which the Montana Supreme Court stated it was mandatory under the provisions of sections 94-7813 and 94-7814 [repealed] that the trial court hold a hearing, either summary or regular, or formal, wherein witnesses who have knowledge of pertinent circumstances may be sworn, examined and give their testimony in the presence of the defendant and his counsel which would help in determining sentence.

Compiler's Comments

1997 Amendment: Chapter 189 in (1), near middle of second sentence after "defendant's attorney", inserted "the probation and parole officer".

1995 Amendment: Chapter 125 at end of (1) inserted last sentence allowing prosecutor to disclose contents of presentence report to victim.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

1991 Amendment: Deleted former (1) that read: "(1) The judge may, in his discretion, make the investigation report or parts of it available to the defendants or others, while concealing the identity of persons who provided confidential information. If the court discloses the identity of persons who provided information, the judge may, in his discretion, allow the defendant to cross-examine those who rendered information"; in (1), before "record", inserted "court", after "record but" substituted "may not be opened for public inspection" for "shall be sealed and opened only on order of the court", and inserted last sentence concerning who is to be provided with the report; inserted (2) concerning other access to report; deleted (3) that read: "(3) If a defendant is committed to a state institution, the investigation report shall be sent to the institution at the time of commitment"; and made minor changes in style.

Case Notes

No Error in Reliance on Presentence Report Not Offered as Exhibit When Report Part of Record: In sentencing Flanagan, the District Court based its findings on a presentence investigation report that was not admitted as an exhibit, which Flanagan asserted was a procedural error. The Supreme Court disagreed. Because the presentence report was already part of the record, as required by this section, it was not required that the report be offered or admitted into evidence at the sentencing hearing, and the District Court did not err in using the report as a basis for its findings. St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003).

Defendant's Affirmation of Correctness of Information in Presentence Investigation Constituting Waiver of Due Process Challenge: McLeod challenged the legality of his dangerous drug sentence on due process grounds because the sentencing court relied on a presentence investigation (PSI) report that indicated that McLeod had five previous felony drug convictions instead of the actual four previous convictions. A convicted defendant has a due process guarantee against a sentence predicated on misinformation. Here, McLeod was given proper notice of the information in the PSI, availed himself of the opportunity to extensively review the information, was represented by counsel at the time that the PSI was made known to him and reviewed the information with counsel, and was given repeated opportunities to rebut the information but chose instead to affirm the accuracy of the PSI. Thus, pursuant to St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), McLeod was afforded the process due to a criminal defendant at sentencing. McLeod's affirmation of the correctness of the PSI constituted a waiver of a due process challenge, and the sentence was affirmed. St. v. McLeod, 2002 MT 348, 313 M 358, 61 P3d 126 (2002).

No Reliance on Misinformation in Sentencing — Due Process Rights Not Violated: Despite the District Court's statement to the contrary, Winkle contended that the court relied on misinformation in sentencing, violating Winkle's due process rights. Due process requires that an offender be given an opportunity to explain, argue, and rebut any information, including presentencing information, that may lead to a deprivation of life, liberty, or property. Winkle

argued that, given the timing of the information, he did not have an opportunity to rebut, so the court should have granted a continuance in the sentencing hearing. The decision to grant a continuance is in the discretion of the sentencing court, and the timeliness of a continuance motion is a legitimate factor for the court to consider in determining whether to grant the motion. When a criminal defendant contests matters in a presentence report, the defendant has an affirmative duty to present evidence establishing inaccuracies, and if the defendant feels that inadequate time has been allowed to accurately rebut the information, a motion for continuance is in order. Here, the motion for continuance was untimely because it was made after counsel twice indicated sentencing should proceed and after the oral imposition of sentence. Winkle's contention that the sentencing court erroneously relied on certain information in imposing sentence was also flawed. The court did not explicitly state the materials that it was deleting from the presentence report, and absent specific objection, a sentencing court is not required to do so. There was information that Winkle was unable to successfully complete the presentence investigation questionnaire, and this is the information that the court relied on. Failing to establish either any misinformation or that he had no opportunity to rebut information, Winkle's due process rights were not violated, and the sentence was affirmed. St. v. Winkle, 2002 MT 312, 313 M 111, 60 P3d 465 (2002), followed in St. v. Roedel, 2007 MT 291, 339 M 489, 171 P3d 694 (2007).

Information Additional to That in Presentence Report Presented at Sentencing Hearing — No Due Process Violation: The presentence investigation report submitted to the District Court showed that defendant had had his parole on another conviction revoked for carrying a concealed weapon. At the sentencing hearing the court, over defendant's objection, received into evidence a written report and additional testimony by defendant's former parole officer about the reasons that parole was revoked. Defendant's due process rights were not violated by this procedure. He was represented by a lawyer at the sentencing hearing, had the opportunity to cross-examine the witness regarding the new material, had the opportunity to rebut the new material, and could have called for a continuance in order to call his own rebuttal witnesses. St. v. Elliott, 221 M 174, 717 P2d 572, 43 St. Rep. 723 (1986).

Out-of-Court Conference Between Sentencing Judge and Probation Officer — Denial of Due Process: The defendant was denied due process when the sentencing judge conferred with the presentence investigation officer behind closed doors where no opportunity was provided for argument, rebuttal, or explanation. St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), distinguished in St. v. Pease, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

Confrontation of Witnesses — Discretionary at Presentence Hearing: Defendant was convicted of aggravated assault for pointing a gun at another person during a barroom altercation. A presentence investigation was completed and provided to the defense. The presentence investigation contained a number of statements by witnesses whose names were ordered withheld by the court. Defendant objected to the consideration of those statements because he was not allowed to confront the makers thereof. The Supreme Court held that the right of cross-examination at a presentence hearing is a discretionary matter with the trial court and that defendant's due process right was protected because he was represented by counsel at the time the information was made known to him and he was given the opportunity to rebut the information. St. v. Trangsrud, 200 M 303, 651 P2d 37, 39 St. Rep. 1765 (1982), followed in St. v. Gilpin, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988).

Misinformation in Sentencing Report Alleged — Due Process of Law: Where the defendant was convicted of sexual intercourse without consent and requested a psychiatric examination and evaluation report prior to sentencing, the court did not err in utilizing a report based in part on unsubstantiated charges of other alleged rape victims with whom the defendant was involved. The use of these allegations, provided to the psychiatrist by the County Attorney, did not violate the defendant's right against imposition of sentence predicated on misinformation because the court was fully informed of the defendant's contention and the defendant had adequate notice and time to prepare for the sentencing hearing. Cross-examination of all those contributing to a presentence report rests in the discretion of the trial court. St. v. Mackie, 191 M 138, 622 P2d 673, 38 St. Rep. 86 (1981).

Not Seen Before Sentencing — Postconviction Petition to Show Report Errors: Where petitioner in a habeas corpus action alleges that he did not have an opportunity to examine his presentence report prior to sentencing or to cross-examine witnesses in respect to the report, his claim of prejudice in sentencing will not prevail unless he can show something erroneous or some ambiguity in the presentence report. Following St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), the Supreme Court held that a convicted defendant has a due process guarantee against a

sentence predicated on misinformation, but he cannot complain if the information in a presentence report is true. Spurlock v. Crist, 188 M 449, 614 P2d 498 (1980).

Proper Sentence — Fairness of Hearing: When the rules of evidence had been suspended, copies of reports were available to the defendant and he was allowed to examine the author of the presentence report, and many, many witnesses appeared, the court found it could not conceive of any way the hearing could have been conducted more fairly. St. v. Lopez, 185 M 187, 605 P2d 178 (1980).

Burden on Defendant to Show Report Inaccurate: When matters contained in a presentence report are contested by the defendant, he has an affirmative duty to present evidence showing the inaccuracies contained in the report. St. v. Radi, 185 M 38, 604 P2d 318 (1979).

Inclusion of Juvenile Record in Presentence Report: Section 41-3-205 does not support appellant's contention that it was improper to include his juvenile record in a presentence report since that section applies only to dependence and neglect situations and not to proceedings for delinquents under the Montana Youth Court Act. Section 41-5-604 (renumbered 41-5-216) does not support appellant's contention either, because the prevention of public dissemination of a juvenile record once that individual attains an age of majority is accomplished by sealing the presentence report. St. v. Radi, 185 M 38, 604 P2d 318 (1979).

Application of Statutes: If and when the trial judge requests a written report of investigation, he must be governed by the statutes relating to such reports. Kuhl v. District Court, 139 M 536, 366 P2d 347 (1961).

Right to Refute Report: The sentence of a defendant, who pleaded guilty to grand larceny, to 4 years in the state prison was reduced to 1 year by the Supreme Court when the trial court passed sentence upon receipt of private reports without allowing the defendant or his counsel to learn of the representations in the reports and holding a hearing for the presentation of evidence to refute such representations. Kuhl v. District Court, 139 M 536, 366 P2d 347 (1961).

Collateral References

Defendant's right to disclosure of presentence reports. 40 ALR 3d 681.

46-18-115. Sentencing hearing — use of two-way electronic audio-video communication.

Commission Comments

1991 Comment: This statute goes beyond the provisions of 1987 MCA 46-18-102 and mainly embodies due process constitutional law that has been developed in the federal courts and by the Montana Supreme Court. In accordance with the Montana Supreme Court's decisions, subsection (5) has been included to require that the sentencing court specifically state its reasons for the sentence, both in open court and in the written judgment. This will not only provide the defendant, the prosecution, and the public with the reasons for the sentence but will also provide a record for review by the Montana Supreme Court, the Sentence Review Commission, and the Parole Board [now Board of Pardons and Parole] at the time parole is considered.

Compiler's Comments

2005 Amendment: Chapter 222 in (3) in third sentence near beginning after "section" deleted "in cases in which the defendant is charged with a misdemeanor offense" and in fourth sentence at end inserted "and has informed the defendant that the defendant has the right to object to its use"; and made minor changes in style. Amendment effective July 1, 2005.

2001 Amendment: Chapter 524 in (1) before "mandatory" substituted "imposition of a sentence enhancement penalty and the applicability of" for "applicability of sentencing enhancement provisions". Amendment effective May 1, 2001.

1997 Amendment: Chapter 163 in (3) inserted third through fifth sentences regarding the acceptability of a court addressing a defendant personally through audio-video communications. Amendment effective March 26, 1997.

Applicability: Section 6, Ch. 163, L. 1997, provided: "[This act] [46-12-211, 46-16-105, 46-17-203, 46-18-102, and 46-18-115] applies to guilty pleas entered and sentences pronounced after [the effective date of this act]." Effective March 26, 1997.

1995 Amendment: Chapter 125 inserted (4) requiring court to permit victim's statement at sentencing hearing and establishing procedures relating to the statement.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Case Notes

No Error in Denial of Motion to Continue Sentencing Hearing for Further Review and Challenge of Accuracy of Presentence Investigation Report: Morrison was convicted of felony partner or family member assault, a sixth offense, misdemeanor criminal mischief, and

misdemeanor disorderly conduct. A charge of felony aggravated burglary was dismissed. Two days before sentencing, Morrison received the presentence investigation report. The following day, concerned that the report recited facts relevant to the dismissed felony aggravated burglary charge, Morrison moved for a continuance of the sentencing hearing in order to investigate and contest those provisions of the report. At sentencing, the District Court entertained Morrison's arguments concerning the accuracy of the "circumstances of the offense" section of the report and decided to strike that section, stating that the court would not rely on that information for sentencing. The motion for continuance was denied. The court also offered to allow Morrison to question the author of the report regarding the accuracy of the section of the report detailing Morrison's criminal history, but Morrison declined the offer and elected to proceed with sentencing. Following sentencing, Morrison appealed on grounds that the District Court erred by denying the motion for continuance. The Supreme Court disagreed. By striking the questioned section of the report, the sentencing court removed any reference to disputed information in the report, and by declining the chance to question the accuracy of the report, Morrison waived any objection to proceeding to sentencing. The District Court did not abuse its discretion by denying the continuance motion, and Morrison's sentence was affirmed. St. v. Morrison, 2009 MT 397, 353 M 407, 220 P3d 659 (2009).

Sentencing Court's Consideration of Defendant's Background Information, Including Self-Reported Incidents of Sexual Contact With Children — No Error: While in sexual offender treatment, Hill admitted sexual contact with 12 or 13 other children. The District Court subsequently considered the self-reported acts in a psychosexual evaluation, which Hill maintained was a violation of the right against self-incrimination. The Supreme Court disagreed. In a classic penalty situation where an accused cannot elect to exercise the right to remain silent because of the possibility of substantial penalties if the person chooses not to speak, the state is prevented from using the compelled statements in later criminal proceedings. However, Hill was not in a classic penalty situation, but rather in a classic plea bargain situation. By consent decree, the state offered Hill treatment in exchange for an admission of misdemeanor assault and an agreement to undergo treatment. Hill was not faced with penalties by refusing to reveal prior sexual contacts, and the consent decree was never revoked even though Hill violated it. Absent a classic penalty situation, Hill's right against self-incrimination was not violated by the District Court's consideration of Hill's character, history, mental and physical condition, and background, including the self-reported acts in the psychosexual evaluation. St. v. Hill, 2009 MT 134, 350 M 296, 207 P3d 307 (2009). See also St. v. Fuller, 276 M 155, 915 P2d 809 (1996), and In re R.L.H., 2005 MT 177, 327 M 520, 116 P3d 791 (2005).

Determination of Restitution When Amount of Actual Loss Unknown: McMaster admitted taking money from Wright, but the actual amount could not be determined. The District Court received several restitution recommendations ranging from $12,914 proposed in the presentence investigation report to $334,425 based on a cash flow analysis. After considering testimony from numerous experts and from McMaster and Wright, the Court set restitution at $30,000, and McMaster appealed, but the Supreme Court affirmed. As established in St. v. Benoit, 2002 MT 166, 310 M 449, 51 P3d 495 (2002), a victim may recover losses even though the actual losses are uncertain if the losses are calculated by use of reasonable methods based on the best available evidence. Nothing requires a court or victim to substantiate a restitution calculation with documentation, nor is a court circumscribed from relying on victim testimony presented at a sentencing hearing. The court properly considered McMaster's written statement and Wright's nonexpert undocumented testimony presented at the sentencing hearing. Substantial evidence supported the court's findings and the court did not abuse its discretion when it set restitution at $30,000. St. v. McMaster, 2008 MT 268, 345 M 172, 190 P3d 302 (2008).

Affirmative Duty of Defendant to Bring Evidence Outside Presentence Investigation Report to Sentencing Court's Attention: A defendant has an affirmative duty to bring evidence outside the presentence report to the attention of the sentencing court. If the evidence is not offered, there is no error based on its absence from the record, and the Supreme Court will not fault a sentencing court for failing to consider a report that was not before it. St. v. Herman, 2008 MT 187, 343 M 494, 188 P3d 978 (2008). See also St. v. Long, 274 M 228, 907 P2d 945 (1995).

Ten-Year Sentence for Criminal Distribution of Dangerous Drugs Affirmed Despite Finding of Impaired Mental Capacity: Novak was sentenced to 10 years with 6 years suspended for selling 0.06 grams of methamphetamine to an undercover informant, despite a finding that Novak was eligible for an exception to the mandatory minimum sentence because of impaired mental capacity. Novak appealed the sentence, but the Supreme Court affirmed. The fact that Novak was eligible for a sentence exception did not mean that he was entitled to it. The sentencing court's oral pronouncement of sentence complied with statutory requirements by providing

adequate reasons for imposing the sentence, and the sentence fell within the parameters of 45-9-101(4) and was not illegal. St. v. Novak, 2008 MT 157, 343 M 292, 183 P3d 887 (2008).

No Error in Treating Retribution as Component of Punishment: Rickman asserted that the sentencing court improperly considered retribution as a factor in sentencing Rickman to life with no parole eligibility for 55 years for deliberate homicide under the felony-murder rule. The Supreme Court disagreed, noting that retribution has repeatedly been held to be a component of punishment. It was appropriate for the sentencing court to consider that the victim was innocent and to consider the impact of the homicide on the victim's family. The judgment and commitment of the sentencing judge indicated that retribution was only the third basis for the sentence, and in light of Rickman's minimal potential for rehabilitation and Rickman's significant threat to the public, the sentencing court's use of the word "retribution" comported with state sentencing policies and procedures. Rickman's sentence was affirmed. St. v. Rickman, 2008 MT 142, 343 M 120, 183 P3d 49 (2008). See also St. v. Kirkbride, 2008 MT 178, 343 M 409, 185 P3d 340 (2008).

Sentence for Sexual Assault Within Statutory Parameters and Adequately Explained: Rogers asserted that his sentence of 20 years with 10 years suspended for two counts of felony assault upon a minor was improperly based on his refusal to participate in a court-ordered psychosexual evaluation. However, nothing in the record indicated that the sentencing court even referenced Rogers' refusal to participate. The court's reasons for its sentence were many and were supported by the evidence. The sentence was within statutory parameters and thus was affirmed. St. v. Rogers, 2007 MT 227, 339 M 132, 168 P3d 669 (2007).

Rules of Evidence Inapplicable in Sentencing Hearings: The Montana Rules of Evidence do not apply to sentencing hearings. A sentencing court may consider any relevant information relating to the nature and circumstances of the crime, the defendant's character, background, history, and mental and physical condition, and any other information that the court considers to have probative force. St. v. Walker, 2007 MT 205, 338 M 529, 167 P3d 879 (2007), following St. v. Mason, 2003 MT 371, 319 M 117, 82 P3d 903 (2003), St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005), and St. v. Harper, 2006 MT 259, 334 M 138, 144 P3d 826 (2006).

Adoption of Sentence Recommended in Presentence Investigation Report, With Variations — No Error in Disparity Between Oral and Written Sentence: As set out in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the oral pronouncement of sentence is the legally effective sentence, and the written judgment and commitment serves as evidence of the sentence orally pronounced. Wiedrich contended that because his written sentence contained terms and conditions that were not orally pronounced, the extra conditions were invalid and should be removed from the sentence. The Supreme Court disagreed. The transcript revealed that the sentencing court clearly adopted the sentence recommended in the presentence investigation report, with some variations—a fact that Wiedrich and his counsel were fully aware of—and the Supreme Court therefore declined to remand for resentencing. St. v. Wiedrich, 2005 MT 127, 327 M 214, 112 P3d 1054 (2005).

Community Risk by Sex Offender — Sentencing Court Consideration of Information in Presentence Report Unrelated to Crime Charged Not Erroneous: Legg pleaded not guilty to felony sexual assault of a 9-year-old girl. The initial mental examination revealed that Legg was severely depressed but competent to understand the charges and appreciate the consequences of possible incarceration. Legg's counsel then requested a psychosexual evaluation of Legg. The analyst categorized Legg as a low-level offender and suggested that community placement and outpatient sexual offender treatment would be appropriate. Legg then entered a plea bargain wherein the state agreed to recommend sentencing in accordance with the evaluations. Legg pleaded guilty, and the District Court ordered a presentence investigation (PSI). The investigator discovered information that Legg had not revealed previously, including the fact that Legg was permanently prohibited from contact with his ex-wife and children and that there were other secondary victims of Legg's sexual abuse. The analyst who performed Legg's psychosexual evaluation then reclassified Legg as a moderate risk offender and recommended confinement rather than community placement because the risk was too great to treat Legg as an outpatient. Legg filed a motion in limine to exclude any evidence from the PSI from persons other than the victim, her family, or her therapists. The motion was not ruled upon, so the challenged evidence was not excluded. The state recommended a 30-year sentence with 25 years suspended, and Legg consented to the recommendation. However, after hearing from the victim's family, doctor, and counselor and from the analyst, the court sentenced Legg to 50 years with none suspended. Legg appealed, but the Supreme Court affirmed. Consideration of all materials in the PSI was required under 46-18-111, and the District Court did not abuse its discretion in doing so. Further, the statements by the sentencing court that the 50-year sentence was both to punish Legg and to protect society from Legg in the future were a sufficient

explanation of the reasons for the sentence, as required under this section. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004).

Failure to Establish Conflict Between Oral and Written Sentences — Waiver of Right to Request Modification of Written Judgment: After receiving a written judgment, Legg moved to amend or correct the judgment to include a designation of offender status and consideration of mitigating factors. Legg made the motion pursuant to 46-18-116, which allows modification of a written sentence to conform with the legally effective oral sentence within 120 days of the written sentence, but Legg failed to establish or discuss the existence of any conflict between the oral and written sentences or to move that the written sentence be amended. By the time that the issue arose on appeal, the 120-day time limit had passed, so Legg waived the right to request modification of the written judgment, and the Supreme Court declined to remand for resentencing on the issue. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004).

No Reliance on Misinformation in Sentencing — Due Process Rights Not Violated: Despite the District Court's statement to the contrary, Winkle contended that the court relied on misinformation in sentencing, violating Winkle's due process rights. Due process requires that an offender be given an opportunity to explain, argue, and rebut any information, including presentencing information, that may lead to a deprivation of life, liberty, or property. Winkle argued that, given the timing of the information, he did not have an opportunity to rebut, so the court should have granted a continuance in the sentencing hearing. The decision to grant a continuance is in the discretion of the sentencing court, and the timeliness of a continuance motion is a legitimate factor for the court to consider in determining whether to grant the motion. When a criminal defendant contests matters in a presentence report, the defendant has an affirmative duty to present evidence establishing inaccuracies, and if the defendant feels that inadequate time has been allowed to accurately rebut the information, a motion for continuance is in order. Here, the motion for continuance was untimely because it was made after counsel twice indicated sentencing should proceed and after the oral imposition of sentence. Winkle's contention that the sentencing court erroneously relied on certain information in imposing sentence was also flawed. The court did not explicitly state the materials that it was deleting from the presentence report, and absent specific objection, a sentencing court is not required to do so. There was information that Winkle was unable to successfully complete the presentence investigation questionnaire, and this is the information that the court relied on. Failing to establish either any misinformation or that he had no opportunity to rebut information, Winkle's due process rights were not violated, and the sentence was affirmed. St. v. Winkle, 2002 MT 312, 313 M 111, 60 P3d 465 (2002), followed in St. v. Roedel, 2007 MT 291, 339 M 489, 171 P3d 694 (2007).

No Error in Refusal to Allow Withdrawal of Guilty Plea — Parents of Sexual Assault Victim Not Parties to Plea Agreement: Following a guilty plea and conviction of sexual assault, Knox moved to withdraw the guilty plea, arguing that the County Attorney violated the terms of a plea agreement, which had recommended a 30-year suspended sentence and dropping a second sexual assault charge in exchange for the guilty plea, and indicated that the parents of the 5-year-old victim would not recommend incarceration in the victim impact statement of the presentence investigation. During the colloquy required by 46-12-210, the District Court informed Knox that, like the court itself, the parents were not bound by the plea agreement and could change their minds at any time as far as recommending future imprisonment, adding that if the parents did change their minds, that fact would not suffice as grounds for withdrawal of a guilty plea. Nevertheless, Knox voluntarily accepted the possible consequences of the plea and pleaded guilty. The parents then recommended imprisonment, and Knox was sentenced to 40 years with 18 suspended. A District Court may permit the withdrawal of a guilty plea upon a showing of good cause, but the determination of good cause is discretionary, and each case is considered on its merits. Here, the District Court subsequently denied the withdrawal motion pursuant to the colloquy, and Knox appealed, but the Supreme Court affirmed. After applying the factors in St. v. Bowley, 282 M 298, 938 P2d 592 (1997), the Supreme Court found that there was no abuse of discretion in the denial of the motion to withdraw and that Knox's guilty plea thus met the constitutional standard of a voluntary, intelligent, and knowing choice among options. The District Court acted according to statutory requirements when it made clear that the parents could make known their opinion and change their minds regarding Knox's incarceration because they were not parties to the plea agreement, pursuant to the court's duties in this section. Further, other evidence in a psychological evaluation indicated that Knox had violent tendencies that presented complications to successful treatment, had high-risk factors for violent recidivism, and had resisted treatment for chemical dependency in the past, so the

parents' incarceration request was not a determinative basis for the sentence. St. v. Knox, 2001 MT 232, 307 M 1, 36 P3d 383 (2001).

Conditions Imposed in Written Judgment and Sentence Different From Those Imposed in Oral Sentence — Lane, Waters, and Simpson Reviewed — Test to Determine Which New Conditions Lawful or Unlawful — Payment of Restitution and Costs: Johnson was sentenced orally for writing bad checks and later contended that four of the conditions imposed in the written judgment and sentence by the District Court were unlawful under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), because they were not announced orally when she was sentenced in open court. The Supreme Court reviewed its decisions in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142 (1999), and St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361 (1999), and reasoned that a written sentence would be held unlawful only if it substantively increased the defendant's loss of liberty or the defendant's sacrifice of property. Under this test, the Supreme Court held that two of the four penalties not mentioned by the District Court in its oral pronouncement of Johnson's sentence were unlawful, those being the restitution ordered to the Missoula County jail of money expended for Johnson's medical care and the requirement that Johnson pay for the costs of her prosecution in District Court. The Supreme Court held that the other two parts of the written sentence, the requirement that Johnson make restitution from money earned in prison and the imposition of certain "civil" restrictions as conditions of Johnson's suspended sentence, such as the requirement that Johnson stay out of gambling casinos, were lawfully imposed because they did not increase the amount of money that Johnson was ordered to pay or increase Johnson's deprivation of liberty in addition to those penalties imposed orally. The requirement for payment from prison earnings only specified where the money was to come from, and the "civil" restrictions were largely mentioned by the District Court at Johnson's sentencing hearing. St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Due Process Violation in Failing to Afford Defendant Opportunity at Sentencing to Rebut Information Not in Presentence Investigation Report: In sentencing Hocevar for criminal endangerment of one child, the District Court denied Hocevar's due process rights by finding by a preponderance of the evidence that Hocevar smothered two other children without affording Hocevar the opportunity procedurally to challenge the accuracy of the information, which was not contained in the presentence investigation report. As determined in St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), a sentencing judge may rely on facts outside the presentence report if, in order to avoid misinformation in sentencing, the defendant is given an opportunity to explain or rebut the information at the presentence hearing. The Supreme Court remanded for resentencing. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Failure to Object to Conduct of Psychological Evaluation or to Continuation of Sentencing Hearing — Waiver of Right to Consideration on Appeal: Osterloth was convicted of felony sexual assault and was required to undergo a sexual offender evaluation by a therapist of his choice at county expense. His scheduled sentencing was continued to allow the evaluation. On appeal, Osterloth contended that the District Court erred by sentencing him without an evaluation prepared by a qualified therapist, pursuant to 46-18-111, and by continuing sentencing instead of conducting a sentencing hearing without delay, as required in this section. The Supreme Court noted that under 46-20-104, it is precluded from considering an alleged error unless a timely objection was made or the criteria of 46-20-701 are met. Osterloth did not object to the evaluation being conducted by his own evaluator or to the sentencing continuation, nor did he assert that he could satisfy any of the requirements of 46-20-701. Thus, Osterloth waived the right to have the Supreme Court consider these alleged errors on appeal. St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000).

Remand for Modification of Written Judgment to Conform to Oral Sentence: Osterloth contended that the District Court failed to comply with the provisions of this section, which require that in felony cases, the court state all reasons for the sentence in open court and in the written judgment, and that, as a result, he was entitled to be resentenced. Osterloth was partially correct, in that the written judgment must conform to the oral sentence; however, resentencing was not required. Rather, the Supreme Court affirmed the sentence and remanded for entry of a modified written judgment setting forth the reasons for the sentence as stated in the oral sentence. St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000). See also St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142 (1999), and St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361 (1999).

Authority to Amend Written Judgment to List Reasons for Parole Restriction: Defendant contended that the District Court erred in failing to state its reasons for restricting parole eligibility in the court's original written judgment and that further error occurred when the court

amended the written judgment, following remand from the Sentence Review Division, to list the reasons parole was restricted. Under 46-18-117 (now repealed), the District Court may correct an erroneous sentence at any time to correct clerical errors and to make the record reflect what was actually decided, as long as the correction does not set aside the judgment or change what was originally intended. Here, the amended judgment was consistent with the oral pronouncement of judgment and merely set forth the reasons for imposing the parole restriction. Further, 46-18-117 (now repealed) allows correction of a sentence following remand from an appellate court. The Sentence Review Division functions as part of the appellate process. Thus, when the Division remanded the matter to the District Court for clarification, the court had the express statutory authority to issue an order amending the written judgment to list its reasons for imposing the parole eligibility restriction. (See 2001 amendment to 46-18-116.) St. v. Christianson, 1999 MT 156, 295 M 100, 983 P2d 909, 56 St. Rep. 613 (1999).

Heinous Nature of Crime Alone Justifying Parole Restriction: Defendant raised several contentions in arguing that the District Court improperly imposed a parole eligibility restriction as part of a sentence for the mitigated deliberate homicide of his 3-year-old daughter. The District Court commented at sentencing that it felt "somewhat as the representative of [the] now deceased child". Defendant alleged that the statement showed undue partisanship and indicated failure of the court to act as an objective judicial officer. However, when viewed in the context of the entire proceeding, the comment underscored the court's conclusion that the heinous, brutal nature of the crime was sufficient reason alone to withdraw the privilege of parole eligibility. Citing St. v. Heit, 242 M 488, 791 P2d 1379 (1990), the Supreme Court also noted that it had in the past upheld parole restrictions based upon the heinous nature of the offense. Imposition of the restriction was not an abuse of the court's broad sentencing discretion. St. v. Christianson, 1999 MT 156, 295 M 100, 983 P2d 909, 56 St. Rep. 613 (1999).

Collateral References

Victim impact evidence in capital sentencing hearings—post-Payne v. Tennessee. 79 ALR 5th 33.

46-18-116. Judgment — conflict between written judgment and oral pronouncement — correction of factually erroneous sentence or judgment.

Compiler's Comments

2003 Amendment: Chapter 141 in (1) at beginning of third sentence substituted "written judgment" for "judgment" and at end inserted "within 30 days after the oral pronouncement of the disposition of the case"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 74 in (1) inserted fourth and fifth sentences requiring service of a copy of the judgment on the defendant, including a statement of the rights set forth in subsection (2); inserted (2) concerning a request for modification of a written judgment and waiver of the request; inserted (3) allowing correction of a factually erroneous or illegal sentence; and made minor changes in style. Amendment effective March 20, 2001.

New subsection (3), concerning correction of a factually erroneous sentence or judgment and how an illegal sentence is addressed, relates to the subject matter of former 46-18-117, which was repealed by Ch. 74, L. 2001.

Applicability: Section 4, Ch. 74, L. 2001, provided: "[This act] applies to all cases currently pending on direct review or that are not yet final".

Case Notes

DECISIONS GOVERNED BY LAW IN EFFECT AFTER
2001 AMENDMENT OF 46-18-116 AND REPEAL OF 46-18-117

Appeal Filed Within Sixty Days of Entry of Judgment Timely: Clark was convicted on March 23, and the written judgment was entered with the Clerk of Court on March 27. Clark filed an appeal on May 23 and an amended notice of appeal on May 25. The state contended that the appeal was untimely because it was not entered within 60 days of the conviction. The Supreme Court disagreed. In criminal cases, an appeal must be entered within 60 days of entry of judgment, not conviction. Clark's appeal was filed 57 days after the written judgment was entered, and the amended notice was filed 59 days after entry of judgment. Thus, the appeal was timely. St. v. Clark, 2008 MT 112, 342 M 461, 182 P3d 62 (2008).

Written Sentence Conforming to Oral Sentence — Sentence Modification Denied: At Garland's sentencing hearing on a mitigated deliberate homicide charge, the District Court sentenced Garland to 30 years plus 10 years for use of a weapon, with the sentences to run consecutively. The County Attorney then suggested the possibility of a 40-year sentence with 10

years suspended to address the ease of supervised probation. The court agreed to a 40-year sentence with 10 years suspended as long as it did not result in an earlier parole. However, after further consulting with the attorneys, the court issued the written judgment the following day stating the original sentence of 30 years plus 10 years for use of a weapon. Almost 12 years later, Garland submitted a motion to modify the written sentence to conform to the orally pronounced 40-year sentence with 10 years suspended. The motion was denied, and on appeal, the Supreme Court affirmed. It was clearly stated at the hearing that imposition of the 40-year sentence with 10 years suspended was contingent on the condition that it would not make Garland eligible for earlier parole. The subsequent discussion with attorneys revealed that the 40-year sentence with 10 years suspended would in fact result in earlier parole, so the written judgment reflected the original sentence. The contingent condition raised at the hearing did not occur, so there was no discrepancy between the oral and written sentence, and Garland's motion to modify the sentence was properly denied. St. v. Garland, 2007 MT 280, 339 M 433, 171 P3d 675 (2007).

Improper Nunc Pro Tunc Judgments Reducing Credit for Time Served Vacated: By nunc pro tunc judgment, the District Court reduced the number of days of credit that Megard received for prior incarceration after two suspended commitments to the Department of Corrections were revoked, and Megard appealed. The Supreme Court reviewed the sentence for legality, noting that once a valid sentence has been pronounced, a District Court has no authority to modify or change it except as provided by statute. Under subsection (3) of this section, a factually erroneous judgment can be corrected at any time, but the original judgments against Megard were not factually incorrect in that Megard was properly credited for time served at that time and the credit did not conflict with the oral pronouncement of Megard's sentence from the bench. Thus, the District Court's amended nunc pro tunc judgments were not within the purview of subsection (3) of this section and, being illegal, were vacated. The case was remanded for reinstatement of the original judgments. St. v. Megard, 2006 MT 84, 332 M 27, 134 P3d 90 (2006), following St. v. Fertterer, 260 M 397, 860 P2d 151 (1993), and St. v. Kroll, 2004 MT 203, 322 M 294, 95 P3d 717 (2004).

Motion to Dismiss Denied Despite Trial Court's Failure to Enter Written Judgment Within Statutory Time Limit: Despite Ferguson's request for expedited sentencing, the District Court still had not entered a written sentence or set a sentencing date more than a month after the oral sentence was pronounced. Ferguson moved for a new trial based on the requirement of this section that a trial court must enter a written sentence within 30 days after oral pronouncement of sentence and asserted that failure of the court to issue a written sentence within the statutory time limit divested the court of jurisdiction to impose a sentence. Neither the state nor the court responded to the motion, but a written sentence was finally rendered 48 days after oral sentencing. Ferguson appealed, citing St. v. Winterrowd, 1998 MT 74, 288 M 208, 957 P2d 522 (1998). The Supreme Court distinguished Winterrowd because that case dealt only with late sentencing by nunc pro tunc orders, and the court declined to extend it in a way that would allow convicted persons to escape sentencing altogether. Although the record did not disclose a legitimate justification for the plain violation of the statute in Ferguson's case, the Supreme Court noted that the statute contains no remedial provision to address a sentencing court's failure to issue a timely written sentence. However, loss of jurisdiction and dismissal of the case were held to be too extreme a remedy, given the relatively minor nature of the sentencing court's statutory infraction. Rather, the Supreme Court deferred to the sentencing court's discretion in rendering timely written judgments on the record and affirmed Ferguson's sentence. St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

District Court Retention of Criminal Jurisdiction — State's Appeal of Order Granting Driving Privileges Not Timely: A condition of Jivelekas's sentence for felony DUI and misdemeanor driving with a revoked or suspended license provided that Jivelekas could not drive unless approval was granted by the sentencing court or Jivelekas's supervising officer. Nearly 2 years after Jivelekas completed all terms of his sentence, he asked the District Court for approval to operate a motor vehicle in order to maintain full-time employment. The state contended that because 61-8-731 required that Jivelekas's probation officer authorize motor vehicle operation, the District Court did not have jurisdiction to consider Jivelekas's motion. The Supreme Court disagreed. Even if the District Court exceeded its statutory authority in imposing the sentence condition, the court still retained jurisdiction to entertain Jivelekas's motion. Additionally, the Supreme Court was precluded from addressing the merits of the state's argument because the state failed to file a timely appeal pursuant to former Rule 5(b), M.R.App.P. (now superseded), so the appeal was time-barred. St. v. Jivelekas, 2005 MT 277, 329 M 204, 122 P3d 1248 (2005), following Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004).

Adoption of Sentence Recommended in Presentence Investigation Report, With Variations — No Error in Disparity Between Oral and Written Sentence: As set out in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the oral pronouncement of sentence is the legally effective sentence, and the written judgment and commitment serves as evidence of the sentence orally pronounced. Wiedrich contended that because his written sentence contained terms and conditions that were not orally pronounced, the extra conditions were invalid and should be removed from the sentence. The Supreme Court disagreed. The transcript revealed that the sentencing court clearly adopted the sentence recommended in the presentence investigation report, with some variations—a fact that Wiedrich and his counsel were fully aware of—and the Supreme Court therefore declined to remand for resentencing. St. v. Wiedrich, 2005 MT 127, 327 M 214, 112 P3d 1054 (2005).

Suspension of Part of Sentence for Failure to Register as Sex Offender — Conditions in Written but Not Oral Judgment That Full Employment Be Maintained and Offender Not Have Contact With Victims: Malloy, a convicted sex offender, pleaded guilty to failing to report his change of address. The written judgment, but not the oral pronouncement of sentence, required him to maintain full-time employment and to not have contact with the victims of his offense. The court could not say that the conditions would not substantively increase his loss of liberty or sacrifice of property, and accordingly, the court ordered those conditions to be vacated. St. v. Malloy, 2004 MT 377, 325 M 86, 103 P3d 1064 (2004).

Imposition of Stock Probation Requirements in Written Sentence When Not Mentioned in Oral Sentence Not Error Absent Showing of Prejudice: When Kroll was sentenced orally for a felony bad check scheme, he received a 10-year prison sentence with all but 180 days suspended and was ordered to pay restitution, not possess or consume alcohol, obtain a chemical dependency evaluation, refrain from entering casinos and playing games of chance, and undergo a sexual risk assessment because many of the materials purchased with the bad checks included pornography. The subsequent written judgment deviated from the oral pronouncement in several respects, omitting the sexual risk assessment and including several conditions not addressed at the oral sentencing, including requirements that Kroll conduct himself in a law-abiding manner, submit to reasonable searches, not own or possess firearms or deadly weapons, maintain full-time legitimate employment, have no contact with the victims, and pay a supervision fee. Kroll contested the validity of the added conditions in the written sentence and the imposition of the sexual risk assessment. The Supreme Court affirmed. The added conditions were civil restrictions that were considered stock requirements for probationers and individuals subject to a suspended sentence and did not substantively increase Kroll's loss of liberty or sacrifice of property. Given the standard nature of the sentencing conditions, Kroll suffered no actual prejudice by failure of the District Court to impose the conditions at oral sentencing, and they were therefore upheld as lawful. The state conceded that the alcohol restrictions and the chemical dependency conditions of the oral sentence were not related to the crime, and the Supreme Court ordered that those conditions be removed, leaving only the gambling and sexual risk assessment at issue. The Supreme Court affirmed those conditions because they were related to the bad check crimes and were a reasonable condition to assist Kroll's rehabilitation. St. v. Kroll, 2004 MT 203, 322 M 294, 95 P3d 717 (2004), following St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480 (2000). See also St. v. Lucero, 2004 MT 248, 323 M 42, 97 P3d 1106 (2004), in which the imposition of significant restrictions and conditions not mentioned in the oral sentence, in addition to stock sentencing conditions authorized in Kroll, was considered prejudicial, reversible error.

No Continuing District Court Jurisdiction to Review Original Sentence and Resentence on Original Charge: Evert was sentenced to 65 years in prison with 15 years suspended for sexual assault. About 5 years into the sentence, Evert petitioned pro se for postconviction relief, alleging numerous claims related to his guilty plea and sentencing, but no hearing was held. Following appointment of two different public defenders, the District Court was notified that the parties had reached an agreement on Evert's petition. In exchange for a new sentence, Evert agreed to withdraw the petition, waive the right to appeal the amended sentence, and waive the right to file any further postconviction petitions based on the new sentence. The District Court agreed to the stipulation, noted Evert's criminal history and progress in prison, and resentenced Evert to 60 years with 20 years suspended, with credit for time served. Evert then appealed the new sentence on grounds that the District Court mistakenly described Evert's eligibility for parole and that because the court did not correctly advise him, he did not fully understand the consequences of waiving his postconviction claims. The Supreme Court reversed because the District Court did not have continuing jurisdiction to resentence Evert after final judgment. Under 46-18-117 (now repealed), the District Court could modify or correct an erroneous

sentence but had no authority to resentence Evert on the original charge. Therefore, Evert's original sentence was reinstated, the postconviction claims that Evert waived were also reinstated, and the case was remanded for consideration of the postconviction claims. St. v. Evert, 2004 MT 178, 322 M 105, 93 P3d 1254 (2004), following Gilbert v. St., 2002 MT 258, 312 M 189, 59 P3d 24 (2002), and Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003).

Remand for Consideration of Amendment of Judgment to Reflect Conviction of Assault With Weapon by Accountability Rather Than Assault With Weapon: Although McDanold's plea of guilty to assault with a weapon was premised entirely on the alternative charge that McDanold was guilty of assault with a weapon by accountability, neither the written nor the oral sentence included any mention of accountability. When McDanold arrived in prison, this fact affected his classification and treatment, so McDanold requested that the judgment be amended to clarify the accountability aspect of the conviction. Even though both the prosecution and defense counsel stipulated to amending the judgment, the District Court noted that the stipulation was not filed until more than 30 days after sentencing and that neither party claimed that the written judgment differed from the oral sentence, so the court declined to amend the judgment. On appeal, the Supreme Court noted that it was uncontested that the reason for including the accountability provision in the judgment did not present itself until McDanold was in prison and that a court may correct a factually incorrect sentence at any time. Therefore, under these unique circumstances, the case was remanded for further consideration of the sentencing issue. St. v. McDanold, 2004 MT 167, 322 M 31, 97 P3d 1076 (2004).

Failure to Establish Conflict Between Oral and Written Sentences — Waiver of Right to Request Modification of Written Judgment: After receiving a written judgment, Legg moved to amend or correct the judgment to include a designation of offender status and consideration of mitigating factors. Legg made the motion pursuant to this section, which allows modification of a written sentence to conform with the legally effective oral sentence within 120 days of the written sentence, but Legg failed to establish or discuss the existence of any conflict between the oral and written sentences or to move that the written sentence be amended. By the time that the issue arose on appeal, the 120-day time limit had passed, so Legg waived the right to request modification of the written judgment, and the Supreme Court declined to remand for resentencing on the issue. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004).

DECISIONS GOVERNED BY LAW IN EFFECT PRIOR TO 2001 AMENDMENT OF 46-18-116 AND REPEAL OF 46-18-117

Addition of Written Sentencing Conditions Not Enunciated Orally at Hearing — Johnson Applied: Drube failed to complete a sex offender program, so the District Court revoked his suspended sentence and sentenced him to a 9-year term, with commitment to the Department of Corrections for the first 5 years and the remainder to be served at the state prison. The court specified that the prison portion of the sentence be suspended as long as Drube met sentencing conditions, including completion of a long-term aftercare program. Drube appealed the sentence on grounds that the court imposed a condition on the sentence that was impossible to fulfill and because the written revocation and sentencing order differed from the oral sentence enunciated at the sentencing hearing. Reviewing the sentence for legality, the Supreme Court affirmed. Drube presented nothing establishing that it would be impossible to complete the sex offender program within the reinstated 5-year commitment to the Department. Arguing that eight written conditions added to the suspended sentence by written order should be stricken, Drube cited St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), for the proposition that when written and oral sentences differ, the oral order prevails. The Supreme Court agreed with the general rule in Lane, but noted that the rule is not absolute. Under St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480 (2000), when deciding whether a subsequent written sentencing order is unlawful because it contains conditions not enunciated orally, the court first determines whether a defendant was afforded the opportunity to respond to the inclusion upon sufficient notice at hearing and second whether the portion of the written sentence substantively increases the defendant's loss of liberty and sacrifice of property. Here, all the conditions in the 2002 written revocation and sentencing order were contained either in Drube's original sentence or in a 2001 revocation and sentencing order and thus were not new or unknown to Drube, who had the opportunity to respond to the conditions placed on the sentence, nor did Drube present any argument that the eight conditions substantively increased the loss of liberty or sacrifice of property. Thus, the 2002 sentencing order was not rendered unlawful by the addition of conditions not imposed orally at the sentencing hearing. St. v. Drube, 2003 MT 138, 316 M 156, 69 P3d 1182 (2003).

Correction of Sentence for Imprisonment Not Erroneous: Kern was convicted of felony sexual assault against a minor. The District Court sentenced Kern to a 15-year commitment to the Department of Corrections, with all but 7 years suspended. However, 46-18-201 requires that a sentence to the Department include suspension of all but 5 years of the commitment. The District Court corrected its mistake and committed Kern to the state prison for 15 years, with all but 7 years suspended. Kern contended that the court erred in correcting the sentence. Under the version of 46-18-117 in effect at the time that the crime was committed (prior to repeal in 2001), the court was allowed to correct the erroneous sentence within 120 days of sentencing. Although Kern might have preferred commitment to the Department for 15 years with all but 5 years suspended, the District Court was not restricted from pursuing the option that it chose and did not err in timely correcting the sentence pursuant to former 46-18-117. (See 2001 amendment to this section.) St. v. Kern, 2003 MT 77, 315 M 22, 67 P3d 272 (2003).

Failure to Credit Inmate With Time Served Before Sentencing in Written Judgment After Allowing Credit in Oral Pronouncement of Sentence: At the sentencing hearing, Horton inquired as to whether he would get credit for time served between arrest and sentencing. The judge responded that credit would be granted automatically. However, in the written judgment entered 2 days later, the judge denied credit for time served because Horton was being held on a probation violation. Under 46-18-403, Horton was entitled to credit for each day of incarceration prior to or after sentencing, and pursuant to St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the court's oral pronouncement controlled over the written judgment. Thus, the Supreme Court directed that the provision in the written judgment denying Horton credit for time served be stricken. St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001).

Extra Conditions in Sentencing Order Not Mentioned in Oral Sentence Stricken: The District Court that sentenced Waters imposed two extra conditions in the sentencing order that were not contained in the plea agreement or presentence investigation or contained in the oral sentence: (1) payment of supervision fees; and (2) submission to Texas authorities. Pursuant to St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), the oral pronouncement controls. Thus, Waters contended that only the conditions contained in the oral sentence could be imposed. The Supreme Court clarified Lane, noting that Waters was on notice of the conditions in the plea agreement and presentence investigation and that those terms applied despite the ambiguous sentencing conditions that were imposed orally. However, the court remanded for an amendment of the written sentence to strike the submission to Texas authorities, which was never mentioned, and to strike the payment of supervision fees as well, unless it was determined that payment of the fees would not impose a significant hardship on Waters, pursuant to 46-23-1031. St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999), followed in St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Authority to Amend Written Judgment to List Reasons for Parole Restriction: Defendant contended that the District Court erred in failing to state its reasons for restricting parole eligibility in the court's original written judgment and that further error occurred when the court amended the written judgment, following remand from the Sentence Review Division, to list the reasons parole was restricted. Under 46-18-117 (now repealed), the District Court may correct an erroneous sentence at any time to correct clerical errors and to make the record reflect what was actually decided, as long as the correction does not set aside the judgment or change what was originally intended. Here, the amended judgment was consistent with the oral pronouncement of judgment and merely set forth the reasons for imposing the parole restriction. Further, 46-18-117 (now repealed) allows correction of a sentence following remand from an appellate court. The Sentence Review Division functions as part of the appellate process. Thus, when the Division remanded the matter to the District Court for clarification, the court had the express statutory authority to issue an order amending the written judgment to list its reasons for imposing the parole eligibility restriction. St. v. Christianson, 1999 MT 156, 295 M 100, 983 P2d 909, 56 St. Rep. 613 (1999).

Heinous Nature of Crime Alone Justifying Parole Restriction: Defendant raised several contentions in arguing that the District Court improperly imposed a parole eligibility restriction as part of a sentence for the mitigated deliberate homicide of his 3-year-old daughter. The District Court commented at sentencing that it felt "somewhat as the representative of [the] now deceased child". Defendant alleged that the statement showed undue partisanship and indicated failure of the court to act as an objective judicial officer. However, when viewed in the context of the entire proceeding, the comment underscored the court's conclusion that the heinous, brutal nature of the crime was sufficient reason alone to withdraw the privilege of parole eligibility. Citing St. v. Heit, 242 M 488, 791 P2d 1379 (1990), the Supreme Court also noted that it had in the past upheld parole restrictions based upon the heinous nature of the offense. Imposition of

the restriction was not an abuse of the court's broad sentencing discretion. St. v. Christianson, 1999 MT 156, 295 M 100, 983 P2d 909, 56 St. Rep. 613 (1999). See also St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

Oral Pronouncement as Legally Effective Sentence — Correction of Error in Written Judgment by Nunc Pro Tunc Order — Due Process and Double Jeopardy Rights Not Violated: The oral pronouncement of sentence is the legally effective sentence. The written judgment and commitment serves as evidence of the sentence orally pronounced. In the event of a conflict between the oral and written sentence, the oral controls. The sentencing court may correct an error in a written judgment and commitment by a nunc pro tunc order, pursuant to 46-18-117 (now repealed), to accurately reflect what was orally pronounced at the sentencing hearing. Absent evidence of a tangible detriment or concrete injury to defendant, a clarifying nunc pro tunc order does not jeopardize a defendant's due process rights or constitute double jeopardy. (See 2001 amendment.) St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), overruling St. v. Enfinger, 222 M 438, 722 P2d 1170 (1986), St. v. Wirtala, 231 M 264, 752 P2d 177 (1988), St. v. Mason, 253 M 419, 833 P2d 1058 (1992), and St. v. Graveley, 275 M 519, 915 P2d 184 (1996), to the extent that those cases held that the written judgment and commitment, rather than the oral pronouncement of sentence, was to be considered the final, valid order, and followed and applied retroactively in St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361, 56 St. Rep. 1032 (1999). The Supreme Court amended former Rule 5, M.R.App.P. (now superseded), to reflect the Lane decision in In re Amending Rule 5 of the Mont. Rules of Appellate Procedure, 55 St. Rep. 1267 (1998). The Lane rule was applied retroactively in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999). Lane was also followed in St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), and St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001). See also St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Abuse of Discretion for Court to Correct Failure to Sentence by Nunc Pro Tunc Order: The District Court failed to sentence Winterrowd, in either open court or by written judgment, on his misdemeanor theft conviction. Four months later, the court issued an order nunc pro tunc, sentencing Winterrowd to 6 months' imprisonment. It is within a District Court's power to enter an order nunc pro tunc modifying or amending a judgment in order to remedy certain types of clerical errors or to make the record reflect what was actually decided. However, in this case, not only was the sentence omitted from the written sentencing order, but the sentence was not even discussed at the sentencing hearing. The Supreme Court reversed and vacated the nunc pro tunc order and sentence. St. v. Winterrowd, 1998 MT 74, 288 M 208, 957 P2d 522, 55 St. Rep. 307 (1998).

No Jurisdiction to Modify Sentence as to Restitution: Defendant was ordered to pay the victim's future counseling costs. Later, on a motion of the state, the court ordered defendant to pay costs for inpatient psychiatric treatment received by the victim prior to the original court order. The Supreme Court held that the District Court was without jurisdiction to modify the sentence under 46-18-117 (now repealed) because the sentence was not erroneous or imposed in an illegal manner. St. v. Richards, 285 M 322, 948 P2d 240, 54 St. Rep. 1172 (1997), followed in St. v. Rennick, 1999 MT 155, 295 M 97, 983 P2d 907, 56 St. Rep. 611 (1999).

Appeal of Misdemeanor Conviction From Justice's Court to District Court — No Record of Oral Pronouncement of Sentence in Justice's Court — District Court Jurisdiction Upheld: Tweedy was convicted by a Justice's Court jury of misdemeanor assault and was scheduled for sentencing on April 18, 1989. On April 19, Tweedy filed a notice of appeal to the District Court. The Justice's Court filed its sentencing order on May 3. Later, in response to a motion by Tweedy to dismiss the underlying charge, the state contended that the District Court had not acquired jurisdiction over Tweedy. The Supreme Court held that since there was no evidence in the record that the sentencing hearing scheduled for April 18 did not, in fact, take place and since, under St. v. Mortenson, 175 M 403, 574 P2d 581 (1978), appeal may be taken within 10 days after sentence is orally pronounced in open court, Tweedy's notice of appeal was timely filed and the District Court had jurisdiction over the case. The Supreme Court also noted that the later enactment of this section, which applies to Justices' Courts by virtue of 46-1-103, requiring a signed judgment on the record, should eliminate confusion in the future regarding when the statutory time for appeal begins to run. St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996).

Variance Between Oral and Written Sentence Held Harmless Error: Graveley was convicted of solicitation to commit deliberate homicide. At the sentencing hearing, the District Court announced Graveley's sentence of 40 years in the custody of the Department of Corrections, with the first 10 years in a prison environment. The District Court's written judgment omitted the reference to the first 10 years. The Supreme Court held that a review of the oral record showed that the District Court intended the reference to 10 years to mean a minimum of 10 years and

that because under the written judgment Graveley would be eligible for a supervised release program earlier than under the oral pronouncement, Graveley was not prejudiced by the written judgment. The Supreme Court held that absent a finding that a sentence is erroneous or illegal, the District Court could not alter its sentence. However, the difference in this case between the oral pronouncement and written judgment was harmless error. St. v. Graveley, 275 M 519, 915 P2d 184, 53 St. Rep. 239 (1996).

No Error in Refusal to Modify Sentence to Run Concurrently With Federal Sentence: After Fertterers were each convicted and sentenced on state felony and misdemeanor counts involving poaching, they were convicted of federal violations arising out of the same acts. The federal District Court stated that the federal sentences "shall be served concurrent to state penalties dealing with the same criminal transaction". The state District Court, which announced its penalties before the federal District Court did, refused to amend its sentences to allow them to run concurrently with the penalties of the federal District Court. The Supreme Court held that the state District Court was correct in its refusal in that the state District Court did not have jurisdiction to amend a lawful sentence once the sentence was pronounced. St. v. Fertterer, 260 M 397, 860 P2d 151, 50 St. Rep. 1135 (1993), followed in St. v. Graveley, 275 M 519, 915 P2d 184, 53 St. Rep. 239 (1996).

Part 2
Form of Sentence

46-18-201. Sentences that may be imposed.

Commission Comments

Source: New.

[Section 46-18-201(1)(a)] was principally constructed for the benefit of a young offender who has no previous criminal record. Thus, if the imposition of sentence is deferred, the fact an individual made one mistake will not plague him for the rest of his life.

Under [46-18-201(1)(b)] the judge may give a credit for elapsed time if he feels this to be an incentive for better behavior.

The conditions which may be imposed are left entirely to the imagination of the individual judge. It is contemplated that conditions will be imposed which are for the benefit of the individual, and which can be fairly met. An example would be jail-basing of the sentenced individual for a specified period of time, or some other limitations on his daily life which [are] in keeping with the individual's particular needs in adjusting to his environment.

Compiler's Comments

2009 Amendment: Chapter 128 inserted (3)(b) authorizing court to permit food donation to pay all or part of fine; and made minor changes in style. Amendment effective April 1, 2009.

2007 Amendment: Chapter 483 in (3)(d)(i) at end after "suspended" inserted "except as provided in 45-5-503(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), 45-5-603(2)(c), and 45-5-625(4)"; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

2005 Amendments — Composite Section: (Version effective July 1, 2006) Chapter 449 in (3)(b) before "counsel" deleted "court-appointed" and inserted "assigned"; in (4)(g) before "counsel" deleted "court-appointed" and inserted "assigned"; and made minor changes in style. Amendment effective July 1, 2006.

Chapter 517 inserted (4)(n) relating to participation in a day reporting program; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2003 Amendments — Composite Section: Chapter 258 in (3)(c) at end after "prison" inserted "to be designated by the department of corrections"; and made minor changes in style. Amendment effective April 9, 2003.

Chapter 272 in (5) near beginning after "any" inserted "other", after "imposed" deleted "pursuant to subsection (1)", after "if" inserted "a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere and", near middle after "victim" substituted "as defined in 46-18-243" for "of the offense", after "shall" inserted "as part of the sentence", and at end after "46-18-249" inserted "whether or not any part of the sentence is deferred or suspended"; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 437 in (5) near beginning after "pursuant to" substituted "this section" for "subsection (1)" (amendment rendered void by Ch. 272 amendment); inserted (6) authorizing the sentencing judge to suspend a person's license or driving privilege and referencing the procedure

for suspending a license or driving privilege; and made minor changes in style. Amendment effective October 1, 2003.

Retroactive Applicability: Section 3, Ch. 258, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to persons sentenced on or before [the effective date of this act]." Effective April 9, 2003.

Section 10, Ch. 272, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who have an unpaid restitution obligation on [the effective date of this act]." Effective October 1, 2003.

Applicability: Section 3, Ch. 437, L. 2003, provided: "[This act] applies to sentences imposed for offenses committed on or after [the effective date of this act]." Effective October 1, 2003.

Retroactive Applicability: Section 1, Ch. 152, L. 2001, amended sec. 18, Ch. 375, L. 1997, to read: "Section 18. Retroactive applicability. The provisions of Title 46, chapter 23, part 5, and of [this act] relating to registration apply retroactively, within the meaning of 1-2-109, to:

(1) sexual offenders who are sentenced by a state or federal court in any state on or after July 1, 1989, or who as a result of a sentence are under the supervision of a county, state, or federal agency in any state on or after July 1, 1989; and

(2) violent offenders who are sentenced by a state or federal court in any state on or after October 1, 1995, or who as a result of a sentence are under the supervision of a county, state, or federal agency in any state on or after October 1, 1995." Amendment effective March 29, 2001.

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to sentencing judge for references to court; in (1)(a) substituted "except as otherwise specifically provided by statute, for a period" for "except as provided in 61-8-734 for sentences for driving under the influence of alcohol or drugs or as provided in 61-6-304, for a period, except as otherwise provided"; inserted (1)(a)(ii) allowing longer deferral period if financial obligation imposed; inserted (1)(b) disallowing deferral when offender has been convicted of prior felony; at end of former (1)(a) deleted former language that read: "The sentencing judge may impose upon the defendant any reasonable restrictions or conditions during the period of the deferred imposition. Reasonable restrictions or conditions may include:

(i) jail base release;

(ii) jail time not exceeding 180 days;

(iii) conditions for probation;

(iv) payment of the costs of confinement;

(v) payment of a fine as provided in 46-18-231;

(vi) payment of costs as provided in 46-18-232 and 46-18-233;

(vii) payment of costs of court-appointed counsel as provided in 46-8-113;

(viii) with the approval of the facility or program, an order that the offender be placed in a community corrections facility or program as provided in 53-30-321;

(ix) with the approval of the prerelease center or prerelease program and confirmation by the department of corrections that space is available, an order that the offender be placed in a prerelease center or prerelease program for a period not to exceed 1 year;

(x) community service;

(xi) home arrest as provided in Title 46, chapter 18, part 10;

(xii) any other reasonable conditions considered necessary for rehabilitation or for the protection of society;

(xiii) payment of expenses for use of a judge pro tempore or special master as provided in 3-5-116; or

(xiv) any combination of the restrictions or conditions in subsections (1)(a)(i) through (1)(a)(xiii)"; in (2) at beginning inserted "Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, a sentencing judge may", after "execution of sentence" inserted "except as otherwise specifically provided by statute", and deleted former second and third sentences that read: "The sentencing judge may impose on the defendant any reasonable restrictions or conditions during the period of suspended sentence. Reasonable restrictions or conditions may include any of those listed in subsection (1)(a)"; in (3) at beginning of introductory clause inserted "Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, a sentencing judge may impose a sentence that may include"; in (3)(b) before first "payment" deleted "require"; in (3)(c) substituted "a term of incarceration at a" for "impose a" and after "state prison" deleted "sentence"; in (3)(d) substituted "commitment of the offender" for "commit the defendant" and after "5 years" inserted "with a recommendation"; inserted (3)(g) allowing chemical treatment of sex offenders; inserted (4) outlining restrictions or conditions allowed as part of a deferred or suspended sentence; deleted former (3) through (8) that read: "(3) If a financial obligation is imposed as a condition under subsection (1)(a), sentence may be

deferred for a period not exceeding 2 years for a misdemeanor or for a period not exceeding 6 years for a felony, regardless of whether any other conditions are imposed.

(4) If any restrictions or conditions imposed under subsection (1)(a) or (1)(b) are violated, the court shall consider any elapsed time and either expressly allow part or all of it as a credit against the sentence or reject all or part as a credit. The court shall state its reasons in the order. Credit, however, must be allowed for jail or home arrest time already served.

(5) Except as provided in 45-9-202 and 46-18-222, the imposition or execution of the first 2 years of a sentence of imprisonment imposed under the following sections may not be deferred or suspended: 45-5-103, 45-5-202(3) relating to aggravated assault, 45-5-302(2), 45-5-303(2), 45-5-401(2), 45-5-502(3), 45-5-503(2) and (3), 45-9-101(2), (3), and (5)(d), 45-9-102(4), and 45-9-103(2).

(6) Except as provided in 46-18-222, the imposition or execution of the first 10 years of a sentence of imprisonment imposed under 45-5-102 may not be deferred or suspended.

(7) Except as provided in 46-18-222, imposition of sentence in a felony case may not be deferred in the case of a defendant who has been convicted of a felony on a prior occasion, whether or not the sentence was imposed, imposition of the sentence was deferred, or execution of the sentence was suspended.

(8) If the victim was less than 16 years old, the imposition or execution of the first 30 days of a sentence of imprisonment imposed under 45-5-503, 45-5-504, 45-5-505, or 45-5-507 may not be deferred or suspended. Section 46-18-222 does not apply to the first 30 days of the imprisonment"; in (6) after "sentence on" substituted "an offender" for "a defendant"; deleted former (10) and (11) that read: "(10) A person convicted of a sexual offense, as defined in 46-23-502, and sentenced to imprisonment in the state prison shall enroll in and complete the educational phase of the prison's sexual offender program. If the person is subject to the provisions of 45-5-512, the person shall also, as provided in 45-5-512, undergo medically safe medroxyprogesterone acetate treatment or its chemical equivalent or other medically safe drug treatment that reduces sexual fantasies, sex drive, or both, paid for by and for a period of time determined by the department of corrections. The period may not exceed the period of state supervision of the person.

(11) In sentencing a nonviolent felony offender, the court shall first consider alternatives to imprisonment of the offender in the state prison, including placement of the offender in a community corrections facility or program or a prerelease center or prerelease program. In considering alternatives to imprisonment, the court shall examine the sentencing criteria contained in 46-18-225. If the court subsequently sentences the offender to a state prison, the court shall state the reasons why it did not select an alternative to imprisonment, based on the criteria contained in 46-18-225"; in (7) after "supervise the" substituted "offender" for "defendant"; deleted former (13) that read: "(13) Except as provided in 46-18-222, a provision of this section that conflicts with 46-18-219 does not apply to a person sentenced under 46-18-219"; and made minor changes in style. Amendment effective October 1, 1999.

The amendment to this section made by Ch. 390, L. 1999, was rendered void by sec. 2, Ch. 390, L. 1999, and sec. 11, Ch. 505, L. 1999, coordination sections.

Chapter 395 in (1)(a) near beginning after "verdict" inserted "of guilty" and after "plea of guilty" inserted "or nolo contendere". Amendment effective October 1, 1999.

The amendment made by Ch. 395 inserting a reference to a plea of nolo contendere in (1)(a) has been repeated in (2) and (3) pursuant to sec. 14, Ch. 52, L. 1999, a codification instruction.

Chapter 432 in (5) (now 46-18-205(2)) after "45-5-202" deleted "(3) relating to aggravated assault". Amendment effective October 1, 1999.

The amendment to (5) made by Ch. 432 was transferred to 46-18-205(2)(b) pursuant to sec. 14, Ch. 52, L. 1999, a codification instruction.

Chapter 505 in (3)(c) and (4)(a) substituted "detention center" for "jail"; in (3)(d)(i) substituted "commit:

(i) an offender not referred to in subsection (3)(d)(ii)" for "commit the defendant", after "corrections" deleted "for a period not to exceed 5 years", and after "program" inserted language requiring all but first 5 years of commitment to be suspended; inserted (3)(d)(ii) authorizing court to commit youth transferred to district court and found guilty of enumerated offense to department for placement in correctional facility or program; in third sentence in (4) (now 46-18-203(7)(b)) substituted "time served in a detention center" for "jail"; in (4)(b) substituted "incarceration in a detention center" for "jail time"; inserted (4)(m) authorizing restrictions or conditions to include order that offender complete boot camp incarceration program; and made minor changes in style. Amendment effective April 28, 1999.

The amendment to (4) made by Ch. 505 was transferred to 46-18-203(7)(b) pursuant to sec. 14, Ch. 52, L. 1999, a codification instruction.

A composite section was prepared by the code commissioner for (4)(a) because the changes to (4)(a) made by Ch. 505 were rendered void by the changes made by Ch. 52.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

Applicability: Section 13(1), Ch. 505, L. 1999, provided: "[Section 1] [46-18-201] applies to all persons sentenced on or after [the effective date of this act]." Effective April 28, 1999.

1997 Amendments — Composite Section: Chapter 181 in (2), in first sentence before "restitution", inserted "full" and deleted second sentence that read: "If the court determines that the defendant is unable to pay restitution, then it may impose, in addition to any other sentence, community service under 46-18-241."

Chapter 189 in (1)(e), near end after "correctional", substituted "facility" for "institution"; and in (11), in third sentence after "sentenced to", substituted "a state prison" for "the state prison or the women's correctional system".

Chapter 322 inserted (1)(a)(ix) and (1)(g) allowing the court to order an offender to a prerelease center or prerelease program for up to a year with the approval of the center or program and with confirmation by the Department of Corrections that space is available; in (1)(e) inserted "for a period not to exceed 5 years"; in (11), at end of first sentence, inserted "or a prerelease center or prerelease program" and in third sentence substituted "a state prison" for "the state prison or the women's correctional system"; inserted (12) providing that felony probationers be supervised by the Department of Corrections unless the court specifies otherwise; adjusted subsection references; and made minor changes in style.

Chapter 341 in (10) inserted second and third sentences providing that if a person is also subject to 45-5-512, the person shall undergo certain chemical or drug treatment to reduce sexual fantasies or sex drive and that the period of treatment may not exceed the period the person is under state supervision.

Chapter 375 in (9), after "provided in", deleted "46-18-254, 46-18-255, and".

Chapter 525 in (1)(a) substituted "61-8-734" for "61-8-714 and 61-8-722".

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Applicability: Section 3, Ch. 341, L. 1997, provided: "[This act] applies to offenses committed after October 1, 1997."

Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989;and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

Section 14, Ch. 525, L. 1997, provided: "[This act] applies to offenses committed on or after October 1, 1997."

1995 Amendments — Composite Section: Chapter 125 deleted former (1)(a)(iv) that read: "(iv) restitution"; inserted (2) requiring payment of restitution to victim or community service; and made minor changes in style.

Chapter 394 inserted (1)(a)(xii) concerning payment of expenses for the use of a judge pro tempore or special master; at end of (1)(a)(xiii) substituted "restrictions or conditions in subsections (1)(a)(i) through (1)(a)(xii)" for "above"; and made minor changes in style. Amendment effective April 12, 1995.

Chapter 407 in (9), after "sexual", inserted "or violent"; and made minor changes in style.

Chapter 482 in version effective July 1, 1997, in (10), near middle after "enroll in", inserted "and complete"; inserted (12) reconciling sentencing conflicts between 46-18-201, 46-18-219, and 46-18-222; and made minor changes in style.

Chapter 546 in (1)(e) substituted "department of corrections" for "department of corrections and human services"; in (11) substituted "women's correctional system" for "women's correctional center"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Applicability: Section 43, Ch. 125, L. 1995, provided: "[Sections 10 [46-18-201], 13 [46-18-241], and 21 [46-18-302]] apply to trials for and sentences imposed for crimes that were committed on or after [the effective date of this act]." Effective October 1, 1995.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 46-18-201, enacted as sec. 13 of Senate Bill No. 66, are effective July 1, 1997.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendments: Chapter 10 in (10), in third sentence, substituted reference to the Women's Correctional Center for reference to a women's correctional facility.

Chapter 262 near beginning of (1)(b), after "sentence", inserted "for a period" and after "allowed" inserted "or for a period of 6 months, whichever is greater".

Chapter 365 in (1)(a), after "alcohol or drugs", inserted "or as provided in 61-6-304".

Chapter 579 substituted (1)(e) that read: "impose a county jail or state prison sentence, as provided in Title 45, for the offense or commit the defendant to the department of corrections and human services for placement in an appropriate correctional institution or program" for "commit the defendant to a correctional institution, with or without a fine as provided by law for the offense". Amendment effective April 28, 1993.

1991 Amendments: Chapter 42 in (4) changed subsection reference to 45-9-102; and made minor change in style.

Chapter 105 in (1)(a), in first sentence before "sentences", substituted "except as provided in 61-8-714 and 61-8-722 for" for "excepting"; inserted (1)(a)(xi) providing for home arrest; at end of (1)(b) deleted reference to subsections of (1)(a); in last sentence of (3), after "jail", inserted "or home arrest"; and made minor changes in style.

Chapter 554 inserted (1)(a)(ix) and (1)(f) allowing court to place an offender in a community corrections facility or program; and in (1)(b) and (1)(g) changed subsection reference. Amendment effective July 1, 1991.

Chapter 564 in (4) inserted reference to 45-5-502(3); and in (7) deleted reference to 45-5-502(3).

Chapter 794 inserted (1)(a)(ix) concerning approval for community corrections placement; in (1)(b), at end, extended reference to subsection (1)(a)(xii); inserted (1)(f) concerning approval for community corrections placement; in (1)(g) extended reference to subsection (1)(f); and inserted (10) concerning consideration of alternative sentencing for nonviolent offenders. Amendment effective July 1, 1991. The Code Commissioner has combined the amendments inserting (1)(a)(ix) and (1)(f) made by Ch. 554 and Ch. 794 to reflect the content of both chapters.

Chapter 802 in (4) inserted reference to 45-9-202.

Severability: Section 14, Ch. 105, L. 1991, was a severability clause.

Applicability: Section 15, Ch. 105, L. 1991, provided: "[This act] applies to sentences imposed after [the effective date of this act] [effective October 1, 1991]."

1989 Amendments: Chapter 293 inserted (8) regarding registration of sexual offenders; inserted (9) requiring enrollment in sexual offender program by convicted sexual offenders; and made minor changes in punctuation. Amendment effective July 1, 1989.

Chapter 575 in (4) inserted reference to 45-9-101(5)(d); and made minor changes in grammar. Amendment effective April 20, 1989.

1987 Amendments: Chapter 370 near middle of (4), after "45-5-103", substituted "45-5-202(3) relating to aggravated assault" for "45-5-202(2)".

Chapter 610 in (4) substituted reference to 45-5-103 for reference to 45-5-103(2); and in (5) substituted reference to 45-5-102 for reference to 45-5-102(2).

Chapter 626 in (3) substituted language stating that if subsection (1)(a) or (1)(b) restrictions or conditions are violated, the court may disallow all or part of elapsed time (except jail time already served) against the sentence for "If any restrictions or conditions imposed under subsection (1)(a) or (1)(b) are violated, any elapsed time, except jail time, is not a credit against the sentence unless the court orders otherwise."

1985 Amendments: Chapter 205 at end of (1)(a)(iv) deleted "as provided in subsection (2)"; and in (2) substituted "any financial obligation" for "restitution" and after "(1)(a)", deleted "or (1)(b)".

Chapter 524 inserted (7) requiring that a minimum of 30 days of any imprisonment sentence be served if the victim was less than 16 years old.

1983 Amendments: Chapter 189, in (1)(a), after "for a period" inserted "except as otherwise provided"; in (1)(a)(iv), inserted "as provided in subsection (2)"; in (1)(b), after "allowed for", substituted "each" for "the"; and inserted (2) allowing deferral of sentence if a financial restitution is imposed as a sentence condition.

Chapter 581, in (1)(a)(ii), changed "90 days" to "180 days"; and inserted (1)(a)(v) including the condition of payment of the costs of confinement.

1981 Amendments: Chapter 198 inserted (1)(a)(v), (1)(a)(vi), and (1)(a)(vii) relating to payment of fine, payment of costs, and community service, respectively; in (1)(b) inserted "or conditions" following "restrictions" in two places; inserted (1)(d) relating to requiring payment of costs; and revised subsection references to reflect inserted subsections.

Chapter 207 inserted (5) restricting deferral of imposition of sentence in a felony case.

Chapter 415 inserted (1)(a)(vii) relating to payment of costs; inserted "or conditions" after "restrictions" in the second and third sentence of (1)(b); changed "(1)(a)(vi)" to "(1)(a)(x)" in (1)(b); inserted (1)(d) relating to payment of costs; and changed "subsections (1)(b), (1)(c), and (1)(d)" to "subsections (1)(b) through (1)(e)" in (1)(f).

Applicability of Commission Comments: The applicability of commission comments should be evaluated with reference to numerous subsequent amendments.

Saving Clause: Section 4, Ch. 322, L. 1979, provided: "This act applies only to offenses committed after the effective date of this act." The effective date was July 1, 1979.

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GENERAL

Authority of District Court to Sentence Youth to Department of Corrections for Fifteen Years With None Suspended: After Quesnel violated five conditions of a suspended sentence for sexual intercourse without consent and sexual assault, Quesnel was sentenced to 15 years with the Department of Corrections with a recommendation for placement at the state prison and that parole eligibility be conditioned on completion of sexual offender treatment. Quesnel was a youth at the time of the offenses but was charged directly in District Court as an adult. Quesnel contended that the District Court lacked authority to impose a 15-year sentence because under the 2001 version of 46-18-201(3)(d)(i), all but the first 5 years of the sentence should be suspended. The state maintained that 46-18-201(3)(d)(ii) should apply because Quesnel was a youth whose case was transferred to District Court, so the District Court was authorized to impose the longer sentence. Quesnel argued that because charges were filed directly in District Court, his case was never technically transferred. The Supreme Court examined the legislative history to reconcile the use of the term "transferred" and concluded that 46-18-201(3)(d)(ii) applied not only to a youth whose case was transferred from Youth Court to District Court, but also to any youth who appears in District Court pursuant to 41-5-206. Quesnel appeared in District Court to answer charges of an offense enumerated in 41-5-206 and was found guilty, therefore the provisions of 46-18-201(3)(d)(ii) applied, and the District Court was not required to suspend all but 5 years of Quesnel's sentence but in fact was authorized to impose the 15-year sentence. The District Court was affirmed. St. v. Quesnel, 2009 MT 388, 353 M 317, 220 P3d 634 (2009).

Report Containing List of Victim's Medical Expenses Insufficient to Serve as Victim-Submitted Affidavit: A presentence investigation report set out the medical expenses paid by or on behalf of a crime victim, but no documentation or evidence of payment was included. The Supreme Court concluded that the report was not sufficient in form and substance to serve as the victim-submitted affidavit of medical expenses required under 46-18-242(1)(b) to form the basis for establishing the amount of restitution owed by defendant for the victim's medical expenses. St. v. Hunt, 2009 MT 265, 352 M 70, 214 P3d 1234 (2009). See also McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

No Statutory Indication That Youth Received Illegal Sentence Following Transfer of Case to District Court: At the age of 17, Strong was charged with two counts of felony burglary, and the state moved to transfer the charges to District Court. The state also filed theft charges against Strong in Youth Court. Strong entered a guilty plea on the burglary charges in exchange for dismissal of the theft charges. The District Court sentenced Strong to the Department of Corrections for 8 years, with 2 years suspended on each count. While serving the prison term, Strong challenged the sentence as illegal because the District Court failed to suspend all but 5 years. The state countered that the 5-year limitation in 46-18-201(3)(d) did not apply to a youth who was transferred to District Court under 41-5-206. The District Court affirmed the original sentence and Strong appealed. Applying the criteria in St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), the Supreme Court addressed the facial challenge to the exemption in 46-18-201(3)(d)(ii) and affirmed. In order for an adult to receive the less onerous commitment to the Department of Corrections, the sentencing court must be willing to suspend all but 5 years of the commitment, but the statute imposes no similar impediment on a court's ability to commit to the Department a youth transferred to District Court under 41-5-206. This enhanced flexibility with regard to the treatment of youth offenders comports with the goals of the Youth Court Act to ensure rehabilitation of youth offenders rather than solely retribution. Therefore, nothing in 46-18-201(3)(d)(ii) established that Strong received an illegal sentence. St. v. Strong, 2009 MT 65, 349 M 417, 203 P3d 848 (2009). See also In re C.H., 210 M 184, 683 P2d 931 (1984).

Failure of Defendant to Admit Incest — Sentence Not Considered More Harsh Given Relevant Sentencing Factors: Bullman consistently maintained that he was not guilty of incest with his stepdaughter because he was never married to her mother. Because Bullman refused to admit guilt and was thus ineligible for community-based treatment, he asserted that he was sentenced more harshly by being sentenced to prison. The Supreme Court examined the record and disagreed. The sentencing court was aware of the prohibition against sentencing a defendant to prison because the defendant does not admit guilt, but the court also considered numerous other relevant factors in sentencing Bullman to prison in addition to the expert opinion that Bullman was not a candidate for community-based treatment, including: (1) the significant impact of the crime on the victim; (2) the need to protect society; (3) Bullman's need for appropriate treatment; (4) Bullman's criminal history; and (5) Bullman's long history of substance abuse. Given these sentencing factors, the Supreme Court could not conclude that Bullman was sentenced to prison for failure to admit guilt, and the conviction was affirmed. St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

What Constitutes Similarly Situated Case for Purposes of Retroactive Application of New Rule — Issue Required to Be Raised in Trial Court: As a general principle, in order for a case to be similarly situated for purposes of retroactive application of a newly announced rule, the issue addressed by the new rule should be raised by the movant at the trial court level and properly preserved for appeal. The only exception would be a challenge under the common-law plain error doctrine or if unique circumstances apply, such as those in St. v. Carter, 2005 MT 87, 326 M 427, 114 P3d 1001 (2005). Here, Foster-DeBerry contended that the new rule regarding suppression of telephone and transmission recordings announced in St. v. Goetz & St. v. Hamper, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), should retroactively apply to Foster-DeBerry's case, which was pending when the Goetz-Hamper rule was announced. However, Foster-DeBerry never filed a motion to suppress or raised the legal issues addressed in Goetz-Hamper in trial court, and thus did not preserve the issue for appeal, so Foster-DeBerry was not entitled to retroactive application of the Goetz-Hamper rule. Further, Foster-DeBerry did not argue for application of the plain error doctrine, so the Supreme Court declined to apply it. St. v. Foster-DeBerry, 2008 MT 397, 347 M 164, 197 P3d 1004 (2008), following Griffith v. Kentucky, 479 US 314 (1987), and St. v. Zivcic, 598 NW2d 565 (Wis. Ct. App. 1999).

Inability of District Court to Impose Sentence in Plea Agreement — Withdrawal of Guilty Plea Allowed: Deserly negotiated a plea agreement on a felony assault with a weapon charge wherein the state would recommend a 10-year sentence with the Department of Corrections and Deserly would be designated a persistent felony offender. However, after the plea was entered, the

District Court and Deserly discovered that under 46-18-201, all but the first 5 years of a department commitment must be suspended, so the sentence in the plea agreement was not one that could be legally imposed. Deserly then moved to withdraw the guilty plea on grounds of good cause, but the District Court denied the motion, and Deserly appealed. The Supreme Court reversed. Under St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), a defendant's plea is not voluntary if the court, the prosecutor, defense counsel, or some other party induced the plea, however slightly, by misrepresentation, including unfulfilled or unfulfillable promises. At the time Deserly entered the plea, it was reasonable for him to expect that the District Court could at least consider, if not actually impose, the recommended sentence, and Deserly was induced, at least in part, by the prospect of being able to receive the sentence that he and the prosecutor had negotiated and agreed to recommend. Because Deserly was induced by an unfulfillable promise of an illegal sentence, albeit unintentionally, his plea was not voluntary, and the case was remanded for further proceedings to allow Deserly to withdraw the guilty plea. St. v. Deserly, 2008 MT 242, 344 M 468, 188 P3d 1057 (2008).

Court's Sua Sponte Withdrawal of Defendant's Guilty Plea Following Judgment Considered Mistake of Law: Friedt pleaded guilty to a stop sign violation and to a charge of failing to carry proof of insurance in the vehicle and was sentenced in Municipal Court. During sentencing, the County Attorney failed to raise any issues of restitution. After judgment was entered, the court was advised by a victim of a claim of damages associated with Friedt's offenses. The court, sua sponte, withdrew Friedt's guilty pleas, appointed counsel, and set an omnibus hearing. Friedt then petitioned the Supreme Court for supervisory control, asserting that the Municipal Court lacked jurisdiction to vacate or modify the sentence once a valid sentence was pronounced and thus proceeded under a mistake of law in withdrawing the guilty pleas, which would result in a gross injustice and unnecessary expense if Friedt was required to stand trial on charges to which she knowingly and voluntarily pleaded guilty and on which she had been sentenced. The County Attorney argued that the Municipal Court retained jurisdiction under 46-16-702 and that the interests of justice to the victim and the mandatory restitution provision in 46-18-201 required the Municipal Court to remedy the situation sua sponte. The Supreme Court noted that 46-16-702 allows a new trial, following judgment, for a defendant in the interests of justice, but that the statute does not authorize a new proceeding to benefit a victim or a prosecutor who fails to timely raise a sentencing matter. Further, although 46-16-105 allows a court for good cause to allow withdrawal of a guilty plea within 1 year after judgment if evidence supports a fundamental miscarriage of justice, nothing in the statute allows a court to forcibly withdraw a defendant's guilty plea sua sponte under any circumstances. Therefore, the Supreme Court agreed that the Municipal Court's action constituted a mistake of law. Friedt's petition for supervisory control was granted, and the Municipal Court was instructed to vacate the order withdrawing Friedt's guilty pleas. Friedt v. Billings Municipal Court, 2008 MT 174, 343 M 386, 184 P3d 1032 (2008).

Adoption of Herd Standard of Review of Challenges to Legality or Propriety of Probation Conditions: The appropriate standard of review for cases challenging the legality or propriety of probation conditions is the two-pronged standard set out in St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004). The sentencing condition is first reviewed for legality. Then, because sentencing statutes authorize the imposition of conditions on deferred or suspended sentences that constitute reasonable restrictions or conditions considered necessary for the rehabilitation or for the protection of the victim or society, the reasonableness of the conditions is reviewed for an abuse of discretion. St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008).

Revocation of Suspended Felony DUI Sentence — Erroneous Order to Serve Time at State Prison: After pleading guilty to a felony DUI committed in 2000, Oie was sentenced to the Department of Corrections for 13 months, followed by 4 years of supervised release with conditions. Oie was subsequently apprehended on several occasions for violating probation conditions, and the state moved to revoke Oie's suspended sentence. The District Court gave Oie credit for time served and sentenced Oie to 4 years at the state prison. Oie appealed the sentence, arguing that under the 1999 version of 61-8-731 in effect at the time of the original offense, the District Court could not impose a sentence that was greater than the remainder of the probationary term. The Supreme Court agreed and reversed. The specific provisions of 61-8-731(5) (1999) governed the imposition of a sentence upon the revocation of Oie's suspended sentence and limited the District Court to either continuing the period of probation or requiring Oie to serve the remainder of the probation sentence. A 4-year prison sentence was outside statutory parameters, and the case was remanded for resentencing consistent with the applicable statute. St. v. Oie, 2007 MT 328, 340 M 205, 174 P3d 937 (2007), following St. v. Webb, 2005 MT 5, 325 M 317, 106 P3d 521 (2005).

Res Judicata Not Bar to Correction of Manifest Error in Prior Decision — Illegal Sentence Reversed: In 1998, when Southwick committed two felonies, this section limited commitment to the Department of Corrections (DOC) to 5 years. In 1999, the Legislature amended the statute to allow a longer DOC commitment up to the maximum time that a defendant could be sentenced for a particular offense, provided that all but the first 5 years of commitment are suspended. When Southwick's parole was subsequently revoked in 2003, the District Court revoked the suspended portion of Southwick's commitments to the DOC, even though Southwick had discharged his unsuspended commitments to the DOC, and ordered Southwick to be recommitted to the DOC for an additional 5 years in each case. Southwick petitioned the Supreme Court for a writ of habeas corpus on grounds that the sentence was illegal, but the petition was denied on grounds of res judicata. Southwick also moved the District Court for resentencing on grounds that the sentence was illegal, but the motion was denied, and Southwick appealed. The Supreme Court noted that res judicata generally precludes reviewing an issue already decided and that relitigation of issues in criminal cases is barred if: (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application; (2) the prior determination was on the merits; and (3) the ends of justice would not be served by reaching the merits of the subsequent application. The court also noted that when a criminal defendant is potentially subject to a facially illegal sentence, the ends of justice suggest that res judicata should not bar rehearing the issues even if the first two criteria are met. In this case, the District Court applied a statute that was not in effect at the time that Southwick committed the crimes, which violated the prohibition on ex post facto laws. Because the District Court did not have authority to impose the sentence, the sentence was illegal and facially invalid. The 5-year DOC commitment for each offense was valid, but not the suspended portions following Southwick's commitment. Southwick had discharged the maximum time that he could have been committed to DOC before the petition to revoke was filed, and the District Court had no authority to revoke a suspended commitment that was illegally imposed. Therefore, the Supreme Court vacated the order revoking the suspended portion of Southwick's commitments. St. v. Southwick, 2007 MT 257, 339 M 281, 169 P3d 698 (2007).

Failure to Base More Onerous Resentence on Objective Information Concerning Identifiable Conduct by Defendant or to Set Out Reasons for Longer Sentence Affirmatively in Record Violative of Due Process — Resentence Reversed: Following conviction for sexual intercourse without consent, Jackson was sentenced to the Department of Corrections for 6 years and ordered to complete a sex offender treatment program before becoming eligible for parole. More than 2 years later, Jackson moved for resentencing, alleging that the sentence violated subsection (3)(d)(i) of this section, which requires that all but the first 5 years of commitment to the Department of Corrections must be suspended, but the motion was dismissed as untimely. Jackson then petitioned for a writ of habeas corpus. The state conceded that the sentence was illegal, but asserted that resentencing, rather than striking the illegal portion of the sentence, was the proper remedy. The District Court agreed and resentenced Jackson to a 6-year term at the state prison with the same program completion requirements, after determining that the new sentence was not more onerous. Jackson appealed. Reviewing the sentence for legality, the Supreme Court reversed. Under St. v. Redfern, 2004 MT 277, 323 M 225, 99 P3d 223 (2004), in order to meet due process requirements and allow full appellate review of the constitutional legitimacy of the sentence, a longer sentence on resentencing after a new trial must be based on objective information concerning identifiable conduct of the defendant after the original sentencing and reasons for the longer sentence must affirmatively appear in the record. Additionally, a sentencing court denies a defendant's due process rights by imposing a heavier sentence as punishment for setting aside the original sentence. In this case, Jackson's resentence was considered more onerous, and the sentencing judge did not base the more burdensome sentence on objective information concerning identifiable conduct by Jackson after the original sentencing or set out the reasons for the longer sentence affirmatively in the record, thus violating Jackson's due process rights. St. v. Jackson, 2007 MT 186, 338 M 344, 165 P3d 321 (2007).

No Prejudice Shown in Incorporation of Tribal Court Juvenile Record Into Sentencing Procedure — Due Process Not Violated: Phillips sought postconviction relief on grounds that his tribal court juvenile record had been illegally requested by the state and incorporated into the presentence investigation report and sentencing proceedings in violation of due process. The petition was denied, and on appeal, the Supreme Court affirmed without addressing the issue of release of the record under tribal law. Phillips did not present any evidence that the juvenile record or any information in the presentence investigation report was materially inaccurate, that the tribal court record influenced placement with the Department of Corrections, or that he

was prejudiced by the tribal court record in violation of due process, so dismissal of the petition for postconviction relief was not erroneous. St. v. Phillips, 2007 MT 117, 337 M 248, 159 P3d 1078 (2007).

Sentence Based Upon Lack of Remorse Inferred From Silence Not Legal Sentence: Rennaker was found guilty of incest after defending against the charge by asserting consent and that the victim was 20 years old at the time of the offense. When Rennaker was found guilty and asked at his sentencing hearing if he had anything to say and he replied that he did not, the District Court found that silence indicated Rennaker's lack of remorse and sentenced Rennaker to a term in the state prison. The Supreme Court, citing St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), and St. v. Cesnik, 2005 MT 257, 329 M 63, 122 P3d 456 (2005), held that because the District Court did not tie Rennaker's apparent lack of remorse to any evidence or statement by him, but rather inferred it from Rennaker's silence, the District Court violated Rennaker's right against self-incrimination. The Supreme Court remanded the case for resentencing. St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

Sufficient Accurate Information to Support Sentence for Distribution of Methamphetamine: Harper was sentenced to 20 years in prison with 10 years suspended and fined $12,000 after pleading guilty to possession of dangerous drugs with intent to distribute. Harper appealed on grounds that the sentencing court based the sentence on inaccurate and insufficient evidence that Harper was the center of the drug operation. Harper had a right to be sentenced based on correct evidence, but also had the affirmative duty to show, beyond mere unsupported contentions, that the alleged misinformation was materially inaccurate and to present information establishing inaccuracies in the presentence investigation report. In this case, the sentencing court did nothing more than consider relevant information relating to the nature and circumstances of the possession of drugs found during the search of Harper's home, including unrefuted information that Harper was at the center of a methamphetamine distribution business conducted from the home. Information in the presentence investigation report simply underscored Harper's involvement in drug distribution and supported that charge to which Harper pleaded guilty. The information was properly before the sentencing court, and the court did not err in imposing a sentence within the statutory parameters. The sentence was affirmed. St. v. Harper, 2006 MT 259, 334 M 138, 144 P3d 826 (2006), followed in St. v. Walker, 2007 MT 205, 338 M 529, 167 P3d 879 (2007), with respect to defendant's affirmative duty to show, beyond mere unsupported contentions, that alleged misinformation in a presentence investigation report was materially inaccurate and to present information establishing inaccuracies in the presentence investigation report.

Punishment for Defendant's Refusal to Accept Responsibility or Show Remorse Not Considered Legal Sentence: Although steadfastly maintaining innocence, Cesnik was convicted of assaulting a fellow gun club member with a weapon. The sentencing court was dismayed at Cesnik's refusal to acknowledge the verdict and placed considerable weight on the fact that Cesnik refused to accept responsibility for the crime despite having been convicted. The court spent the bulk of the sentencing hearing commenting on the need to impose a sentence that would instill a sense of responsibility in Cesnik and then sentenced Cesnik to 10 years with 6 years suspended. On appeal, the Supreme Court reversed, holding that a sentencing court may not punish a defendant for failing to accept responsibility for a crime when the defendant has expressly maintained innocence and has a right to appeal the conviction. St. v. Cesnik, 2005 MT 257, 329 M 63, 122 P3d 456 (2005), followed in St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

Imposition of Restitution Only Upon Deferral or Suspension of Sentence Under 2001 Version of Statute: In addition to Honey's sentences for felony theft, the District Court also ordered Honey to pay restitution and ordered forfeiture of Honey's bond as partial payment of restitution. Honey contended that under the 2001 version of this section in effect at the time that the crimes were committed, the court exceeded its statutory authority by imposing restitution because the statute allowed imposition of a restitution obligation only if all or part of the sentence was deferred or suspended. The Supreme Court agreed. In the absence of a deferral or suspension of all or part of Honey's sentence, it was improper for the District Court to impose restitution on top of Honey's prison term. Because the restitution order was reversed, the order of forfeiture of Honey's bail for restitution was also reversed. St. v. Honey, 2005 MT 107, 327 M 49, 112 P3d 983 (2005).

Claim of Illegal Sentence Based on Lack of Jurisdiction to Be Raised on Direct Appeal, Not Postconviction Petition — Pena Applied: Camarillo was a minor when he was convicted in 1999 of deliberate homicide, robbery, and aggravated burglary and sentenced as an adult offender to 70 years in the state prison. The case was filed directly in District Court rather than Youth

Court, as allowed under 41-5-206. Camarillo filed a petition for postconviction relief in 2003, claiming that the District Court lacked subject matter jurisdiction. The state responded that the claims could have been raised on direct appeal, and the District Court agreed and dismissed the petition. On appeal, the Supreme Court noted that the District Court properly exercised jurisdiction under Art. VII, sec. 4, Mont. Const., so Camarillo's jurisdiction argument failed. The court then applied Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004), and held that the issues that Camarillo attempted to raise in the petition for postconviction relief could have been but were not raised on direct appeal and, pursuant to 46-21-105, could not be brought in the petition for postconviction relief. In addition, under 46-21-102, petitions for postconviction relief must be filed within 1 year of final judgment. Camarillo's petition was not filed until more than 3 years after judgment and thus was untimely. The District Court was affirmed. Camarillo v. St., 2005 MT 29, 326 M 35, 107 P3d 1265 (2005).

No Standing to Raise Constitutionality of Restitution Statutes Absent Showing of Direct Personal Injury: The 2003 Legislature amended the state restitution statutes, and Thaut sought to challenge the constitutionality of the amendments on numerous grounds. However, Thaut was unable to show a direct personal injury resulting from application of the restitution laws. Pursuant to St. v. Krantz, 241 M 501, 788 P2d 298 (1990), and Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140 (1996), Thaut lacked standing to challenge the constitutionality of the restitution statutes, and the Supreme Court declined to address the issue. St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004). See also St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), in which defendant established direct economic injury and thus standing to challenge the constitutionality of repayment conditions on equal protection grounds through the District Court's order to repay $2,398 in costs of appointed counsel.

Restitution Order Proper Given Defendant's Ability to Pay: The sentencing court ordered Thaut to pay $69,457 in restitution. Thaut appealed the award on grounds that the court failed to meet statutory requirements establishing Thaut's financial resources and future ability to pay and on grounds that due process rights were violated when the court failed to consider several factors in Thaut's ability to pay, including Thaut's age and short time to work following parole, minimum wage employment history, lack of assets and ability to acquire assets in the future, and mental health issues related to an alleged prior head injury. However, the presentence investigation and supplemental presentence investigation provided adequate documentation regarding Thaut's ability to pay restitution and to work hard to earn a living. Further, Thaut had no documented physical limitations and was unemployed only because he was incarcerated. The District Court's determination that Thaut had the ability to pay medical expenses, a grant from the Board of Crime Control, and property damages was amply supported by the record, and the Supreme Court affirmed. St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004).

Right to Appeal Error in Length of Sentence Lost by Failing to File Petition Within Statutory Time Limit: Pena, who was 17 years of age at the time, was sentenced as an adult to 45 years in prison for deliberate homicide and aggravated burglary. Pena did not challenge the legality of his sentence on direct appeal, but more than a year after entering a guilty plea and being sentenced, Pena filed a petition alleging that his sentence was illegal because the Montana Youth Court Act provided that a youth could not be sentenced to the custody of the Department of Corrections for more than 5 years and therefore the District Court did not have subject matter jurisdiction to impose a longer sentence. Pena argued that the lack of subject matter jurisdiction was not subject to any statutory postconviction time limits for filing appeals and could be raised at any time. The Supreme Court held that an error in sentencing does not divest a court of subject matter jurisdiction over the case before it. The Supreme Court further held that all postconviction claims, both jurisdictional and nonjurisdictional, must be brought within the 1-year time limit provided by statute and that the time limit was jurisdictional and was not waived by the state's failure to raise the issue in District Court. Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004). Pena was overruled in Davis v. St., 2008 MT 226, 344 M 300, 187 P3d 654 (2008), to the extent that Pena held that the Legislature limited District Courts' subject matter jurisdiction by codifying a 1-year time bar on postconviction relief pursuant to 46-21-102.

Increased Sentence Imposed on Resentencing After Original Sentence Vacated Not Due Process Violation: After Redfern's petition for postconviction relief was granted, Redfern's original sentence was vacated and the District Court resentenced him to a greater period of potential imprisonment and supervision than the original sentence. Redfern appealed the new sentence, contending that the greater sentence on resentencing violated the right to due process. The Supreme Court affirmed. Under N.C. v. Pearce 395 US 711 (1969), neither double jeopardy nor equal protection bars imposition of a more severe sentence upon resentencing after an original conviction is set aside unless a heavier sentence is imposed to punish a defendant for

successfully having the original conviction set aside. However, in order to meet due process requirements and allow full appellate review of the constitutional legitimacy of the sentence, a longer sentence on resentencing after a new trial must be based on objective information concerning identifiable conduct of the defendant after the original sentencing and reasons for the longer sentence must affirmatively appear on the record. Both conditions were met here, there was no showing that the more severe sentence was imposed as retaliatory motivation by the sentencing judge, and the new sentence was within statutory sentencing parameters. St. v. Redfern, 2004 MT 277, 323 M 225, 99 P3d 223 (2004), following St. v. Forsyth, 233 M 389, 761 P2d 363 (1988), and St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001), and distinguishing St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001).

Failure to Raise Question of District Court's Sentencing Authority on Direct Appeal — Issue Precluded in Postconviction Hearing: In a petition for postconviction relief, Thurston alleged that the District Court erred by imposing a prison sentence without considering the statutory nonviolent offender criteria. The claim was denied by the District Court on grounds that the issue should have been raised on direct appeal. The Supreme Court affirmed. Contrary to Thurston's contention, the issue was not a subject matter jurisdiction issue that could be raised at any time. The failure to consider nonviolent offender sentencing alternatives should have been raised on direct appeal, and failure to do so precluded consideration of the issue in postconviction proceedings. Thurston v. St., 2004 MT 142, 321 M 411, 91 P3d 1259 (2004), distinguishing St. v. Moorman, 279 M 330, 928 P2d 145 (1996).

Error in Sentencing to Department of Corrections — Remand Based on Partially Illegal Sentence: Upon conviction for sexual intercourse without consent, the District Court sentenced Heath to the Department of Corrections for 25 years with 5 years suspended and required Heath to complete a sex offender program and a criminal thinking course at the state prison. However, the court erred because under subsection (3)(d) of this section, commitment to the Department requires that all but the first 5 years of the sentence be suspended. The Supreme Court generally remands for resentencing if the illegal portion of a sentence affects the entire sentence or if the court is unable to discern what sentence the trial court would have imposed if it had correctly applied the law. Heath asserted that resentencing could impermissibly expose him to an increased sentence if the trial court was vindictive because Heath successfully attacked the conviction. Nevertheless, the illegal unsuspended portion of Heath's sentence affected the entire sentence, so the case was remanded with instructions that the sentencing court avoid vindictiveness in imposing a new sentence. St. v. Heath, 2004 MT 58, 320 M 211, 89 P3d 947 (2004). On remand, the District Court sentenced Heath to prison for 25 years with 15 years suspended. Citing St. v. Tracy, 2005 MT 128, 327 M 220, 113 P3d 297 (2005), Heath appealed on grounds that commitment to prison instead of to the Department of Corrections was harsher than the original sentence, but the Supreme Court affirmed. Despite the more flexible nature of a commitment to the Department of Corrections, Heath could not seriously argue that he received a harsher sentence on remand because the sentence was changed to run concurrently rather than consecutively, actually reducing the sentence by 12 years. St. v. Heath, 2005 MT 280, 329 M 226, 123 P3d 228 (2005).

Consideration at Sentencing of Alleged Crimes Dismissed by Plea Bargain Not Violative of Due Process: At sentencing, the District Court considered allegations of other crimes for which Mason had been initially charged but that had been dismissed by plea agreement. Mason contended that consideration of statements related to unproved conduct violated the right to due process. The Supreme Court noted that due process protects a defendant from being sentenced based on misinformation and requires that a defendant be given an opportunity to rebut any information that may lead to deprivation of life, liberty, or property, but does not protect against all misinformation unless the sentence is premised on materially false misinformation. The court also noted that St. v. Collier, 277 M 46, 919 P2d 376 (1996), allows a sentencing court to consider any evidence that has probative force, including other acts that have been dismissed by plea agreement, as in St. v. Baldwin, 192 M 521, 629 P2d 222 (1981). Nothing in Mason's plea agreement prevented the state from presenting the facts of the case during the sentencing hearing, and in fact, that inquiry is required as part of the presentence investigation report under 46-18-112. Mason failed to show that the sentencing court relied on misinformation and thus was not entitled to resentencing on due process grounds. Further, the plea agreement required relinquishment of Mason's parental rights, so the sentencing court properly considered evidence of the danger Mason posed to the other children in order to approve that portion of the agreement. St. v. Mason, 2003 MT 371, 319 M 117, 82 P3d 903 (2003), followed in St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Presumption of Punishment for Going to Trial Based on Difference Between Pretrial Offer and Actual Sentence — Remand: As set out in St. v. Baldwin, 192 M 521, 629 P2d 222 (1981), when a District Court becomes involved in plea negotiations and an offer is made, any difference in the sentencing after trial must point out the factors justifying an increased sentence, and failure to enumerate the factors leads to the presumption that a greater sentence has been imposed for a vindictive purpose. Here, when the District Court failed to justify having an 11-year sentence run consecutively rather than concurrently with another sentence, the Baldwin standard requiring an explanation for imposing a harsher sentence than that offered in plea negotiations was not met, constituting reversible error. The case was remanded for resentencing. St. v. Hall, 2003 MT 253, 317 M 356, 77 P3d 239 (2003).

Error in Failing to Consider Street Time Credit at Time Sentence Revoked — Remand for Resentencing: Pursuant to the 1997 version of this section in effect at the time of Williams' sentencing, District Courts were required to either allow or reject street time, meaning time spent serving a suspended sentence, as credit against a term of incarceration imposed as a result of the revocation of an individual's sentence. Thus, the District Court erred by not considering and awarding or denying street time credit to Williams at the time that his suspended sentence was revoked. The only remaining question was whether the case should be remanded for resentencing or whether the remaining days that Williams had not already served on probation or in prison should be excused. The District Court's error resulted in the imposition of a revoked suspended sentence that was not reduced to account for some or all of the time already served. The error affected the entire sentence, and there was no discreet portion that could be identified or stricken. Because the Supreme Court was unable to surmise what the District Court would have done if it had followed the statutory directive, the case was remanded for resentencing. St. v. Williams, 2003 MT 136, 316 M 140, 69 P3d 222 (2003). See also Speldrich v. McCormick, 243 M 238, 794 P2d 339 (1990), and St. v. Brister, 2002 MT 13, 308 M 154, 41 P3d 314 (2002).

Adequate Nexus Between Alcohol Consumption and Sexual Assault to Warrant Substance Monitoring as Sentencing Condition for Sex Crime: As a condition of probation for Flanagan's 10-year suspended sentence for felony sexual assault, the District Court required that Flanagan: (1) submit to alcohol and drug testing at the probation officer's request; (2) undergo a chemical dependency evaluation and, if recommended, chemical dependency treatment; and (3) not possess alcohol or drugs or frequent places where alcohol is the main item of sale. Citing St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), Flanagan protested the conditions on grounds that they had no nexus to the offense or the environment in which it was committed. The Supreme Court distinguished Ommundson, noting that Flanagan himself connected the assault charge to his alcohol consumption in requesting a mental evaluation to determine whether his substance use rendered him capable of acting knowingly. There was a sufficient connection between the offense and Flanagan's chronic alcohol consumption to warrant imposition of the parole conditions, and the sentencing court was affirmed. St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003).

Prior DUI Convictions Properly Used to Enhance Sentence: The District Court used three prior DUI convictions to sentence Jackson for felony DUI. Jackson contended that use of two of the prior convictions was improper because he waived his right to counsel in one case and because he did not have an attorney in another case. However, when a defendant collaterally attacks a prior conviction, a presumption of regularity attaches to the conviction and failure to sign a waiver of rights does not constitute reversible error but is merely a factor to be considered in the totality of the circumstances. Here, the state provided sufficient proof for the court to rely on the prior convictions in sentencing, and the court did not err in doing so. St. v. Jackson, 2002 MT 212, 311 M 281, 54 P3d 990 (2002).

No Abuse of Discretion in Imposing Sentence Greater Than Sentence Suggested in Plea Agreement — Sentence Adequately Explained: Wells was charged with DUI, negligent vehicular assault, operation of a motor vehicle without insurance, and driving with a revoked license. Wells entered a plea agreement in which he pleaded guilty to negligent vehicular assault and driving with a revoked license and agreed to pay restitution, and the prosecution agreed to recommend a 5-year sentence with all but 18 months suspended. At the sentencing hearing, Wells' probation officer disagreed with the recommended sentence, stating that 18 months was an insufficient time for Wells to deal with his alcohol and drug problems and that restitution was unlikely given Wells' work and drug abuse history. The sentencing court considered the testimony and the evidence and imposed a 5-year sentence without any time suspended. Wells appealed on grounds that the sentence was not adequately explained and was erroneous. Under St. v. Stumpf, 187 M 225, 609 P2d 298 (1980), the sentencing court has the discretion to impose the maximum sentence allowed by law but should provide any rationale for the sentence. Here,

the court provided a rationale, explaining the nature of the offense and the degree of harm done by Wells and describing Wells' history of drug abuse and inability to pay restitution as well as a concern for future harm to society. Wells was informed that the judge was not bound by the terms of the plea agreement and retained the authority to impose a greater or lesser sentence than recommended, within the statutory limits for the offense. The sentence was adequately explained and within statutory limits and was thus affirmed. St. v. Wells, 2001 MT 112, 305 M 303, 27 P3d 47 (2001).

Suspending Less of Sentence After Retrial Than After First Trial — Court's Belief Time Needed to Complete Ordered Programs: If a judge imposes a more severe sentence upon a defendant after a new trial than that imposed in the former trial, the reasons for doing so must appear in the record and be based on objective information concerning identifiable conduct of defendant occurring after the time of the original sentencing. Otherwise, there is a presumption that the greater sentence was for a vindictive purpose, and the presumption must be rebutted. It was constitutionally legitimate for the court to reduce, after a second trial resulting in the same incarceration term, the amount of time that the sentence was suspended after the first trial. The court believed that defendant needed the time to complete rehabilitative programs that the court ordered him to complete in each sentence and suspended less time to ensure that there was sufficient time to complete the programs. St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Four-Year Mandatory Minimum Sentence for Sexual Intercourse With Minor Properly Applied: By plea agreement, Fauque pleaded guilty to one count of sexual intercourse without consent and one count of sexual assault against his 14-year-old daughter. The District Court concluded that the 4-year minimum sentence provided in 45-5-503 applied and that Fauque had failed to establish entitlement to any exceptions to the mandatory minimum sentence provided in 46-18-222. The court sentenced Fauque to 25 years on each count, with all but 4 years suspended and the sentences to run concurrently. Fauque appealed on grounds that a direct conflict existed between the mandatory minimum sentence for sexual intercourse without consent when the victim is less than 16 and the defendant is 3 or more years older contained in 45-5-503 and the 30-day mandatory minimum sentence for sexual intercourse without consent when the victim is less than 16 contained in this section (see 1999 amendment and enactment of 46-18-205). The Supreme Court examined the legislative intent of both sentencing provisions and found no conflict in this case. The 4-year mandatory minimum provided in 45-5-503 clearly applied to Fauque, who was 53 years old at the time that he assaulted his 14-year-old daughter and who did not argue any sentencing exception under 46-18-222. The mandatory minimum (now contained in 46-18-205) in this section simply disallowed suspension of the first 30 days of a sentence under 45-5-503 under any circumstances, even if an exception existed under 46-18-222. Because no exception existed here, this section did not come into play, so the Supreme Court affirmed Fauque's 4-year mandatory minimum sentence pursuant to 45-5-503. St. v. Fauque, 2000 MT 168, 300 M 307, 4 P3d 651, 57 St. Rep. 693 (2000).

Retroactive Applicability of Judicial Rule Regarding Oral Pronouncement of Sentence: Retroactivity is a threshold matter that compels the evenhanded application of a new rule for the conduct of criminal prosecutions to all similarly situated cases that are pending on direct appeal or not yet final. Therefore, all defendants whose cases meet those criteria are entitled to the retroactive application of a new judicial rule of criminal procedure. This standard applies irrespective of whether the new judicial rule constitutes a clear break from existing precedent and without regard to whether the rule was available to the District Court at the time that it ruled. Thus in the present case, the rule in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), that oral pronouncement of sentence controls over the written sentence for purposes of finality applied retroactively to Waters' appeal, even though the District Court did not have the Lane rule at the time of sentencing. St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999), following St. v. Egelhoff, 272 M 114, 900 P2d 260 (1995), and St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999), overruling St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), Peterson v. Mont. Bank of Bozeman, N.A., 212 M 37, 687 P2d 673 (1984), and their progeny, and followed in St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361, 56 St. Rep. 1032 (1999). See also Teague v. Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989).

Misdemeanor Offender Not Entitled to Consideration of Mandatory Sentencing Requirement Applicable to Nonviolent Felony Offenders: Renee was sentenced to incarceration for three misdemeanor violations. On appeal, Renee contended that because the misdemeanors were nonviolent offenses, the District Court erred in not complying with this section by considering alternatives to sentencing for Renee's nonviolent offenses. However, the plain language of

46-18-104(3) applies only to defendants who commit a particular kind of felony that is nonviolent. Therefore, a misdemeanor offender is not entitled to have a sentencing court consider the mandatory sentencing requirements of 46-18-225 and this section, which apply only to felony offenders. St. v. Renee, 1999 MT 135, 294 M 527, 983 P2d 893, 56 St. Rep. 545 (1999).

Nonviolent Felony Offenders Not Similarly Situated With Misdemeanor Offenders — No Equal Protection Violation in Different Felony and Misdemeanor Sentencing Schemes: Renee contended that Montana's nonviolent felony offender sentencing statutes violated his equal protection rights to physical liberty as a misdemeanor offender because both kinds of offenders may be subject to imprisonment, thus both felony and misdemeanor offenders are similarly situated classes dealt with unequally under the law. The Supreme Court disagreed. Relying on Tigner v. Tex., 310 US 141, 84 L Ed 1124, 60 S Ct 879 (1940), the court found that the constitution does not require that things that are different in fact or opinion be treated in law as though they were the same. Misdemeanor and felony offenders are not similarly situated because of differences in the quality and duration of punishment, as well as the long-term effects on an individual's liberty interest brought about by a felony conviction as compared to that for a misdemeanor conviction. Renee failed to make the necessary threshold showing that misdemeanor and nonviolent felony offenders are similarly situated, so the equal protection challenge failed. St. v. Renee, 1999 MT 135, 294 M 527, 983 P2d 893, 56 St. Rep. 545 (1999), distinguishing In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997).

No Error in Youth Court Conclusion That Incarceration Not Mandatory if Youth Convicted in District Court: In its transfer order, the Youth Court concluded that transferring Spina into the adult system neither mandated incarceration nor precluded rehabilitation and that although any commitment of the youth must necessarily be to the Department of Corrections, the Department was not necessarily bound to incarcerate Spina. The Supreme Court agreed. The sentencing guidelines in this section provide a District Court with a number of sentencing options, including imposition of a deferred or suspended sentence. The Youth Court was correct in concluding that Spina's conviction would not mandate incarceration. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Payment of Justice's Court Cost Imposed as Judgment of District Court Held Improper — Smith Reaffirmed: Morales was charged with assaulting a sports official, in violation of 45-5-211, after striking a basketball referee. Upon his conviction in Justice's Court, Morales appealed to District Court. Upon his conviction, the District Court ordered Morales to pay the costs of the trial in Justice's Court. The Supreme Court reaffirmed its holding in Billings v. Smith, 281 M 133, 932 P2d 1058 (1997), and held that a trial de novo in District Court has the effect of erasing any debt for costs in Justice's Court incurred before the appeal to District Court. St. v. Morales, 284 M 238, 943 P2d 1286, 54 St. Rep. 862 (1997).

Recommendation of Prosecutor and Probation Officer Adequate Statement of Sentencing Reason — No Improper Reliance on Pending Charge in Sentencing: The District Court's statements both orally and in its written sentence that Goulet's sentence was imposed at the recommendation of the prosecutor and the probation officer, plus the court's consideration of Goulet's prior record and long history of contact with the legal system, were sufficient statements of sentencing reasons to comply with St. v. Stumpf, 187 M 225, 609 P2d 298 (1980). Further, in the present case, nothing in the record indicated that the sentencing court improperly relied on a pending deliberate homicide charge against Goulet in sentencing him for escape. St. v. Goulet, 277 M 308, 921 P2d 1245, 53 St. Rep. 739 (1996), following St. v. Johnson, 221 M 503, 719 P2d 1248 (1986), St. v. Petroff, 232 M 20, 757 P2d 759 (1988), and St. v. Krantz, 241 M 501, 788 P2d 298 (1990).

Sexual Abuse — Failure of District Court to Consider Sentencing Alternatives — No Objection — Sentence Not Illegal or Violation of Due Process: Swoboda pleaded guilty to sexual abuse of children, was classified as a nondangerous offender, and was sentenced to 15 years with the Department of Corrections. On appeal, she claimed as error the District Court's failure to consider alternatives to incarceration. The Supreme Court noted that she had not objected at sentencing to the District Court's failure and declined to review the judgment. The Supreme Court noted that in the past, it had made an exception and reviewed such a failure of the District Court when the state conceded the failure of the District Court or when the sentence was illegal. Here, however, the Supreme Court noted that the sentence was not beyond the District Court's jurisdiction. Citing St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep 310 (1996), the Supreme Court also held that the failure of the District Court was not a manifest miscarriage of justice and would not leave unsettled the question of the fundamental fairness of the trial or the proceedings. St. v. Swoboda, 276 M 479, 918 P2d 296, 53 St. Rep. 478 (1996).

Judgment as Including Sentence — Sentence Not Strictly Premised on Punishment: A defendant had 60 days under former Rule 5(b), M.R.App.P. (now superseded), to appeal a final judgment. Although prior to the 1991 enactment of 46-1-202, "sentence" was interpreted as being the same as "punishment", 46-1-202 now defines a sentence as any judicial disposition of a criminal proceeding upon a plea, verdict, or finding of guilt. The judicial disposition is itself a sentence regardless of whether actual punishment is deferred or imposed immediately. This broader definition applies to deferment cases, but in double jeopardy cases, the narrower meaning premised on the punishment factor still applies. Therefore, a judgment that includes a deferred sentence is final for purposes of appeal, and an appeal filed more that 60 days after sentencing was dismissed as untimely. St. v. Rice, 275 M 81, 910 P2d 245, 53 St. Rep. 48 (1996), followed in Davis v. St., 2004 MT 112, 321 M 118, 88 P3d 1285 (2004).

Sentence of Imprisonment of Dangerous Offender — No Need to Consider Alternatives: After a conviction for kidnapping and assault, when the District Court clearly articulated numerous reasons for designating the defendant as a dangerous offender (see 1995 repeal of 46-18-404) and its reasons were fully supported by the record, the court's reasons for designating the defendant a dangerous offender are sufficient to rule out alternatives to imprisonment. By its findings, the court, as a practical matter, satisfied the requirements of statutory criteria for sentencing. St. v. Eichenlaub, 272 M 332, 901 P2d 90, 52 St. Rep. 786 (1995).

Twenty-Five Year Sentence for Bank Robbery Not Improper: The Supreme Court upheld the lower court's sentencing of the defendant to 25 years for bank robbery on the basis that the lower court's sentence was within the statutory guidelines and therefore did not violate the constitution. St. v. Hembd, 254 M 407, 838 P2d 412, 49 St. Rep. 788 (1992).

Misinterpretation of Criminal Record Contained in Presentence Investigation Report — Conclusions Proper — Resentencing Inappropriate: The District Court misinterpreted defendant's criminal record as contained in the presentence investigation report, counting as a new felony the revocation of an earlier offense previously counted and counting criminal endangerment and criminal possession of dangerous drugs offenses as one felony instead of two. The court therefore arrived at the right conclusion as to the number of offenses even though it used the wrong means. This did not constitute an error that mandated resentencing. St. v. Willson, 250 M 241, 818 P2d 1199, 48 St. Rep. 907 (1991).

Sufficient Statement of Reasons for Sentence — Consistency With Presentence Report: It was a sufficient statement of reasons in sentencing for the District Court to cite defendant's entire and extensive criminal record and his threat to society, especially when the sentence was consistent with the presentence investigation report that recommended a lengthy sentence. St. v. Willson, 250 M 241, 818 P2d 1199, 48 St. Rep. 907 (1991).

Failure of Sentencing Court to Consider Time Served — Remand — Writ of Habeas Corpus Denied: Petitioner was sentenced to 5 years in the state prison for aggravated assault, with all 5 years suspended upon certain conditions. He served 4 ½ years of the suspended sentence before violating probation. After an appropriate petition, the District Court revoked the suspended sentence and sentenced petitioner to 5 years in the state prison, with 2 years suspended upon certain conditions. Petitioner sought a writ of habeas corpus seeking restoration of his good time but not appealing his sentence or conviction. After review, the Supreme Court held that the District Court had jurisdiction to revoke the suspended sentence and impose the original sentence but remanded for compliance with 46-18-201, requiring the District Court to consider elapsed time and state its reasons for either expressly allowing or rejecting elapsed time as credit against the sentence. The petition for writ of habeas corpus was denied for failure to set forth any basis for granting the writ. Speldrich v. McCormick, 243 M 238, 794 P2d 339, 47 St. Rep. 1186 (1990), followed in St. v. Docken, 274 M 296, 908 P2d 213, 52 St. Rep. 1240 (1995).

Failure to Appear for Probation Officer-Ordered Urine Sample — Minimal Grounds Required to Order Testing: It was error for the District Court to dismiss a petition for revocation of suspended sentence based on the defendant's failure to appear for purposes of providing a urine sample because the probation officer did not have some articulable reasons for requesting the test. Under the standard established in St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988), the Supreme Court held that a probation officer's opinion that rehabilitation could not begin until the defendant was free of drugs and the fact that the defendant had not passed a drug test since his arrest constituted sufficient evidence to establish reasonable grounds for requiring a urine sample. St. v. Sigler, 236 M 137, 769 P2d 703, 46 St. Rep. 244 (1989).

Different Sentencing Judge — No Presumption of Vindictiveness When Sentence Increased on Remand: Due process rights on resentencing create a presumption of vindictiveness when a sentence is increased on remand. However, when a different judge performs resentencing, there

is no presumption of vindictiveness; rather, the defense must show actual vindictiveness. St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988).

Rules of Evidence Inapplicable to Sentencing: Defendant contended that the court erred in adding 10 years to his sentence for being a persistent felony offender because the court relied on evidence improperly before it. The Supreme Court affirmed the sentence because the rules of evidence do not apply to sentencing and because the evidence was competent. St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988).

Supreme Court Review of Sentence — Legality Only: Defendant requested the Supreme Court remand for resentencing on the grounds that the District Court erred in believing a mandatory minimum sentence applied to the crime of attempt. The Supreme Court found no evidence of ineffective assistance of counsel or prejudice in sentencing. The Supreme Court will review sentences for legality only. Because the sentence was well within the legal limits, the request for remand was refused. St. v. Hurlbert, 232 M 115, 756 P2d 1110, 45 St. Rep. 923 (1988), followed in St. v. Cope, 250 M 387, 819 P2d 1280, 48 St. Rep. 949 (1991), St. v. Graves, 272 M 451, 901 P2d 549, 52 St. Rep. 755 (1995), St. v. Romannose, 279 M 58, 931 P2d 1394, 54 St. Rep. 72 (1997), and St. v. Gordon, 1999 MT 169, 295 M 183, 983 P2d 377, 56 St. Rep. 654 (1999).

Claim of Reliance on Incorrect Information in Sentencing — Sentencing Court Presumed Correct: Defendant contended the District Court wrongly assumed he had two prior probation violations and relied on this incorrect information in sentencing. Although a defendant has a right to a sentence based on substantially correct information, the Supreme Court will not strain at worst-case assumptions to find a mistake on review. Rather than finding two previous probation violations, the District Court correctly recognized defendant's two prior chances to avoid a more severe penalty. The sentencing court was presumed correct and judgment affirmed. St. v. Petroff, 232 M 20, 757 P2d 759, 45 St. Rep. 833 (1988).

Judgment Containing Reasons for Sentence Sufficient — Oral and Written Reasoning Not Required: The rationale set out in St. v. Stumpf, 187 M 225, 609 P2d 298 (1980), acknowledging a defendant's right to be informed of the reasons underlying punishment, does not impose a duty on a District Court to set forth its reasoning orally in open court and in writing. It was sufficient when the reasons underlying a sentence were clearly stated in the judgment. St. v. Petroff, 232 M 20, 757 P2d 759, 45 St. Rep. 833 (1988).

Use of Dismissed Charge in Sentencing: The District Court, during sentencing, improperly relied on a prior conviction that had been dismissed following defendant's successful completion of a deferred sentence. However, given defendant's course of criminal conduct, his criminal history, and his continuing disregard for the rights and safety of others, the error was harmless. St. v. Wirtala, 231 M 264, 752 P2d 177, 45 St. Rep. 596 (1988).

Disparity in Codefendants' Sentences — One by Trial, One by Plea Bargain: That defendant, after a trial, was sentenced to 35 years and a codefendant, after plea bargaining, was sentenced to 8 years does not, standing alone, establish that defendant was punished for exercising his right to a jury trial. The judge outlined his reasons for sentencing, which was well within the maximum authorized; the reasons support the severity of the sentence given, and there was no abuse of discretion. Therefore, the defendant was not denied his right to trial. St. v. Davison, 188 M 432, 614 P2d 489 (1980).

Failure to Include Reasons for Sentence — Abuse of Discretion: Failure of trial court to specify the reasons behind the determination of the defendant's sentence is an abuse of discretion. It is not enough that the sentence be within the statutory maximum. The defendant is entitled to know why the sentencing judge chose the particular sentence involved. St. v. Stumpf, 187 M 225, 609 P2d 298 (1980), cited in St. v. Johnson, 221 M 503, 719 P2d 1248, 43 St. Rep. 1010 (1986).

Sentencing Guidelines: A criminal statute need not contain sentencing guidelines. St. v. Stumpf, 187 M 225, 609 P2d 298 (1980).

Appellate Review of Sentence — No Objection Necessary: The Supreme Court generally will not review an issue where there was no objection at trial. However, the court will review a sentence imposed in a criminal case if it is alleged that the sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing. St. v. Lenihan, 184 M 338, 602 P2d 997 (1979), contrasted in St. v. Swoboda, 276 M 479, 918 P2d 296, 53 St. Rep. 478 (1996), and followed in St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407, 56 St. Rep. 1090 (1999), St. v. Brister, 2002 MT 13, 308 M 154, 41 P3d 314 (2002), St. v. Honey, 2005 MT 107, 327 M 49, 112 P3d 983 (2005), St. v. Hameline, 2008 MT 241, 344 M 461, 188 P3d 1052 (2008), and St. v. Heddings, 2008 MT 402, 347 M 169, 198 P3d 242 (2008).

Guilty Plea — Refusal to Allow Withdrawal — Discretion: It was not an error or an abuse of court's discretion to not allow defendant to withdraw his guilty plea after serving 2 months of a

20-year sentence because the judge has complete discretion to deny a change of plea. St. v. Sattler, 170 M 35, 549 P2d 1080 (1976).

Postconviction Relief: Time spent in jail under a suspended sentence must be credited to sentence for violation of probation. In re Hanson, 169 M 80, 544 P2d 816 (1976).

DEFERRAL

Portion of Sentence Imposed Beyond Sentencing Authority Illegal — Timely Petition to Revoke: The District Court sentenced DeShields to 4 years for sexual assault and deferred imposition of the sentence for 4 years subject to certain terms and conditions. The state twice petitioned to revoke DeShields' sentence for violation of the deferred sentence. Both petitions were filed within the 4-year period of deferral. DeShields filed for postconviction relief. The Supreme Court held that the initial 4-year sentence was illegally imposed because the maximum time that the sentence could be deferred was 3 years, but DeShields' argument that the entire sentence was void was mistaken. The mere fact that the District Court exceeded its statutory authority in imposing an improper deferred sentence did not render the sentence void ab initio. Only the portion of the sentence beyond the court's authority was illegal. Additionally, the state filed its petitions within the allowable 3-year deferral period, so DeShields' deferred sentence was properly revoked. DeShields v. St., 2006 MT 58, 331 M 329, 132 P3d 540 (2006).

Authority to Defer Imposition of Sentence When Financial Condition Imposed — Failure to File Timely Appeal: Ingersoll filed for postconviction relief, arguing that the District Court lacked statutory authority to either impose consecutive deferred sentences or to defer imposition of his sentence in excess of 3 years. The Supreme Court found that the District Court had statutory authority at the time of sentencing under this section to impose a deferred sentence for up to 6 years for Ingersoll's felony conviction for criminal mischief. Therefore, pursuant to former Rule 5(b), M.R.App.P. (now superseded), Ingersoll had 60 days after sentencing to appeal the court's authority to impose the sentence. Failure to file a timely appeal rendered Ingersoll's claim procedurally barred in a postconviction hearing. Ingersoll v. St., 1999 MT 215, 295 M 520, 986 P2d 403, 56 St. Rep. 843 (1999).

Limitation on Deferral of Sentence — Constitutionality: The provision of this section prohibiting a defendant from receiving a referred sentence if he has been convicted of a prior felony is not unconstitutional under the due process clause. Defendant who had received a deferred sentence in 1973 and had not attempted to have that conviction dismissed or expunged was not entitled to a deferred sentence after a 1988 conviction. Defendant's argument regarding constitutionality is moot because the 1987 amendment to 46-18-204 was repealed in 1989. St. v. Lorash, 238 M 345, 777 P2d 884, 46 St. Rep. 1321 (1989), distinguished in St. v. Bowles, 284 M 490, 947 P2d 52, 54 St. Rep. 962 (1997), as to the requirement for a motion for expungement.

Deferral or Suspension of Entire Sentence Proper: Defendant was sentenced to 5 years in prison, with all but 2 years suspended by a judge who mistakenly believed that suspension or deferral of the entire sentence was prohibited by this section. The Supreme Court vacated the sentence and remanded the case for resentencing, ruling the District Court's belief that the charge required imprisonment was prejudicial to defendant. St. v. Arbgast, 202 M 220, 656 P2d 828, 40 St. Rep. 45 (1983).

Deferring Sentence Imposition — Second Deferment: Contention that sentencing court had no jurisdiction to defer imposition of sentence a second time did not affect the court's power to subsequently revoke suspension of part of the sentence and was not validly raised on appeal from the revocation. The conviction and first deferment of imposition of sentence occurred on October 7, 1975. The sentence, part of which was suspended, was imposed on October 28, 1977, within the 3-year period set in October 1975, for deferment of the imposition of sentence. The court could not be held in error for ordering (at August 19, 1977, revocation hearing) deferment for an additional 3 years. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Revocation of Sentence Deferred or Suspended Longer Than Allowed by Statute:

Petitioner was convicted of felony theft. On May 22, 1978, he was given a 3-year deferred imposition of sentence on the condition that restitution be made. On August 20, 1979, this deferred sentence was continued and petitioner was ordered to complete restitution by November 5, 1980. This was not done, and a petition to revoke the deferred sentence was filed on January 16, 1981. A hearing on the petition was held May 27, 1981, 3 years and 5 days after the initial deferral. The court revoked the deferred sentence and sentenced petitioner to 3 ½ years in prison, over petitioner's objections that the District Court was without jurisdiction to do so. The District Court contended it retained jurisdiction when the petition to revoke is filed within the deferral time. On a petition for a Writ of Habeas Corpus, the Supreme Court held that this section grants jurisdiction to revoke suspended sentences or impose sentences following deferral

only during the period of the suspended or deferred sentences. This jurisdiction extends only through the running of the suspended or deferred sentence, regardless of whether a petition for revocation has been filed prior to the termination of the suspended or deferred sentence. Felix v. Mohler, 195 M 391, 636 P2d 830, 38 St. Rep. 1881 (1981).

On October 24, 1977, the petitioner received a deferred imposition of sentence and was placed on probation for 1 year. On August 14, 1978, the deferred imposition of sentence was extended for an additional 2 years. On April 4, 1979, the deferred imposition of sentence was again extended for 2 years. On February 2, 1981, petitioner was found guilty of a misdemeanor in Justice's Court. Based on that conviction, the court revoked its order staying deferment of sentence and sentenced petitioner to 5 years in the state prison for the original crime. In granting his petition for a Writ of Habeas Corpus, the Supreme Court said that this section gives the District Judge the authority to defer imposition of sentence for a period not to exceed 3 years. The District Court can revoke a deferred imposition of sentence only during the 3-year period immediately following the initial sentence deferral. Gonzales v. Blodgett, 193 M 504, 632 P2d 1084, 38 St. Rep. 1159 (1981).

Restrictions During — Abuse of Discretion: When the trial court deferred imposition of sentence but required the defendants to serve 1 year in the county jail with release for working hours, it abused its discretion to impose reasonable restrictions or conditions during the period of the deferred imposition. St. v. Openshaw, 172 M 511, 565 P2d 319 (1977).

Presumption for Deferral: The trial judge's belief that a 19-year-old defendant lied to him when he asked where the defendant got marijuana is not the type of aggravated circumstances necessary to overcome the presumption of a deferred sentence, as the aggravating circumstances should be supported by substantial evidence over and above the simple facts of a prima facie crime. St. v. Burris, 168 M 195, 542 P2d 1223 (1975).

Revocation — Ground Not Formal Condition: The trial court could revoke the deferred imposition of sentence after the defendant refused to testify against another defendant even though his cooperation with the State was not made a formal condition of the judgment deferring sentence. St. v. Lintz, 162 M 102, 509 P2d 13 (1973).

SUSPENSION

Illegal Portion of Sentence Affecting Entirety of Sentence — Remand for Resentencing: For sexual intercourse without consent, Hicks was sentenced to 14 years with the Department of Corrections with no time suspended, and because of the seriousness of the offense, Hicks was also ordered to complete sexual offender treatment, undergo psychiatric evaluation to determine possible mental or personality disorders, and complete a chemical dependency evaluation, a cognitive and behavioral modification program, and an anger management course. Hicks appealed the legality of the sentence because it violated sentencing statutes. The Supreme Court noted that subsection (3)(d)(i) of this section provides that when a defendant is sentenced to the Department, all but the first 5 years of the sentence must be suspended, so the unsuspended sentence was illegal. However, the court could not determine whether the sentencing court would consider a 14-year sentence with 9 years suspended adequate to complete the recommended sentence conditions. Because the illegal portion of the sentence affected the entirety of the sentence, the Supreme Court remanded for resentencing under a correct application of the sentencing statutes. St. v. Hicks, 2006 MT 71, 331 M 471, 133 P3d 206 (2006).

Revocation of Juvenile Offender's Suspended Sentence and Commitment to Department Authorized: Following a dispositional hearing, the Youth Court entered an order declaring Lesmeister a delinquent youth and serious juvenile offender, transferred the 18 year old's case to District Court, and placed the youth on probation until age 25, with the entire commitment suspended upon certain conditions. One year later, on a petition filed by the Cascade County Attorney alleging numerous probation violations, the District Court revoked Lesmeister's suspended sentence and committed the youth to the Department of Corrections until age 25. On appeal, Lesmeister challenged the legality of the court's commitment to the Department, arguing that 41-5-208 authorizes the District Court to impose only those conditions provided for in 46-18-201 through 46-18-203, which does not include a sentence to the Department of Corrections. In affirming the District Court decision, the Supreme Court ruled that state law authorizes a District Court to impose a sentence to commit an offender to the Department of Corrections when all but the first 5 years are suspended. St. v. Lesmeister, 2000 MT 318, 302 M 500, 15 P3d 392, 57 St. Rep. 1344 (2000).

Right to Jury Trial — Not Applicable to Suspended Sentence Revocation Proceedings: Since a trial by jury under the seventh amendment to the U.S. Constitution and Art. II, sec. 26, Mont.

Const., is guaranteed only in "criminal prosecutions", it does not apply in proceedings for revocation of a suspended sentence. St. v. Watts, 221 M 104, 717 P2d 24, 43 St. Rep. 670 (1986).

Deferral or Suspension of Entire Sentence Proper: Defendant was sentenced to 5 years in prison, with all but 2 years suspended by a judge who mistakenly believed that suspension or deferral of the entire sentence was prohibited by this section. The Supreme Court vacated the sentence and remanded the case for resentencing, ruling the District Court's belief that the charge required imprisonment was prejudicial to defendant. St. v. Arbgast, 202 M 220, 656 P2d 828, 40 St. Rep. 45 (1983).

Revocation of Suspended Sentence — No Double Jeopardy: The court rejected defendant's contention that revocation of a suspended sentence enhanced his punishment and thus subjected him to double jeopardy. Even though a defendant must live with the conditions of probation throughout the period of suspension and even though he must serve the entire sentence if the suspension is revoked, there is no double jeopardy. The prohibitions against double jeopardy do not preclude the State from filing a second petition for revocation of suspended sentence that alleges the same facts. St. v. Oppelt, 184 M 48, 601 P2d 394 (1979), followed in St. v. Johnston, 2008 MT 318, 346 M 93, 193 P3d 925 (2008).

Purpose of Suspension: A former statute providing for the suspension of sentences in criminal actions was designed to afford first offenders an opportunity for reformation, and the court held that it should be liberally construed. State ex rel. Bottomly v. District Court, 73 M 541, 237 P 525 (1925).

Time When Sentence May Be Suspended:

The defendant was convicted of a violation of the liquor laws and sentenced to serve 60 days in jail and pay a fine. He at once perfected an appeal, secured a certificate of probable cause, and was admitted to bail. Five months thereafter his appeal was dismissed and the trial court on the day the certificate of dismissal was received suspended his sentence. The court held on an application for a Writ of Supervisory Control that since the defendant had never been committed, the trial court could properly, after entry of judgment, suspend the sentence at the time it did. State ex rel. Bottomly v. District Court, 73 M 541, 237 P 525 (1925).

Assuming that the court had the power to suspend the execution of the accused's sentence and to place him upon probation, that power, too, must have been exercised at the time the sentence was pronounced. When an order suspending sentence is made, it is in effect a part of the judgment itself. It is the court's direction as to how the judgment shall be carried into effect. State ex rel. Reid v. District Court, 68 M 309, 218 P 558 (1923).

FINE OR IMPRISONMENT

Plea Bargain Rejected — Imposition of State-Recommended Maximum Sentence Not Violative of Due Process: Killam was charged with felony aggravated assault with a weapon. The state entered into plea negotiations, but Killam rejected the proposed agreement. Killam ultimately pleaded guilty. At sentencing, the state recommended the maximum sentence, which was greater than the sentence offered in the plea agreement, and the sentencing court imposed the maximum statutory sentence. On appeal, Killam contended that the state acted vindictively and violated Killam's due process rights by recommending a more severe sentence than was offered in the plea negotiations, citing N.C. v. Pearce, 395 US 711 (1969), and Blackledge v. Perry, 417 US 21 (1974). The Supreme Court distinguished both federal cases because they dealt with vindictiveness based on harsher sentences imposed following retrial, while Killam argued vindictiveness during initial sentencing. The court noted that a defendant is free to accept or reject a plea offer, but if the offer is rejected, the prosecution may proceed with the case and make any legal sentencing recommendation because there is no agreement to the contrary. When Killam entered a guilty plea, the District Court informed him of the maximum sentence and the state was free to recommend the maximum statutory sentence. Thus, imposition of the maximum sentence did not violate Killam's due process rights. St. v. Killam, 2005 MT 255, 329 M 50, 122 P3d 439 (2005), following Bordenkircher v. Hayes, 434 US 357 (1978).

Correction of Sentence for Imprisonment Not Erroneous: Kern was convicted of felony sexual assault against a minor. The District Court sentenced Kern to a 15-year commitment to the Department of Corrections, with all but 7 years suspended. However, this section requires that a sentence to the Department include suspension of all but 5 years of the commitment. The District Court corrected its mistake and committed Kern to the state prison for 15 years, with all but 7 years suspended. Kern contended that the court erred in correcting the sentence. Under the version of 46-18-117 in effect at the time that the crime was committed (prior to repeal in 2001), the court was allowed to correct the erroneous sentence within 120 days of sentencing. Although Kern might have preferred commitment to the Department for 15 years with all but 5 years

suspended, the District Court was not restricted from pursuing the option that it chose and did not err in timely correcting the sentence pursuant to former 46-18-117. St. v. Kern, 2003 MT 77, 315 M 22, 67 P3d 272 (2003).

Acquiescence in Assessment of Interest on Unpaid Portion of Criminal Fine — Waiver of Right to Appeal: As part of a plea agreement on a felony drug charge, Micklon was fined $55,000. After hearing testimony on Micklon's financial status, the sentencing court agreed to allow five annual payments of $11,000, but assessed interest at 10% a year on the unpaid balance. Micklon appealed the interest charges on grounds that there was no statutory authority for requiring interest on a criminal fine. The state responded that appeal was waived by Micklon's failure to object to the interest provisions at the time of sentencing. The Supreme Court recognized that a defendant often must remain silent even in the face of invalid conditions to guard against the possibility that the sentencing court may forego a more lenient sentence if the defendant objects to one of the conditions, and that in those circumstances a defendant's failure to object does not necessarily constitute a waiver of the right to appeal. However, during sentencing Micklon did not remain silent, but in fact affirmatively agreed to inclusion of the interest condition in the sentence. Without addressing the legality of interest charges, the Supreme Court concluded that Micklon waived the right to appeal the issue and affirmed the sentencing court's assessment of interest on the unpaid portion of Micklon's criminal fine. St. v. Micklon, 2003 MT 45, 314 M 291, 65 P3d 559 (2003), followed in St. v. Walker, 2007 MT 205, 338 M 529, 167 P3d 879 (2007).

Jail Sentence for DUI Not Cruel and Unusual Punishment: The defendant, who has an extensive record of driving under the influence of alcohol, was convicted on three counts of driving under the influence (DUI) and sentenced to serve 10 months in the county jail. The defendant contends her sentence is cruel and unusual punishment and a denial of equal protection because it may be greater than would be served in the state prison for a more serious offense since county jail inmates are not entitled to statutory good time allowance or parole eligibility as are prison inmates. However, the sentence falls within the maximum authorized by statute and is not so disproportionate to the crime that it shocks the conscience and outrages the moral sense of the community or of justice. Therefore, the sentence imposed is not cruel and unusual punishment that would render it unconstitutional. St. v. Bruns, 213 M 372, 691 P2d 817, 41 St. Rep. 2178 (1984).

Power of District Court:

A judgment under former law requiring a defendant who was convicted on three counts of an information charging violations of the liquor law to pay a fine of $200 and to serve 60 days in the county jail on each count and, if the fines were not paid, to serve them out at the rate of 1 day for each $2 of the fines was held not uncertain or ambiguous. It meant that he would be imprisoned for a total of 180 days and would serve 1 day for each $2 of the fines aggregating $600. In re Pyle, 72 M 494, 234 P 254 (1925).

The District Court had the power under a former statute to impose a sentence of imprisonment in the county jail for a certain number of days, the defendant in addition to pay a fine in a stated amount and, in default of payment, to stand committed 1 day for every $2 of the fine after expiration of the term of imprisonment, until the fine was paid. In re Londos, 54 M 418, 170 P 1045 (1918).

Sufficiently Definite and Certain: A judgment under former law in a case of misdemeanor, imposing a fine of $500 and providing that in default of payment the defendant be imprisoned "for the term of one day for each $2 of said fine", was sufficiently definite and certain. State ex rel. Poindexter v. District Court, 51 M 186, 149 P 958 (1915).

RESTRICTIONS OR CONDITIONS

Restriction on Financial Transactions as Condition for Suspended Sentence for Sexual Assault Affirmed: As a condition for a suspended sentence for sexual assault of a child, Hernandez was required to obtain permission from the probation officer before engaging in financial transactions to finance or purchase a vehicle, engage in business, or incur debt. Hernandez appealed on grounds that the condition was unrelated to the crime. The Supreme Court noted that the sentencing condition was authorized by statute and Department of Corrections rule, so the Ashby requirement of a nexus to the offender or the offense did not apply. The financial transaction restriction was considered a standard condition of the Department, and Hernandez offered nothing indicating that the condition would impose a hardship; because Hernandez's priority financial obligations while serving the suspended sentence would be restitution, child support, fines, and fees, the imposition of the condition was appropriate and not an abuse of discretion. The District Court was affirmed. St. v. Hernandez, 2009 MT 341, 353 M 111, 220 P3d 25 (2009).

Prohibition Against Firearms as Condition of Deferred Sentence for Stalking Affirmed: As a condition of Essig's deferred sentence for stalking, the District Court prohibited Essig from owning, possessing, or being in control of firearms. Essig appealed the prohibition, but the Supreme Court affirmed. Several years earlier Essig was convicted of a concealed weapon violation, and considering the threatening nature of the stalking violation, the District Court did not abuse its discretion by restricting Essig's firearms use to obtain the objectives of rehabilitation and the protection of the victim and society. St. v. Essig, 2009 MT 340, 353 M 99, 218 P3d 838 (2009).

Sufficient Nexus of Sentencing Condition to Offense of Sexual Intercourse Without Consent: Brinson was sentenced to 20 years with 10 years suspended for sexual intercourse without consent, and the sentencing court also attached 56 terms and conditions to the sentence. Brinson challenged three conditions. The Supreme Court applied the nexus test in St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008), to determine whether the conditions lacked a nexus either to the offense or to Brinson. In this case a sufficient nexus was established to affirm imposition of conditions: (1) that Brinson's contact with his daughter be supervised; (2) prohibiting Brinson from having a cell phone, with exceptions, or other technology or device with photo, video, or internet capabilities; and (3) prohibiting Brinson from viewing television or motion pictures that were geared toward Brinson's offending cycle or as a stimulus to arouse deviant thoughts or fantasies. St. v. Brinson, 2009 MT 200, 351 M 136, 210 P3d 164 (2009).

Restitution Proper for Felony Criminal Endangerment: As part of Perkins' plea agreement on a charge of felony criminal endangerment, the state was allowed to seek restitution, and the sentencing court assessed $5,947 in restitution. Perkins appealed. The state conceded that $78.44 was not supported by documentation, but the Supreme Court held that there was sufficient legal authority for the sentencing court to impose restitution as part of the sentence. Therefore, the restitution award was affirmed but was reduced by $78.44. St. v. Perkins, 2009 MT 150, 350 M 387, 208 P3d 386 (2009).

Alcohol-Related Sentencing Condition for Incest Conviction Affirmed: As sentencing conditions following conviction for felony incest, the sentencing court required Heddings to abstain from and be tested for alcohol and drugs. Heddings argued that the alcohol-related conditions should be stricken because they were unrelated to the crime or to Heddings himself. Citing St. v. Stephenson, 2008 MT 64, 342 M 60, 179 P3d 502 (2008), the Supreme Court noted that a sentencing condition is illegal if: (1) the sentencing court lacked statutory authority to impose it; (2) the condition falls outside the parameters of the applicable sentencing statutes; or (3) the sentencing court did not adhere to affirmative mandates of the applicable sentencing statutes. Here, the presentence investigation revealed that Heddings was a situational, opportunistic child molester and that allowing him to drink would give him more opportunities to fail and increase the likelihood of reoffending. Heddings maintained that the incest did not involve the use of alcohol, but he did not challenge the accuracy of the findings. Thus, there was a nexus between the alcohol-related conditions and Heddings as an offender. It was within the sentencing court's discretion to impose conditions that were reasonable and necessary for rehabilitation or for the protection of the victim or society, and the Supreme Court affirmed. St. v. Heddings, 2008 MT 402, 347 M 169, 198 P3d 242 (2008).

Alcohol-Related Sentencing Conditions for Fraudulently Obtaining Dangerous Drugs Affirmed: Following conviction for fraudulently obtaining dangerous drugs, Hunter challenged two sentencing conditions that prohibited the possession and consumption of alcohol and that required chemical testing for drugs and alcohol. The Supreme Court affirmed. Prohibiting and monitoring Hunter's consumption of both alcohol and drugs would help prevent Hunter from repeating the same criminal conduct that gave rise to the sentence. A sufficient nexus was established between the offense and the alcohol-related sentence conditions. St. v. Hunter, 2008 MT 395, 347 M 155, 197 P3d 998 (2008), following St. v. Winkel, 2008 MT 89, 342 M 267, 182 P3d 54 (2008). See also St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008).

Alcohol-Related Conditions Unrelated to Felony Theft Stricken From Sentence: As a condition of Stiles' sentence for felony theft, the sentencing court prohibited Stiles from possessing or consuming intoxicants and entering places where intoxicants are sold and required Stiles to submit to drug and alcohol testing. The Supreme Court noted that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), and its progeny, a nexus must exist between a sentencing condition and the offense and offender. Because there was no nexus between the sentencing condition and Stiles and the offense of felony theft, the alcohol-related condition was stricken from Stiles' sentence. St. v. Stiles, 2008 MT 390, 347 M 95, 197 P3d 966 (2008).

Sentencing Conditions May Not Restrict Medical Treatment Authorized by State Law: Nelson was charged with seven drug-related crimes. Nelson suffers from a degenerative disc disorder

and has had four surgeries on his back. Nelson had applied with the state to be a qualified patient in Montana's medical marijuana program and to be entitled to the lawful use of medical marijuana. On December 8, 2006, subsequent to being charged with the drug-related crimes, Nelson was accepted into the medical marijuana program, placed on the confidential registry, and issued an identification card indicating his participation in the program. On February 7, 2007, Nelson entered into a plea agreement with the state. In exchange for pleading nolo contendere to criminal possession or manufacture of dangerous drugs, Nelson received a 3-year deferred imposition of sentence, and the state agreed to dismiss the remaining six counts. On February 26, 2007, Nelson appeared before the District Court and formally pleaded no contest to the charge. The District Court asked Nelson's attorney how Nelson participated in the medical marijuana program. The state offered that it had spoken to officials at the Department of Corrections, who opined that they would not allow Nelson to smoke marijuana while under their supervision but would allow him to use the pill form of marijuana, dronabinol, as prescribed by a physician. Nelson's attorney argued that such a restriction on Nelson's use of medical marijuana would be cost-prohibitive for him due to the expense of dronabinol and was thus contrary to the intent behind the passage of the Medical Marijuana Act, which was to allow individuals to obtain medical relief through the use of medical marijuana in a manner that was cost-effective. Nelson was ultimately given a 3-year deferred imposition of sentence subject to 20 conditions. Nelson appealed the conditions requiring him to comply with federal law and restricting his use and possession of marijuana to the pill form. Under the Medical Marijuana Act, "medical use" specifically contemplates "cultivation" and the use of "paraphernalia relating to the consumption of marijuana". The Supreme Court concluded that the District Court exceeded its statutory authority in imposing the condition limiting use to the pill form. The District Court unlawfully denied Nelson the right and privilege to use a lawful medical treatment for relief from a debilitating condition under the Medical Marijuana Act. The District Court also exceeded its authority in imposing the condition requiring compliance with federal law, insofar as it could be invoked to support a revocation of his deferred sentence in the face of contrary state law. It is an axiom of federalism under the U.S. Constitution that Congress does not have the authority to commandeer the processes of states by directly compelling them to enact and enforce a federal regulatory program. St. v. Nelson, 2008 MT 359, 346 M 366, 195 P3d 826 (2008).

District Court Lacked Power to Impose Conditions of Parole: The District Court imposed an illegal sentence when sentencing defendant on a petition to revoke and on a new charge because the court purported to impose many "parole and probation" conditions. St. v. Dennison, 2008 MT 344, 346 M 295, 194 P3d 704, (2008).

Requirement for Annual Polygraph Test as Condition of Suspended Sentence Not Unlawful — Use of Test Results in Punishment Prohibited: As a condition of Hameline's suspended sentence the District Court required Hameline to undergo an annual polygraph test. Hameline objected on grounds that the condition was illegal because polygraph results are not admissible in Montana court proceedings and on grounds that requiring the test violated the constitutional right against self-incrimination. The Supreme Court reiterated the complete prohibition against the direct or indirect use of polygraph results in court proceedings, while noting that requiring a person to undergo a polygraph test is not in itself illegal, so requiring a polygraph test for other purposes is not prohibited. The court also held that the right against self-incrimination did not prevent the District Court from compelling Hameline to undergo a polygraph test, but the right did prevent the state from using information gleaned from the test to punish Hameline. St. v. Hameline, 2008 MT 241, 344 M 461, 188 P3d 1052 (2008), followed in St. v. Smart, 2009 MT 1, 348 M 274, 201 P3d 123 (2009). See also St. v. Heddings, 2008 MT 402, 347 M 169, 198 P3d 242 (2008).

Restrictions Against Gambling and Use of Alcohol Unrelated to Offense of Theft or to Defendant Stricken — Drug Testing Requirement Affirmed: As conditions of Lessard's conviction for the theft of carved bears from neighborhood lawns, the sentencing court required that Lessard not consume alcohol or drugs, submit to alcohol and drug testing, and refrain from entering casinos and gambling. Lessard contested the conditions as unrelated to the theft of carved bears and asserted that he had no problem with or criminal history related to substance abuse or gambling, even though a marijuana pipe was found in Lessard's bedroom during a search for the bears and Lessard admitted to smoking marijuana 2 days prior to the search. In deliberating whether the conditions had a nexus to the offense or to Lessard himself, the Supreme Court held that the alcohol and gambling conditions were too much, that requiring no conditions would be too little, but that the drug testing condition was just right. The case was remanded with instructions to strike the alcohol and gambling conditions and the alcohol testing

requirement from Lessard's sentence, while leaving the drug testing requirement in effect. St. v. Lessard, 2008 MT 192, 344 M 26, 185 P3d 1013 (2008).

Sentencing Conditions for Theft Conviction, Except Requirement for Mental Health Evaluation, Affirmed: As conditions of Greensweight's sentence for theft, the sentencing court required Greensweight to obtain a chemical dependency evaluation and to attend either Alcoholics Anonymous or Narcotics Anonymous, prohibited Greensweight from possessing, using, or drinking intoxicants and from entering any place where intoxicants were the chief item of sale, and required Greensweight to participate in counseling, including mental health counseling. Greensweight contested the conditions as unrelated to the crime, and the Supreme Court considered each condition for legality and reasonableness and considered whether the conditions were related either to the crime or to Greensweight's unique background and characteristics. In light of Greensweight's history of chronic drug use, the chemical dependency evaluation and attendance at group meetings were reasonable and were affirmed. Citing St. v. Brotherton, 2008 MT 119, 342 M 511, 182 P3d 88 (2008), the court also affirmed the "no intoxicants" condition as legal because of the history of chronic drug use and as necessary for Greensweight's rehabilitation, including a requirement for drug and alcohol testing. The court also affirmed the counseling requirement, but absent any history of mental health issues or nexus to the theft crime, the requirement for mental health counseling was ordered stricken. St. v. Greensweight, 2008 MT 185, 343 M 474, 187 P3d 613 (2008).

Appropriate Conditions on Probation of Delinquent and Serious Youth Sex Offender: As a youth, D.A.S. was convicted of sexual assault and placed in a youth correctional facility. When D.A.S. turned 18, jurisdiction and supervisory responsibility were transferred from Youth Court to District Court until age 25, and numerous supervisory conditions were attached, including prohibitions on the use of drugs and alcohol, a curfew, and a requirement that D.A.S. obtain a GED 1 year prior to expiration of the sentence. D.A.S. objected to these conditions on grounds that they were unrelated to the crime of sexual assault, but the Supreme Court affirmed, applying St. v. Ashby, 2008 MT 83, 342, M 187, 179 P3d 1164 (2008), which allows imposition of conditions that have a nexus either to the offense or to the offender. In this case, both alcohol and drug prohibitions were reasonably related to D.A.S.'s rehabilitation and placement in a sexual offender program. A curfew was reasonable to ensure development of a consistent and healthy routine and was reasonable given legislative intent to provide youth offenders with additional supervision. Completion of the high school equivalency test was not an abuse of discretion because it was consistent with legislative intent to rehabilitate youth offenders through competency development, especially given D.A.S.'s expressed desire to further his education. In re D.A.S., 2008 MT 168, 343 M 360, 184 P3d 349 (2008).

Defendant Not Involved in Initial Vehicle Theft or Damage — Restitution Not Owing: Seghetti stole a vehicle and picked up Breeding and another friend for a ride, during which the vehicle was damaged while Seghetti was driving. Seghetti then revealed that the vehicle was stolen, and Breeding suggested driving the vehicle to California. During the trip, Breeding and Seghetti shared the driving. California police stopped the vehicle for a broken turn signal, and Breeding and Seghetti were subsequently charged with and convicted of felony theft. At sentencing, the District Court ordered that Breeding pay restitution for damage to the vehicle. Asserting that he was not driving when the damage occurred and thus was not responsible for the damage, Breeding appealed the restitution order. The Supreme Court reversed. Without a causal connection between Breeding's commission of theft and the damage inflicted earlier by Seghetti, there was no basis for requiring Breeding to pay restitution for that damage, so the District Court was ordered to strike the restitution requirement from Breeding's sentence. St. v. Breeding, 2008 MT 162, 343 M 323, 184 P3d 313 (2008).

Partial Parole Restrictions Affirmed: Rickman was sentenced to life with no parole eligibility for 55 years for deliberate homicide under the felony-murder rule. Rickman appealed the sentence on grounds that the sentencing court had no authority to restrict parole eligibility for only part of the sentence. Noting that challenges to partial parole restriction have been upheld since at least 1988, the Supreme Court disagreed with Rickman's assertion. A sentencing court has discretion to impose parole restrictions, and if a sentencing court has discretion to impose a restriction of no parole eligibility, then a sentencing court can likewise impose a restriction of limited parole eligibility. St. v. Rickman, 2008 MT 142, 343 M 120, 183 P3d 49 (2008). See also St. v. Kirkbride, 2008 MT 178, 343 M 409, 185 P3d 340 (2008), and St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

Sentence Restriction Prohibiting Alcohol Use Sufficiently Related to Defendant's History of Substance Abuse to Warrant Affirmation — Unrelated Casino Restriction Stricken: As conditions of Brotherton's sentence for criminal possession of dangerous drugs with intent to

distribute, the District Court prohibited Brotherton's use of alcohol, prohibited him from entering any place where intoxicants were the chief item of sale, and also prohibited him from entering casinos or playing games of chance. Brotherton appealed the conditions on grounds that they were unrelated to the offense, given that his criminal history involved only drugs and not alcohol. The Supreme Court agreed that the casino restriction was improper and remanded with directions that the condition be stricken. However, the court affirmed the alcohol use restriction, given Brotherton's significant history of chemical dependency and the reasonable possibility that Brotherton might substitute alcohol for drugs and thus impede his rehabilitation. St. v. Brotherton, 2008 MT 119, 342 M 511, 182 P3d 88 (2008).

No General or Inherent Authority of Sentencing Court to Generally Impose Parole Conditions — Parole Condition Related to Sexual Offense Authorized: There is no general or inherent authority for a sentencing court to impose parole conditions. A sentencing court may impose conditions on parole that are authorized by statute only. In this case, all conditions on Burch's suspended sentence for sexual offenses were proper, but only one parole condition, prohibiting Burch from possessing pornography or accessing the Internet, was authorized under 46-18-255. Burch's admission that he used the Internet at work to access pornography while on parole established that Burch violated a condition of his suspended sentence by a preponderance of the evidence. Thus, the sentencing court did not err in revoking Burch's suspended sentence. St. v. Burch, 2008 MT 118, 342 M 499, 182 P3d 66 (2008), followed in St. v. Dennison, 2008 MT 344, 346 M 295, 194 P3d 704, (2008), and St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009), regarding authority of sentencing court.

Conditions Including Restrictions on Alcohol Consumption and Entering Casinos Related to Drug Possession — Affirmed: As conditions of Winkel's suspended sentence for felony possession of dangerous drugs, the sentencing court prohibited Winkel from consuming alcohol and from entering any place where intoxicants were the chief item of sale and prohibited Winkel from entering casinos or playing games of chance. Winkel contended that the conditions should be stricken because alcohol and gambling were not related to the drug offense. The Supreme Court noted that sentencing conditions must be reasonably connected to the underlying offense and to the offender and concluded that in this case, that connection existed. The alcohol prohibition was connected to the drug-related nature of Winkel's drug offense and was called for, given Winkel's recent and chronic history of substance abuse and chemical dependency. Thus, the sentencing court did not err in finding that Winkel's rehabilitation would be jeopardized if Winkel had access to intoxicants like alcohol. Additionally, because alcohol is inseparable from gambling in Montana casinos, the prohibition against entering casinos achieved the same objectives of rehabilitation and protection and was also warranted. The conditions of Winkel's suspended sentence were affirmed. St. v. Winkel, 2008 MT 89, 342 M 267, 182 P3d 54 (2008), followed in St. v. Teets, 2008 MT 130, 343 M 73, 183 P3d 45 (2008), St. v. Deshazo, 2008 MT 131, 343 M 77, 183 P3d 47 (2008), St. v. Corbin, 2008 MT 146, 343 M 211, 184 P3d 287 (2008), and St. v. Sadowsky, 2008 MT 405, 347 M 192, 197 P3d 1018 (2008). See also St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008).

Probation Condition Banning Alcohol Consumption Unrelated to Crime of Issuing Bad Check Reversed — Condition Prohibiting Gambling Related to Fiscal Irresponsibility Affirmed: Probation conditions on Ashby's bad check conviction included a restriction that Ashby not gamble or consume alcohol or drugs. Ashby contested the conditions under the rule in St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), that there must be a nexus between probation conditions and the offense. The District Court denied Ashby's assertion and imposed the conditions as "stock" or standard. On appeal, the Supreme Court expanded the Ommundson nexus rule to include a nexus either to the offense or to the offender, rather than to the offense alone. In this case, there was no evidence that the bad check offense was related in any way to alcohol or drugs, that Ashby had a drinking or drug problem, or that an alcohol and drug prohibition would protect Ashby from another bout of writing bad checks. Thus, the alcohol and drug restriction was stricken from the sentence. Likewise, there was no evidence that Ashby had a gambling problem. However, citing St. v. Kroll, 2004 MT 203, 322 M 294, 95 P3d 717 (2004), the court found that because of considerable previous fiscal irresponsibility on Ashby's part, it was reasonable for the sentencing court to conclude that a prohibition on gambling was appropriate to rehabilitate Ashby's ability to manage his finances, so the gambling restriction was affirmed. The court also warned against the imposition of alcohol and gambling restrictions as standard or universal because they are not mandated by law. St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008), followed in St. v. Corbin, 2008 MT 146, 343 M 211, 184 P3d 287 (2008), St. v. Krueger, 2008 MT 265, 345 M 147, 190 P3d 318 (2008), St. v. Jones, 2008 MT 440, 347 M 512, 199 P3d 216 (2008), and, with regard to imposition of a gambling restriction in light of defendant's

financial irresponsibility, in St. v. Simpson, 2009 MT 43, 349 M 275, 203 P3d 791 (2009). Kruger was followed in St. v. Smart, 2009 MT 1, 348 M 274, 201 P3d 123 (2009).

Repayment of Costs and Fees of Court-Appointed Counsel as Condition of Deferred Sentence: As a condition of Holland's deferred sentence, the District Court ordered Holland to repay $2,922 in costs and fees expended in his defense by court-appointed counsel. Holland appealed on grounds that the court was not authorized to impose such a condition on a deferred sentence. The Supreme Court disagreed, holding that because 46-8-113(1) included all costs related to a criminal defense and because the statute contained no limitation on which defense costs a judge may require a defendant to pay, the District Court did not err in requiring Holland to repay costs and fees of court-appointed counsel as a condition of the deferred sentence. (Note: A 2005 amendment provided that costs must be limited to costs incurred by the Office of State Public Defender.) St. v. Holland, 2008 MT 26, 341 M 237, 177 P3d 482 (2008).

Parenting Interference Conviction — Imposition of Conditions Restricting Alcohol Consumption and Gambling Reversed — Requirement for Mental Health Evaluation Affirmed: As a sentencing condition for conviction of parenting interference, a mother was required to refrain from consuming alcohol and frequenting casinos and was ordered to undergo a mental health evaluation. The mother appealed the imposition of the conditions. The Supreme Court noted that a sentencing condition must have some correlation or connection to the underlying offense, and in this case there was no nexus between alcohol consumption or gambling and parenting interference, so those conditions were stricken. However, the mother's past actions and the conduct forming the basis for the underlying offense revealed a correlation between the evaluation ordered and the conviction for parenting interference, so the sentencing court did not err in requiring a mental health evaluation as a sentencing condition in this case, and that requirement was affirmed. St. v. Young, 2007 MT 323, 340 M 153, 174 P3d 460 (2007), following St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999).

Youth Court Adjudication Not Considered Conviction — No Authority to Require Adjudicated Youth to Register as Sexual or Violent Offender Under Pre-2007 Law: In 1998, 16-year-old Hastings was adjudicated a delinquent youth in Youth Court, admitting one offense of sexual intercourse without consent, and was committed to the Department of Corrections (DOC). When Hastings turned 18 in 2000, his case was transferred to District Court until age 25 based on the parties' stipulation that Hastings had not completed sex offender treatment or paid restitution and was at high risk to reoffend. The District Court then determined that Hastings had violated the conditions of the Youth Court order and committed Hastings to the DOC and also required that Hastings register as a level 2 sex offender. Hastings initially registered as a sex offender, but failed to update registration after moving and was subsequently charged with failure to maintain registration. Hastings moved to dismiss the charge, asserting that he had not been convicted of a sexual offense and that neither the commitment order nor statutes required him to register after discharging his sentence. The motion was denied, and Hastings appealed. The Supreme Court reversed. Although the Youth Court had the authority to require sex offender registration pursuant to 41-5-1513, no requirement was made in this case. Because the Youth Court adjudication did not constitute a conviction, the District Court could not impose registration requirements under this section. (Note that the 2007 Legislature amended 46-23-502 to include an adjudicated youth in the definition of a sexual or violent offender.) The District Court's opinion that 41-5-1513 suggests a wholesale incorporation of sexual offender registry into the Montana Youth Court Act was erroneous, and absent statutory authority, a court may not impose a registration requirement. Failure to grant Hastings' motion to dismiss was error, and the case was remanded for dismissal. St. v. Hastings, 2007 MT 294, 340 M 1, 171 P3d 726 (2007), distinguishing St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), and St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

No Prosecution for Breach of Suspended Sentence Only: As a condition of Letasky's suspended sentence for partner or family member assault, he was directed to have no contact with the victim. When contact allegedly occurred, Letasky was charged with criminal contempt. Letasky moved to dismiss the charge, but the motion was denied. On appeal, the Supreme Court reversed. A condition of a suspended sentence, unlike a court order, is not an independent mandate of the court, but instead represents a requirement that Montana law allows the court to place upon an order suspending an offender's sentence. An offender may be prosecuted for a crime if the facts that establish the offender's noncompliance with a condition of the suspended sentence also establish the elements of a crime, but an offender may not be prosecuted based only on breach of the condition itself. St. v. Letasky, 2007 MT 51, 336 M 178, 152 P3d 1288 (2007).

Home Visit of Probationer's Residence by Supervising Officer Not Considered Search — Diminished Expectation of Privacy — When Reasonable Cause Required to Search Probationer's Residence: As part of Moody's conditions of probation, the sentencing court required that Moody's home be open and available for the probation and parole officer to visit as required by state policy. Moody objected to the condition on grounds that it obviated the reasonable cause requirement for searches of probationers' homes and thus violated the constitutional rights of privacy and protection from unreasonable search and seizure. The Supreme Court noted that in Montana, a probation officer may search a probationer's residence without a warrant if the officer has reasonable cause for the search. The reasonable cause standard is substantially less than the probable cause standard required for searches of other citizens' homes because probationers do not enjoy the absolute liberty and heightened expectations of privacy afforded every Montana citizen. Rather, probationers are subject to conditional liberty that is properly dependent upon special restrictions. A convicted felon who is unambiguously aware of the clearly expressed condition that the residence be open and available for home visits does not have a reasonable expectation of privacy that precludes home visits, and because there is no reasonable expectation of privacy, there is no search. Therefore, home visits conducted as a routine and reasonable element of supervising a convicted person are not searches and are not subject to the reasonable cause standard. Although a home visit has the potential to turn into a search pursuant to an officer's plain view observations, it must remain within the parameters of a home visit unless and until reasonable cause exists for the officer to engage in a search. A probationer's diminished expectation of privacy during supervision nevertheless provides that the enclosed areas of the probationer's residence, such as closets, cabinets, and drawers, cannot be searched without reasonable cause. Thus, Moody's constitutional rights to privacy and to be free from unreasonable searches were not violated by the home visit probation condition. St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006), followed in St. v. Greeson, 2007 MT 23, 336 M 1, 152 P3d 695 (2007).

Restriction of Travel as Probation Condition Related to Rehabilitation and Protection of Society Affirmed: As part of Moody's conditions of probation, the sentencing court required that Moody obtain written permission from the probation officer before traveling outside Moody's assigned district. Moody objected to the restriction, arguing that it improperly placed Moody's rights at the mercy of the supervising officer. The Supreme Court noted that a probation condition must be reasonably related to the objectives of rehabilitation and protection of the victim and society and have some correlation or connection to the underlying offense. In this case, the offense resulted from Moody's admitted problem with alcohol. The deferred sentence allowed Moody to address the problem under the supervision of the probation officer and properly included a travel restriction to allow the officer to effectively keep track of Moody and ensure that Moody remained on course with treatment. Imposition of the travel restriction was affirmed. St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006).

Sentencing Condition Unrelated to Underlying Offense Stricken: Attorney Holt pleaded not guilty to five counts of felony theft of clients' funds. As a condition of a suspended sentence, the trial court prohibited Holt from possessing or consuming alcohol and from establishing a checking or credit card account. Holt appealed both sentencing conditions. The Supreme Court noted that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), and St. v. Lucero, 2004 MT 248, 323 M 42, 97 P3d 1106 (2004), a sentencing limitation or condition must have some correlation to the underlying offense in order to be reasonably related to the objectives of rehabilitation and protection of the victim and society. In this case, there was no evidence that alcohol contributed to the offenses in question, so the Supreme Court struck that condition from the judgment. However, there was a correlation between Holt being allowed to establish a checking or credit card account and the crime of theft of clients' funds, so imposition of that condition was not improper and was affirmed. St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006), followed in St. v. Armstrong, 2006 MT 334, 335 M 131, 151 P3d 46 (2006), and St. v. Greeson, 2007 MT 23, 336 M 1, 152 P3d 695 (2007).

Restitution Proper for Insurance Fraud: Borsberry was convicted of insurance fraud and ordered to pay restitution of $22,997.52 to the insurer in repayment of the fraudulently obtained amount. Borsberry appealed on grounds that restitution was not proper because the insurer was not a victim who suffered a pecuniary loss. The Supreme Court disagreed. Borsberry's policy contained a provision that his policy would be voided if a fraudulent claim was filed. The insurer paid the fraudulent claim under a reservation of rights and suffered a pecuniary loss based on Borsberry's criminal activity. Under Tyler v. Fireman's Fund Ins. Co., 255 M 174, 841 P2d 538 (1992), insurance payments made under fraudulent claims entitle the insurer to restitution in the amount of the payments. The restitution fell within statutory parameters and was affirmed. St. v. Borsberry, 2006 MT 126, 332 M 271, 136 P3d 993 (2006).

Restitution Properly Imposed Without Suspension or Deferral of Sentence: Citing St. v. Honey, 2005 MT 107, 327 M 49, 112 P3d 983 (2005), Vernes contended that the sentencing court had no authority under this section to impose restitution costs without suspending or deferring part of Vernes' sentence. The Supreme Court noted that an alternative sentencing authority for the imposition of restitution costs, not addressed in Honey, exists in 46-18-202 that allows any limitation reasonably related to the objectives of rehabilitation and the protection of society, as long as the restriction or condition has some connection to the underlying offense, and does not require suspension or deferral of a portion of a defendant's sentence. Thus, the sentencing court had authority to impose restitution for costs directly connected to the pecuniary loss of the victim, and restitution in this case was affirmed St. v. Vernes, 2006 MT 32, 331 M 129, 130 P3d 169 (2006).

Improper Order to Pay Child Support as Condition of Sentence for Possession of Dangerous Drugs: Erickson entered a plea agreement on drug charges, and although it was not part of the agreement, the sentencing court ordered that Erickson also forfeit one-third of his prison earnings as restitution to be paid toward Erickson's delinquent child support. Erickson never invited or acquiesced to the child support order. On appeal, the Supreme Court held that possession of dangerous drugs is a victimless crime for which restitution cannot be owed and also noted that the amount of restitution must be determined and fixed. The court agreed with Erickson that there was no connection between drug crimes and the failure to pay child support, so ordering payment of child support arrearages as restitution was not an appropriate condition of sentencing for a drug crime. However, in this case, the sentencing court made it clear that the order to pay child support was in lieu of requiring Erickson to pay cleanup costs associated with a clandestine drug lab, attorney costs, or jury costs. The sentencing court could have imposed both costs and restitution if not for the imposition of the illegal child support obligation, so the Supreme Court was unable to determine what sentence would have been imposed if the law had been correctly applied. The case was remanded for resentencing on whether Erickson must pay restitution and costs. St. v. Erickson, 2005 MT 276, 329 M 192, 124 P3d 119 (2005).

Adoption of Sentence Recommended in Presentence Investigation Report, With Variations — No Error in Disparity Between Oral and Written Sentence: As set out in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the oral pronouncement of sentence is the legally effective sentence, and the written judgment and commitment serves as evidence of the sentence orally pronounced. Wiedrich contended that because his written sentence contained terms and conditions that were not orally pronounced, the extra conditions were invalid and should be removed from the sentence. The Supreme Court disagreed. The transcript revealed that the sentencing court clearly adopted the sentence recommended in the presentence investigation report, with some variations—a fact that Wiedrich and his counsel were fully aware of—and the Supreme Court therefore declined to remand for resentencing. St. v. Wiedrich, 2005 MT 127, 327 M 214, 112 P3d 1054 (2005).

Conditioning Suspension of Part of Sentence for Failure to Register as Sex Offender on No Contact With Persons Under 18 and No Possession of Pornographic Material: Malloy, a convicted sex offender, pleaded guilty to failing to report his change of address. He appealed conditions on his suspended sentence that prohibited contact with persons under 18 years of age and access to or possession of pornographic or other material tending to arouse deviant thoughts or fantasies, claiming that the conditions were not reasonably related to the offense, as required by case law interpretation of the provision under this section allowing "reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society". The Sexual or Violent Offender Registration Act was adopted to protect the public from the recidivism of sex offenders, prevent victimization of vulnerable children, and assist law enforcement in keeping track of sex offenders. Malloy had two prior sex offense convictions and failed to complete two different sex offender programs. He had a history of inability to conform his conduct to the demands of the state's sex offender laws and exhibited behavior placing society in danger because of his recidivism. The conditions were reasonably related to the goal of protecting society, including children. St. v. Malloy, 2004 MT 377, 325 M 86, 103 P3d 1064 (2004).

Suspension of Part of Sentence for Failure to Register as Sex Offender — Conditions in Written but Not Oral Judgment That Full Employment Be Maintained and Offender Not Have Contact With Victims: Malloy, a convicted sex offender, pleaded guilty to failing to report his change of address. The written judgment, but not the oral pronouncement of sentence, required him to maintain full-time employment and to not have contact with the victims of his offense. The court could not say that the conditions would not substantively increase his loss of liberty or sacrifice of property, and accordingly, the court ordered those conditions to be vacated. St. v. Malloy, 2004 MT 377, 325 M 86, 103 P3d 1064 (2004).

No Prejudice in Property Valuation When Less Than Full Restitution Required: The total losses incurred by individuals and businesses in a fire started by Gilbert was $5,721,684.57. In calculating the value of a building destroyed in the fire for establishing restitution, the District Court used replacement value rather than actual value. Gilbert contended that failure to use actual value was reversible error under St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000). The Supreme Court agreed that actual value should have been used but that Gilbert failed to show that any prejudice resulted from the error. Gilbert's presentence investigation report adequately documented Gilbert's financial resources and future ability to pay restitution, and Gilbert was ordered to pay only $24,000 in restitution, which was but a minuscule fraction of the losses. Any error by the District Court in using replacement value for the building did not prejudice Gilbert because he was not required to pay full restitution. St. v. Gilbert, 2004 MT 368, 324 M 530, 106 P3d 127 (2004), following St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Deferred Sentence, Community Service, and Restitution Properly Imposed for Sexual Intercourse Without Consent: Following Grindheim's conviction for sexual intercourse without consent, the District Court deferred Grindheim's sentence for 6 years, subject to 6 months in the county jail, 2,000 hours of community service, and fines and restitution totaling about $6,496.60. Grindheim appealed on grounds that the combination of the conditions rendered the sentence unreasonable and impossible to perform and constituted punishment instead of rehabilitation. The Supreme Court held that the conditions and community service were within the parameters of the sentencing statute and were reasonably related to the circumstances of the offense and that the restitution calculations were reasonable considering the victim's long-term counseling needs. Therefore, the District Court did not err in imposing the sentence, and the sentence was affirmed. St. v. Grindheim, 2004 MT 311, 323 M 519, 101 P3d 267 (2004).

Improper Inclusion of Social Security Benefits When Determining Income for Purposes of Restitution: An order that Social Security benefits be included in appellant's net income for purposes of determining the amount of net income to be paid as restitution improperly burdened appellant's Social Security benefits. Including Social Security benefits in income conflicts with 42 U.S.C. 407(a), which provides that the benefits cannot be subjected to execution, levy, attachment, garnishment, or other legal process. The order was an improper attempt to subject the benefits to "other legal process". St. v. Eaton, 2004 MT 283, 323 M 287, 99 P3d 661 (2004).

Ordering Restitution When Section Required It for Deferred Sentence and Did Not Mention Suspended Sentence — Allowable When Failure to Mention Suspended Sentence Was Due to Error: Under a 1999 amendment, this section mandated restitution when a deferred sentence was imposed. Defendant was given a suspended sentence and ordered to pay restitution. An error was made in the 1999 amendments to this section, under which only a deferred sentence was referred to. The amendments were not intended to make any change in the substance or effect of the section, which required mandatory restitution when either a deferred or a suspended sentence was imposed. Therefore, it was not error to order appellant to pay restitution. St. v. Eaton, 2004 MT 283, 323 M 287, 99 P3d 661 (2004).

Review of Legality of Imposing Restitution — Failure to Raise Issue Below: If a defendant appeals a sentence in a criminal case on the grounds that it is illegal or exceeds statutory mandates, the issue may be reviewed even if no objection was made at the time of sentencing. Therefore, defendant's claim that an order to pay restitution as a condition to a suspended sentence was illegal was not waived by his failure to raise the issue below and would be reviewed on appeal. St. v. Eaton, 2004 MT 283, 323 M 287, 99 P3d 661 (2004), followed in St. v. Eaton, 2004 MT 381, 325 M 92, 103 P3d 1068 (2004).

Restitution Properly Ordered When Dismissed Charges Related to Charge for Which Defendant Convicted: McIntire was charged with felony burglary, misdemeanor theft, and misdemeanor forgery. Pursuant to a plea agreement, McIntire pleaded guilty to the burglary charge and the other charges were dismissed. The trial court ordered McIntire to pay restitution, but McIntire contended that because the forgery charges were dismissed, restitution could not be ordered to compensate for the forged checks and that the court lacked authority to impose restitution when there was no longer a victim with respect to the dismissed forgery charges. The Supreme Court disagreed. The victim was the same for both crimes, and the burglary was directly connected to the forgery, constituting an ongoing criminal transaction, so dismissal of the forgery charges did not deprive the court of authority to impose a restitution obligation on McIntire for the checks stolen from the victim during the burglary and for the pecuniary loss from the subsequent forgery of those checks. St. v. McIntire, 2004 MT 238, 322 M 496, 97 P3d 576 (2004).

Imposition of Stock Probation Requirements in Written Sentence When Not Mentioned in Oral Sentence Not Error Absent Showing of Prejudice: When Kroll was sentenced orally for a felony bad check scheme, he received a 10-year prison sentence with all but 180 days suspended and was ordered to pay restitution, not possess or consume alcohol, obtain a chemical dependency evaluation, refrain from entering casinos and playing games of chance, and undergo a sexual risk assessment because many of the materials purchased with the bad checks included pornography. The subsequent written judgment deviated from the oral pronouncement in several respects, omitting the sexual risk assessment and including several conditions not addressed at the oral sentencing, including requirements that Kroll conduct himself in a law-abiding manner, submit to reasonable searches, not own or possess firearms or deadly weapons, maintain full-time legitimate employment, have no contact with the victims, and pay a supervision fee. Kroll contested the validity of the added conditions in the written sentence and the imposition of the sexual risk assessment. The Supreme Court affirmed. The added conditions were civil restrictions that were considered stock requirements for probationers and individuals subject to a suspended sentence and did not substantively increase Kroll's loss of liberty or sacrifice of property. Given the standard nature of the sentencing conditions, Kroll suffered no actual prejudice by failure of the District Court to impose the conditions at oral sentencing, and they were therefore upheld as lawful. The state conceded that the alcohol restrictions and the chemical dependency conditions of the oral sentence were not related to the crime, and the Supreme Court ordered that those conditions be removed, leaving only the gambling and sexual risk assessment at issue. The Supreme Court affirmed those conditions because they were related to the bad check crimes and were a reasonable condition to assist Kroll's rehabilitation. St. v. Kroll, 2004 MT 203, 322 M 294, 95 P3d 717 (2004), following St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480 (2000). See also St. v. Lucero, 2004 MT 248, 323 M 42, 97 P3d 1106 (2004), in which the imposition of significant restrictions and conditions not mentioned in the oral sentence, in addition to stock sentencing conditions authorized in Kroll, was considered prejudicial, reversible error.

Order for Restitution Upon Imposition of Deferred or Suspended Sentence — 1999 Amendments to Sentencing Statute Clarified: Heath was convicted of theft and possession of burglary tools and sentenced to 10 years in prison with 2 years suspended upon conditions, including payment of restitution. Heath appealed on grounds that the 1999 amendments to this section no longer allowed a sentencing court to impose restitution as a condition of a suspended or deferred sentence. Upon amendment in 1999, an internal reference in subsection (5) of this section was not changed to reflect the renumbering of the other subsections, which resulted in an ambiguity in the plain language of this section, potentially rendered 46-18-237 and 46-18-251(2) meaningless, created uncertain directives for payment of restitution for all victims in 46-18-241(1) and 46-18-244(2), and created a potentially absurd application of subsection (1) of this section. Because of the potentially absurd consequences of the 1999 amendment, the Supreme Court looked beyond the words of the statute and inquired whether the Legislature intended to make any change in the substance and effect of this section. The court concluded that the 1999 amendment was a simple codification error that resulted in a cross-reference problem that was completely inconsistent with legislative intent to authorize sentencing courts to impose restitution when necessary for rehabilitation or for the protection of the victim or society if there is an appropriate correlation to the offense committed. Heath's argument failed, and the imposition of restitution as a condition of Heath's suspended sentence was affirmed. (Note: The erroneous internal reference in subsection (5) of this section was deleted in 2003.) St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004), followed in St. v. McDanold, 2004 MT 167, 322 M 31, 97 P3d 1076 (2004), and St. v. McIntire, 2004 MT 238, 322 M 496, 97 P3d 576 (2004).

Restitution Adequately Documented in PSI Report and Information Submitted by Victim: Heath contended that the presentence investigation report (PSI) contained insufficient information to document his ability to pay restitution and the victim's pecuniary loss, citing St. v. Brown, 263 M 223, 867 P2d 1098 (1994), St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866 (1999), and St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000). The Supreme Court distinguished Brown, Hilgers, and Pritchett on grounds that the PSI report deficiencies in those cases were not present in Heath's case. Rather, the court followed St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003), and St. v. Dunkerson, 2003 MT 234, 317 M 228, 76 P3d 1085 (2003), finding that the PSI report adequately addressed Heath's employability, assets and debts, and capability of paying restitution. The valuation of the victim's pecuniary loss was adequately provided in documentation submitted by the victim and, coupled with expert testimony on the value of recovered items, provided substantial credible evidence upon which to base the

restitution amount. St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004), followed in St. v. Eaton, 2004 MT 381, 325 M 92, 103 P3d 1068 (2004).

Lack of Remorse Not Sole Sentence Enhancement Factor — Incest Sentence Affirmed: Defendant contended that the sentencing court erred in augmenting a sentence for incest simply because defendant did not show remorse or admit guilt. The Supreme Court noted that St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), prohibits enhancement of a sentence solely because a defendant is not remorseful or refuses to be accountable for the defendant's conduct. However, in this case, the sentencing court did not rely solely on defendant's attitude in enhancing the incest sentence but also considered defendant's risk of reoffending, risk to society, prospects for rehabilitation, character, background, history, and mental and physical functioning. Thus, Shreves was distinguishable, and the sentence was affirmed. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

Addition of Written Sentencing Conditions Not Enunciated Orally at Hearing — Johnson Applied: Drube failed to complete a sex offender program, so the District Court revoked his suspended sentence and sentenced him to a 9-year term, with commitment to the Department of Corrections for the first 5 years and the remainder to be served at the state prison. The court specified that the prison portion of the sentence be suspended as long as Drube met sentencing conditions, including completion of a long-term aftercare program. Drube appealed the sentence on grounds that the court imposed a condition on the sentence that was impossible to fulfill and because the written revocation and sentencing order differed from the oral sentence enunciated at the sentencing hearing. Reviewing the sentence for legality, the Supreme Court affirmed. Drube presented nothing establishing that it would be impossible to complete the sex offender program within the reinstated 5-year commitment to the Department. Arguing that eight written conditions added to the suspended sentence by written order should be stricken, Drube cited St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), for the proposition that when written and oral sentences differ, the oral order prevails. The Supreme Court agreed with the general rule in Lane, but noted that the rule is not absolute. Under St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480 (2000), when deciding whether a subsequent written sentencing order is unlawful because it contains conditions not enunciated orally, the court first determines whether a defendant was afforded the opportunity to respond to the inclusion upon sufficient notice at hearing and second whether the portion of the written sentence substantively increases the defendant's loss of liberty and sacrifice of property. Here, all the conditions in the 2002 written revocation and sentencing order were contained either in Drube's original sentence or in a 2001 revocation and sentencing order and thus were not new or unknown to Drube, who had the opportunity to respond to the conditions placed on the sentence, nor did Drube present any argument that the eight conditions substantively increased the loss of liberty or sacrifice of property. Thus, the 2002 sentencing order was not rendered unlawful by the addition of conditions not imposed orally at the sentencing hearing. St. v. Drube, 2003 MT 138, 316 M 156, 69 P3d 1182 (2003).

Restitution as Condition of Suspended Sentence Proper Under 1997 Version of Sentencing Statute: The District Court suspended Flanagan's 10-year sentence for felony assault and required that Flanagan pay restitution. Flanagan asserted that St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), precluded restitution as a condition of the suspended sentence. However, Horton was decided under the 1999 version of this section, while Flanagan was sentenced under the 1997 version in effect when the assault was committed, and the 1997 version expressly authorized payment of restitution as a condition of a suspended sentence. Thus, the District Court was affirmed on the issue. St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003).

Sentence Based on Refusal to Admit Guilt Violative of Right Against Self-Incrimination: Shreves was convicted of deliberate homicide and sentenced to 100 years in prison, with no parole for 60 years. At trial, Shreves chose to testify on his own behalf and assert his innocence, and at sentencing, Shreves chose not to testify, but his counsel indicated that Shreves maintained his innocence. The District Court imposed the sentence based in significant part on Shreves' failure to show remorse or responsibility. Shreves appealed on grounds that it was improper to hold his refusal to admit to the crime against him in determining the sentence. The state contended that the sentencing court properly considered the lack of remorse as a factor relevant to Shreves' rehabilitation and the danger presented to the community and argued that the lack of remorse was based on trial testimony and evidence. The Supreme Court considered whether Shreves adequately invoked the right to maintain silence, the scope of the oral sentence that controlled over the subsequent written sentence as it related to the entire sentence, and the District Court's decision to base its sentence in large part on Shreves' refusal to admit to the

crime. Although lack of remorse can be considered as a sentencing factor, a sentence that is based on a refusal to admit guilt cannot be upheld. Here, the Supreme Court was unable to find a sentencing distinction between punishing Shreves for remaining silent and the proper consideration of Shreves' failure to show remorse. A sentencing court may not draw a negative inference of lack of remorse from a defendant's silence at sentencing when the defendant has maintained innocence throughout the proceedings. Shreves was improperly penalized for maintaining his innocence pursuant to the constitutional right to remain silent. The sentence was therefore illegal. Shreves' conviction was reversed, and the case was remanded for resentencing. St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), distinguished in St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004), and St. v. Burkhart, 2004 MT 372, 325 M 27, 103 P3d 1037 (2004). See also St. v. Imlay, 249 M 82, 813 P2d 979 (1991), St. v. Kelly, 265 M 298, 876 P2d 641 (1994), St. v. Fuller, 276 M 155, 915 P2d 809 (1996), and St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

Conditioning Suspended Portion of Incarceration Sentence Upon Entering Into Plan to Pay Fine in Installments: The court conditioned suspension of half the incarceration term upon defendant's entering into a plan for payment of a fine in installments. The court did not impose the fine as a condition on the suspended portion of the incarceration term. Thus, the Sentence Review Board's elimination of the suspended portion of the incarceration term did not eliminate the obligation to pay the fine. St. v. George, 2002 MT 300, 313 M 11, 59 P3d 1151 (2002).

Deferral of Sentence to Allow Payment of Restitution Not Violative of Due Process Rights: Benoit was charged with felony theft and entered a nonbinding plea agreement to plead guilty in exchange for a recommendation for a 2-year deferred sentence, based on the possible imposition of various conditions, including the payment of restitution. Benoit was then convicted and ordered to repay $15,933.90 in restitution. At the restitution hearing, Benoit admitted that with her current take-home salary and expenses, the restitution could not be repaid in 2 years, so the sentencing court sentenced Benoit to a 6-year deferred sentence to allow time to pay the restitution, but gave Benoit the opportunity to withdraw the guilty plea after 2 years if restitution was paid within that time. Benoit appealed on grounds that increasing the deferred sentence was a violation of due process, citing St. v. Farrell, 207 M 483, 676 P2d 168 (1984), and St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000), and asserted that the sentence should be remanded for determination of a length of sentence consistent with the charge and Benoit's history instead of the ability to pay restitution. The Supreme Court distinguished Farrell and Pritchett, noting that Benoit's sentence was not based on indigency, and coupled with the fact that Benoit was given the opportunity to withdraw the guilty plea prior to the termination of the 6-year deferred sentence, Benoit's due process rights were not violated through imposition of the conditional 6-year deferred sentence. St. v. Benoit, 2002 MT 166, 310 M 449, 51 P3d 495 (2002).

Failure to Document Victim's Pecuniary Loss and Offender's Financial Resources and Ability to Pay Restitution — Restitution Condition Vacated: Muhammad was convicted of sexual intercourse without consent with a minor. One condition of sentencing was a requirement that Muhammad pay $5,000 in restitution. Under this section, a sentencing judge shall require a defendant to pay full restitution to a victim if the judge finds that the victim has sustained a pecuniary loss. Imposition of restitution is subject to detailed statutory procedures and qualifications, which include documented evidence of the victim's loss and the offender's ability to pay. The sentencing court is required to specify the amount, method, and time of each payment to the victim. Here, the presentence investigation did not document the victim's pecuniary loss or Muhammad's future ability to pay restitution, nor did the sentencing court consider Muhammad's future ability to pay because the relevant evidence was not presented to the court. Therefore, the Supreme Court held that the restitution condition of the sentence was illegal, and that condition was vacated. St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002), following St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000), and followed in St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007).

Plenary Review of Criminal Sentence by Supreme Court Even Though No Objection Made at Sentencing: Brister was sentenced to 20 years for felony sexual assault with 10 years suspended, served the 10-year prison sentence, and then was released and began the 10-year suspended sentence. About 6 years into the suspended sentence, Brister was arrested for felony theft and for violating various parole conditions. The District Court then revoked the suspended sentence and reimposed another 10-year suspended sentence to run consecutively with a 5-year felony theft sentence. The new suspended sentence included 26 additional conditions. Brister did not object to any of the conditions when they were imposed, but filed a motion objecting to the sentence 2 months later, claiming that the conditions were not and could not have been included in the original suspended sentence, and thus violated double jeopardy and ex post facto laws. The state

maintained that Brister waived any objections to the conditions by failing to contemporaneously object when the sentence was pronounced, and that the appeal from the sentence was not timely filed. The Supreme Court disagreed and reversed. Under St. v. Lenihan, 184 M 338, 602 P2d 997 (1979), the court will review a sentence imposed in a criminal case if it is alleged that the sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing. Further, Brister provided the District Court with an opportunity to correct any sentencing errors by filing an objection under 46-18-117 (now repealed), which allowed 120 days for correction of an illegal sentence, so Brister retained the right to appeal the purportedly illegal sentence. St. v. Brister, 2002 MT 13, 308 M 154, 41 P3d 314 (2002), overruling St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019 (2000), St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001), and St. v. Smith, 2001 MT 111, 305 M 298, 27 P3d 39 (2001), to the extent that those cases held that failure to raise a contemporaneous objection to an illegal sentence at the time of hearing resulted in waiver of defendant's objection, and followed in St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002). See also St. v. Southwick, 2007 MT 257, 339 M 281, 169 P3d 698 (2007).

Question Whether Parole Denied for Failure to Satisfy Additional Treatment Conditions — Remand: Ringewold pleaded guilty to two counts of felony assault and was sentenced to a total of 14 years' commitment to the Department of Corrections. The next day, Ringewold was placed in the state hospital. The placement order allowed Ringewold to petition for a conditional release from the hospital, but did not specify any conditions. About 17 months later, Ringewold petitioned for release from the hospital. The state agreed that a hearing on the petition was proper, but argued that if it was found that Ringewold no longer suffered from a mental disease or defect that presented a risk to Ringewold or others, it was appropriate to remand Ringewold to the Department. The District Court ordered an independent mental evaluation, but it was never performed. Ringewold then filed another petition for release, but about the same time, the hospital staff determined that Ringewold would no longer benefit from active inpatient treatment and transferred him to the state prison pursuant to 46-14-312. At the request of counsel, Ringewold was transferred back to the state hospital, with the state conceding that hospital placement was proper and that Ringewold should be allowed to petition for release pursuant to 46-14-312. About 4 months later, the Department Director sought an order transferring Ringewold back to the prison on grounds that Ringewold continued to suffer from a dangerous mental disorder but would no longer benefit from active inpatient treatment for the disorder. At a conditional release hearing about 9 months later, the District Court orally resentenced Ringewold to 8 years in prison. The court specified that the total sentence not exceed more than the original sentence, but the court also conditioned Ringewold's parole on completion of an anger management course, moral reconation therapy, and chemical dependence treatment. In a written amended judgment about 1 month later, the District Court reimposed the original 14-year sentence and restated the parole conditions. Ringewold appealed. The Supreme Court held that under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the oral pronouncement of sentence was legally effective and constituted final judgment. However, it was not possible to determine from the record whether the additional conditions added to the sentence improperly lengthened Ringewold's sentence, so the case was remanded for supplementation of the factual record to determine if Ringewold was being denied consideration for parole because of failure to satisfy the additional treatment conditions and, if so, to strike the conditions from the amended judgment, because under those circumstances, the practical effect of the conditions would be to lengthen the sentence in violation of 46-14-312. St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001).

Failure to Complete Prison Sex Offender Program Not Because of Defendant's Willful Conduct — Consideration of Incarceration Alternatives Constitutionally Required: Lee was sentenced to two concurrent 40-year terms in prison for sexual intercourse without consent and attempted sexual intercourse without consent and was ineligible for parole during the first 10 years of the sentence unless a sex offender treatment plan was successfully completed. Lee entered prison in 1995 and immediately requested enrollment in Phase I of the two-phase program. Lee was finally enrolled in Phase I after a 3-year wait, successfully completed that phase, and was placed on a waiting list for enrollment in Phase II. Because of a sitdown strike, Lee was unable to complete Phase II by his scheduled release date. The state petitioned to revoke Lee's suspended sentence because the program was not completed, and Lee moved to dismiss on grounds that the failure to complete treatment was not his fault. The District Court found that Lee's failure to complete the program was not due to any volitional conduct on Lee's part, but the court nevertheless determined that the failure constituted a violation of the terms of the suspended sentence and ordered Lee to serve the remaining 30 years on each count, declaring Lee ineligible for parole until both phases of treatment were completed. Lee appealed on grounds that the court

violated his right to due process because it was impossible to complete the program during incarceration because of prison waiting periods and the length of the program. The Supreme Court agreed. In St. v. Williams, 1999 MT 240, 296 M 258, 993 P2d 1 (1999), it was held that a court could revoke a suspended sentence even though a probationer's failure to comply with the terms of the sentence was not willful, and the court in this case affirmed Williams to the extent that violations of nonfinancial probationary conditions need not necessarily be willful in order to justify revocation. However, the probationer in Williams was unable to gain acceptance into sex offender programs because of a lack of social skills, immaturity, and "acting out" behavior, whereas Lee was unable to access the programs because of actions of the state. Due process required the trial court to consider whether there were alternatives to incarceration that would further the purpose of Lee's suspended sentence. The Supreme Court remanded for a determination of whether there were any reasonable alternative measures other than continued incarceration because to do otherwise would deprive Lee of his conditional freedom simply because the state prevented him from completing the sex offender program while imprisoned. St. v. Lee, 2001 MT 176, 306 M 173, 31 P3d 998 (2001), and distinguished in St. v. Price, 2008 MT 319, 346 M 106, 193 P3d 921 (2008).

Order Not to Socialize With Females Under Age 19 Improperly Imposed as Condition of Sentence for Assault of Police Officer: Watson was sentenced to 50 years with 40 suspended for assaulting a police officer. As a condition of the suspended sentence, Watson was ordered not to socialize with females under the age of 19. Watson objected to the condition, and the Supreme Court reversed. Under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), in order to be reasonably related to the objectives of rehabilitation and the protection of the victim and society, a sentencing limitation or condition must have some correlation or connection to the underlying offense for which the defendant is being sentenced. Watson's crime did not involve young girls, and he was never charged with any offense in which the victim was a young girl. The fact that the District Court sincerely believed in the speculation that Watson would sooner or later victimize a young girl did not provide a legal basis for imposing a sentencing condition that was unconnected to the underlying offense. St. v. Watson, 2001 MT 143, 306 M 33, 29 P3d 1026 (2001).

Attendance at Parenting Classes Improperly Imposed as Condition of Sentence for Parole Violation: Smith violated parole, and in addition to a sentence for new jail time, Smith was required to attend parenting classes and to pay the costs of incarceration as a condition of sentencing. Smith argued on appeal that the sentencing court exceeded its authority by imposing the new conditions. The Supreme Court agreed that requiring attendance at parenting classes was improper. Applying St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), the court found no nexus between the underlying charged offenses of felony theft, burglary, and unauthorized control of a motor vehicle and a requirement of participation in parenting classes. Although the classes may have been beneficial to Smith and his family, they could not be made a condition of the sentence when they bore no relation to the conduct for which Smith was convicted. The court reversed on that issue. However, because Smith did not object to the payment of incarceration costs at the revocation hearing, that issue could not be raised for the first time on appeal, so that portion of the sentence was affirmed. St. v. Smith, 2001 MT 111, 305 M 298, 27 P3d 39 (2001).

Payment of Child Support Improper Condition of Sentence for Felony DUI — Victim and Correlation to Underlying Offense Necessary for Imposition of Restitution: Horton was arrested for DUI, and a search of his driving record revealed nine prior DUI convictions. A further search showed that Horton also owed more than $47,000 in back child support. Horton was charged with felony DUI, with driving with a suspended or revoked license, as a habitual traffic offender operating a motor vehicle, and with felony nonsupport. By plea agreement, Horton agreed to plead guilty to the traffic offenses in exchange for dismissal of the nonsupport charge. The plea agreement stated that the state would recommend a 13-month sentence to be served in prerelease, followed by 4 years of probation, and, as a condition of the probationary sentence, provided that Horton would also make regular child support payments plus an additional sum monthly toward the support arrearage. As set out in the agreement, Horton pleaded guilty to the traffic offenses, and the nonsupport charge was dismissed. At sentencing, the habitual traffic offender charge was subsequently dismissed for failure of the state to prove that a valid habitual offender designation was in place at the time of the offense, and in addition, Horton's counsel objected to the court ordering payment of any child support arrearage, arguing that because the nonsupport charge had been dismissed, Horton would be paying restitution on a count for which he had not been convicted. Nevertheless, the court ordered Horton to pay support and promised to revoke his probation and sentence him to 4 years in prison with no parole if support was not

paid. On appeal, Horton argued that the District Court abused its discretion and exceeded statutory mandates when it required him to pay restitution for an offense that was dismissed, citing St. v. Brown, 263 M 223, 867 P2d 1098 (1994), for the position that restitution is statutorily limited to the victim of the crime and that because there was no victim who sustained pecuniary or economic loss as a result of the felony DUI or driving with a suspended or revoked license, restitution was inappropriate. The state argued that Horton was attempting to receive the benefit of the plea agreement—having the felony nonsupport charge dismissed—without holding up his end of the bargain by paying child support. The Supreme Court noted that a plea agreement is subject to contract law and that the court will not assist a defendant in escaping the obligations of a plea agreement once its benefits are received. However, the court also pointed out that a District Court's authority to impose sentences in criminal cases is defined and constrained by statute. The statutory authority for payment of restitution is in this section, which limits payment of restitution to the victim of a crime for which a defendant is convicted, and because Horton was not convicted of nonsupport, there was no victim to whom Horton could be ordered to pay restitution. The state also contended that ordering Horton to pay child support was proper because under 46-18-202(1), a sentencing court may impose any condition reasonably related to the objectives of rehabilitation and the protection of the victim and society. The Supreme Court noted that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), a sentencing condition must have some correlation or connection to the underlying offense, but there was no correlation or connection between Horton's conviction for DUI and ordering him to pay child support. Thus, the Supreme Court ordered that the portion of Horton's sentence requiring payment of child support be stricken. St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), followed in St. v. Setters, 2001 MT 101, 305 M 253, 25 P3d 893 (2001).

Revocation of Juvenile Offender's Suspended Sentence and Commitment to Department Authorized: Following a dispositional hearing, the Youth Court entered an order declaring Lesmeister a delinquent youth and serious juvenile offender, transferred the 18 year old's case to District Court, and placed the youth on probation until age 25, with the entire commitment suspended upon certain conditions. One year later, on a petition filed by the Cascade County Attorney alleging numerous probation violations, the District Court revoked Lesmeister's suspended sentence and committed the youth to the Department of Corrections until age 25. On appeal, Lesmeister challenged the legality of the court's commitment to the Department, arguing that 41-5-208 authorizes the District Court to impose only those conditions provided for in 46-18-201 through 46-18-203, which does not include a sentence to the Department of Corrections. In affirming the District Court decision, the Supreme Court ruled that state law authorizes a District Court to impose a sentence to commit an offender to the Department of Corrections when all but the first 5 years are suspended. St. v. Lesmeister, 2000 MT 318, 302 M 500, 15 P3d 392, 57 St. Rep. 1344 (2000).

Conditions Imposed in Written Judgment and Sentence Different From Those Imposed in Oral Sentence — Lane, Waters, and Simpson Reviewed — Test to Determine Which New Conditions Lawful or Unlawful — Payment of Restitution and Costs: Johnson was sentenced orally for writing bad checks and later contended that four of the conditions imposed in the written judgment and sentence by the District Court were unlawful under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), because they were not announced orally when she was sentenced in open court. The Supreme Court reviewed its decisions in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142 (1999), and St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361 (1999), and reasoned that a written sentence would be held unlawful only if it substantively increased the defendant's loss of liberty or the defendant's sacrifice of property. Under this test, the Supreme Court held that two of the four penalties not mentioned by the District Court in its oral pronouncement of Johnson's sentence were unlawful, those being the restitution ordered to the Missoula County jail of money expended for Johnson's medical care and the requirement that Johnson pay for the costs of her prosecution in District Court. The Supreme Court held that the other two parts of the written sentence, the requirement that Johnson make restitution from money earned in prison and the imposition of certain "civil" restrictions as conditions of Johnson's suspended sentence, such as the requirement that Johnson stay out of gambling casinos, were lawfully imposed because they did not increase the amount of money that Johnson was ordered to pay or increase Johnson's deprivation of liberty in addition to those penalties imposed orally. The requirement for payment from prison earnings only specified where the money was to come from, and the "civil" restrictions were largely mentioned by the District Court at Johnson's sentencing hearing. St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Failure to Document Defendant's Financial Resources and Ability to Pay Restitution and Victim's Pecuniary Loss — Restitution Sentence Improper: The general mandate to sentencing courts is that a sentence must include full restitution whenever it is found that the victim of an offense has sustained a pecuniary loss, subject to mandatory detailed statutory procedures and qualifications. Here, although the District Court received some evidence of these amounts during the sentencing hearing, the failure of the presentence investigation report to document the victim's pecuniary loss, as well as the defendant's financial resources and future ability to pay restitution, provided the court no authority to impose a sentence of restitution and rendered its judgment illegal. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000), following St. v. Brown, 263 M 223, 867 P2d 1098 (1994), and St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866 (1999), distinguished in St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Failure to Specify Amount, Method, and Time of Payment — Restitution Order Invalid: The District Court ordered defendant to make restitution payments according to a schedule to be determined by defendant's probation officer. However, 46-18-244 requires the court to specify the amount, method, and time of payments, after considering the defendant's financial resources and future ability to pay. Thus, the court failed to comply with the statutory requirements by leaving that determination to the discretion of the probation officer, invalidating the restitution order. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000).

Sentence of Restitution Based on Defendant's Indigency Constituting Due Process Violation: Pritchett entered the garage of a former employer in an effort to return two hunting rifles that he had stolen and pawned to support his gambling habit. Pritchett dropped his flashlight and, unable to find it in the dark, lit a cigarette lighter, which ignited a leaking propane bottle and caused an explosion that destroyed the garage and its contents. Pritchett was convicted of burglary and ordered to pay restitution of $63,569.25. Noting that the amount of restitution was "enormous", the probation officer who prepared the presentence investigation report stated that Pritchett should receive a 20-year suspended sentence to allow adequate time to pay off the restitution. The District Court adopted the sentencing recommendation exactly as proposed. Although the court did not expressly state that it was sentencing Pritchett to the maximum term to provide sufficient time to pay the ordered restitution, there was sufficient evidence in the record to show that the length of the sentence was based on Pritchett's indigency because, given Pritchett's limited financial resources, no shorter time would allow payment of restitution. Under St. v. Farrell, 207 M 483, 676 P2d 168 (1984), basing a prison term on a defendant's indigency is a violation of the right to due process. Thus, the Supreme Court vacated the sentence and remanded for further proceedings. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000).

Failure to Complete Sexual Offender Treatment Sufficient to Warrant Suspended Sentence Revocation and Continued Incarceration: Vallier received 5 years for felony assault and 20 years for felony sexual assault of an 11-year-old child, with 10 years suspended if Vallier completed the prison sexual offender program. Vallier failed to complete the program by the time of scheduled discharge of the active sentence, so the District Court revoked the suspended portion of the sentence, further classifying Vallier as a level 3 sexual offender at a high risk to reoffend. On appeal, the Supreme Court affirmed, finding Vallier's failure to complete the sexual offender program of such a nature as to require Vallier's continued incarceration. Sufficient evidence was offered to prove that Vallier continued to be a serious community threat until the treatment was received, and Vallier did not meet the burden of showing that the District Court abused its discretion in revoking the suspended sentence. St. v. Vallier, 2000 MT 225, 301 M 228, 8 P3d 112, 57 St. Rep. 928 (2000).

Defendant Not Responsible for Restitution in Excess of Damages Caused by Criminal Conduct: During the course of a drug investigation, Beavers admitted accepting stolen property in exchange for illegal drugs. The District Court ordered Beavers to pay restitution to the victims of the thefts, even though Beavers did not actually steal the property. Under St. v. Blanchard, 270 M 11, 889 P2d 1180 (1995), an accused is liable for restitution for offenses to which the accused has admitted guilt, been found guilty, or has agreed to pay restitution, so Beavers was not responsible for restitution for offenses she did not commit. Beavers' admission of the offense of receiving stolen property was sufficient to satisfy the causal standard of 46-18-241, that the victim suffered loss as a result of Beavers' offense, so the court did not abuse its discretion in ordering restitution; however, Beavers was required to pay restitution only for the property that formed the basis of the offense, not for property that was stolen by others but not received and possessed by Beavers. When stolen property is recovered, the amount of restitution owed is the difference between the value of the property taken and the salvage value of the property

returned, and the state has the burden of establishing those values. The case was remanded for calculation of the amount of restitution owed. St. v. Beavers, 2000 MT 145, 300 M 49, 3 P3d 614, 57 St. Rep. 567 (2000).

New Sentence Restriction Added Upon Revocation of Suspended Sentence Stricken: If a District Court finds that a defendant has violated the terms or conditions of a suspended sentence, the court may revoke the suspended sentence and require the defendant to serve either the sentence imposed or any lesser sentence, but nothing in 46-18-203 authorizes a court to impose additional restrictions when revoking a suspended sentence. (See 2001 amendment to this section, which allows it.) In this case, the District Court originally sentenced Richardson to 20 years in prison for felony sexual assault against a child, with all but 70 days suspended, conditioned in part upon completion of a sex offender treatment program. Richardson failed treatment and admitted violating other conditions of the suspended sentence, so the sentence was revoked, and Richardson was sentenced to prison for the remainder of the 20-year sentence. Additionally, the court conditioned Richardson's parole eligibility upon successful completion of the first two phases of sexual offender treatment in prison. The additional restriction on the sentence was error, and the case was remanded for the limited purpose of striking that condition from the sentence. St. v. Richardson, 2000 MT 72, 299 M 102, 997 P2d 786, 57 St. Rep. 320 (2000), following St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997).

When Restitution Owing: Under this section, the sentencing court is required to provide for full restitution by a defendant to the victim of a criminal offense who sustains a pecuniary loss. Here, Hilgers' issuance of more than 50 bad checks and stealing cash and diverting checks and money orders from his employer in an amount exceeding $33,500 clearly qualified as a pecuniary loss. The court found the state's witnesses more credible than Hilgers, providing adequate support in the record as to the amount owing. The restitution amount was not clearly erroneous and was affirmed on appeal. However, the Supreme Court remanded for lack of documentation, as required under 46-18-242, regarding Hilgers' financial resources and future ability to pay restitution, finding the information in the presentence report regarding Hilgers' age, education, assets and obligations, and marital and employment status inadequate in addressing Hilgers' resources and ability to pay the amount in question. St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866, 56 St. Rep. 1146 (1999), following St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996), distinguishing St. v. Brown, 263 M 223, 867 P2d 1098, 51 St. Rep. 24 (1994), followed in St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000), and distinguished in St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Suspension of Sentence and Imposition of Sentence Conditions Within Discretion of Sentencing Court: Both the suspension of sentence and the imposition of conditions on a suspended sentence are discretionary with the sentencing court. Although it may be uncommon for a court to suspend part or all of a sentence without attaching conditions, it is within the court's discretion to do so. Here, the sentencing court orally sentenced Simpson to 30 years in prison with 10 years suspended, recommending that Simpson be required to complete a chemical dependency program before being eligible for parole and that appropriate measures be taken to prevent Simpson from assaulting prison staff. When the court issued its written sentence, it imposed 20 additional conditions that were not articulated in the oral pronouncement. Pursuant to St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), the oral pronouncement controls, so the additional conditions in the written sentence were held invalid and the case was reversed to conform the written sentence with the oral pronouncement. St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361, 56 St. Rep. 1032 (1999), following St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999).

Extra Conditions in Sentencing Order Not Mentioned in Oral Sentence Stricken: The District Court that sentenced Waters imposed two extra conditions in the sentencing order that were not contained in the plea agreement or presentence investigation or contained in the oral sentence: (1) payment of supervision fees; and (2) submission to Texas authorities. Pursuant to St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), the oral pronouncement controls. Thus, Waters contended that only the conditions contained in the oral sentence could be imposed. The Supreme Court clarified Lane, noting that Waters was on notice of the conditions in the plea agreement and presentence investigation and that those terms applied despite the ambiguous sentencing conditions that were imposed orally. However, the court remanded for an amendment of the written sentence to strike the submission to Texas authorities, which was never mentioned, and to strike the payment of supervision fees as well, unless it was determined that payment of the fees would not impose a significant hardship on Waters, pursuant to 46-23-1031. St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999), followed in St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Sentencing Condition Required to Have Correlation or Connection to Underlying Offense: Ommundson pleaded guilty to felony DUI. In imposing sentence, the District Court considered a presentence investigation that documented Ommundson's criminal history, which included more than 10 convictions for indecent exposure. The court also considered a sex offender evaluation, which determined that Ommundson qualified for community-based treatment. The court committed Ommundson to the Department of Corrections for 54 months, with all but 6 months suspended on condition that Ommundson participate in a sex offender treatment program and not have any contact with children without adult supervision. Ommundson did not object to the condition prohibiting contact with children, so that issue was not cognizable on appeal. However, on the issue of whether the District Court had authority to impose a condition of participation in a sex offender program as a penalty for DUI, the Supreme Court held that 46-18-202 allows only the imposition of sentencing limitations reasonably related to the objectives of rehabilitation and the protection of the victim and society. That authority is broad, but not without limit. In order to be reasonably related, a sentencing limitation or condition must have some correlation or connection to the underlying offense for which the defendant is being sentenced. In the present case, the requirement that Ommundson participate in a sex offender program was not reasonably related to the rehabilitation of a DUI offender or to the protection of society from drunk drivers. The Supreme Court reversed the part of Ommundson's sentence requiring that he participate in a sex offender program. St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620, 56 St. Rep. 70 (1999), following St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982), and St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990), distinguishing Dahlman v. District Court, 215 M 470, 698 P2d 423, 42 St. Rep. 550 (1985), St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988), and St. v. Blanchard, 270 M 11, 889 P2d 1180, 52 St. Rep. 54 (1995), and followed in St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), St. v. Setters, 2001 MT 101, 305 M 253, 25 P3d 893 (2001), St. v. Smith, 2001 MT 111, 305 M 298, 27 P3d 39 (2001), St. v. Watson, 2001 MT 143, 306 M 33, 29 P3d 1026 (2001), and St. v. Armstrong, 2006 MT 334, 335 M 131, 151 P3d 46 (2006). In St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008), the Ommundson nexus rule was expanded to allow a sentencing judge to impose a particular condition of probation as long as the condition has a nexus either to the offense for which the offender is being sentenced or to the offender. However, offender-related conditions may be imposed only in cases in which the history or pattern of conduct to be restricted is recent and significant or chronic. A passing, isolated, or stale instance of behavior or conduct is insufficient to support a restrictive probation condition imposed in the name of offender rehabilitation. Ashby was followed in St. v. Stiles, 2008 MT 390, 347 M 95, 197 P3d 966 (2008), St. v. Sadowsky, 2008 MT 405, 347 M 192, 197 P3d 1018 (2008), and St. v. Park, 2008 MT 429, 347 M 462, 198 P3d 321 (2008). Stiles was followed in St. v. Russette, 2008 MT 413, 347 M 285, 198 P3d 791 (2008).

Discovery of Shotgun Case During Routine Walk-Through of Probationer's Residence Constituting Reasonable Grounds for Further Warrantless Search: Probationer Stucker allowed a voluntary tour of his residence by probation officers, who discovered two weapons cases in plain view in the master bedroom. One case contained a bow, which Stucker was allowed to possess under the terms of his probation; the other contained a semiautomatic shotgun, which constituted contraband under the probation conditions. The discovery of the shotgun case in plain view constituted reasonable grounds for the officers to conduct a warrantless search of the residence to determine if additional weapons were present. The District Court did not err in denying Stucker's motion to suppress the fruits of the search. St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999).

Oral Pronouncement as Legally Effective Sentence — Correction of Error in Written Judgment by Nunc Pro Tunc Order — Due Process and Double Jeopardy Rights Not Violated: The oral pronouncement of sentence is the legally effective sentence. The written judgment and commitment serves as evidence of the sentence orally pronounced. In the event of a conflict between the oral and written sentence, the oral controls. The sentencing court may correct an error in a written judgment and commitment by a nunc pro tunc order, pursuant to 46-18-117 (now repealed), to accurately reflect what was orally pronounced at the sentencing hearing. Absent evidence of a tangible detriment or concrete injury to defendant, a clarifying nunc pro tunc order does not jeopardize a defendant's due process rights or constitute double jeopardy. St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), overruling St. v. Enfinger, 222 M 438, 722 P2d 1170 (1986), St. v. Wirtala, 231 M 264, 752 P2d 177 (1988), St. v. Mason, 253 M 419, 833 P2d 1058 (1992), and St. v. Graveley, 275 M 519, 915 P2d 184 (1996), to the extent that those cases held that the written judgment and commitment, rather than the oral pronouncement of sentence, was to be considered the final, valid order, and followed and applied

retroactively in St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361, 56 St. Rep. 1032 (1999). The Supreme Court amended former Rule 5, M.R.App.P. (now superseded), to reflect the Lane decision in In re Amending Rule 5 of the Mont. Rules of Appellate Procedure, 55 St. Rep. 1267 (1998). The Lane rule was applied retroactively in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999). Lane was also followed in St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), and St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001). See also St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Abuse of Discretion for Court to Correct Failure to Sentence by Nunc Pro Tunc Order: The District Court failed to sentence Winterrowd, in either open court or by written judgment, on his misdemeanor theft conviction. Four months later, the court issued an order nunc pro tunc, sentencing Winterrowd to 6 months' imprisonment. It is within a District Court's power to enter an order nunc pro tunc modifying or amending a judgment in order to remedy certain types of clerical errors or to make the record reflect what was actually decided. However, in this case, not only was the sentence omitted from the written sentencing order, but the sentence was not even discussed at the sentencing hearing. The Supreme Court reversed and vacated the nunc pro tunc order and sentence. St. v. Winterrowd, 1998 MT 74, 288 M 208, 957 P2d 522, 55 St. Rep. 307 (1998).

Reservation of Right to Specify Ineligibility for Parole Upon Subsequent Revocation of Suspended Sentence — Lack of Authority in District Court: When Lindeman was sentenced for sexual assault and incest, the District Court reserved the right, in the event that Lindeman ever violated a condition of probation and his suspended sentence was imposed, to specify that Lindeman would be ineligible for parole until he completed a sex offender treatment program. When Lindeman failed to complete the program and the state requested that Lindeman's probation be revoked and the suspended sentence imposed, Lindeman objected to the District Court's imposition of the condition preventing parole. The Supreme Court held that under St. v. Finley, 276 M 126, 915 P2d 208 (1996), the only punishment that the District Court could impose was the suspended sentence or a lesser penalty and that the District Court was without authority to impose the additional condition. The Supreme Court noted that 46-18-202, the statutory provision relied upon by the District Court when it reserved the right to impose the condition, applies only to the original sentence under this section and that the District Court had no authority to impose the condition upon subsequently revoking the suspended sentence. St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997), followed, with regard to the impropriety of new sentence restrictions added upon revocation, in St. v. Richardson, 2000 MT 72, 299 M 102, 997 P2d 786, 57 St. Rep. 320 (2000).

Improper to Reserve Right, at Time of Sentencing, to Impose Additional Restrictions on Probation: The District Court, which sentenced defendant to an imprisonment term and suspended the sentence, had no authority to reserve the right to impose additional restrictions during the term of probation. St. v. Wilson, 279 M 34, 926 P2d 712, 53 St. Rep. 1034 (1996).

"Street Time" While on Out-of-State Probation Properly Denied: In 1989, Hardy pleaded guilty to four counts of burglary and was sentenced to four concurrent terms of 10 years in prison with 9 years suspended. In 1990, Hardy was released on probation to serve the suspended portion of his sentence, and pursuant to the Uniform Act for Out-of-State Parolee Supervision, supervision of his parole was transferred to Utah. While in Utah, Hardy committed other crimes, and Utah refused to continue parole supervision. After judgment and sentencing in Utah, Hardy was extradited back to Montana where his suspended sentence was revoked, he was sentenced to four concurrent terms of 9 years in prison, and he was not given credit for the 2 years he spent on probation in Utah. Hardy contended that the District Court improperly denied credit for his "street time" while on probation in Utah when it failed to sufficiently set forth reasons for the denial in the record. The denial of credit for Hardy's street time was an express provision of his sentence. The reasons for the sentence included the reasons for the denial of credit. The District Court adequately considered this section and sufficiently stated its reasons for denying the credit. Therefore, Hardy was not arbitrarily denied credit for his street time. St. v. Hardy, 278 M 516, 926 P2d 700, 53 St. Rep. 998 (1996).

Racial Bias of Judge Who Illegally Made Deportation Condition of Parole Not Shown by Mere Unsupported Speculation: Upon an aggravated kidnapping and assault conviction of a native of Bangladesh, the court ordered deportation as a condition of parole. This was an illegal condition but did not alone show the judge was racially biased against defendant. A claim of bias was not upheld when it was supported by mere speculation or conjecture by defendant. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Restitution Not Conditioned on Suspended or Deferred Sentence — Restitution Upheld as Additional Restrictions on Sentence: Collier was arrested and charged with solicitation of

deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged the District Court's recommendation that she be required to make restitution if she was released on parole or supervised release. The Supreme Court noted that it had previously held in St. v. Bourne, 259 M 274, 856 P2d 222 (1993), that a District Court has the power under 46-18-202 to recommend restitution and payment of supervision fees as a condition of parole. St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

Illegal Search of Person but Lawful Search of Vehicle — Vehicle Search Upheld as Probation Search and Not "Fruit of Poisonous Tree": Deputy Turner watched New make several turns in his vehicle without signaling and, after determining by his vehicle license plate that New was on probation, stopped the vehicle and searched New. Upon discovering drugs in New's pocket, Turner impounded the vehicle. Detective Jacobs questioned New, and New gave Jacobs approval to search the vehicle. Then Jacobs talked to Forsyth, New's probation officer, who conducted the search of New's vehicle with Jacobs. Turner's search of New's pockets was subsequently held illegal but the District Court refused to quash evidence taken from the vehicle as a result of Forsyth's search. The Supreme Court affirmed, holding that the search of the vehicle was not the "fruit of the poisonous tree", the illegal personal search of New, but was justified upon the independent grounds that Forsyth had previously determined that he wanted to search New's vehicle because of pending charges of violations of the conditions of New's probation. St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996).

Revocation of Suspension of Part of Sentence While Nonsuspended Part Being Served: The District Court had authority to revoke suspension of part of a sentence when, prior to having begun to serve the suspended part, the prisoner was released on parole before serving the whole of the nonsuspended part of the sentence and violated conditions of probation relating to the suspended part. Christofferson v. St., 272 M 518, 901 P2d 588, 52 St. Rep. 909 (1995).

Error to Impose Prosecution Legal Fees as Condition of Suspended Sentence: Henry was convicted of driving under the influence, first in City Court and then in District Court. As part of Henry's suspended sentence, the District Court imposed certain conditions, including payment of $10,550 to the town of Darby for legal fees incurred in prosecuting the case and for additional legal fees incurred in defending the appeal. The Supreme Court held that the imposition of prosecution legal fees is neither expressly nor implicitly authorized by statute and that the District Court abused its discretion in imposing the payment of prosecution legal fees as a condition of Henry's suspended sentence. St. v. Henry, 271 M 491, 898 P2d 1195, 52 St. Rep. 516 (1995).

Requiring Defendant to Pay Restitution for Admitted Offenses for Which Defendant Is Not Charged or Convicted: Blanchard argued that the lower court erred in requiring him, as part of the plea bargain, to pay restitution for offenses that he admitted committing but for which he was never charged or convicted. The Supreme Court held that the issue is one of first impression in Montana but that other jurisdictions have held that an accused is liable for restitution for offenses admitted to even if the accused is not charged or convicted of the crimes and especially in cases in which the accused has agreed to pay the restitution as part of a plea bargain. The Supreme Court also held that the lower court had not erred in ordering the restitution when it was intended to serve a rehabilitative purpose. St. v. Blanchard, 270 M 11, 889 P2d 1180, 52 St. Rep. 54 (1995), followed in St. v. Beavers, 2000 MT 145, 300 M 49, 3 P3d 614, 57 St. Rep. 567 (2000).

Completion of Sexual Offender Treatment Program Proper Condition of Sentence for Sex Crime: The District Court did not err in requiring the completion of a sex offender treatment program as a condition of sentence upon conviction for sexual assault when the condition related to defendant's need for rehabilitation and to the protection of society. St. v. Larson, 266 M 28, 878 P2d 886, 51 St. Rep. 638 (1994).

Restitution Order for Present Asset Forfeiture Reversed — Condition of Present Sentence Void: Brown was convicted of felony criminal endangerment and negligent homicide after killing one pedestrian and injuring another when he lost control of his vehicle. The District Court sentenced Brown to a 30-year prison term, with 10 years suspended, and ordered Brown to make restitution. As part of the order for restitution, the District Court ordered that several of Brown's assets be sold and that the proceeds be turned over to his victims. The Supreme Court held that the statutory provisions relied on by the District Court to impose forfeiture were improperly relied on in that they limited the District Court only to conditions that could be imposed during the suspended portion of Brown's sentence. Because Brown was required to first serve a prison term, forfeiture could not be immediately ordered. St. v. Brown, 263 M 223, 867 P2d 1098, 51 St. Rep. 24 (1994).

180 Days Maximum Total Jail Time Allowed — No Power to Impose Sentence in Absence of Specific Statutory Authority: The District Court erred when it ordered a suspended sentence that included 30 days in jail plus a possible additional 180 days in jail to be served at the discretion of the supervising probation officer. Maximum jail time allowed under this section is 180 days. Further, 46-18-202, which allows additional restrictions on sentence, does not authorize a District Court to delegate sentencing discretion to a probation officer. St. v. Hatfield, 256 M 340, 846 P2d 1025, 50 St. Rep. 101 (1993), followed in St. v. Long, 274 M 228, 907 P2d 945, 52 St. Rep. 1204 (1995), and St. v. Phelps, 2000 MT 18, 298 M 135, 995 P2d 963, 57 St. Rep. 105 (2000).

Warrantless Search by Probation Officer Lawful if Based on Reasonable Suspicion of Probation Violation: Defendant's deferred sentence was revoked after a warrantless search initiated by her probation officer pursuant to the terms of her probation revealed that defendant possessed dangerous drugs in violation of the terms of her probation. Search by a probation officer of his probationer's car, premises, or other belongings is lawful if it is based on the probation officer's reasonable suspicion of a probation violation. St. v. Small, 235 M 309, 767 P2d 316, 46 St. Rep. 9 (1989), followed in St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996), and St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998).

Warrantless Police Search of Probationers' Car and Residence Allowed — Reasonable Grounds Standard — Fogarty Overruled: A police officer's warrantless search of the probationers' car and residence based on the officer's observations and with permission of the probation officer, in compliance with probationary conditions, did not violate the fourth amendment. St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), is specifically overruled and the "reasonable grounds" standard of Griffin v. Wis., 483 US 868, 97 L Ed 2d 709, 107 S Ct 3164 (1987), is adopted. Police cooperation with probation officers is to be encouraged as an important aid to effective administration of the probation system. To impose a warrant requirement for residential searches, on the basis of rights enjoyed by persons not on probation, would artificially raise a probationer's privacy interest to a level inconsistent with conditional liberty status. St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988), clarified, regarding the fact that probation officers, other than the one assigned to a probationer, are not precluded from authorizing a probationary search, in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), and followed in St. v. Boston, 269 M 300, 889 P2d 814, 51 St. Rep. 1142 (1994), St. v. Burchett, 277 M 192, 921 P2d 854, 53 St. Rep. 590 (1996), St. v. Beaudry, 282 M 225, 937 P2d 459, 54 St. Rep. 324 (1997), St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999), and St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006).

Child Support as Restitution and Condition of Probation: Child support violations were noted in the presentence investigation. Defendant should have known that they might be considered by the court, so there was no due process violation. The District Court properly ordered payment of child support as a form of restitution and rehabilitation and as a legitimate condition of parole. St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Order to Complete Sex Offender Program Not Abuse of Discretion: It was not an abuse of discretion for the sentencing judge to order defendant to complete a sex offender program despite expert testimony that defendant was not likely to benefit from the program. St. v. Pease, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

Inability to Pay Restitution — Not Violative of Equal Protection in Light of State Correctional Policy and Previous Offenses: A defendant convicted of felony theft was sentenced to 5 years in the state prison with 2 years suspended and, in addition, was ordered to pay restitution. The defendant asserted on appeal that he was sentenced to a prison term because of his indigency, in violation of his right to equal protection. However, the District Judge specifically noted the prison term was necessary to protect the property of others and that the defendant's criminal record contained three previous misdemeanor thefts. The Supreme Court found these to be sufficient reasons to support incarceration and upheld the state's correctional policy outlined in 46-18-101. The court noted that the sentence was well within the parameters of punishment for felony theft in 45-6-301. Finding no abuse of discretion or violation of the defendant's constitutional rights, the District Court was affirmed. St. v. Carroll, 220 M 466, 716 P2d 212, 43 St. Rep. 531 (1986).

Error in Sentencing Order — Correction "Nunc Pro Tunc" Two Years Later Upheld: The District Court, as a condition of sentence, ordered defendant to pay certain medical expenses and called the required payment "restitution" in the order. The payment was not restitution, but the court did have statutory authority to require payment. The court's effort to correct nunc pro tunc the original order 2 years after it was entered was proper. The error was clerical in nature. Every

court has the inherent right to correct clerical errors. Dahlman v. District Court, 215 M 470, 698 P2d 423, 42 St. Rep. 550 (1985).

Medical Expenses for Self-Inflicted Injuries — Payment by Defendant Reasonable Condition of Sentence: A sentencing court acted properly in ordering a defendant to reimburse a local government for medical expenses incurred for injuries defendant inflicted upon himself while in jail after his arrest. This section permits the imposition of reasonable conditions on sentences for rehabilitation purposes. Dahlman v. District Court, 215 M 470, 698 P2d 423, 42 St. Rep. 550 (1985).

Valid Condition of Sentence — Incorrect Basis Given in Order — Condition Upheld: When there was statutory authority to require defendant, as part of his sentence, to pay the medical expenses incurred for injuries he inflicted upon himself while in jail after his arrest, but neither the District Court's original order nor corrected order cited the proper authority, the Supreme Court held defendant liable for the medical expenses. Dahlman v. District Court, 215 M 470, 698 P2d 423, 42 St. Rep. 550 (1985).

Restitution — Persons Not Direct Victims of Specified Crime: To be eligible for restitution by one convicted of a crime, one must be within the class of persons injured by the crime. This section's provision for restitution does not define the class or state its breadth, but the Crime Victims Compensation Act of Montana defines a victim as, among other things, one who suffers bodily injury or death as a result of criminally injurious conduct, without the necessity of a direct relationship to a crime for which a conviction was obtained. That is a persuasive approach, and where defendant driver was convicted of negligent homicide, killing two persons in the other auto, it was proper to order him to make restitution to three girls who were also in the other auto and were injured but not killed. St. v. Morgan, 198 M 391, 646 P2d 1177, 39 St. Rep. 1072 (1982).

Restitution — Standards — Findings to Be Stated: Restitution under this section may be allowed by payment of money equivalent to the loss resulting from property taken, destroyed, broken, or otherwise harmed, and of out-of-pocket losses such as medical expenses. Where the District Court ordered restitution but did not state what it was for or determine the amount of the losses, Supreme Court could not determine the propriety of the restitution order and vacated that part of the sentence and remanded for resentencing on this matter. The District Court on remand should set forth written findings, stating its basis for the restitution ordered and whether appellant will be able to pay it; the appellant may petition the District Court for remission of all or part of the payments upon a showing to the satisfaction of the court that the payments impose manifest hardship on appellant or his immediate family. St. v. Morgan, 198 M 391, 646 P2d 1177, 39 St. Rep. 1072 (1982).

Alcoholics — Refraining as Valid Condition of Suspended Sentence: One who, because of addiction or character disorder, is unable to control his excessive drinking of alcoholic beverages has no constitutional or statutory right to release free from limitations on his use of alcohol, either on parole or pursuant to a suspended sentence. There was no merit to appellant's contention that it was vindictive and unreasonable or illegal to require him, an acknowledged alcoholic, to refrain from drinking as a condition of his probation or parole. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982), followed, with regard to the requirement for nexus between the sentencing limitation or condition and the underlying offense, in St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620, 56 St. Rep. 70 (1999).

Parole Conditions — Application to Suspended Portion of Sentence: Parole conditions set by Board of Pardons (now Board of Pardons and Parole) also applied to period of suspended sentence where court passing sentence did not set conditions upon suspended portion of sentence, particularly where that court expressly directed that when defendant was not in prison he was to be under the supervision of the Board and court could revoke the suspended sentence for violation of those conditions. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Unlimited Search and Polygraph Provisions on Probation Unconstitutional: As conditions for imposition of a suspended sentence, defendant was required to submit to an unlimited search provision by any lawful authorities and to submit to a polygraph examination upon the request of any law enforcement officer. The Supreme Court when reviewing the revocation of defendant's suspended sentence held that the unlimited polygraph examination condition was overly broad and thus an invalid condition of probation and that the unlimited warrantless search provision is an unconstitutional condition of probation. The Supreme Court said that a sentencing court cannot inject prosecuting attorneys or law enforcement officials into the probation process by granting them direct rights to search the probationer, his home, or vehicle. A type of probable cause or some identifiable reason is required before a search clause may be exercised to search the probationer or his vehicle. The legal interests of innocent third persons living with a

probationer are to be protected by requiring a search warrant before searching the probationer's home. Polygraph examinations as a condition of probation can be effectively contained within constitutional parameters by confining the right to demand a polygraph examination to the probation officer. St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), overruled in St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988).

Suspended Sentence Conditioned on Restitution Not Cruel and Unusual Punishment: Conditioning the suspension of the last 30 years of a 56-year sentence on restitution [in 1983 an amendment provided for a maximum 6-year deferral for a felony if restitution is imposed], which included restitution for three counts for which the defendant was acquitted, did not constitute cruel and unusual punishment or an excessive fine considering the defendant's indigent status. Restitution, particularly in theft-type convictions, is a proper condition for suspension on probation. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Deferred Sentence Conditioned on Repayment of Attorney's Fees: Lenihan pleaded guilty to a charge of burglary and received a deferred sentence [prior to 1981 amendment adding provisions allowing court to require defendant to pay costs and fines]. One of the conditions of his deferred sentence was that he pay the county $250 as reimbursement for his court-appointed attorney. The Supreme Court found that the repayment of attorney's fees is not permitted when no consideration was given to the defendant's ability to pay or to the consequences in the event of default. This repayment condition revives the fears espoused by the court in St. v. Babbit, 175 M 433, 574 P2d 998 (1978), and must be vacated. St. v. Lenihan, 184 M 338, 602 P2d 997 (1979).

Other Charges: Subsection (2) does not apply to incarceration for other charges. In re Davis, 179 M 196, 587 P2d 30 (1979).

Fine Imposed Unreasonable — Possession of Drugs: The fine provision in 45-9-102, in itself, does not allow the sentencing court to make payment of a fine a condition to suspended execution of a sentence. Additionally, the Supreme Court found no reasonable association between the fines imposed and the offenses committed, nor did it find the fines to be reasonable or necessary conditions of probation or for the protection of the public. St. v. Cripps, 177 M 410, 582 P2d 312 (1978).

Improper Condition of Probation — Fine:

The Supreme Court held the imposition of a $500 fine or payment as a condition of probation after deferred imposition of sentence to be a nullity and of no force or effect and that the same be vacated and set aside to conform with St. v. Babbit, 175 M 433, 574 P2d 998 (1978). St. v. Petko, 177 M 229, 581 P2d 425 (1978). [But see 1981 amendment allowing payment of a fine as a condition of probation.]

The imposition of a condition of probation that requires the payment of a fine having no reasonable association to the crime committed or to public protection is a nullity and of no force or effect. St. v. Babbit, 175 M 433, 574 P2d 998 (1978). [But see 1981 amendment allowing payment of a fine as a condition of probation.]

Probationer Search Clause: Execution of a probationer search clause by law enforcement personnel, being instrumental in achieving the objectives of probation, is a proper condition of probation. St. v. Means, 177 M 193, 581 P2d 406 (1978).

Condition of Probation: Under former law, provisions in a probation order permitting the petitioner to have employment outside the county jail, absolving the Sheriff from liability in permitting the petitioner to be absent from his custody without bail, and requiring that the petitioner pay his own board at the jail from his earnings, while similar to some former provisions relating to convicted misdemeanants serving county jail sentences, did not convert a condition of probation into a term of imprisonment. In re Williams' Petition, 145 M 45, 399 P2d 732 (1965).

Subsequent Imprisonment: When the order placing the petitioner on probation provided that he would be "jailbased" and referred to him as a "prisoner", the substance of the order and not its form or descriptive terminology determined its effect and meaning so that his subsequent imprisonment did not place the petitioner in double jeopardy in violation of the federal constitution or Art. II, sec. 25, Mont. Const. In re Williams' Petition, 145 M 45, 399 P2d 732 (1965).

Improper Condition of Probation — Sentence to Leave County: Suspending a sentence on the condition that the defendant leave and remain out of the county has no force or effect other than to suspend the sentence; the court has no power to pronounce a sentence in the absence of specific statutory authority. The prisoner is by law subject only to the rules and regulations of the Board of Pardons (now Board of Pardons and Parole), and floating is void as an attempted exercise of pardoning power. Ex parte Sheehan, 100 M 244, 49 P2d 438 (1935).

NONVIOLENT OFFENDER PRISON ALTERNATIVES

District Court Required to Consider Alternatives — Alternative Sentences Allowed to Be Imposed: Alden pleaded guilty to several offenses, and at the sentencing hearing, the District Court considered but rejected alternatives to terms of imprisonment. The District Court's rejection was based upon testimony and written documents. Because there was testimony supporting Alden's contention that he should not have been sentenced to prison, Alden appealed the sentence. The Supreme Court held that the standard applicable to the exercise of the District Court's discretion is whether the law was incorrectly applied or whether the District Court's findings are clearly erroneous. The Supreme Court noted that the applicable statutes require the District Court to consider an alternative to imprisonment but only allow and do not require the District Court to impose that alternative. The Supreme Court found that the District Court had considered the alternatives but that the presentence investigation, Alden's admission, the absence of a reason or excuse for the offenses, the risk that Alden would reoffend, the need to protect society, the seriousness of the crime charged, and the ineffective nature of prior treatment all supported the District Court's view that imprisonment was necessary notwithstanding testimony supporting an opposite view. For these reasons, the Supreme Court affirmed the sentence. St. v. Alden, 282 M 45, 934 P2d 210, 54 St. Rep. 234 (1997).

Sentence Within Maximum for Crime — Failure to Object at Trial as Precluding Consideration on Appeal: Montana law requires a sentencing court to consider alternatives to incarceration when sentencing nonviolent offenders. In this case, Goulet's own counsel recommended a prison term and did not object to a 10-year sentence for felony escape or move for reconsideration of the sentence. The sentence did not exceed the maximum allowed for the crime, and failure to object precluded consideration of the issue on appeal. St. v. Goulet, 277 M 308, 921 P2d 1245, 53 St. Rep. 739 (1996), following St. v. Nelson, 274 M 11, 906 P2d 663 (1995).

Requirements for Sentencing Nonviolent Felony Offenders Mandatory: Savaria was convicted in District Court on seven counts of felony theft and was sentenced to 10 years in the state prison. Savaria appealed, claiming that the District Court had failed to consider the obligations imposed upon a District Court by 46-18-225 and this section in sentencing a nonviolent felony offender. The Supreme Court held that those considerations are mandatory and that under the circumstances, the District Court failed to properly sentence Savaria. St. v. Savaria, 274 M 197, 906 P2d 215, 52 St. Rep. 1153 (1995).

Failure to State Reasons for Not Selecting Alternatives to Imprisonment Must Be Objected to if Sentence Not Illegal: Nelson argued that the lower court failed to consider alternatives to imprisonment for a nonviolent offender as required by statute. The Supreme Court held that the lower court had failed to consider alternatives as required but that the sentence imposed by the lower court was not in excess of the maximum allowed by law and therefore was not illegal. The Supreme Court further held that since the sentence was not illegal, Nelson could not raise the consideration of alternatives on appeal when he had failed to object to the sentence when it was entered. St. v. Nelson, 274 M 349, 906 P2d 663, 52 St. Rep. 1069 (1995), distinguishing St. v. Lenihan, 184 M 338, 602 P2d 997 (1979), and St. v. Hatfield, 256 M 340, 846 P2d 1025 (1993), and following St. v. Arlington, 265 M 127, 875 P2d 307 (1994). Nelson was followed, with respect to the District Court's failure to consider alternatives being raised for the first time on appeal, in St. v. Harper, 284 M 185, 943 P2d 1255, 54 St. Rep. 837 (1997). Nelson was followed, with respect to the exception arising when a defendant alleges that a sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing, in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999). See also St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001).

Procedure for Considering Alternatives to Prison for Nonviolent Offender: Because the District Court did not consider alternatives to prison as required by this section, did not take into account the criteria contained in 46-18-225 and this section that require examination of alternatives to prison, and did not, as required by this section, state its reasons why alternatives to imprisonment were not selected, the prison sentence was vacated and the case remanded. St. v. Pence, 273 M 223, 902 P2d 41, 52 St. Rep. 937 (1995).

Failure to Consider Sentencing Alternatives to Incarceration for Nonviolent Felony Offense — Remand: Criminal sentencing alternatives are strictly matters of statute in Montana. This section requires a trial court to consider alternatives to imprisonment when sentencing a nonviolent felony offender, and 46-18-225 sets out 10 criteria that the court must consider. The court has no discretion in making these considerations. Therefore, when the court in this case considered pertinent facts concerning defendant's background but did not specifically consider any alternatives to incarceration, failure to consider the sentencing alternatives warranted

remand for resentencing. St. v. Lamere, 272 M 355, 900 P2d 926, 52 St. Rep. 828 (1995), following St. v. Stevens, 259 M 114, 854 P2d 336 (1993).

Failure to State Reasons for Not Selecting Alternatives to Imprisonment as Error: The Supreme Court reversed a lower court's sentence for a nonviolent felony offender because the lower court had failed to state its reasons for not selecting alternatives to imprisonment and failed to indicate that it had examined the statutory sentencing criteria. St. v. Stevens, 259 M 114, 854 P2d 336, 50 St. Rep. 707 (1993).

Attorney General's Opinions

Restitution Not to Be Made From Forfeited Appearance Bond: A judge is without the authority to order restitution to be made from a forfeited appearance bond. Restitution is not a "cost" of the case that may be defrayed. Section 46-18-603 refers specifically to costs incurred by the county, not by the victim. The money from the forfeited bond is to be paid to the County Treasurer. 38 A.G. Op. 96 (1980).

Law Review Articles

Credit for Jail Time Upon Revocation of Deferred Imposition of Sentence or Suspended Execution of Sentence, Kinnard, 38 Mont. L. Rev. 357 (1977).

Discussion of In re Meidinger, 37 Mont. L. Rev. 265 (1976).

Credit for Time Spent Incarcerated Prior to Revocation of an Order Deferring Imposition of Sentence, Little, 36 Mont. L. Rev. 345 (1975).

Collateral References

Criminal Law *key* 1001.

24 C.J.S. Criminal Law §§2087 through 2103.

21 Am. Jur. 2d Criminal Law §758, et seq.

Persons or entities entitled to restitution as "victim" under state criminal restitution statute. 92 ALR 5th 35.

Propriety of probation condition exposing defendant to public shame or ridicule. 65 ALR 5th 187.

Measure and elements of restitution to which victim is entitled under state criminal statute. 15 ALR 5th 391, §7(k) superseded by 44 ALR 6th 301, §12(a), (b) superseded by 45 ALR 6th 435.

Validity, construction, and application of state statute requiring inmate to reimburse government for expense of incarceration. 13 ALR 5th 872.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case. 13 ALR 5th 628.

Appealability of order suspending imposition or execution of sentence. 51 ALR 4th 939.

Validity, construction, and application of state recoupment statutes permitting state to recover counsel fees expended for benefit of indigent criminal defendants. 39 ALR 4th 597.

Sentencing: permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine. 35 ALR 4th 192.

Right of convicted defendant to refuse probation. 28 ALR 4th 736.

Travel restriction: propriety of conditioning probation on defendant's not entering specified geographical area. 28 ALR 4th 725.

Credit for time served: defendant's right to credit for time spent in halfway house, rehabilitation center, or other restrictive environment as condition of probation. 24 ALR 4th 789.

Intoxicants: propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants. 19 ALR 4th 1251.

Partial service of sentence: propriety of conditioning probation on defendant's serving part of probationary period in jail or prison. 6 ALR 4th 446.

Violent crimes: validity of statutes prohibiting or restricting parole, probation, or suspension of sentence in cases of violent crimes. 100 ALR 3d 431.

Credit on state sentence: right to credit on state sentence for time served under sentence of court of separate jurisdiction where state court fails to specify in that regard. 90 ALR 3d 408.

Bond: propriety of conditioning probation upon defendant's posting of bond guaranteeing compliance with terms of probation. 79 ALR 3d 1068.

Reparation to injured victim: propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 ALR 3d 976.

Right to credit for time spent in custody prior to trial or sentence. 77 ALR 3d 182.

Payment: ability to pay as necessary consideration in conditioning probation or suspended sentence upon reparation or restitution. 73 ALR 3d 1240.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 ALR 3d 474.

Good behavior: what constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 ALR 3d 1156.

State court's power to place defendant on probation without imposition of sentence. 56 ALR 3d 932.

Political activity: propriety of conditioning probation or suspended sentence on defendant's refraining from political activity, protest, or the like. 45 ALR 3d 1022.

Racial discrimination in punishment for crime. 40 ALR 3d 227.

46-18-202. Additional restrictions on sentence.

Compiler's Comments

2007 Amendment: Chapter 483 deleted former (3) that read: "(3) An offender convicted of a sexual offense, as defined in 46-23-502, except an offense under 45-5-301 through 45-5-303, and sentenced to imprisonment in a state prison shall enroll in and complete the educational phase of the prison's sexual offender program." Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

2002 Amendment: Chapter 22 in (3) near middle inserted "except an offense under 45-5-301 through 45-5-303". Amendment effective August 21, 2002.

Applicability: Section 9, Ch. 22, Sp. L. August 2002, provided: "[This act] applies to convictions on or after [the effective date of this act]." Effective August 21, 2002.

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to sentencing judge for references to district court and substituted references to offender for references to defendant; inserted (3) requiring enrollment in the prison sexual offender program; deleted former (3) and (4) that read: "(3) When the court imposes a sentence of probation, as defined in 46-23-1001, any probation agreement signed by the defendant may contain a clause waiving extradition.

(4) Whenever the district court imposes a sentence of imprisonment in the state prison for a violation of 45-5-502(3), 45-5-503, 45-5-504(2)(c), 45-5-507 (unless the act occurred between two consenting persons 16 years of age or older), or 45-5-625, the court may also impose the restriction that the defendant be ineligible for a good time allowance while serving that term. If such a restriction is to be imposed, the court shall state the reasons for it in writing. If the court finds that the restriction is necessary for the protection of society, it shall impose the restriction as part of the sentence and the judgment must contain a statement of the reasons for the restriction"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 147 inserted (1)(e) concerning requirement for biological sample as part of plea bargain; and made minor changes in style. Amendment effective March 23, 1999.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

1995 Amendments: Chapter 125 near end of (1) and (1)(e) substituted "protection of the victim and society" for "protection of society"; and made minor changes in style.

Chapter 350 in (1) and (3), at beginning before "court", deleted "district"; deleted former (3) that read: "(3) The judge in a justice's, city, or municipal court does not have the authority to restrict an individual's rights as enumerated in subsection (1)(a)"; and made minor changes in style.

Chapter 550 inserted (4) allowing imposition of a restriction on eligibility for a good time allowance.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Section 31, Ch. 350, L. 1995, was a severability clause.

1993 Amendment: Chapter 262 at end of (3) substituted "subsection (1)(a)" for "subsections (1) and (2)"; and made minor changes in style.

1987 Amendment: Inserted (4) providing that a probation agreement may waive extradition.

1981 Amendment: Substituted "supervised release program" for "prisoner furlough program" in the middle of (2).

Case Notes

Restriction on Financial Transactions as Condition for Suspended Sentence for Sexual Assault Affirmed: As a condition for a suspended sentence for sexual assault of a child, Hernandez was required to obtain permission from the probation officer before engaging in financial transactions to finance or purchase a vehicle, engage in business, or incur debt. Hernandez appealed on grounds that the condition was unrelated to the crime. The Supreme Court noted that the sentencing condition was authorized by statute and Department of Corrections rule, so the Ashby requirement of a nexus to the offender or the offense did not apply. The financial transaction restriction was considered a standard condition of the Department, and Hernandez offered nothing indicating that the condition would impose a hardship; because Hernandez's priority financial obligations while serving the suspended sentence would be restitution, child support, fines, and fees, the imposition of the condition was appropriate and not an abuse of discretion. The District Court was affirmed. St. v. Hernandez, 2009 MT 341, 353 M 111, 220 P3d 25 (2009).

Prohibition Against Firearms as Condition of Deferred Sentence for Stalking Affirmed: As a condition of Essig's deferred sentence for stalking, the District Court prohibited Essig from owning, possessing, or being in control of firearms. Essig appealed the prohibition, but the Supreme Court affirmed. Several years earlier Essig was convicted of a concealed weapon violation, and considering the threatening nature of the stalking violation, the District Court did not abuse its discretion by restricting Essig's firearms use to obtain the objectives of rehabilitation and the protection of the victim and society. St. v. Essig, 2009 MT 340, 353 M 99, 218 P3d 838 (2009).

Defendant's Fathering of Own Child Following Assault of Child — Sentencing Condition That Defendant Not Engage in Contact With Children Under 15 Years of Age Affirmed: Rowe was convicted of felony criminal endangerment and misdemeanor negligent endangerment after assaulting a 2-year-old child whom Rowe was babysitting. As a condition of sentence, the District Court prohibited Rowe from having contact with any child under 15 years of age unless supervised by an approved adult. Rowe appealed the sentencing condition on grounds that because he married and fathered a child following conviction, the sentencing condition effectively precluded him from contact with his own child and violated his fundamental right to parent. Nevertheless, the Supreme Court affirmed. Citing In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001), the court noted that the child abuse and neglect statutes reflect the tension between the need to protect family unity whenever possible and the need to provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection, including a parent. Undisputedly, Rowe had an anger problem, and he participated in anger management for several years before the assault but voluntarily stopped taking his medications 2 to 3 weeks prior to the assault. Rowe also committed other incidents of violence in addition to the assault and posed a substantial risk of harm to his own child, so the District Court did not abuse its discretion by imposing a sentencing condition precluding Rowe's contact with his own child. St. v. Rowe, 2009 MT 225, 351 M 334, 217 P3d 471 (2009).

Sufficient Nexus of Sentencing Condition to Offense of Sexual Intercourse Without Consent: Brinson was sentenced to 20 years with 10 years suspended for sexual intercourse without consent, and the sentencing court also attached 56 terms and conditions to the sentence. Brinson challenged three conditions. The Supreme Court applied the nexus test in St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008), to determine whether the conditions lacked a nexus either to the offense or to Brinson. In this case a sufficient nexus was established to affirm imposition of conditions: (1) that Brinson's contact with his daughter be supervised; (2) prohibiting Brinson from having a cell phone, with exceptions, or other technology or device with photo, video, or internet capabilities; and (3) prohibiting Brinson from viewing television or motion pictures that were geared toward Brinson's offending cycle or as a stimulus to arouse deviant thoughts or fantasies. St. v. Brinson, 2009 MT 200, 351 M 136, 210 P3d 164 (2009).

Failure of Defendant to Admit Incest — Sentence Not Considered More Harsh Given Relevant Sentencing Factors: Bullman consistently maintained that he was not guilty of incest with his stepdaughter because he was never married to her mother. Because Bullman refused to admit guilt and was thus ineligible for community-based treatment, he asserted that he was sentenced

more harshly by being sentenced to prison. The Supreme Court examined the record and disagreed. The sentencing court was aware of the prohibition against sentencing a defendant to prison because the defendant does not admit guilt, but the court also considered numerous other relevant factors in sentencing Bullman to prison in addition to the expert opinion that Bullman was not a candidate for community-based treatment, including: (1) the significant impact of the crime on the victim; (2) the need to protect society; (3) Bullman's need for appropriate treatment; (4) Bullman's criminal history; and (5) Bullman's long history of substance abuse. Given these sentencing factors, the Supreme Court could not conclude that Bullman was sentenced to prison for failure to admit guilt, and the conviction was affirmed. St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

Parole Restriction Based on Defendant's Danger to Society Warranted: Following conviction for kidnapping and sexual assault, Dunning was sentenced to 10 years in prison and designated as ineligible for parole. Dunning argued on appeal that the parole restriction was unwarranted, but the Supreme Court affirmed. Two psychosexual evaluations confirmed Dunning's high risk to reoffend equivalent to a level 3 offender, and Dunning remained an untreated sexual offender who was considered a danger to society based on a 30-year history of sexually related offenses. The factual evidence presented to the sentencing court provided a sufficient basis to support the court's conclusion that the parole restriction was proper. St. v. Dunning, 2008 MT 427, 347 M 443, 198 P3d 828 (2008).

Alcohol-Related Sentencing Condition for Incest Conviction Affirmed: As sentencing conditions following conviction for felony incest, the sentencing court required Heddings to abstain from and be tested for alcohol and drugs. Heddings argued that the alcohol-related conditions should be stricken because they were unrelated to the crime or to Heddings himself. Citing St. v. Stephenson, 2008 MT 64, 342 M 60, 179 P3d 502 (2008), the Supreme Court noted that a sentencing condition is illegal if: (1) the sentencing court lacked statutory authority to impose it; (2) the condition falls outside the parameters of the applicable sentencing statutes; or (3) the sentencing court did not adhere to affirmative mandates of the applicable sentencing statutes. Here, the presentence investigation revealed that Heddings was a situational, opportunistic child molester and that allowing him to drink would give him more opportunities to fail and increase the likelihood of reoffending. Heddings maintained that the incest did not involve the use of alcohol, but he did not challenge the accuracy of the findings. Thus, there was a nexus between the alcohol-related conditions and Heddings as an offender. It was within the sentencing court's discretion to impose conditions that were reasonable and necessary for rehabilitation or for the protection of the victim or society, and the Supreme Court affirmed. St. v. Heddings, 2008 MT 402, 347 M 169, 198 P3d 242 (2008).

Alcohol-Related Sentencing Conditions for Fraudulently Obtaining Dangerous Drugs Affirmed: Following conviction for fraudulently obtaining dangerous drugs, Hunter challenged two sentencing conditions that prohibited the possession and consumption of alcohol and that required chemical testing for drugs and alcohol. The Supreme Court affirmed. Prohibiting and monitoring Hunter's consumption of both alcohol and drugs would help prevent Hunter from repeating the same criminal conduct that gave rise to the sentence. A sufficient nexus was established between the offense and the alcohol-related sentence conditions. St. v. Hunter, 2008 MT 395, 347 M 155, 197 P3d 998 (2008), following St. v. Winkel, 2008 MT 89, 342 M 267, 182 P3d 54 (2008). See also St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008).

Alcohol-Related Conditions Unrelated to Felony Theft Stricken From Sentence: As a condition of Stiles' sentence for felony theft, the sentencing court prohibited Stiles from possessing or consuming intoxicants and entering places where intoxicants are sold and required Stiles to submit to drug and alcohol testing. The Supreme Court noted that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), and its progeny, a nexus must exist between a sentencing condition and the offense and offender. Because there was no nexus between the sentencing condition and Stiles and the offense of felony theft, the alcohol-related condition was stricken from Stiles' sentence. St. v. Stiles, 2008 MT 390, 347 M 95, 197 P3d 966 (2008).

Revocation of Youth Court Probation and Imposition of Suspended Sentence Proper: When Hinkle was 17 years old, he pleaded true to the charge of negligent homicide. The case was tried in District Court, and Hinkle was committed to the Youth Court for suspended placement in a treatment facility until age 18, placed on formal juvenile probation until age 25, and given a stayed adult sentence of 20 years with the Department of Corrections, pursuant to 22 probation conditions, including requirements that Hinkle not violate the dispositional order, possess or consume alcohol, or commit a new offense. Twelve days after the sentencing hearing, Hinkle was cited for being a minor in possession of alcohol. The Youth Court revoked Hinkle's probation and transferred the case back to District Court for further proceedings. After considering numerous

balancing factors, the District Court imposed the 20-year adult sentence that had been stayed, but suspended the sentence subject to 19 conditions, including prohibiting Hinkle from entering casinos and gambling. Hinkle appealed on grounds that his probation was improperly revoked, that the 20-year sentence was improperly imposed, and that the casino and gambling restriction was illegal. The Supreme Court affirmed on all issues. The District Court did not err in concluding that simply continuing Hinkle's youth probation for the probation violations would be no more than a slap on the wrist and would be inappropriate given the seriousness of the underlying homicide offense. Imposing a suspended adult sentence was in fact a further act of grace, in light of the fact that the court could have imposed a 20-year sentence of confinement, but Hinkle ignored the act of grace in asserting that the suspended sentence was unduly harsh. Additionally, Hinkle's personal characteristics made him particularly vulnerable to the pitfalls of irresponsible gambling, so the casino and gambling restriction was appropriate. Thus, the District Court's order was "neither arbitrary nor without conscientious judgment or exceeding the bounds of reason and was an appropriate exercise of discretion". St. v. Hinkle, 2008 MT 217, 344 M 236, 186 P3d 1279 (2008).

Restrictions Against Gambling and Use of Alcohol Unrelated to Offense of Theft or to Defendant Stricken — Drug Testing Requirement Affirmed: As conditions of Lessard's conviction for the theft of carved bears from neighborhood lawns, the sentencing court required that Lessard not consume alcohol or drugs, submit to alcohol and drug testing, and refrain from entering casinos and gambling. Lessard contested the conditions as unrelated to the theft of carved bears and asserted that he had no problem with or criminal history related to substance abuse or gambling, even though a marijuana pipe was found in Lessard's bedroom during a search for the bears and Lessard admitted to smoking marijuana 2 days prior to the search. In deliberating whether the conditions had a nexus to the offense or to Lessard himself, the Supreme Court held that the alcohol and gambling conditions were too much, that requiring no conditions would be too little, but that the drug testing condition was just right. The case was remanded with instructions to strike the alcohol and gambling conditions and the alcohol testing requirement from Lessard's sentence, while leaving the drug testing requirement in effect. St. v. Lessard, 2008 MT 192, 344 M 26, 185 P3d 1013 (2008).

Sentencing Conditions for Theft Conviction, Except Requirement for Mental Health Evaluation, Affirmed: As conditions of Greensweight's sentence for theft, the sentencing court required Greensweight to obtain a chemical dependency evaluation and to attend either Alcoholics Anonymous or Narcotics Anonymous, prohibited Greensweight from possessing, using, or drinking intoxicants and from entering any place where intoxicants were the chief item of sale, and required Greensweight to participate in counseling, including mental health counseling. Greensweight contested the conditions as unrelated to the crime, and the Supreme Court considered each condition for legality and reasonableness and considered whether the conditions were related either to the crime or to Greensweight's unique background and characteristics. In light of Greensweight's history of chronic drug use, the chemical dependency evaluation and attendance at group meetings were reasonable and were affirmed. Citing St. v. Brotherton, 2008 MT 119, 342 M 511, 182 P3d 88 (2008), the court also affirmed the "no intoxicants" condition as legal because of the history of chronic drug use and as necessary for Greensweight's rehabilitation, including a requirement for drug and alcohol testing. The court also affirmed the counseling requirement, but absent any history of mental health issues or nexus to the theft crime, the requirement for mental health counseling was ordered stricken. St. v. Greensweight, 2008 MT 185, 343 M 474, 187 P3d 613 (2008).

Partial Parole Restrictions Affirmed: Rickman was sentenced to life with no parole eligibility for 55 years for deliberate homicide under the felony-murder rule. Rickman appealed the sentence on grounds that the sentencing court had no authority to restrict parole eligibility for only part of the sentence. Noting that challenges to partial parole restriction have been upheld since at least 1988, the Supreme Court disagreed with Rickman's assertion. A sentencing court has discretion to impose parole restrictions, and if a sentencing court has discretion to impose a restriction of no parole eligibility, then a sentencing court can likewise impose a restriction of limited parole eligibility. St. v. Rickman, 2008 MT 142, 343 M 120, 183 P3d 49 (2008). See also St. v. Kirkbride, 2008 MT 178, 343 M 409, 185 P3d 340 (2008), and St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

Sentence Restriction Prohibiting Alcohol Use Sufficiently Related to Defendant's History of Substance Abuse to Warrant Affirmation — Unrelated Casino Restriction Stricken: As conditions of Brotherton's sentence for criminal possession of dangerous drugs with intent to distribute, the District Court prohibited Brotherton's use of alcohol, prohibited him from entering any place where intoxicants were the chief item of sale, and also prohibited him from

entering casinos or playing games of chance. Brotherton appealed the conditions on grounds that they were unrelated to the offense, given that his criminal history involved only drugs and not alcohol. The Supreme Court agreed that the casino restriction was improper and remanded with directions that the condition be stricken. However, the court affirmed the alcohol use restriction, given Brotherton's significant history of chemical dependency and the reasonable possibility that Brotherton might substitute alcohol for drugs and thus impede his rehabilitation. St. v. Brotherton, 2008 MT 119, 342 M 511, 182 P3d 88 (2008).

No General or Inherent Authority of Sentencing Court to Generally Impose Parole Conditions — Parole Condition Related to Sexual Offense Authorized: There is no general or inherent authority for a sentencing court to impose parole conditions. A sentencing court may impose conditions on parole that are authorized by statute only. In this case, all conditions on Burch's suspended sentence for sexual offenses were proper, but only one parole condition, prohibiting Burch from possessing pornography or accessing the Internet, was authorized under 46-18-255. Burch's admission that he used the Internet at work to access pornography while on parole established that Burch violated a condition of his suspended sentence by a preponderance of the evidence. Thus, the sentencing court did not err in revoking Burch's suspended sentence. St. v. Burch, 2008 MT 118, 342 M 499, 182 P3d 66 (2008), followed in St. v. Dennison, 2008 MT 344, 346 M 295, 194 P3d 704, (2008), and St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009), regarding authority of sentencing court.

Conditions Including Restrictions on Alcohol Consumption and Entering Casinos Related to Drug Possession — Affirmed: As conditions of Winkel's suspended sentence for felony possession of dangerous drugs, the sentencing court prohibited Winkel from consuming alcohol and from entering any place where intoxicants were the chief item of sale and prohibited Winkel from entering casinos or playing games of chance. Winkel contended that the conditions should be stricken because alcohol and gambling were not related to the drug offense. The Supreme Court noted that sentencing conditions must be reasonably connected to the underlying offense and to the offender and concluded that in this case, that connection existed. The alcohol prohibition was connected to the drug-related nature of Winkel's drug offense and was called for, given Winkel's recent and chronic history of substance abuse and chemical dependency. Thus, the sentencing court did not err in finding that Winkel's rehabilitation would be jeopardized if Winkel had access to intoxicants like alcohol. Additionally, because alcohol is inseparable from gambling in Montana casinos, the prohibition against entering casinos achieved the same objectives of rehabilitation and protection and was also warranted. The conditions of Winkel's suspended sentence were affirmed. St. v. Winkel, 2008 MT 89, 342 M 267, 182 P3d 54 (2008), followed in St. v. Teets, 2008 MT 130, 343 M 73, 183 P3d 45 (2008), St. v. Deshazo, 2008 MT 131, 343 M 77, 183 P3d 47 (2008), St. v. Corbin, 2008 MT 146, 343 M 211, 184 P3d 287 (2008), and St. v. Sadowsky, 2008 MT 405, 347 M 192, 197 P3d 1018 (2008). See also St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008).

Adoption of Herd Standard of Review of Challenges to Legality or Propriety of Probation Conditions: The appropriate standard of review for cases challenging the legality or propriety of probation conditions is the two-pronged standard set out in St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004). The sentencing condition is first reviewed for legality. Then, because sentencing statutes authorize the imposition of conditions on deferred or suspended sentences that constitute reasonable restrictions or conditions considered necessary for the rehabilitation or for the protection of the victim or society, the reasonableness of the conditions is reviewed for an abuse of discretion. St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008).

Probation Condition Banning Alcohol Consumption Unrelated to Crime of Issuing Bad Check Reversed — Condition Prohibiting Gambling Related to Fiscal Irresponsibility Affirmed: Probation conditions on Ashby's bad check conviction included a restriction that Ashby not gamble or consume alcohol or drugs. Ashby contested the conditions under the rule in St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), that there must be a nexus between probation conditions and the offense. The District Court denied Ashby's assertion and imposed the conditions as "stock" or standard. On appeal, the Supreme Court expanded the Ommundson nexus rule to include a nexus either to the offense or to the offender, rather than to the offense alone. In this case, there was no evidence that the bad check offense was related in any way to alcohol or drugs, that Ashby had a drinking or drug problem, or that an alcohol and drug prohibition would protect Ashby from another bout of writing bad checks. Thus, the alcohol and drug restriction was stricken from the sentence. Likewise, there was no evidence that Ashby had a gambling problem. However, citing St. v. Kroll, 2004 MT 203, 322 M 294, 95 P3d 717 (2004), the court found that because of considerable previous fiscal irresponsibility on Ashby's part, it was reasonable for the sentencing court to conclude that a prohibition on gambling was appropriate

to rehabilitate Ashby's ability to manage his finances, so the gambling restriction was affirmed. The court also warned against the imposition of alcohol and gambling restrictions as standard or universal because they are not mandated by law. St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008), followed in St. v. Corbin, 2008 MT 146, 343 M 211, 184 P3d 287 (2008), St. v. Krueger, 2008 MT 265, 345 M 147, 190 P3d 318 (2008), St. v. Jones, 2008 MT 440, 347 M 512, 199 P3d 216 (2008), and St. v. Simpson, 2009 MT 43, 349 M 275, 203 P3d 791 (2009), with regard to imposition of a gambling restriction in light of defendant's financial irresponsibility. Kruger was followed in St. v. Smart, 2009 MT 1, 348 M 274, 201 P3d 123 (2009).

Open-Ended Restitution Condition Reversed: As a condition of Meyers' sentence for assaulting his child, it was ordered that Meyers pay restitution to all the victims in an amount to remain open until the victims received any help that they needed. However, 46-18-244 requires that the sentencing court specify the total amount of restitution that the offender shall pay. Thus, it was reversible error for the sentencing court to leave the amount of restitution open, and the Supreme Court remanded for reimposition of the restitution requirement in a specified amount. St. v. Meyers, 2007 MT 230, 339 M 160, 168 P3d 645 (2007).

Residency Restriction in Sentence Affirmed: As a condition of Meyers' sentence for assaulting his child, it was ordered that Meyers not reside in Broadwater County unless he was employed in that county. Meyers appealed the residency restriction, likening the sentencing condition to the banishment condition addressed in St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002). However, the Supreme Court distinguished Muhammad because Meyers was not banished from Broadwater County, but could in fact live there if he was employed in the county. The residency restriction was designed to protect the victims and yet allow Meyers limited ability to be in the county. Because the residency restriction was an appropriately tailored condition satisfying the requirement to be reasonably related to the protection of the victims and society, the sentencing condition was affirmed. St. v. Meyers, 2007 MT 230, 339 M 160, 168 P3d 645 (2007).

Order That Defendant Pay "Assessments" to Community Entities as Part of Sentence for Sexual Assault Illegal: As part of Krum's sentence for two counts of felony sexual assault, the District Court ordered Krum to pay a $5,000 assessment to the Park County Court Automation Fund, $2,500 to the Tri-County Network for Domestic Violence, and $2,500 to the Park County Big Brothers and Sisters in order to give back to society and to those who assist victims of these types of crimes. Krum appealed the assessments, and the Supreme Court reversed. Although the sentencing court had authority to fine Krum up to $50,000 for each conviction, the court did not include a fine per se in Krum's sentence, but instead ordered the payment of assessments to the community entities. However, 46-18-235 provides that all fines and costs collected from a criminal defendant be paid to the Department of Revenue for deposit in the general fund, and a District Court may not redirect money collected from a defendant simply by labeling the money as an assessment instead of a fine. The state argued that the assessments were authorized as a condition of sentencing pursuant to this section because the assessments were reasonably related to the underlying crimes, but the Supreme Court held that this section does not provide the necessary authority for imposing assessments in the first place. The assessments were not limitations on Krum's conduct and could not be considered restitution because the money was not payable to the victims. Thus, the assessment portion of the sentence was unauthorized and illegal. The remainder of the sentence was affirmed, but the case was remanded with instructions to strike the illegal assessments from the sentence. St. v. Krum, 2007 MT 229, 339 M 154, 168 P3d 658 (2007), followed in St. v. Stephenson, 2008 MT 64, 342 M 60, 179 P3d 502 (2008), to the extent that a fine or surcharge payable to the community service program that is imposed without statutory authority is illegal. Stephenson was followed in St. v. VanWinkle, 2008 MT 208, 344 M 175, 186 P3d 1258 (2008).

Restriction of Travel as Probation Condition Related to Rehabilitation and Protection of Society Affirmed: As part of Moody's conditions of probation, the sentencing court required that Moody obtain written permission from the probation officer before traveling outside Moody's assigned district. Moody objected to the restriction, arguing that it improperly placed Moody's rights at the mercy of the supervising officer. The Supreme Court noted that a probation condition must be reasonably related to the objectives of rehabilitation and protection of the victim and society and have some correlation or connection to the underlying offense. In this case, the offense resulted from Moody's admitted problem with alcohol. The deferred sentence allowed Moody to address the problem under the supervision of the probation officer and properly included a travel restriction to allow the officer to effectively keep track of Moody and ensure that Moody remained on course with treatment. Imposition of the travel restriction was affirmed. St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006).

Dangerous Offender Designation as Part of Life Sentence Without Parole — No Error: Gratzer was sentenced to life without parole and contended that the sentencing court erred by also designating him a dangerous offender for all purposes. Gratzer argued that the designation cannot be applied to a life sentence because the only purpose for a dangerous offender designation is to affect a prisoner's parole eligibility. The Supreme Court held that the designation in this case had no effect on the time that Gratzer had to serve before becoming parole eligible because Gratzer's life sentence and ineligibility for parole precluded Gratzer from ever becoming eligible for parole, so no rights were violated by designating Gratzer as a dangerous offender for all purposes. Gratzer v. Mahoney, 2006 MT 282, 334 M 297, 150 P3d 343 (2006).

Federal Prohibition Against Penalty Beyond Statutory Maximum Not Retroactively Applicable: Following Gratzer's 1982 conviction for deliberate homicide, the District Court sentenced Gratzer to a consecutive 10-year term for using a weapon in committing the crime. The U.S. Supreme Court subsequently decided Apprendi v. N.J., 530 US 466 (2000) (followed in Ring v. Ariz., 536 US 584 (2002), and Blakely v. Wash., 542 US 296 (2004)), holding that other than the fact of a prior conviction, any fact that increases a penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Gratzer later petitioned for a writ of habeas corpus on grounds that the consecutive sentence for use of a weapon was a violation of Gratzer's constitutional rights. Gratzer's sentence enhancement was not submitted to the jury, so Apprendi was potentially applicable. Notwithstanding that Gratzer's conviction became final in 1984, long before Apprendi and its progeny were decided, the Supreme Court nevertheless considered Gratzer's claim pursuant to Teague v. Lane, 498 US 288 (1989), on grounds of whether Apprendi and its progeny applied retroactively. Under Teague, a new constitutional rule of criminal procedure does not apply retroactively to cases on collateral review unless the rule: (1) places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe; or (2) qualifies as a watershed rule of criminal procedure. Noting that the U.S. Supreme Court held that Ring (and by implication Apprendi and Blakely) did not apply retroactively in Schriro v. Summerlin, 542 US 348 (2004), the court applied the Schriro rationale to Gratzer's case, holding that Apprendi failed to satisfy the first Teague exception for retroactivity because Apprendi announced a rule that did not inhibit the state's ability to substantively proscribe and punish a defendant for using a weapon in the commission of an offense, but merely established procedures that the state must follow in doing so, nor did the Apprendi rule qualify as a watershed rule of criminal procedure without which the likelihood of an accurate conviction would be seriously diminished. Federal courts of appeals nearly unanimously agree that the Apprendi line of cases do not apply retroactively to cases on collateral review, and the Supreme Court concurred. Gratzer's petition was denied. Gratzer v. Mahoney, 2006 MT 282, 334 M 297, 150 P3d 343 (2006).

Life Sentence Without Parole Not Violative of Constitutional Rights: Gratzer asserted that the sentencing court exceeded its authority and violated the constitutional right to habeas corpus when the court sentenced Gratzer to life without the possibility of parole. Gratzer's argument was that use of the word "term" implied that there was a distinction between sentences imposed for a specific time and indeterminate life sentences and that the statutory sentencing scheme does not authorize a court to remove a prisoner's eligibility for parole if the prisoner is serving a life sentence. The Supreme Court declined to recognize the distinction. "Term" is used throughout the criminal code to refer to the duration of a sentence without any indication that it is meant to refer exclusively to determinate time sentences, and the language in this section that allows a court to impose the parole eligibility exception applies equally to time sentences and life sentences. A sentence of imprisonment in the state prison for a term exceeding 1 year refers to all felonies, including those punishable by a life sentence, rather than a cryptic means of limiting a sentencing court's ability to restrict the parole eligibility of prisoners serving life sentences. The District Court did not violate Gratzer's rights, and the sentence of life without parole was affirmed. Gratzer v. Mahoney, 2006 MT 282, 334 M 297, 150 P3d 343 (2006).

Maximum Statutory Sentence for Deliberate Homicide When Death Penalty Not Sought: Because subsection (2) of this section does not remove from the jury a determination of facts necessary to restrict parole, the statutory maximum for deliberate homicide when the death penalty is not sought is life imprisonment without the possibility of parole. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006), followed in St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009).

No Implied Presumption of Parole Eligibility — Federal Constitutional Protections Not Violated by Sentence of Life Imprisonment Without Parole — Montana Constitutional Protections Not Addressed: Garrymore was sentenced to life in prison without parole for the deliberate homicide of his adopted infant child. Garrymore appealed the parole restriction and sought to have the sentence vacated on grounds that 45-5-102(2) contains an implicit presumption of parole eligibility. Garrymore contended that under the statute, standing alone and without the operation of this section, he was entitled to a parole-eligible sentence, subject to 46-23-201, that was taken away by the sentencing judge in violation of due process and a trial by jury. The Supreme Court found nothing in sentencing statutes that creates a presumption in favor of parole eligibility that must be overcome in order for a sentencing judge to impose a parole restriction. Rather, sentencing courts have broad discretion under this section to impose parole eligibility restrictions on felony sentences, and the Legislature has placed no limitation on the exercise of that authority. A parole-eligible sentence was not taken away from Garrymore because he was not entitled to such a sentence to begin with. Additionally, although the judge must state the reasons for a parole eligibility restriction when one is imposed, no particular finding of fact need be included among those reasons. Therefore, because the statutory maximum for violating 45-5-102(1)(a) is life in prison without parole, restricting Garrymore's parole eligibility did not violate any federal constitutional rights. The Supreme Court also declined to address Garrymore's undeveloped argument that the parole eligibility restriction violated the Montana Constitution's greater jury trial right absent a compelling reason why Montana's greater jury trial right dictated a different result. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006), followed in St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

Sentencing Court Neither Allowed nor Required to Increase Punishment for Charged Offense: Garrymore contended that this section allowed or required the sentencing court to add on to the sentence imposed by 45-5-102(2), in violation of 46-1-401. The Supreme Court disagreed. Under 45-5-102, a District Court may impose both life imprisonment and life imprisonment without the possibility of parole. Thus, subsection (2) of this section does not, vis-a-vis an act, omission, or fact, allow or require a sentencing court to increase punishment for a charged offense. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006).

Sentencing Condition Unrelated to Underlying Offense Stricken: Attorney Holt pleaded not guilty to five counts of felony theft of clients' funds. As a condition of a suspended sentence, the trial court prohibited Holt from possessing or consuming alcohol and from establishing a checking or credit card account. Holt appealed both sentencing conditions. The Supreme Court noted that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), and St. v. Lucero, 2004 MT 248, 323 M 42, 97 P3d 1106 (2004), a sentencing limitation or condition must have some correlation to the underlying offense in order to be reasonably related to the objectives of rehabilitation and protection of the victim and society. In this case, there was no evidence that alcohol contributed to the offenses in question, so the Supreme Court struck that condition from the judgment. However, there was a correlation between Holt being allowed to establish a checking or credit card account and the crime of theft of clients' funds, so imposition of that condition was not improper and was affirmed. St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006), followed in St. v. Armstrong, 2006 MT 334, 335 M 131, 151 P3d 46 (2006), and St. v. Greeson, 2007 MT 23, 336 M 1, 152 P3d 695 (2007).

Restitution Properly Imposed Without Suspension or Deferral of Sentence: Citing St. v. Honey, 2005 MT 107, 327 M 49, 112 P3d 983 (2005), Vernes contended that the sentencing court had no authority under 46-18-201 to impose restitution costs without suspending or deferring part of Vernes' sentence. The Supreme Court noted that an alternative sentencing authority for the imposition of restitution costs, not addressed in Honey, exists in this section that allows any limitation reasonably related to the objectives of rehabilitation and the protection of society, as long as the restriction or condition has some connection to the underlying offense, and does not require suspension or deferral of a portion of a defendant's sentence. Thus, the sentencing court had authority to impose restitution for costs directly connected to the pecuniary loss of the victim, and restitution in this case was affirmed St. v. Vernes, 2006 MT 32, 331 M 129, 130 P3d 169 (2006).

Requirement That Any Correctional Placement Be Outside Area Where Aggravated Assault Occurred Not Error: As a restriction on Dunfee's correctional placement, the sentencing court ordered that any correctional placement of Dunfee be outside the area where Dunfee's aggravated assault occurred. Dunfee argued that the correctional placement condition was error because it was not reasonably related to the goals of rehabilitation. However, the record amply supported the condition for purposes of rehabilitation and for the protection of the victim and society. The condition fell within the parameters set by this section and was not erroneous, and Dunfee's commitment was affirmed. St. v. Dunfee, 2005 MT 147, 327 M 335, 114 P3d 217 (2005).

Adoption of Sentence Recommended in Presentence Investigation Report, With Variations — No Error in Disparity Between Oral and Written Sentence: As set out in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the oral pronouncement of sentence is the legally effective sentence, and the written judgment and commitment serves as evidence of the sentence orally pronounced. Wiedrich contended that because his written sentence contained terms and conditions that were not orally pronounced, the extra conditions were invalid and should be removed from the sentence. The Supreme Court disagreed. The transcript revealed that the sentencing court clearly adopted the sentence recommended in the presentence investigation report, with some variations—a fact that Wiedrich and his counsel were fully aware of—and the Supreme Court therefore declined to remand for resentencing. St. v. Wiedrich, 2005 MT 127, 327 M 214, 112 P3d 1054 (2005).

Ten-Year Suspension of Accompaniment and Nongame Hunting Privileges Affirmed: Ruiz was convicted on numerous counts related to hunting, fishing, and outfitting. The District Court suspended Ruiz's privileges to accompany others and partake in nongame hunting for 10 years. Ruiz appealed on grounds that the 10-year suspension of privileges had little connection to and were not statutorily authorized for the underlying charges. The Supreme Court disagreed. Under 87-1-102, a long suspension period is authorized when warranted, and this section also allows imposition of sentencing conditions that are reasonably related to the rehabilitation of the offender and the protection of the victim and society. The sentencing court was influenced by the fact that Ruiz attended college and majored in forestry, resource conservation, and wildlife biology and yet deliberately disregarded the hunting laws and regulations, in which he was well-versed, for money and personal benefit. In order to protect wildlife and slow down Ruiz's behavior, the significant restrictions of Ruiz's ability to engage in hunting were warranted. The 10-year suspension of privileges was legal and was affirmed. St. v. Ruiz, 2005 MT 117, 327 M 109, 112 P3d 1001 (2005).

Restitution Properly Ordered When Dismissed Charges Related to Charge for Which Defendant Convicted: McIntire was charged with felony burglary, misdemeanor theft, and misdemeanor forgery. Pursuant to a plea agreement, McIntire pleaded guilty to the burglary charge and the other charges were dismissed. The trial court ordered McIntire to pay restitution, but McIntire contended that because the forgery charges were dismissed, restitution could not be ordered to compensate for the forged checks and that the court lacked authority to impose restitution when there was no longer a victim with respect to the dismissed forgery charges. The Supreme Court disagreed. The victim was the same for both crimes, and the burglary was directly connected to the forgery, constituting an ongoing criminal transaction, so dismissal of the forgery charges did not deprive the court of authority to impose a restitution obligation on McIntire for the checks stolen from the victim during the burglary and for the pecuniary loss from the subsequent forgery of those checks. St. v. McIntire, 2004 MT 238, 322 M 496, 97 P3d 576 (2004).

Imposition of Stock Probation Requirements in Written Sentence When Not Mentioned in Oral Sentence Not Error Absent Showing of Prejudice: When Kroll was sentenced orally for a felony bad check scheme, he received a 10-year prison sentence with all but 180 days suspended and was ordered to pay restitution, not possess or consume alcohol, obtain a chemical dependency evaluation, refrain from entering casinos and playing games of chance, and undergo a sexual risk assessment because many of the materials purchased with the bad checks included pornography. The subsequent written judgment deviated from the oral pronouncement in several respects, omitting the sexual risk assessment and including several conditions not addressed at the oral sentencing, including requirements that Kroll conduct himself in a law-abiding manner, submit to reasonable searches, not own or possess firearms or deadly weapons, maintain full-time legitimate employment, have no contact with the victims, and pay a supervision fee. Kroll contested the validity of the added conditions in the written sentence and the imposition of the sexual risk assessment. The Supreme Court affirmed. The added conditions were civil restrictions that were considered stock requirements for probationers and individuals subject to a suspended sentence and did not substantively increase Kroll's loss of liberty or sacrifice of property. Given the standard nature of the sentencing conditions, Kroll suffered no actual prejudice by failure of the District Court to impose the conditions at oral sentencing, and they were therefore upheld as lawful. The state conceded that the alcohol restrictions and the chemical dependency conditions of the oral sentence were not related to the crime, and the Supreme Court ordered that those conditions be removed, leaving only the gambling and sexual risk assessment at issue. The Supreme Court affirmed those conditions because they were related to the bad check crimes and were a reasonable condition to assist Kroll's rehabilitation. St. v. Kroll, 2004 MT 203, 322 M 294, 95 P3d 717 (2004), following St. v. Johnson, 2000 MT 290,

302 M 265, 14 P3d 480 (2000). See also St. v. Lucero, 2004 MT 248, 323 M 42, 97 P3d 1106 (2004), in which the imposition of significant restrictions and conditions not mentioned in the oral sentence, in addition to stock sentencing conditions authorized in Kroll, was considered prejudicial, reversible error.

Forty-Year Driving Ban for Multiple Negligent Vehicular Homicides Reversed: Following conviction on four counts of negligent vehicular homicide, Herd was sentenced to: (1) two concurrent 20-year sentences, all suspended; (2) enter and successfully complete a prerelease program; (3) remain under the jurisdiction of the Probation and Parole Bureau for the 40-year term; (4) pay $200 a month in restitution for 20 years; (5) not own or be in control of firearms for 40 years; (6) not enter any bars or casinos for 40 years; (7) not drink or possess alcoholic beverages for 40 years; (8) obtain any counseling requested by Herd's probation officer; (9) submit to drug and alcohol testing at any time that the probation officer had reasonable grounds to suspect that testing would reveal a probation violation; and (10) not drive during the entire 40-year sentence. Herd appealed the length of the driving restriction, and the Supreme Court reversed on grounds that the prohibition was unnecessary to protect a victim or society as a whole; and drastically inhibited Herd's ability to make a living, serve the needs of her family, and pay restitution; and impaired the prospects of rehabilitation. St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004).

Lack of Remorse Not Sole Sentence Enhancement Factor — Incest Sentence Affirmed: Defendant contended that the sentencing court erred in augmenting a sentence for incest simply because defendant did not show remorse or admit guilt. The Supreme Court noted that St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), prohibits enhancement of a sentence solely because a defendant is not remorseful or refuses to be accountable for the defendant's conduct. However, in this case, the sentencing court did not rely solely on defendant's attitude in enhancing the incest sentence but also considered defendant's risk of reoffending, risk to society, prospects for rehabilitation, character, background, history, and mental and physical functioning. Thus, Shreves was distinguishable, and the sentence was affirmed. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

Driver's License Suspension Limited to One Year When Original Sentence and Suspension Discharged: Following his involvement in a fatal car accident in 1994, Parpart was sentenced to a 2-year prison sentence followed by an 8-year placement in an appropriate program, and Parpart's driver's license was suspended for the entire 10-year period. In 1999, Parpart's sentence was discharged, and he requested reinstatement of his driver's license in 2000, but the request was denied. During the following year, Parpart was twice convicted of driving with a suspended license. The Department of Justice, Motor Vehicle Division, assumed that Parpart's 1994 suspension extended through 2004 and that any subsequent violations required continuation for a like period under 61-5-212, so two additional 10-year suspension periods were added for each violation, extending the suspension to 2024. Parpart challenged the constitutionality of the initial license suspension and the two subsequent license suspensions. The District Court granted summary judgment for the Department, and Parpart appealed. Without addressing the constitutional issues, the Supreme Court held that the sentencing court had the authority to impose the initial license suspension as a condition of the sentence, but once the sentence was discharged in 1999, the suspension was discharged as well. Parpart should have appealed the denial of his request for reinstatement rather than disregarding it and driving without a license, but because the 1994 sentence was discharged, the Department's authority to suspend Parpart's license for each of the subsequent violations was limited to 1 year, pursuant to 61-5-208. Thus, because Parpart's two 1-year suspensions would have ended in 2002, Parpart was entitled to reinstatement of driving privileges upon compliance with 61-5-218. Parpart v. Dept. of Justice, 2004 MT 4, 319 M 182, 84 P3d 1 (2004).

Addition of Written Sentencing Conditions Not Enunciated Orally at Hearing — Johnson Applied: Drube failed to complete a sex offender program, so the District Court revoked his suspended sentence and sentenced him to a 9-year term, with commitment to the Department of Corrections for the first 5 years and the remainder to be served at the state prison. The court specified that the prison portion of the sentence be suspended as long as Drube met sentencing conditions, including completion of a long-term aftercare program. Drube appealed the sentence on grounds that the court imposed a condition on the sentence that was impossible to fulfill and because the written revocation and sentencing order differed from the oral sentence enunciated at the sentencing hearing. Reviewing the sentence for legality, the Supreme Court affirmed. Drube presented nothing establishing that it would be impossible to complete the sex offender program within the reinstated 5-year commitment to the Department. Arguing that eight written conditions added to the suspended sentence by written order should be stricken, Drube

cited St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), for the proposition that when written and oral sentences differ, the oral order prevails. The Supreme Court agreed with the general rule in Lane, but noted that the rule is not absolute. Under St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480 (2000), when deciding whether a subsequent written sentencing order is unlawful because it contains conditions not enunciated orally, the court first determines whether a defendant was afforded the opportunity to respond to the inclusion upon sufficient notice at hearing and second whether the portion of the written sentence substantively increases the defendant's loss of liberty and sacrifice of property. Here, all the conditions in the 2002 written revocation and sentencing order were contained either in Drube's original sentence or in a 2001 revocation and sentencing order and thus were not new or unknown to Drube, who had the opportunity to respond to the conditions placed on the sentence, nor did Drube present any argument that the eight conditions substantively increased the loss of liberty or sacrifice of property. Thus, the 2002 sentencing order was not rendered unlawful by the addition of conditions not imposed orally at the sentencing hearing. St. v. Drube, 2003 MT 138, 316 M 156, 69 P3d 1182 (2003).

Adequate Nexus Between Alcohol Consumption and Sexual Assault to Warrant Substance Monitoring as Sentencing Condition for Sex Crime: As a condition of probation for Flanagan's 10-year suspended sentence for felony sexual assault, the District Court required that Flanagan: (1) submit to alcohol and drug testing at the probation officer's request; (2) undergo a chemical dependency evaluation and, if recommended, chemical dependency treatment; and (3) not possess alcohol or drugs or frequent places where alcohol is the main item of sale. Citing St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), Flanagan protested the conditions on grounds that they had no nexus to the offense or the environment in which it was committed. The Supreme Court distinguished Ommundson, noting that Flanagan himself connected the assault charge to his alcohol consumption in requesting a mental evaluation to determine whether his substance use rendered him capable of acting knowingly. There was a sufficient connection between the offense and Flanagan's chronic alcohol consumption to warrant imposition of the parole conditions, and the sentencing court was affirmed. St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003).

Sentence Based on Refusal to Admit Guilt Violative of Right Against Self-Incrimination: Shreves was convicted of deliberate homicide and sentenced to 100 years in prison, with no parole for 60 years. At trial, Shreves chose to testify on his own behalf and assert his innocence, and at sentencing, Shreves chose not to testify, but his counsel indicated that Shreves maintained his innocence. The District Court imposed the sentence based in significant part on Shreves' failure to show remorse or responsibility. Shreves appealed on grounds that it was improper to hold his refusal to admit to the crime against him in determining the sentence. The state contended that the sentencing court properly considered the lack of remorse as a factor relevant to Shreves' rehabilitation and the danger presented to the community and argued that the lack of remorse was based on trial testimony and evidence. The Supreme Court considered whether Shreves adequately invoked the right to maintain silence, the scope of the oral sentence that controlled over the subsequent written sentence as it related to the entire sentence, and the District Court's decision to base its sentence in large part on Shreves' refusal to admit to the crime. Although lack of remorse can be considered as a sentencing factor, a sentence that is based on a refusal to admit guilt cannot be upheld. Here, the Supreme Court was unable to find a sentencing distinction between punishing Shreves for remaining silent and the proper consideration of Shreves' failure to show remorse. A sentencing court may not draw a negative inference of lack of remorse from a defendant's silence at sentencing when the defendant has maintained innocence throughout the proceedings. Shreves was improperly penalized for maintaining his innocence pursuant to the constitutional right to remain silent. The sentence was therefore illegal. Shreves' conviction was reversed, and the case was remanded for resentencing. St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), distinguished in St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004), and St. v. Burkhart, 2004 MT 372, 325 M 27, 103 P3d 1037 (2004). See also St. v. Imlay, 249 M 82, 813 P2d 979 (1991), St. v. Kelly, 265 M 298, 876 P2d 641 (1994), St. v. Fuller, 276 M 155, 915 P2d 809 (1996), and St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

District Court Error in Sentence Providing for No Parole and Setting Out Conditions for Parole: The District Court sentenced Gilbert to serve 5 years without the possibility of parole because of his extensive criminal history. The District Court also stipulated that upon complying with certain conditions Gilbert could be eligible for parole. The Supreme Court held that absent statutory authority, the District Court could not retain jurisdiction to alter Gilbert's sentence. The Supreme Court also held that it would not attempt to determine the District Court's intent

with respect to the contradictory sentence provisions and remanded the case for the District Court to clarify its sentence. Gilbert v. St., 2002 MT 258, 312 M 189, 59 P3d 24 (2002).

Repeal of Dangerous Offender Statute Retroactively Applied: In 1995, the Legislature repealed 46-18-404, which required sentencing judges to determine whether an offender was dangerous or nondangerous for parole eligibility purposes. Parker was designated a dangerous offender for parole eligibility when initially sentenced in 1986, and when the District Court resentenced Parker in 1999 after his suspended sentence was revoked, he was again designated a dangerous offender, even though 46-18-404 had been repealed. The state conceded that the District Court had no authority to impose a dangerous offender designation in 1999 when the designation was repealed in 1995, but contended that the error was harmless because the District Court had the authority to provide the same result by restricting parole eligibility pursuant to this section. The Supreme Court disagreed. The proper remedy was to strike the portion of the sentence that was illegal and amend the judgment to that limited extent. Thus, the portion of the sentence designating Parker as a dangerous offender was vacated. St. v. Parker, 2002 MT 162, 310 M 418, 51 P3d 484 (2002).

No Requirement That Defendant Be Informed of Federal Firearms Prohibitions Resulting From State Conviction of Partner Assault — Direct Versus Collateral Consequences of Plea — Denial of Motion to Withdraw Guilty Plea Affirmed: Liefert pleaded guilty in Justice's Court to charges of partner assault and was subsequently charged under federal law 18 U.S.C. 922 with unlawfully possessing a firearm, following a hunting investigation. After federal charges were filed, Liefert moved to withdraw the guilty plea, contending that good cause existed because the Justice's Court did not inform him of the federal prohibition on possessing a firearm as a result of the plea under Montana law. The motion was denied in Justice's Court and in District Court, which cited St. v. Reynolds, 253 M 386, 833 P2d 153 (1992), and held that Liefert did not need to be informed of the federal prohibition because it was a collateral consequence of Liefert's sentence. Liefert appealed to the Supreme Court, which affirmed. Although the Supreme Court has previously held that there is no appeal to District Court from the denial of a motion to withdraw a guilty plea in Justice's Court, in this case, Liefert's appeal was treated as a motion for postconviction relief, and the Supreme Court proceeded to determine whether Liefert had good cause to withdraw the plea. The court determined whether the District Court erred in disallowing withdrawal of the plea by applying the factors in St. v. Bowley, 282 M 298, 938 P2d 592 (1997). The only applicable Bowley factor was the adequacy of the plea colloquy. Liefert did not assert that a judge must inform every defendant of the effect of a guilty plea on gun possession, but presented only the issue of whether a defendant must be informed when charged with partner assault and contended that state sentencing statutes require a judge to inform a defendant of the punishment that can result from a violation. Although never explicitly adopted, the Supreme Court has previously applied the prevailing rule in Torrey v. Estelle, 842 F2d 234 (9th Cir. 1988), that because it is impossible for a judge to inform a defendant of every possible consequence of a guilty plea, judges are required to inform defendants of direct consequences, but are not required to inform of collateral consequences. A consequence is considered direct if it has a definite, immediate, and largely automatic effect and is considered collateral if a defendant has control over whether or not the consequence occurs, if it is not under the control of the sentencing judge, or if it is a procedure under the control of a different sovereign or agency. Notwithstanding Liefert's due process, federal preemption, and negative implication arguments, Liefert had discretionary control over whether he would be in violation of federal law upon entry of a guilty plea for partner assault, and the consequence in this case was under the control of the federal government and thus collateral. Further, the guilty plea was not involuntary simply because it may have been entered to avoid the possibility of a greater punishment at trial or because Liefert may have viewed punishment under the guilty plea as lesser than his immediate personal consequences. Therefore, the District Court did not err in denying Liefert's motion to withdraw the plea. St. v. Liefert, 2002 MT 48, 309 M 19, 43 P3d 329 (2002), followed in Duffy v. St., 2005 MT 228, 328 M 369, 120 P3d 398 (2005).

Sentencing Condition Imposing Banishment From County Not Reasonably Related to Objectives of Rehabilitation and Protection: Muhammad was convicted of sexual intercourse without consent with a minor. One condition of sentencing was banishment from Cascade County. Muhammad contested the condition as violations of his constitutional right to freedom of travel, association, and assembly. In a case of first impression, the Supreme Court declined to address the constitutional arguments, but concluded that the banishment condition was not reasonably related to the goals of rehabilitation and was broader than necessary to protect the victim and society, in violation of the 1997 version of this section, and vacated the banishment condition. St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002).

Sentencing Condition Requiring Posting of Warning Signs at Entrances to Sex Offender's Residence Not Reasonably Related to Objectives of Rehabilitation and Protection: Muhammad was convicted of sexual intercourse without consent with a minor. One condition of sentencing was that Muhammad post a prominent sign at every entrance to his residence stating that children under age 18 were not allowed by court order. Muhammad argued that the sentencing condition violated his constitutional right to privacy and exceeded the statutory parameters regarding the dissemination of information concerning sexual offenders. The state contended that even if the signs revealed confidential criminal justice information, the District Court was allowed to disseminate the information if necessary under 44-5-302 or after finding that the demands of individual privacy did not clearly exceed the merits of public disclosure under 44-5-303. In a case of first impression, the Supreme Court declined to address the constitutional argument, but concluded that the posting requirement was not reasonably related to the goals of rehabilitation and the protection of the victim and society, as required in this section. The condition was unduly severe and punitive to the point of being unrelated to rehabilitation, such a scarlet letter condition tending to overshadow any rehabilitative potential that it might generate. Thus, the posting condition was vacated. St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002).

Order Not to Socialize With Females Under Age 19 Improperly Imposed as Condition of Sentence for Assault of Police Officer: Watson was sentenced to 50 years with 40 suspended for assaulting a police officer. As a condition of the suspended sentence, Watson was ordered not to socialize with females under the age of 19. Watson objected to the condition, and the Supreme Court reversed. Under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), in order to be reasonably related to the objectives of rehabilitation and the protection of the victim and society, a sentencing limitation or condition must have some correlation or connection to the underlying offense for which the defendant is being sentenced. Watson's crime did not involve young girls, and he was never charged with any offense in which the victim was a young girl. The fact that the District Court sincerely believed in the speculation that Watson would sooner or later victimize a young girl did not provide a legal basis for imposing a sentencing condition that was unconnected to the underlying offense. St. v. Watson, 2001 MT 143, 306 M 33, 29 P3d 1026 (2001).

Attendance at Parenting Classes Improperly Imposed as Condition of Sentence for Parole Violation: Smith violated parole, and in addition to a sentence for new jail time, Smith was required to attend parenting classes and to pay the costs of incarceration as a condition of sentencing. Smith argued on appeal that the sentencing court exceeded its authority by imposing the new conditions. The Supreme Court agreed that requiring attendance at parenting classes was improper. Applying St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), the court found no nexus between the underlying charged offenses of felony theft, burglary, and unauthorized control of a motor vehicle and a requirement of participation in parenting classes. Although the classes may have been beneficial to Smith and his family, they could not be made a condition of the sentence when they bore no relation to the conduct for which Smith was convicted. The court reversed on that issue. However, because Smith did not object to the payment of incarceration costs at the revocation hearing, that issue could not be raised for the first time on appeal, so that portion of the sentence was affirmed. St. v. Smith, 2001 MT 111, 305 M 298, 27 P3d 39 (2001).

Payment of Child Support Improper Condition of Sentence for Felony DUI — Victim and Correlation to Underlying Offense Necessary for Imposition of Restitution: Horton was arrested for DUI, and a search of his driving record revealed nine prior DUI convictions. A further search showed that Horton also owed more than $47,000 in back child support. Horton was charged with felony DUI, with driving with a suspended or revoked license, as a habitual traffic offender operating a motor vehicle, and with felony nonsupport. By plea agreement, Horton agreed to plead guilty to the traffic offenses in exchange for dismissal of the nonsupport charge. The plea agreement stated that the state would recommend a 13-month sentence to be served in prerelease, followed by 4 years of probation, and, as a condition of the probationary sentence, provided that Horton would also make regular child support payments plus an additional sum monthly toward the support arrearage. As set out in the agreement, Horton pleaded guilty to the traffic offenses, and the nonsupport charge was dismissed. At sentencing, the habitual traffic offender charge was subsequently dismissed for failure of the state to prove that a valid habitual offender designation was in place at the time of the offense, and in addition, Horton's counsel objected to the court ordering payment of any child support arrearage, arguing that because the nonsupport charge had been dismissed, Horton would be paying restitution on a count for which he had not been convicted. Nevertheless, the court ordered Horton to pay support and promised

to revoke his probation and sentence him to 4 years in prison with no parole if support was not paid. On appeal, Horton argued that the District Court abused its discretion and exceeded statutory mandates when it required him to pay restitution for an offense that was dismissed, citing St. v. Brown, 263 M 223, 867 P2d 1098 (1994), for the position that restitution is statutorily limited to the victim of the crime and that because there was no victim who sustained pecuniary or economic loss as a result of the felony DUI or driving with a suspended or revoked license, restitution was inappropriate. The state argued that Horton was attempting to receive the benefit of the plea agreement—having the felony nonsupport charge dismissed—without holding up his end of the bargain by paying child support. The Supreme Court noted that a plea agreement is subject to contract law and that the court will not assist a defendant in escaping the obligations of a plea agreement once its benefits are received. However, the court also pointed out that a District Court's authority to impose sentences in criminal cases is defined and constrained by statute. The statutory authority for payment of restitution is in 46-18-201, which limits payment of restitution to the victim of a crime for which a defendant is convicted, and because Horton was not convicted of nonsupport, there was no victim to whom Horton could be ordered to pay restitution. The state also contended that ordering Horton to pay child support was proper because under subsection (1) of this section, a sentencing court may impose any condition reasonably related to the objectives of rehabilitation and the protection of the victim and society. The Supreme Court noted that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), a sentencing condition must have some correlation or connection to the underlying offense, but there was no correlation or connection between Horton's conviction for DUI and ordering him to pay child support. Thus, the Supreme Court ordered that the portion of Horton's sentence requiring payment of child support be stricken. St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), followed in St. v. Setters, 2001 MT 101, 305 M 253, 25 P3d 893 (2001).

Denial of Eligibility for Parole for Aggravated Kidnapping — Designation as Dangerous Offender Upheld: When the court found and petitioner did not contest the fact that petitioner participated in a brutal criminal episode, that petitioner is an alcoholic, that alcohol played a role in the offenses, and that there is no guarantee of continued sobriety, the District Court did not err in designating petitioner as a dangerous offender for purposes of parole eligibility. When petitioner's conduct in connection with the crime of aggravated kidnapping was an integral part of the events leading to the victim's death and because petitioner had the opportunity to take action to terminate the kidnapping and thereby prevent the victim's brutal and needless death, the District Court did not err when it denied petitioner eligibility for parole with respect to the conviction for aggravated kidnapping. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Conditions Imposed in Written Judgment and Sentence Different From Those Imposed in Oral Sentence — Lane, Waters, and Simpson Reviewed — Test to Determine Which New Conditions Lawful or Unlawful — Payment of Restitution and Costs: Johnson was sentenced orally for writing bad checks and later contended that four of the conditions imposed in the written judgment and sentence by the District Court were unlawful under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), because they were not announced orally when she was sentenced in open court. The Supreme Court reviewed its decisions in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142 (1999), and St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361 (1999), and reasoned that a written sentence would be held unlawful only if it substantively increased the defendant's loss of liberty or the defendant's sacrifice of property. Under this test, the Supreme Court held that two of the four penalties not mentioned by the District Court in its oral pronouncement of Johnson's sentence were unlawful, those being the restitution ordered to the Missoula County jail of money expended for Johnson's medical care and the requirement that Johnson pay for the costs of her prosecution in District Court. The Supreme Court held that the other two parts of the written sentence, the requirement that Johnson make restitution from money earned in prison and the imposition of certain "civil" restrictions as conditions of Johnson's suspended sentence, such as the requirement that Johnson stay out of gambling casinos, were lawfully imposed because they did not increase the amount of money that Johnson was ordered to pay or increase Johnson's deprivation of liberty in addition to those penalties imposed orally. The requirement for payment from prison earnings only specified where the money was to come from, and the "civil" restrictions were largely mentioned by the District Court at Johnson's sentencing hearing. St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

No Departmental Authority to Modify Sentence During Term of Sentence Through Special Probationary Conditions: Field was sentenced to 16 years in prison with 8 years suspended for felony deviate sexual conduct. After serving a portion of the sentence, Field was placed on

probation. The sentencing judge attempted to incorporate conditions that might be imposed on probation by providing that any agent of the Montana Probation and Parole Bureau (now Department of Corrections) was authorized to arrange and establish rules necessary for Field's probation and to modify, increase, or reduce the requirements of the rules. Based on that authority, 4 years after the sentence, a Department probation officer added a handwritten special parole condition that Field not be alone with minor children. When Field violated the special condition, the probationary sentence was revoked. As amended in 1995, 46-18-801 allows a sentencing judge to incorporate by reference conditions of parole established by the Department at the time that the sentence is imposed, but does not authorize a judge to grant to the Department the power to modify a sentence by imposing subsequent constitutional infringements, such as a restriction on the freedom of association, after the judgment and sentence have been signed. Here, no evidence was offered that the special condition imposed on Field was a standard Department rule at the time of sentencing, and nothing in the sentence allowed for the special condition that Field not be alone with a minor; therefore, Field's incarceration for parole violation was premised on a violation of a special condition that was never imposed by a court. Reversing, the Supreme Court held that sentencing of a defendant to an abridgment of a constitutionally protected interest must be performed by the District Court and articulated at the time of sentencing, not modified by a probation officer 4 years after a sentence is imposed. St. v. Field, 2000 MT 268, 302 M 62, 11 P3d 1203, 57 St. Rep. 1123 (2000).

New Sentence Restriction Added Upon Revocation of Suspended Sentence Stricken: If a District Court finds that a defendant has violated the terms or conditions of a suspended sentence, the court may revoke the suspended sentence and require the defendant to serve either the sentence imposed or any lesser sentence, but nothing in 46-18-203 authorizes a court to impose additional restrictions when revoking a suspended sentence. (See 2001 amendment to this section, which allows it.) In this case, the District Court originally sentenced Richardson to 20 years in prison for felony sexual assault against a child, with all but 70 days suspended, conditioned in part upon completion of a sex offender treatment program. Richardson failed treatment and admitted violating other conditions of the suspended sentence, so the sentence was revoked, and Richardson was sentenced to prison for the remainder of the 20-year sentence. Additionally, the court conditioned Richardson's parole eligibility upon successful completion of the first two phases of sexual offender treatment in prison. The additional restriction on the sentence was error, and the case was remanded for the limited purpose of striking that condition from the sentence. St. v. Richardson, 2000 MT 72, 299 M 102, 997 P2d 786, 57 St. Rep. 320 (2000), following St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997).

No Sentence Enhancement for Use of Weapon in Assault on Police Officer: Because a conviction for assault on a police officer requires proof of use of a weapon, an additional sentence for use of a weapon under 46-18-221 violates the double jeopardy provision of the Montana Constitution. St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000), following St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999).

Authority to Amend Written Judgment to List Reasons for Parole Restriction: Defendant contended that the District Court erred in failing to state its reasons for restricting parole eligibility in the court's original written judgment and that further error occurred when the court amended the written judgment, following remand from the Sentence Review Division, to list the reasons parole was restricted. Under 46-18-117 (now repealed), the District Court may correct an erroneous sentence at any time to correct clerical errors and to make the record reflect what was actually decided, as long as the correction does not set aside the judgment or change what was originally intended. Here, the amended judgment was consistent with the oral pronouncement of judgment and merely set forth the reasons for imposing the parole restriction. Further, 46-18-117 (now repealed) allows correction of a sentence following remand from an appellate court. The Sentence Review Division functions as part of the appellate process. Thus, when the Division remanded the matter to the District Court for clarification, the court had the express statutory authority to issue an order amending the written judgment to list its reasons for imposing the parole eligibility restriction. St. v. Christianson, 1999 MT 156, 295 M 100, 983 P2d 909, 56 St. Rep. 613 (1999).

Heinous Nature of Crime Alone Justifying Parole Restriction: Defendant raised several contentions in arguing that the District Court improperly imposed a parole eligibility restriction as part of a sentence for the mitigated deliberate homicide of his 3-year-old daughter. The District Court commented at sentencing that it felt "somewhat as the representative of [the] now deceased child". Defendant alleged that the statement showed undue partisanship and indicated failure of the court to act as an objective judicial officer. However, when viewed in the context of the entire proceeding, the comment underscored the court's conclusion that the heinous, brutal

nature of the crime was sufficient reason alone to withdraw the privilege of parole eligibility. Citing St. v. Heit, 242 M 488, 791 P2d 1379 (1990), the Supreme Court also noted that it had in the past upheld parole restrictions based upon the heinous nature of the offense. Imposition of the restriction was not an abuse of the court's broad sentencing discretion. St. v. Christianson, 1999 MT 156, 295 M 100, 983 P2d 909, 56 St. Rep. 613 (1999). See also St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

Parole Period Not to Be Reduced by Good Time Credit — Good Time Allowance Properly Limited: The sentencing court restricted Wilson's right to earn any good time against a 30-year term during which Wilson was ordered ineligible for parole. Wilson maintained that this section contained no language that would allow the District Court to restrict a defendant's right to earn a good time allowance. Good time allowances were authorized by 53-30-105 (now repealed) and operated as a credit on a prisoner's sentence. Upon review of the sentencing order, the Supreme Court concluded that Wilson was not limited in earning good time against the sentence, but rather that the 30-year period of ineligibility for parole was not to be reduced by any good time credits that Wilson received toward the total sentence. The restriction was within the sentencing court's authority, and the sentence was affirmed. St. v. Wilson, 1999 MT 52, 293 M 429, 976 P2d 962, 56 St. Rep. 220 (1999).

Application of Weapon Enhancement Statute to Felony Conviction When Underlying Offense Requires Proof of Weapon Use Unconstitutional Under Montana Double Jeopardy Provision: When presented with the question of whether the weapon enhancement statute, 46-18-221, violates the double jeopardy provisions of Art. II, sec. 25, Mont. Const., the Supreme Court held that the Montana Constitution affords greater protection against multiple punishment than the federal constitution and that application of the weapon enhancement statute to felony convictions when the underlying offense requires proof of the use of a weapon violates Montana's constitutional double jeopardy provision. In the instant case, the only factor raising Guillaume's charge from misdemeanor assault to felony assault (now assault with a weapon) was the use of a weapon. The distinction between the two offenses and the different penalties imposed by each offense is the Legislature's way of punishing a criminal defendant for the use of a weapon in committing an assault. Thus, when the weapon enhancement statute was applied to the felony assault (now assault with a weapon) conviction, Guillaume was subjected to double punishment—once when the charge was elevated from misdemeanor assault to felony assault (now assault with a weapon) and again when the weapon enhancement statute was applied. This is exactly what double jeopardy was intended to prevent. The state's argument, that double jeopardy did not protect against multiple punishments for the same offense because that protection is not explicit in the constitutional language, failed because the fifth amendment to the U.S. Constitution has been held in N.C. v. Pearce, 393 US 711, 23 L Ed 2d 656, 89 S Ct 2072 (1969), to protect against multiple punishments for the same offense, and the Montana Constitution provides at least the same protection or greater. Further, the fact that legislative modification of the felony assault (now assault with a weapon) statute could achieve the same result as the present sentencing scheme did not mean that double jeopardy did not apply in this case. St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999), distinguishing St. v. Davison, 188 M 432, 614 P2d 489 (1980), and St. v. Zabawa, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996), followed in St. v. Brown, 1999 MT 31, 293 M 268, 975 P2d 321, 56 St. Rep. 139 (1999), St. v. Roullier, 1999 MT 37, 293 M 304, 977 P2d 970, 56 St. Rep. 157 (1999), St. v. Aguilar, 1999 MT 159, 295 M 133, 983 P2d 345, 56 St. Rep. 629 (1999), St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000), St. v. Weitzel, 2000 MT 86, 299 M 192, 998 P2d 1154, 57 St. Rep. 368 (2000), and St. v. Gustafson, 2000 MT 364, 303 M 386, 15 P3d 944, 57 St. Rep. 1554 (2000), and distinguished in St. v. Park, 2001 MT 157, 306 M 98, 30 P3d 1062 (2001). Aguilar was followed in St. v. Gustafson, 2000 MT 364, 303 M 386, 15 P3d 944, 57 St. Rep. 1554 (2000). Guillaume will not be retroactively applied to cases not pending on direct appeal or to cases that were final when that opinion was issued. St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999). Nichols was overruled in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), to the extent that the Supreme Court refused to retroactively apply Guillaume.

Sentencing Condition Required to Have Correlation or Connection to Underlying Offense: Ommundson pleaded guilty to felony DUI. In imposing sentence, the District Court considered a presentence investigation that documented Ommundson's criminal history, which included more than 10 convictions for indecent exposure. The court also considered a sex offender evaluation, which determined that Ommundson qualified for community-based treatment. The court committed Ommundson to the Department of Corrections for 54 months, with all but 6 months suspended on condition that Ommundson participate in a sex offender treatment

program and not have any contact with children without adult supervision. Ommundson did not object to the condition prohibiting contact with children, so that issue was not cognizable on appeal. However, on the issue of whether the District Court had authority to impose a condition of participation in a sex offender program as a penalty for DUI, the Supreme Court held that this section allows only the imposition of sentencing limitations reasonably related to the objectives of rehabilitation and the protection of the victim and society. That authority is broad, but not without limit. In order to be reasonably related, a sentencing limitation or condition must have some correlation or connection to the underlying offense for which the defendant is being sentenced. In the present case, the requirement that Ommundson participate in a sex offender program was not reasonably related to the rehabilitation of a DUI offender or to the protection of society from drunk drivers. The Supreme Court reversed the part of Ommundson's sentence requiring that he participate in a sex offender program. St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620, 56 St. Rep. 70 (1999), following St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982), and St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990), distinguishing Dahlman v. District Court, 215 M 470, 698 P2d 423, 42 St. Rep. 550 (1985), St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988), and St. v. Blanchard, 270 M 11, 889 P2d 1180, 52 St. Rep. 54 (1995), and followed in St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), St. v. Setters, 2001 MT 101, 305 M 253, 25 P3d 893 (2001), St. v. Smith, 2001 MT 111, 305 M 298, 27 P3d 39 (2001), and St. v. Watson, 2001 MT 143, 306 M 33, 29 P3d 1026 (2001), and St. v. Armstrong, 2006 MT 334, 335 M 131, 151 P3d 46 (2006). In St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008), the Ommundson nexus rule was expanded to allow a sentencing judge to impose a particular condition of probation as long as the condition has a nexus either to the offense for which the offender is being sentenced or to the offender. However, offender-related conditions may be imposed only in cases in which the history or pattern of conduct to be restricted is recent and significant or chronic. A passing, isolated, or stale instance of behavior or conduct is insufficient to support a restrictive probation condition imposed in the name of offender rehabilitation. Ashby was followed in St. v. Stiles, 2008 MT 390, 347 M 95, 197 P3d 966 (2008), St. v. Sadowsky, 2008 MT 405, 347 M 192, 197 P3d 1018 (2008), and St. v. Park, 2008 MT 429, 347 M 462, 198 P3d 321 (2008). Stiles was followed in St. v. Russette, 2008 MT 413, 347 M 285, 198 P3d 791 (2008).

Discovery of Shotgun Case During Routine Walk-Through of Probationer's Residence Constituting Reasonable Grounds for Further Warrantless Search: Probationer Stucker allowed a voluntary tour of his residence by probation officers, who discovered two weapons cases in plain view in the master bedroom. One case contained a bow, which Stucker was allowed to possess under the terms of his probation; the other contained a semiautomatic shotgun, which constituted contraband under the probation conditions. The discovery of the shotgun case in plain view constituted reasonable grounds for the officers to conduct a warrantless search of the residence to determine if additional weapons were present. The District Court did not err in denying Stucker's motion to suppress the fruits of the search. St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999).

Reservation of Right to Specify Ineligibility for Parole Upon Subsequent Revocation of Suspended Sentence — Lack of Authority in District Court: When Lindeman was sentenced for sexual assault and incest, the District Court reserved the right, in the event that Lindeman ever violated a condition of probation and his suspended sentence was imposed, to specify that Lindeman would be ineligible for parole until he completed a sex offender treatment program. When Lindeman failed to complete the program and the state requested that Lindeman's probation be revoked and the suspended sentence imposed, Lindeman objected to the District Court's imposition of the condition preventing parole. The Supreme Court held that under St. v. Finley, 276 M 126, 915 P2d 208 (1996), the only punishment that the District Court could impose was the suspended sentence or a lesser penalty and that the District Court was without authority to impose the additional condition. The Supreme Court noted that this section, the statutory provision relied upon by the District Court when it reserved the right to impose the condition, applies only to the original sentence under 46-18-201 and that the District Court had no authority to impose the condition upon subsequently revoking the suspended sentence. St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997), followed, with regard to the impropriety of new sentence restrictions added upon revocation, in St. v. Richardson, 2000 MT 72, 299 M 102, 997 P2d 786, 57 St. Rep. 320 (2000).

Improper to Reserve Right, at Time of Sentencing, to Impose Additional Restrictions on Probation: The District Court, which sentenced defendant to an imprisonment term and suspended the sentence, had no authority to reserve the right to impose additional restrictions during the term of probation. St. v. Wilson, 279 M 34, 926 P2d 712, 53 St. Rep. 1034 (1996).

Restitution Not Conditioned on Suspended or Deferred Sentence — Restitution Upheld as Additional Restrictions on Sentence: Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged the District Court's recommendation that she be required to make restitution if she was released on parole or supervised release. The Supreme Court noted that it had previously held in St. v. Bourne, 259 M 274, 856 P2d 222 (1993), that a District Court has the power under this section to recommend restitution and payment of supervision fees as a condition of parole. St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

Illegal Search of Person but Lawful Search of Vehicle — Vehicle Search Upheld as Probation Search and Not "Fruit of Poisonous Tree": Deputy Turner watched New make several turns in his vehicle without signaling and, after determining by his vehicle license plate that New was on probation, stopped the vehicle and searched New. Upon discovering drugs in New's pocket, Turner impounded the vehicle. Detective Jacobs questioned New, and New gave Jacobs approval to search the vehicle. Then Jacobs talked to Forsyth, New's probation officer, who conducted the search of New's vehicle with Jacobs. Turner's search of New's pockets was subsequently held illegal but the District Court refused to quash evidence taken from the vehicle as a result of Forsyth's search. The Supreme Court affirmed, holding that the search of the vehicle was not the "fruit of the poisonous tree", the illegal personal search of New, but was justified upon the independent grounds that Forsyth had previously determined that he wanted to search New's vehicle because of pending charges of violations of the conditions of New's probation. St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996).

Lack of Authority to Determine Parole Eligibility — Reversible Error: When the District Court lacked the statutory authority to reserve the right to determine a defendant's parole eligibility but did so anyway, reversible error was committed. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), distinguished in St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997), and followed in St. v. Rennick, 1999 MT 155, 295 M 97, 983 P2d 907, 56 St. Rep. 611 (1999).

Eligibility for Parole or Supervised Release Properly Denied — Danger to Society: The District Court properly denied Blake eligibility for parole or participation in a supervised release program based on evidence that in committing murder, Blake acted unpredictably and without motivation, showed no true remorse for the crime, and, if released, would be a further danger to society. St. v. Blake, 274 M 349, 908 P2d 676, 52 St. Rep. 1269 (1995).

Completion of Sexual Offender Treatment Program Proper Condition of Sentence for Sex Crime: The District Court did not err in requiring the completion of a sex offender treatment program as a condition of sentence upon conviction for sexual assault when the condition related to defendant's need for rehabilitation and to the protection of society. St. v. Larson, 266 M 28, 878 P2d 886, 51 St. Rep. 638 (1994).

Restitution Order for Present Asset Forfeiture Reversed — Condition of Present Sentence Void: Brown was convicted of felony criminal endangerment and negligent homicide after killing one pedestrian and injuring another when he lost control of his vehicle. The District Court sentenced Brown to a 30-year prison term, with 10 years suspended, and ordered Brown to make restitution. As part of the order for restitution, the District Court ordered that several of Brown's assets be sold and that the proceeds be turned over to his victims. The Supreme Court held that the statutory provisions relied on by the District Court to impose forfeiture were improperly relied on in that they limited the District Court only to conditions that could be imposed during the suspended portion of Brown's sentence. Because Brown was required to first serve a prison term, forfeiture could not be immediately ordered. St. v. Brown, 263 M 223, 867 P2d 1098, 51 St. Rep. 24 (1994).

Delegation of Sentencing and Incarceration Power to Probation Officer — No Power to Impose Sentence in Absence of Specific Statutory Authority: The District Court erred when it ordered a suspended sentence that included 30 days in jail plus a possible additional 180 days in jail to be served at the discretion of the supervising probation officer. Maximum jail time allowed under 46-18-201 is 180 days. Further, this section, which allows additional restrictions on sentence, does not authorize a District Court to delegate sentencing discretion to a probation officer. The Supreme Court refused to expand statutory authority for a District Court to impose conditions that it considers necessary for rehabilitation to allow delegation of the actual and direct power and discretion to incarcerate for extended periods of time from the court to a probation officer. St. v. Hatfield, 256 M 340, 846 P2d 1025, 50 St. Rep. 101 (1993).

Designation as Extremely Dangerous Person — Limitation of Eligibility of Parole: In its reasons for sentence, the District Court characterized defendant as "shrewd, self-serving,

deceitful, extremely dangerous, a high risk for escape and for future crimes". This designation was sufficient to take defendant out of the category of nondangerous offender (designation under 46-18-404, repealed in 1995) and to warrant limiting his eligibility for parole for 25 years. St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991), followed in St. v. Peck, 263 M 1, 865 P2d 304, 50 St. Rep. 1692 (1993).

Sexual Offender's Course Proper Additional Limitation for Sexual Assault: In imposing additional limitations and sentence, there must be a correlation between the limitations and either the rehabilitation of the offender or the protection of society. The nature of a sexual assault constituted a significant connection between the crime and the need for defendant to attend a sexual offenders program. Therefore, imposition of attendance at the course as a condition of sentence was proper. St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990), followed in St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991), and St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620, 56 St. Rep. 70 (1999).

Factual Basis of Brutality of Crime Not Specified as Rationale for Parole Denial — No Error in Case of Heinous Crime: In its findings of fact, the trial court thoroughly laid out the events constituting the perpetuation of a homicide, clearly demonstrating the pointless and brutal nature of the act. While the court failed to articulate that the brutality of the crime distinguished the defendant from others convicted of deliberate homicide, it did state that the defendant possessed violent tendencies and felt no remorse and that the sentence was imposed because of the obvious importance of protecting society. Although the factual basis for this conclusion was not precisely specified as the rationale for parole denial, the heinous nature of the crime made the rationale for the denial obvious. St. v. Heit, 242 M 488, 791 P2d 1379, 47 St. Rep. 919 (1990).

Setting Parole Conditions When Imposing Maximum Sentence: In an embezzlement case, the judge imposed the maximum sentence without suspending or deferring any portion of it. The court also ordered restitution and that an auto parts store owned by the defendant be sold with the proceeds going towards restitution. The defendant argued that the court could not order the sale of his business or restitution because it had imposed the maximum sentence. The Supreme Court ruled that the judge could impose the restitution conditions but that the conditions could only take effect at the time, if ever, the defendant was paroled. St. v. Klippenstein, 239 M 42, 778 P2d 892, 46 St. Rep. 1498 (1989), followed in St. v. Todd, 257 M 321, 849 P2d 175, 50 St. Rep. 288 (1993), and in St. v. Bourne, 259 M 274, 855 P2d 222, 50 St. Rep. 791 (1993).

Failure to Appear for Probation Officer-Ordered Urine Sample — Minimal Grounds Required to Order Testing: It was error for the District Court to dismiss a petition for revocation of suspended sentence based on the defendant's failure to appear for purposes of providing a urine sample because the probation officer did not have some articulable reasons for requesting the test. Under the standard established in St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988), the Supreme Court held that a probation officer's opinion that rehabilitation could not begin until the defendant was free of drugs and the fact that the defendant had not passed a drug test since his arrest constituted sufficient evidence to establish reasonable grounds for requiring a urine sample. St. v. Sigler, 236 M 137, 769 P2d 703, 46 St. Rep. 244 (1989).

Warrantless Search by Probation Officer Lawful if Based on Reasonable Suspicion of Probation Violation: Defendant's deferred sentence was revoked after a warrantless search initiated by her probation officer pursuant to the terms of her probation revealed that defendant possessed dangerous drugs in violation of the terms of her probation. Search by a probation officer of his probationer's car, premises, or other belongings is lawful if it is based on the probation officer's reasonable suspicion of a probation violation. St. v. Small, 235 M 309, 767 P2d 316, 46 St. Rep. 9 (1989), followed in St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996), and St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998).

Warrantless Police Search of Probationers' Car and Residence Allowed — Reasonable Grounds Standard — Fogarty Overruled: A police officer's warrantless search of the probationers' car and residence based on the officer's observations and with permission of the probation officer, in compliance with probationary conditions, did not violate the fourth amendment. St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), is specifically overruled and the "reasonable grounds" standard of Griffin v. Wis., 483 US 868, 97 L Ed 2d 709, 107 S Ct 3164 (1987), is adopted. Police cooperation with probation officers is to be encouraged as an important aid to effective administration of the probation system. To impose a warrant requirement for residential searches, on the basis of rights enjoyed by persons not on probation, would artificially raise a probationer's privacy interest to a level inconsistent with conditional liberty status. St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988), clarified, regarding the fact that probation officers, other than the one assigned to a probationer, are not precluded from authorizing a probationary search, in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55

St. Rep. 1235 (1998), and followed in St. v. Boston, 269 M 300, 889 P2d 814, 51 St. Rep. 1142 (1994), St. v. Burchett, 277 M 192, 921 P2d 854, 53 St. Rep. 590 (1996), St. v. Beaudry, 282 M 225, 937 P2d 459, 54 St. Rep. 324 (1997), St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999), and St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006).

Ineligibility for Parole Not in Conflict With Rehabilitation: Defendant asserted that his designation as ineligible for parole conflicted with society's desire to rehabilitate him because serving a minimum 40-year term would make him a permanent public charge, discourage his pursuit of education and development of skills, and whither his religious faith. However, it was within the discretion of the District Court, in light of the violence associated with defendant's crimes and the frequency of their commission, to restrict defendant's opportunity for parole in order to protect society. In re Petition of Arledge, 232 M 450, 756 P2d 1169, 45 St. Rep. 1188 (1988).

Three Hundred-Year Prison Sentence of Mentally Ill Defendant Upheld: Sentencing defendant, who was found mentally ill but criminally culpable, to the Montana State Prison for a term of 300 years without the possibility of parole or furlough was not cruel and unusual punishment. The District Court had stated, among other things, that defendant was very dangerous and there was no treatment program that would alter his behavior. St. v. Watson, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984).

Prison's Custody Classification as Alleged Violation of Plea Bargaining Agreement — Withdrawal of Plea Denied: Under a plea bargain agreement, defendant was sentenced to 10 years as a nondangerous offender (see 1995 repeal of 46-18-404) without parole. Upon entering prison, he was held in close custody for 24 months under prison rules calling for dangerous offenders and those sentenced without parole to serve 24 months in close custody prior to being considered for transfer to lower, more amenable custody levels. The prosecution, defense counsel, defendant, and judge were all unaware of those rules. Defendant was not entitled to withdraw his plea on the ground he was kept in close custody for 24 months in violation of his plea agreement. There was no violation of the agreement, nor was he entitled to the additional good time credits he would have received had he not been held so long in close custody. Prison officials take many factors into account in making custody reclassifications, and there was no guarantee he would have been held in close custody only for the time he claimed he should have been upon entry to the prison. St. v. Mesler, 210 M 92, 682 P2d 714, 41 St. Rep. 939 (1984).

Alcoholics — Refraining as Valid Condition of Suspended Sentence: One who, because of addiction or character disorder, is unable to control his excessive drinking of alcoholic beverages has no constitutional or statutory right to release free from limitations on his use of alcohol, either on parole or pursuant to a suspended sentence. There was no merit to appellant's contention that it was vindictive and unreasonable or illegal to require him, an acknowledged alcoholic, to refrain from drinking as a condition of his probation or parole. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982), followed, with regard to the requirement for nexus between the sentencing limitation or condition and the underlying offense, in St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620, 56 St. Rep. 70 (1999).

Parole Conditions — Application to Suspended Portion of Sentence: Parole conditions set by Board of Pardons (now Board of Pardons and Parole) also applied to period of suspended sentence where court passing sentence did not set conditions upon suspended portion of sentence, particularly where that court expressly directed that when defendant was not in prison he was to be under the supervision of the Board and court could revoke the suspended sentence for violation of those conditions. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Parole Eligibility — Ex Post Facto Application: Defendant committed a crime in 1975 for which he was tried and convicted in 1979. In sentencing defendant, the trial court declared him a dangerous offender under 46-18-404 (now repealed), and declared him ineligible for parole under 46-18-202. Both of these statutes became effective July 1, 1977. Application of a law which eliminates or delays a defendant's parole eligibility after the criminal offense has been committed is ex post facto as applied to that defendant and is therefore unconstitutional. St. v. Beachman, 189 M 400, 616 P2d 337 (1980).

Sentencing — Ineligibility for Parole or Supervised Release — Vagueness: Petitioners contend that this section's provision allowing a judge who imposes a sentence of more than 1 year in prison to add a restriction barring parole and supervised release is invalid because it is too vague in defining the supposed offense. This section does not define an offense. It does not create a new offense, nor does it forbid or require the doing of an act. Its sole purpose is to permit a District Judge, in the course of ordinary sentencing, to determine that a defendant should serve his full sentence for the protection of society. Cavanaugh v. Crist, 189 M 274, 615 P2d 890 (1980).

Sentencing — Not Delegation of Legislative Authority: Petitioners contend that 46-18-202(2) unlawfully delegates legislative authority to the judicial and executive branches of government. The thrust of this argument appears to be that the section vests too much discretion in District Judges and prosecuting attorneys. A District Judge is particularly well positioned to predict whether the restriction (ineligibility for parole or supervised release) is necessary for the protection of society. The determination of whether to impose the restriction is manifestly with the District Judge alone. Cavanaugh v. Crist, 189 M 274, 615 P2d 890 (1980).

Sentencing — Restrictions on Parole and Supervised Release Permissible: Section 46-18-202 provides that whenever a sentence of imprisonment in the state prison for a term exceeding 1 year is given, the court may impose the restriction that the defendant be ineligible for parole and participation in the supervised release program while serving his term. If the court finds the restriction necessary, it shall impose the restriction as part of the sentence and set forth its reasons for imposing the restrictions in writing. This statute is not a sentence enhancement statute. It does not permit District Judges to add any time beyond the statutory maximum underlying the offense. Petitioners, who both pleaded guilty, were represented by counsel and were given presentence hearings. Parole and participation in the supervised release program are privileges, not rights. Petitioners were not denied due process or equal protection in being sentenced under 46-18-202. Cavanaugh v. Crist, 189 M 274, 615 P2d 890 (1980).

Review of Reversed Convictions: The defendant argued that his 10-year sentence without an opportunity for parole or participation in the supervised release program is improper because the District Court relied on a presentence investigation report that contained false and misleading information. The defendant asserts that the court relied on a felony conviction in Washington that was reversed, an Oregon felony conviction that was reversed, and a Wyoming felony conviction that was constitutionally infirm. The defendant also contends that his "rap" sheet with 45 entries was prejudicial because only 16 of the entries reflect convictions. On review, the Supreme Court held that in light of the defendant's extensive criminal background he experienced no material prejudice or substantial interference with his rights because of the trial court's consideration of convictions that were later reversed. St. v. Olsen, 189 M 43, 614 P2d 1061 (1980).

Unlimited Search and Polygraph Provisions on Probation Unconstitutional: As conditions for imposition of a suspended sentence, defendant was required to submit to an unlimited search provision by any lawful authorities and to submit to a polygraph examination upon the request of any law enforcement officer. The Supreme Court, when reviewing the revocation of defendant's suspended sentence, held that the unlimited polygraph examination condition was overly broad and thus an invalid condition of probation and that the unlimited warrantless search provision is an unconstitutional condition of probation. The Supreme Court said that a sentencing court cannot inject prosecuting attorneys or law enforcement officials into the probation process by granting them direct rights to search the probationer, his home, or his vehicle. A type of probable cause or some identifiable reason is required before a search clause may be exercised to search the probationer or his vehicle. The legal interests of innocent third persons living with a probationer are to be protected by requiring a search warrant before searching the probationer's home. Polygraph examinations as a condition of probation can be effectively contained within constitutional parameters by confining the right to demand a polygraph examination to the probation officer. St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), overruled in St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988).

Improper Sentencings — Excess of Maximum — Failure to Prove Essential Element: Where the District Court sentenced defendant to 20 years for burglary and the maximum possible sentence was 10 years, the Supreme Court reduced the sentence to 10 years. The Supreme Court also reversed the 10-year sentence the defendant received upon his conviction for felony theft, as the State failed to prove the essential element that the value of the property taken exceeded $150. All other sentences received by the defendant, as well as the provision of the sentence for no parole or supervised release, were within the maximum allowed by law and as such were within the discretion of the sentencing judge and were not overturned. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Persistent Felony Offender Sentence — Presumption of Constitutionality: Following a conviction for attempted deliberate homicide, the defendant was sentenced as a persistent felony offender to 30 years in prison without parole. While the defendant claims the sentence to be unconstitutional, it was held in St. v. Karathanos, 158 M 461, 493 P2d 326 (1972), that a sentence within statutory limits is presumed to be constitutional. The defendant has the burden of overcoming the presumption and has not done so. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Ex Post Facto Application of Sentencing Statute: The provision in the sentence rendering the defendant ineligible for parole or supervised release until one-half of his sentence was served was improper since the law authorizing such a provision did not become effective until after the commission of the crime of which the defendant was convicted. St. v. Azure, 179 M 281, 587 P2d 1297 (1978); St. v. Gone, 179 M 271, 587 P2d 1291 (1978).

Improper Condition of Probation — Fine:

The Supreme Court held the imposition of $500 fine or payment as a condition of probation after deferred imposition of sentence to be a nullity and of no force or effect and that the same be vacated and set aside to conform with St. v. Babbit, 175 M 433, 574 P2d 998 (1978). St. v. Petko, 177 M 229, 581 P2d 425 (1978). [But see 1981 amendment to 46-18-201 allowing payment of a fine as a condition of probation.]

The imposition of a condition of probation that requires the payment of a fine having no reasonable association to the crime committed or to public protection is a nullity and of no force or effect. St. v. Babbit, 175 M 433, 574 P2d 998 (1978). [But see 1981 amendment to 46-18-201 allowing payment of a fine as a condition of probation.]

Probationer Search Clause: Execution of a probationer search clause by law enforcement personnel, being instrumental in achieving the objectives of probation, is a proper condition of probation. St. v. Means, 177 M 193, 581 P2d 406 (1978).

Improper Condition of Probation — Sentence to Leave County: Suspending a sentence on the condition that the defendant leave and remain out of the county has no force or effect other than to suspend the sentence; the court has no power to pronounce a sentence in the absence of specific statutory authority. The prisoner is by law subject only to the rules and regulations of the Board of Pardons (now Board of Pardons and Parole), and floating is void as an attempted exercise of pardoning power. Ex parte Sheehan, 100 M 244, 49 P2d 438 (1935).

Law Review Articles

Discussion of In re Meidinger, 37 Mont. L. Rev. 265 (1976).

Collateral References

Propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants. 46 ALR 6th 241.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches. 99 ALR 5th 557.

Travel restrictions: propriety of conditioning probation on not entering specified geographical area. 28 ALR 4th 725.

Intoxicants: propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants. 19 ALR 4th 1251.

46-18-203. Revocation of suspended or deferred sentence.

Commission Comments

1991 Comment: This statute is an attempt to clarify the provisions and procedures for the revocation of a probationary sentence.

Compiler's Comments

2007 Amendment: Chapter 483 in (1) near middle of first sentence after "sentence" inserted "or any condition of supervision after release from imprisonment imposed pursuant to 45-5-503(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), 45-5-603(2)(c), or 45-5-625(4)"; inserted (6)(a)(ii) allowing alternative proof of a violation of a condition of supervision after release from imprisonment imposed pursuant to certain statutes; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

2003 Amendments — Composite Section: Chapter 345 inserted (9) providing that the provisions of this section apply to any offender whose suspended or deferred sentence is subject to revocation regardless of the date of the offender's conviction and regardless of the terms and conditions of the offender's original sentence. Amendment effective April 15, 2003.

Chapter 386 in (7)(a)(iii) at end after "any" substituted "sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence" for "lesser sentence"; and made minor changes in style. Amendment effective April 17, 2003.

Retroactive Applicability: Section 3, Ch. 345, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders in the custody of or under the supervision of the department of corrections on [the effective date of this act]." Effective April 15, 2003.

2001 Amendment: Chapter 493 in (1) in last sentence near middle after "or a probation" inserted "and parole"; inserted (7)(c) authorizing judge to set, modify, or add conditions of probation; and made minor changes in style. Amendment effective May 1, 2001.

Retroactive Applicability: Section 10, Ch. 493, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who are under the custody or supervision of the department of corrections on [the effective date of this act]." Effective May 1, 2001.

1999 Amendment — Code Commissioner Correction: Chapter 52 throughout section substituted references to sentencing judge for references to district court and substituted references to offender for references to defendant; inserted (7)(b) regarding consideration of elapsed time as credit against the sentence; and made minor changes in style. Amendment effective October 1, 1999.

In last sentence of (7)(b) the Code Commissioner substituted "time served in a detention center" for "jail" pursuant to the authority contained in sec. 14, Ch. 52, L. 1999.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

1993 Amendment: Chapter 262 near beginning of (1), after "revocation", deleted "accompanied by an affidavit".

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services" (deleted by Ch. 800), pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 800 substituted (1) concerning petition for revocation, order for revocation, and issuance of warrant for former text that read: "A judge, magistrate, or justice of the peace who has suspended the execution of a sentence or deferred the imposition of a sentence of imprisonment under 46-18-201 or his successor is authorized in his discretion to revoke the suspension or impose sentence and order the person committed. He may also, in his discretion, order the prisoner placed under the jurisdiction of the department of institutions as provided by law or retain such jurisdiction with his court"; in (2), after "revocation", deleted "of a suspended sentence or imposition of a sentence previously deferred"; deleted former (3) that read: "(3) Prior to the revocation of an order suspending or deferring the imposition of sentence, the person affected shall be given a hearing"; inserted (3) concerning applicability of bail provisions; inserted (4) concerning advising defendant of certain rights; inserted (5) concerning when hearing is not required; inserted (6) requiring proof of terms and conditions of suspended or deferred sentence other than failure to pay restitution; inserted (7) concerning authority of court; inserted (8) concerning release of defendant; and made minor changes in style.

1983 Amendment: Near middle of (1), after "successor is authorized" deleted "during the period of the suspended sentence or deferred imposition of sentence"; and inserted (2) relating to filing of and jurisdiction over a petition to revoke.

Applicability of 1983 Amendment: Section 2, Ch. 204, L. 1983, provided that "Section 1 applies to any petition filed after the effective date of this act." The act was effective March 23, 1983, and section 1 amended this section.

1981 Amendment: Substituted "department of institutions (now department of corrections)" for "board of pardons" after "under the jurisdiction of the" in the second sentence.

Case Notes

General 903
Revocation of Deferral 913
Revocation of Suspension 915

GENERAL

Illegal Revocation of Sentence — Habeas Corpus Relief Warranted: The state petitioned to revoke Borgen's suspended sentence, and the District Court granted the petition and resentenced Borgen to incarceration for an additional 14 years. Borgen petitioned for habeas corpus relief. The Supreme Court determined that after an illegal weapon enhancement sentence was subtracted from Borgen's original sentence, the total time remaining on Borgen's suspended sentence was about 9 years, 1 month. However, the petition to revoke the suspended sentence was not filed until 9 years, 8 months after sentencing. Because the legal portion of Borgen's sentence had expired before the petition to revoke was filed, revocation of Borgen's sentence was facially illegal, and Borgen's incarceration constituted a grievous wrong and a miscarriage of justice warranting habeas corpus relief. Therefore, the Supreme Court granted Borgen's petition, vacated the sentence revocation, and ordered that Borgen be released from custody. Borgen v. Sorrell, 2009 MT 143, 350 M 339, 217 P3d 1022 (2009). See also Lott v. St., 2006 MT 279, 334 M 270, 150 P3d 337 (2006).

Due Process in Sentence Revocation Proceeding: Triplett entered into a plea agreement with the state and pleaded guilty to one count of sexual intercourse without consent in exchange for the state dismissing the other two counts. The District Court sentenced Triplett to the state prison for 12 years with 4 years suspended. Triplett was made ineligible for parole until he completed phases I and II of the sex offender treatment program. The court also imposed other conditions upon his suspended sentence. Triplett then petitioned the Sentence Review Division for review of the District Court's sentence. After a hearing, the Sentence Review Division amended Triplett's sentence, imposing a 40-year sentence, all of which was suspended upon specific conditions. The District Court issued an amended judgment and commitment reflecting the Sentence Review Division's action and Triplett was released. On September 28, 2006, the state filed a petition for revocation of the suspended sentence. The District Court issued a bench warrant and Triplett was arrested on October 2, 2006. On October 17, 2006, Triplett made an initial appearance and the court informed Triplett of the allegations in the petition and of his rights. On October 24, 2006, the court conducted an answer hearing, and Triplett denied each allegation of the petition. Triplett's counsel requested at least 3 to 4 weeks in which to prepare for an evidentiary hearing. Based on the parties' schedules and the court's calendar, the court then set an evidentiary hearing for December 22, 2006. After several delays, the parties advised the court they had reached an agreement for adjudication and recommended disposition. Pursuant to the agreement, Triplett answered "true" to some of the alleged violations of his sentence conditions in exchange for the state's agreement to request dismissal of other allegations and to recommend the court impose the sentence it originally imposed, which was 12 years with 4 suspended. Based on his admissions, the court found Triplett did violate the terms of the suspended portion of his previously imposed sentence. The District Court indicated it had not decided whether it would follow the terms of the plea agreement and scheduled a dispositional hearing for May 1, 2007. Stating that it saw nothing in the statutes giving it authority to overturn the amended judgment and commitment of the Sentence Review Division, the court sentenced Triplett to 40 years in the state prison with 20 years suspended. Triplett received credit for 595 days prior time served in prison and in jail during the revocation proceedings. Triplett appealed. The due process rights of a probationer in a revocation proceeding are different from those afforded a defendant in a criminal proceeding. Due process protections for a revocation hearing are codified in 46-18-203. Triplett argued he was denied due process because the state failed to bring him before the judge for his final revocation hearing without unnecessary delay, which he asserted is required by 46-18-203(4). The state argued, and the Supreme Court agreed, that the "without unnecessary delay" language plainly referred to the first court appearance after an offender is arrested pursuant to a revocation petition. Triplett also argued that even if the "without unnecessary delay" language of 46-18-203(4) does not apply to the revocation hearing, minimum due process requirements require that a revocation hearing take place within a reasonable time. The delays at issue in this case arose out of the parties' scheduling needs, particularly Triplett's. Triplett also made multiple requests for change of counsel. Triplett was not in a position to claim the delays were unfair when his counsel procured many of them, either by seeking a continuance or by delaying efforts to schedule a hearing date, and when Triplett's requests for new counsel added to the uncertainty of the schedule. The Supreme Court held that the scheduling of the revocation hearing was fundamentally fair and Triplett's due process rights were not violated. St. v. Triplett, 2008 MT 360, 346 M 383, 195 P3d 819 (2008).

Original Sentence — Sentence Review Decision as Final: Triplett entered into a plea agreement with the state and pleaded guilty to one count of sexual intercourse without consent

in exchange for the state dismissing the other two counts. The District Court sentenced Triplett to the state prison for 12 years with 4 years suspended. Triplett was made ineligible for parole until he completed phases I and II of the sex offender treatment program. The court also imposed other conditions upon his suspended sentence. Triplett then petitioned the Sentence Review Division for review of the District Court's sentence. After a hearing, the Sentence Review Division amended Triplett's sentence, imposing a 40-year sentence, all of which was suspended upon specific conditions. The District Court issued an amended judgment and commitment reflecting the Sentence Review Division's action and Triplett was released. On September 28, 2006, the State filed a petition for revocation of the suspended sentence. The District Court issued a bench warrant and Triplett was arrested on October 2, 2006. On October 17, 2006, Triplett made an initial appearance and the court informed Triplett of the allegations in the petition and of his rights. On October 24, 2006, the court conducted an answer hearing, and Triplett denied each allegation of the petition. Triplett's counsel requested at least 3 to 4 weeks in which to prepare for an evidentiary hearing. Based on the parties' schedules and the court's calendar, the court then set an evidentiary hearing for December 22, 2006. After several delays, the parties advised the court they had reached an agreement for adjudication and recommended disposition. Pursuant to the agreement, Triplett answered "true" to some of the alleged violations of his sentence conditions in exchange for the state's agreement to request dismissal of other allegations and to recommend the court impose the sentence it originally imposed, which was 12 years with 4 suspended. Based on his admissions, the court found Triplett did violate the terms of the suspended portion of his previously imposed sentence. The District Court indicated it had not decided whether it would follow the terms of the plea agreement and scheduled a dispositional hearing for May 1, 2007. Stating that it saw nothing in the statutes giving it authority to overturn the amended judgment and commitment of the Sentence Review Division, the court sentenced Triplett to 40 years in the state prison with 20 years suspended. Triplett received credit for 595 days prior time served in prison and in jail during the revocation proceedings. Triplett appealed, contending that he should have received the original sentence imposed by the District Court. The Supreme Court held that the only logical interpretation of 46-18-203 in light of the authority of the Sentence Review Division is that a sentence imposed by the Division steps into the stead of the previous District Court sentence and, in effect, becomes the "original" sentence for purposes of revocation. The statute says that Division sentences are "final." Only this interpretation can give meaning and purpose to the sentence review process as a "critical stage" of the criminal proceeding. St. v. Triplett, 2008 MT 360, 346 M 383, 195 P3d 819 (2008).

Due Process in Probation Revocation Process Considered Constitutionally Adequate: The following procedures in 46-23-1012 provide adequate due process to an alleged probation violator: (1) the probation officer must file a report of violation within 10 days of the probationer's arrest; (2) the state must bring the probationer before a judge for a hearing on the charges without unnecessary delay after the report of violation is filed; and (3) the state must notify the probationer at the hearing of the alleged probation violations. St. v. Johnston, 2008 MT 318, 346 M 93, 193 P3d 925 (2008). See also St. v. Swan, 220 M 162, 713 P2d 1003 (1986).

No Prosecution for Breach of Suspended Sentence Only: As a condition of Letasky's suspended sentence for partner or family member assault, he was directed to have no contact with the victim. When contact allegedly occurred, Letasky was charged with criminal contempt. Letasky moved to dismiss the charge, but the motion was denied. On appeal, the Supreme Court reversed. A condition of a suspended sentence, unlike a court order, is not an independent mandate of the court, but instead represents a requirement that Montana law allows the court to place upon an order suspending an offender's sentence. An offender may be prosecuted for a crime if the facts that establish the offender's noncompliance with a condition of the suspended sentence also establish the elements of a crime, but an offender may not be prosecuted based only on breach of the condition itself. St. v. Letasky, 2007 MT 51, 336 M 178, 152 P3d 1288 (2007).

Inapplicability of Mental Disease or Defect Sentencing Provisions to Probation Revocation Proceedings: Boulton asserted that because her probation violations were the result of a mental illness, she should have been sentenced to continued probation with intense supervision pursuant to 46-14-311 and 46-14-312, rather than committed to the Department of Corrections. The state argued that sentencing provisions related to a defendant with a mental disease or defect apply only to original sentencing and not to sentence revocation proceedings. The Supreme Court agreed with the state. It is generally irrelevant whether a probation violation may have been committed while a probationer was suffering a mental disease or defect. Rather, the question is whether the purposes of rehabilitation are being achieved and whether, by virtue of subsequent criminal conduct or evidence that a probationer's behavior was not in compliance

with the rules and objectives of the probation, the objectives of probation are best served by continued liberty or by incarceration. The alternative sentencing provisions of 46-14-311 and 46-14-312 do not apply in sentence revocation proceedings, although the revoking court may consider evidence of a mental disease or defect during the proceedings. In the present case, after Boulton pleaded true to multiple probation violations, the revoking court concluded that evidence of Boulton's mental disorders did not warrant placement in the state hospital, consistent with the testimony of Boulton's psychiatrist, and that placement with the Department better served the purposes of probation. Revocation of Boulton's sentence was affirmed. St. v. Boulton, 2006 MT 170, 332 M 538, 140 P3d 482 (2006), following St. v. Averill, 2001 MT 161, 306 M 106, 30 P3d 1059 (2001).

Improper Nunc Pro Tunc Judgments Reducing Credit for Time Served Vacated: By nunc pro tunc judgment, the District Court reduced the number of days of credit that Megard received for prior incarceration after two suspended commitments to the Department of Corrections were revoked, and Megard appealed. The Supreme Court reviewed the sentence for legality, noting that once a valid sentence has been pronounced, a District Court has no authority to modify or change it except as provided by statute. Under 46-18-116(3), a factually erroneous judgment can be corrected at any time, but the original judgments against Megard were not factually incorrect in that Megard was properly credited for time served at that time and the credit did not conflict with the oral pronouncement of Megard's sentence from the bench. Thus, the District Court's amended nunc pro tunc judgments were not within the purview of 46-18-116(3) and, being illegal, were vacated. The case was remanded for reinstatement of the original judgments. St. v. Megard, 2006 MT 84, 332 M 27, 134 P3d 90 (2006), following St. v. Fertterer, 260 M 397, 860 P2d 151 (1993), and St. v. Kroll, 2004 MT 203, 322 M 294, 95 P3d 717 (2004).

Probation Violation — Standard of Review: When a probation violation has occurred, the District Court must exercise its discretion in determining an appropriate action in response to the violation, and the Supreme Court will not intervene absent an abuse of that discretion. St. v. Burke, 2005 MT 250, 329 M 1, 122 P3d 427 (2005), following St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003).

Oral and Written Versions of Original Sentence Requiring Outpatient Sexual Offender Treatment — Violation of Suspended Sentence: The District Court revoked Van Haele's suspended sentence on grounds that he failed to qualify for outpatient sexual offender treatment. Van Haele contended that the sentencing condition was improperly added by amendment and that he was entitled to a hearing on the added condition because it was not part of the original sentence. The Supreme Court disagreed. The requirement could not have been added to the original sentence because it was part of the original oral and written sentence, so no hearing was required. The basis for revoking Van Haele's suspended sentence was therefore not invalid, and suspension was affirmed. St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005).

Credit Allowed for Time Served Concurrently With Other Sentences: Tracy's original sentence in Cascade County was for 10 years suspended with the Department of Corrections, to run concurrently with two other sentences that Tracy received in Yellowstone County. When Tracy violated his release conditions, the District Court in Cascade County revoked the original 10-year sentence but declined to give Tracy credit for the time served in detention pursuant to the Yellowstone County sentences. On appeal, the Supreme Court held that, when read together, 46-18-401 and this section require that Tracy be given credit for time spent in a detention center or on home arrest on all the sentences that were being served concurrently. The case was remanded to calculate and grant appropriate credit. St. v. Tracy, 2005 MT 128, 327 M 220, 113 P3d 297 (2005).

Imposition of More Burdensome Prison Sentence in Place of Placement With Department of Corrections — Illegal Ex Post Facto Application of Former Sentencing Statute: Tracy's original sentence in Cascade County was for 10 years suspended with the Department of Corrections, to run concurrently with two other sentences that Tracy received in Yellowstone County. Tracy eventually discharged the incarceration portions of both Yellowstone County sentences. When Tracy violated his release conditions, the District Court in Cascade County revoked the original 10-year sentence to the Department of Corrections and resentenced Tracy to 10 years at the state prison. Tracy appealed the imposition of the prison sentence. Under the version of this section in effect at the time of Tracy's original offense in 1996, if Tracy violated the terms of his suspended sentence, the District Court could revoke the sentence and require Tracy to serve either the sentence imposed or a lesser sentence. The statute was later amended to require an offender to serve either the sentence imposed or any sentence that could have been imposed as long as the sentence is not longer than the original sentence. The Supreme Court held that a prison sentence

was not the same or less than the original sentence with the Department of Corrections in an appropriate facility or program. Rather, the new sentence imposed an additional, more burdensome condition requiring Tracy to go to prison. Although the new sentence was appropriate under the amended 2003 version of this section, application of the 2003 version to a crime committed in 1996 was an ex post facto application that could not pass constitutional muster, so the Supreme Court vacated the prison sentence and remanded for resentencing under the version of this section in effect at the time of the original judgment. St. v. Tracy, 2005 MT 128, 327 M 220, 113 P3d 297 (2005).

No Standing to Raise Constitutionality of Restitution Statutes Absent Showing of Direct Personal Injury: The 2003 Legislature amended the state restitution statutes, and Thaut sought to challenge the constitutionality of the amendments on numerous grounds. However, Thaut was unable to show a direct personal injury resulting from application of the restitution laws. Pursuant to St. v. Krantz, 241 M 501, 788 P2d 298 (1990), and Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140 (1996), Thaut lacked standing to challenge the constitutionality of the restitution statutes, and the Supreme Court declined to address the issue. St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004). See also St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), in which defendant established direct economic injury and thus standing to challenge the constitutionality of repayment conditions on equal protection grounds through the District Court's order to repay $2,398 in costs of appointed counsel.

Misdemeanor Contempt Not Enforceable More Than One Year After Sentence Expired: On April 9, 1998, Dexter was sentenced in Justice's Court to 1 year in jail for third offense DUI. The sentence was suspended on condition that Dexter serve 90 days in jail and pay a $770 fine, but Dexter did neither. Sentence revocation proceedings could have been instituted under this section during the time of Dexter's sentence, but were not. About 3 years later, Dexter was arrested on an outstanding warrant after the suspended sentence had expired, and the Justice's Court invoked its contempt powers to sentence Dexter to jail time for failing to fulfill the conditions of the suspended sentence. The Justice of the Peace contended that under 3-10-401, contempt proceedings could be brought at any time, and the District Court concluded that the Justice's Court had the authority to enforce compliance with the lawful sentencing order, but on appeal, the Supreme Court reversed. Under the penalties in 3-1-519 in effect at the time (repealed in 2001), contempt of court constituted a misdemeanor crime, which was required under 45-1-205(2)(b) to be prosecuted within 1 year of commission. The last day on which Dexter could have committed contempt was April 9, 1999, so prosecution was required to be commenced by April 9, 2000. Because the contempt prosecution did not commence until Dexter was arrested on January 23, 2002, the Justice's Court lacked jurisdiction to hold Dexter in contempt for failure to comply with the terms of a sentence that expired in April 1999. Dexter v. Shields, 2004 MT 159, 322 M 6, 92 P3d 1208 (2004). See also Milanovich v. Milanovich, 200 M 83, 655 P2d 959 (1982).

No Constitutional Violation in Admission of Telephonic Testimony at Revocation Hearing — No Abuse of Discretion Upon Good Cause: To accommodate counsel, the state moved to allow the admission of telephonic testimony from two law enforcement officers who could not attend Megard's sentence revocation hearing in person. Megard objected, relying on Rule 611, M.R.Ev. (Title 26, ch. 10), and In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994). The District Court held that neither the rule nor Bonamarte applied and that Megard's fundamental rights would be adequately protected, so the motion was granted. On appeal, Megard also contended that allowing the telephonic testimony violated his due process right and the right to confront witnesses. The Supreme Court affirmed. The District Court was familiar with the witnesses. Allowing telephonic testimony did not impede the ability to judge a witness's credibility in relation to other witnesses, who corroborated the testimony, because knowledge of a witness's identity and credentials may constitute a special circumstance under which telephonic testimony is allowed. Although telephonic testimony is generally not allowed in trials absent special circumstances or the parties' consent, evidentiary rules do not apply to revocation proceedings. Because a revocation hearing is not a criminal trial, Megard had no constitutional right to confront witnesses at the hearing. Further, Megard's due process rights were not violated because his counsel actually cross-examined the witnesses, and good cause existed for the District Court to admit the telephonic testimony to address scheduling conflicts. Even if error occurred, it was harmless, given Megard's failure to establish prejudice pursuant to St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003). St. v. Megard, 2004 MT 67, 320 M 323, 87 P3d 448 (2004).

No Requirement to Bifurcate Revocation Hearing Into Evidentiary and Dispositional Phases: Pedersen contended that he was entitled to a bifurcated sentence revocation hearing, with the

evidentiary and dispositional phases separated into two distinct hearings, and that the only proper time for introducing and rebutting evidence was during the evidentiary phase of the hearing. However, Pedersen cited no authority for the bifurcation proposition, and the Supreme Court declined to adopt it. The District Court has wide latitude to control courtroom proceedings, and it was not an abuse of the court's discretion to allow the state to present evidence during the dispositional phase, rather than divide the hearing into distinct proceedings for evidentiary purposes. St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003).

Probation Revocation Based on Statements of Defense Counsel Without Waiver of Right to Hearing by Defendant Violative of Due Process: At Finley's rerevocation hearing, his attorney told the court that Finley had decided to admit violating the terms of his probation. The court accepted the admission, revoked probation, and sentenced Finley to 10 years in prison. Finley immediately asked to withdraw the admission, but the request was denied. On appeal, Finley contended that his due process rights were violated because he never personally admitted any alleged violations or waived the right to a revocation hearing. The state countered that Finley did not refute counsel's statement, so the court was correct to accept counsel's statement as true and revoke Finley's suspended sentence. In a case of first impression, the Supreme Court agreed with Finley. Under this section, a probationer is guaranteed a hearing before the sentencing court. Alternatively, a probationer may waive the right to a full revocation hearing and admit the alleged violation or accept favorable relief granted by the court, but for a waiver of a fundamental right to be recognized by the courts, the waiver must be informed, intelligent, and voluntary, and this applies to waiver of a revocation hearing as well. Courts may not presume waiver based on the representations of counsel. Here, in accepting counsel's statement, the District Court committed reversible error when it: (1) failed to admonish Finley regarding his constitutional rights; (2) neglected to ascertain that Finley knew the consequences of admitting a parole violation; (3) failed to determine that Finley voluntarily waived the right to a revocation hearing; (4) accepted a waiver of the right to a hearing based on presumption only; and (5) failed to establish a factual basis for the alleged violation. The state's argument that Finley admitted the violations at a prior initial revocation hearing also failed. The District Court took no notice of the entry of Finley's admission at the prior voided hearing, nor was testimony at the earlier voided proceeding admissible as evidence during the later proceeding. Because Finley's alleged waiver was not informed, intelligent, and voluntary, his due process rights were violated, and the case was remanded. St. v. Finley, 2003 MT 239, 317 M 268, 77 P3d 193 (2003). See also Gagnon v. Scarpelli, 411 US 778 (1973), and People v. Hall, 760 NE 2d 971 (Ill. 2001).

No Credit for Time Served on Informal House Arrest: The District Court conditioned Gulbranson's release on bond with informal house arrest. Gulbranson contended that the house arrest restricted his liberty in a manner sufficiently similar to incarceration, as provided in 46-18-403, to require that he be given credit for time served. However, Gulbranson did not cite any legal authority to support the contention, and the Supreme Court declined to consider the unsupported argument. Instead, the Supreme Court held that the informal house arrest in this case was not house arrest as provided for in Title 46, ch. 18, part 10, so this section did not require that Gulbranson's sentences be credited with time served for that period. Gulbranson failed to show that the District Court was statutorily required to credit him for time served while released on bond, so it was within the District Court's discretion whether to allow credit. Absent an abuse of discretion, the District Court was affirmed. St. v. Gulbranson, 2003 MT 139, 316 M 163, 69 P3d 1187 (2003), followed in St. v. Clark, 2008 MT 112, 342 M 461, 182 P3d 62 (2008), and in St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009).

Probationer Not Entitled to Good Time Credit for Time Served on Original Sentence: Williams' suspended sentence for felony assault was revoked after Williams violated the terms of the suspension. Williams requested that he be credited for good time that he served on the suspended sentence. The District Court concluded that Williams was a probationer, not a parolee, and declined to grant good time credit. Williams appealed, but the Supreme Court affirmed. Williams' original sentence did not provide that Williams be treated as a parolee, so as a probationer, Williams was not entitled to credit for good time under McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001). St. v. Williams, 2003 MT 136, 316 M 140, 69 P3d 222 (2003).

Dual Statutory Revocation Proceedings — Formal Revocation Proceedings Not Subject to Time and Procedural Requirements of Probation Violator Prison Diversion Program: Section 46-23-1012 authorizes two distinct methods of commencing revocation. One method is the formal proceeding outlined in 46-23-1012(1) and this section. The other method is an abbreviated proceeding initiated by detention by the probation and parole office, known as the probation violator prison diversion program, set forth in 46-23-1012(3) through (5), and the abbreviated

proceeding may be converted to a formal revocation pursuant to 46-23-1012(5). The time and procedural requirements of the probation violator prison diversion program, as provided in 46-23-1012(3) through (5), do not apply to the formal proceeding initiated pursuant to 46-23-1012(1) and this section, which requires that an offender be brought before the court without unnecessary delay. Gonzales v. Mahoney, 2001 MT 259, 307 M 228, 37 P3d 653 (2001), followed in St. v. Finley, 2003 MT 239, 317 M 268, 77 P3d 193 (2003).

No Credit Allowed for Time Served While on Probation: Gundrum was placed on probation but was later arrested on a probation violation. Gundrum contended that he should receive credit for the time that he was on probation under 46-18-402, even though he was not incarcerated. The Supreme Court disagreed. Section 46-18-402 applies to credit for time served while incarcerated and thus does not apply to Gundrum. Further, under this section and McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001), a judge has complete discretion to consider elapsed time that an offender is on probation and may expressly allow or reject the time as credit on the offender's sentence. Here, the District Court considered the nature of Gundrum's violations and the magnitude of his financial obligations before denying credit for time served on probation. Gundrum did not assert that the District Court failed to follow the mandates of this section, and the Supreme Court affirmed the denial of credit for time that Gundrum served on probation. Gundrum v. Mahoney, 2001 MT 246, 307 M 96, 36 P3d 890 (2001).

No Power of State to Refile Petition to Revoke Suspended or Deferred Sentence Once Original Sentence Expires: Vance claimed that because a probable cause hearing was not held within 36 hours of arrest under a bench warrant for probation revocation, the provisions of St. v. Giddings, 2001 MT 76, 305 M 74, 29 P3d 475 (2001), should apply and the revocation proceedings should be rendered void. The state agreed that Giddings applied, but indicated that a petition for revocation of deferred sentence would be refiled pursuant to 46-23-1012. Vance pointed out that the original deferred sentence had expired, and argued that the refiling of a petition for revocation of an expired sentence was prohibited under this section. The state contended that the reasoning in St. v. Goebel, 2001 MT 73, 305 M 53, 31 P3d 335 (2001), implied that the original sentence was tolled during the period of the void proceedings for purposes of refiling a petition to revoke. The Supreme Court agreed with Vance. The fact that the previous revocation proceedings were defective and therefore void ab initio did not mean that time stood still during the defective proceedings, nor do Giddings and Goebel suspend the provisions of this section, which clearly state that the petition for revocation must be filed with the sentencing court during the period of suspension or deferral. Nothing in law allows the state to refile a revocation petition to relate back to the date of the probation violation, and once the term of the sentence expires, the state has no more power to refile to revoke the suspended or deferred sentence than it would have to file an original proceeding to revoke under those circumstances. Vance v. Acton, 2001 MT 243, 307 M 71, 36 P3d 881 (2001).

Discretionary Sentencing Authority Including Reassignment of Original Consecutive Terms as Concurrent Terms: Frazier was sentenced in Cascade County to 55 years with 25 suspended on four felony counts. The first three sentences were ordered to run consecutively, and the sentence for the fourth count was ordered to run concurrently with the sentence for the third count. After serving 7 years, and 2 weeks before his scheduled release from a prerelease center, Frazier was convicted in Silver Bow County of two counts of felony drug violations and was sentenced to concurrent prison terms of 8 years and 5 years, to run concurrently with the outstanding Cascade County sentences. About 2 months later, the Cascade County Attorney petitioned to revoke the suspended portions of the Cascade County sentences on grounds that Frazier had violated the terms of the suspensions. The Cascade County District Court revoked the suspended sentences and recommended Frazier's participation in a boot camp program, ordering that if the program was successfully completed, the court would consider reimposing a probationary sentence for the remaining term of the sentences. Frazier appealed on grounds that the court made several mistakes and believed that it lacked authority upon revocation to assign Frazier's three consecutive terms to run concurrently. The Supreme Court agreed with Frazier and remanded for resentencing. When the District Court determined to retain jurisdiction after sentence revocation, the court had statutory authority to alter the terms and conditions of the original sentences, as long as the new sentence remained within the parameters set forth by the original sentencing court and imposed no new restrictions, and that discretionary authority included the power to reassign Frazier's terms to run concurrently when they were originally designated to run consecutively. St. v. Frazier, 2001 MT 210, 306 M 358, 34 P3d 96 (2001). See also St. v. Docken, 274 M 296, 908 P2d 213 (1995), and St. v. Gordon, 1999 MT 169, 295 M 183, 983 P2d 377 (1999).

Failure to Complete Prison Sex Offender Program Not Because of Defendant's Willful Conduct — Consideration of Incarceration Alternatives Constitutionally Required: Lee was sentenced to two concurrent 40-year terms in prison for sexual intercourse without consent and attempted sexual intercourse without consent and was ineligible for parole during the first 10 years of the sentence unless a sex offender treatment plan was successfully completed. Lee entered prison in 1995 and immediately requested enrollment in Phase I of the two-phase program. Lee was finally enrolled in Phase I after a 3-year wait, successfully completed that phase, and was placed on a waiting list for enrollment in Phase II. Because of a sitdown strike, Lee was unable to complete Phase II by his scheduled release date. The state petitioned to revoke Lee's suspended sentence because the program was not completed, and Lee moved to dismiss on grounds that the failure to complete treatment was not his fault. The District Court found that Lee's failure to complete the program was not due to any volitional conduct on Lee's part, but the court nevertheless determined that the failure constituted a violation of the terms of the suspended sentence and ordered Lee to serve the remaining 30 years on each count, declaring Lee ineligible for parole until both phases of treatment were completed. Lee appealed on grounds that the court violated his right to due process because it was impossible to complete the program during incarceration because of prison waiting periods and the length of the program. The Supreme Court agreed. In St. v. Williams, 1999 MT 240, 296 M 258, 993 P2d 1 (1999), it was held that a court could revoke a suspended sentence even though a probationer's failure to comply with the terms of the sentence was not willful, and the court in this case affirmed Williams to the extent that violations of nonfinancial probationary conditions need not necessarily be willful in order to justify revocation. However, the probationer in Williams was unable to gain acceptance into sex offender programs because of a lack of social skills, immaturity, and "acting out" behavior, whereas Lee was unable to access the programs because of actions of the state. Due process required the trial court to consider whether there were alternatives to incarceration that would further the purpose of Lee's suspended sentence. The Supreme Court remanded for a determination of whether there were any reasonable alternative measures other than continued incarceration because to do otherwise would deprive Lee of his conditional freedom simply because the state prevented him from completing the sex offender program while imprisoned. St. v. Lee, 2001 MT 176, 306 M 173, 31 P3d 998 (2001), distinguished in St. v. Price, 2008 MT 319, 346 M 106, 193 P3d 921 (2008).

Imprisonment for Probation Violation Not Considered Double Jeopardy: Walker was convicted of felony DUI, sentenced to 6 months in prison followed by 2 years of supervised probation, and fined $1,000. Following 6 months' confinement, Walker was released and began serving the probationary sentence but violated the terms of probation about 1 year later. During revocation hearings, Walker contended that additional incarceration pursuant to 61-8-731 for probation violations would constitute double jeopardy because the entirety of the 6 months' prison term had already been served. The District Court disagreed, revoked probation, and committed Walker to the Department of Corrections for the time remaining on the original 2-year probation. Walker appealed, but the Supreme Court affirmed. The court found no distinction between the revocation of a suspended sentence and the revocation of a probationary sentence. In either case, the subsequent conduct, not the original offense, forms the basis for revocation, and the sentencing court retains jurisdiction over the defendant during the period of probation. Walker conceded that 61-8-731 provides by its terms for revocation of probation and for incarceration upon violation of probation. The revocation is not new punishment for the criminal offense of felony DUI, but rather constitutes the consequence of violating probationary conditions. Walker failed to bear the burden of proving 61-8-731 unconstitutional beyond a reasonable doubt on double jeopardy grounds. St. v. Walker, 2001 MT 170, 306 M 159, 30 P3d 1099 (2001), distinguishing St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999).

Proof of Constructive Possession of Firearm Sufficient to Show Possession in Violation of Probationary Condition: Caekaert, who had been earlier placed on probation subject to the condition that he "not own, possess, or be in control of any firearms . . . as defined by State or Federal law", was found to have firearms in an outbuilding on real property that he owned. Caekaert possessed a key to the building in which the firearms were found but claimed that the firearms belonged to friends or relatives and that he did not exercise control over the firearms because the owners had not given him permission to do so. The District Court found Caekaert to have violated the terms of his probation and revoked the probation. Citing St. v. Meader, 184 M 32, 601 P2d 386 (1979), the Supreme Court found that the District Court did not abuse its discretion in revoking the probation because there was sufficient evidence that Caekaert was in possession of the weapons because he exercised constructive possession over the weapons. St. v. Caekaert, 1999 MT 147, 295 M 42, 983 P2d 332, 56 St. Rep. 583 (1999).

Finding of Violation of Suspended Sentence Predicate to Continuation of Sentence With Modifications or Additional Conditions: As part of the sentencing order, the original sentencing court provided that Nelson not be considered for parole until successfully completing the sexual offender program at Montana State Prison. Nelson was never paroled from the prison. Instead, he was discharged from the prison and began the suspended portion of his sentence in Big Horn County. The Big Horn County Attorney filed for revocation of Nelson's suspended sentence, alleging that Nelson violated and disregarded the rules of probation by failing to successfully complete a sexual offender program. The court denied the petition for revocation but imposed additional conditions to the original suspended sentence. When Nelson violated one of the new conditions, his suspended sentence was revoked. The clear language of this section requires that the trial court find that the defendant violated the terms and conditions of the suspended sentence as a predicate to exercising its authority to continue the suspended sentence with modified or additional terms and conditions. A District Court has no power to impose a sentence in the absence of specific statutory authority. Having failed to make the statutorily required predicate finding that Nelson violated the terms of the suspended sentence, the court was without authority to continue the suspended sentence with modified or additional terms and conditions and thus without authority to revoke Nelson's suspended sentence for violation of the added condition. St. v. Nelson, 1998 MT 227, 291 M 15, 966 P2d 133, 55 St. Rep. 949 (1998), followed, with regard to the Supreme Court's plenary review of a question of law concerning whether a District Court had authority to take a specific action, in St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005).

Modification of Original Sentence as Dangerous Offender Not Allowed: At the time of Moorman's original sentencing in 1982, 46-18-404 (now repealed) did not allow a District Court in a revocation proceeding to add new terms or conditions to a defendant's original sentence. The court could not impose a dangerous offender designation upon revocation of a suspended sentence when the original sentence was silent on the issue or designated the defendant as nondangerous. However, Moorman was designated a dangerous offender when originally sentenced. Under the version of this section in effect at the time of sentencing, the court could revoke the suspension or impose sentence and order Moorman committed but could not modify the sentence. Therefore, Moorman's original dangerous offender designation remained a part of his sentence upon the subsequent revocation of his suspended sentence. St. v. Moorman, 279 M 330, 928 P2d 145, 53 St. Rep. 1173 (1996).

Privilege Against Self-Incrimination as Self-Executing Under Threat of Penalty: Citing numerous federal cases, the Supreme Court held that a person claiming protection against self-incrimination generally must affirmatively invoke it, even when the government is unquestionably attempting to compel an answer. If a witness under compulsion to answer makes disclosures instead of claiming the privilege, the witness cannot be said to have been compelled to self-incriminate. A defendant's ignorance of the right against self-incrimination generally does not excuse the failure to claim the privilege, and if the defendant fails to assert the privilege, it is considered waived. However, failure to invoke the privilege does not preclude the benefit if the defendant is placed in a situation in which the defendant is not free to admit, deny, or refuse to answer. In that case, the privilege is said to be self-executing. One such case is when the government prevents a voluntary invocation of the privilege by threatening to penalize the individual if the privilege is invoked. A command to speak, under threat of loss of liberty, implicitly forecloses the option of remaining silent. In the present case, Fuller was convicted of rape and sexual assault and was required to enter sexual offender treatment. As part of the treatment, he was required to disclose his offense history and was told that failure to do so would result in revocation of probation and subsequent imprisonment. Fuller complied, admitting prior offenses, which were reported and for which he was then charged and arrested. Fuller was essentially ordered to incriminate himself to avoid punishment, and despite the holding in St. v. Imlay, 249 M 82, 813 P2d 979 (1991), that a sentencing court lacks authority to revoke probation solely on grounds that a defendant refuses to admit guilt, the threat of punishment was credible and Fuller's reliance on the belief that the court could carry out the threat was reasonable. Because the state improperly compelled Fuller to disclose past criminal acts in violation of his right against compelled self-incrimination and his right to remain silent, the state was prohibited from using any of the elicited information as the basis for a later, separate criminal prosecution. St. v. Fuller, 276 M 155, 915 P2d 809, 53 St. Rep. 325 (1996), discussed in St. v. Woods, 283 M 359, 942 P2d 88, 54 St. Rep. 617 (1997), and followed in St. v. Woods, 2005 MT 186, 328 M 54, 117 P3d 152 (2005). See also Minn. v. Murphy, 465 US 420, 79 L Ed 2d 409, 104 S Ct 1136 (1984), and In re A.N. & C.N., 2000 MT 35, 298 M 237, 995 P2d 427, 57 St. Rep. 155 (2000).

Increase in Restitution Based on Revised Sentencing Provisions Barred as Ex Post Facto: At a sentence revocation hearing, the District Court considered Leistiko's motion to reduce his monthly restitution payments based on his financial situation. The court reduced payments for 3 months but increased the total restitution by $10,000. Leistiko relied on the 1983 version of this section that was in effect at the time of the crime and the initial sentencing, contending that the court did not have authority to apply the 1991 revised version of this section to increase restitution. Under Weaver v. Graham, 450 US 24, 67 L Ed 2d 17, 101 S Ct 960 (1981), an increase in the severity of a criminal punishment compared with that authorized at the time the act was committed is a criminal conduct measure coming within the ban on ex post facto laws. The Supreme Court applied the test set out in Miller v. Fla., 482 US 423, 96 L Ed 2d 351, 107 S Ct 2446 (1987), in determining whether the constitutional ban on ex post facto laws was violated: (1) the law must be retrospective; and (2) it must disadvantage the offender affected by it. The revised version of this section changed the legal consequences of Leistiko's crime by allowing the District Court to change the sentence, placing a more onerous burden on Leistiko than he could have foreseen at the time he committed the crime and entered into the original plea agreement. The portion of the order imposing additional restitution was vacated under Art. II, sec. 31, Mont. Const. St. v. Leistiko, 255 M 458, 844 P2d 97, 49 St. Rep. 1104 (1992), followed in In re Young, 1999 MT 195, 295 M 394, 983 P2d 985, 56 St. Rep. 759 (1999), St. v. Shockley, 2001 MT 180, 306 M 196, 31 P3d 350 (2001), and St. v. Brister, 2002 MT 13, 308 M 154, 41 P3d 314 (2002).

Abuse of Discretion in Probation Revocation for Failure to Complete Sexual Offender Program — Standard of Review: Applying the standard set out in St. v. Robinson, 190 M 145, 619 P2d 813 (1980), that revocation of probation is appropriate if the judge is reasonably satisfied that the conduct of probationer was not what he agreed it would be if liberty was granted, the District Court revoked the probation of defendant who failed to complete a sexual offender program even though defendant had a 100% record in attending 76 group therapy and 13 individual therapy sessions, each session requiring a 150-mile round trip, and had paid $2,450 in counseling fees but still owed $1,260. The standard of review applied by the Supreme Court is whether the District Court abused its discretion. An abuse occurred in this case because revocation was based on defendant's failure to pay the full fees and his expression of religious beliefs at the therapy sessions, rather than a willingness to participate in the written portions of the program. The District Court could have required defendant to establish a payment plan or enter another program, but the terms of probation did not require him to give up his religious beliefs or take food from the family table to pay for counseling. St. v. Lundquist, 251 M 329, 825 P2d 204, 49 St. Rep. 65 (1992), distinguished in St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997). The standard of review was also applied in St. v. Price, 2008 MT 319, 346 M 106, 193 P3d 921 (2008).

Refusal to Admit Guilt Following Conviction — Augmentation of Sentence Prohibited: Defendant's sentence for sexual assault was suspended on the condition that he complete a sex offender treatment course. Despite attempts to seek enrollment in two separate courses, he was not accepted for treatment because he consistently denied committing a sexual offense. Upon evidence of his failure to complete a course, his suspended sentence was revoked and he was sentenced to 5 years in the state prison. The Supreme Court, following the decision in Thomas v. U.S., 368 F2d 941 (5th Cir. 1966), found that even though defendant had already been convicted of the crime he now denies, the criminal justice system still provides opportunities to challenge that conviction. These legally guaranteed rights would be rendered meaningless if defendant could be compelled to admit guilt as a condition to his continued freedom. While defendant would be foreclosed from invoking the protection of such procedures to establish his innocence, the reliability of an admission of guilt would be highly suspect. Additionally, because defendant testified in his own defense at trial and denied committing a sexual crime, by admitting his guilt, he would have abandoned his right against self-incrimination, not only as to the crime for which he was charged but also as to the crime of perjury. Therefore, absent any grant of immunity, when a defendant has consistently denied guilt, his right against self-incrimination should be protected and augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination is prohibited. St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), overruling any holding to the contrary in St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990), and distinguished in St. v. Butler, 272 M 286, 900 P2d 908, 52 St. Rep. 745 (1995), and St. v. Osborne, 2007 MT 217, 339 M 45, 167 P3d 405 (2007).

"Fundamental Fairness" Standard: At a probation revocation hearing, the standard required is "fundamental fairness". The hearing is not a criminal trial. The defendant has already been convicted of a crime, and the hearing is for the purpose of establishing violations of the prisoner's probation. The process must be flexible enough to allow the court to consider documentary

evidence that may not meet usual evidentiary requirements. Therefore, the admission into evidence of police officers' hearsay statements was not error, and defendant's constitutional right to due process was not violated. St. v. Kingery, 239 M 160, 779 P2d 495, 46 St. Rep. 1587 (1989).

Probation Revocation — Due Process Requirements: In a probation revocation hearing, the due process requirements are: (1) written notice of the violations; (2) disclosure of evidence against the probationer; (3) opportunity to be heard in person and to present witnesses and evidence; (4) a neutral tribunal; (5) a written statement by the fact finder of the evidence relied on and the reasons for the revocation; (6) the right to cross-examine witnesses unless the hearing body finds good cause for disallowing confrontation; and (7) the right to counsel in some circumstances. The record in this case establishes that all of these requirements were met and that defendant's constitutional rights were upheld. St. v. Kingery, 239 M 160, 779 P2d 495, 46 St. Rep. 1587 (1989).

Closure of Probation Revocation Hearing — Interruption a Contempt — Prior Notice of Closure Not Required: The public and the press have the right, with limited exceptions, to attend and observe probation revocation hearings. In a proper case, a District Court may close such a hearing. When a hearing is properly closed, no member of the public or representative of the press may interrupt the due course of the hearing in a manner that might defeat the reason for closure. Such an interruption constitutes a contempt of court. A District Court may proceed on an ad hoc basis, without giving prior notice, to make a closure decision in accordance with the facts and circumstances facing it at the time. State ex rel. Great Falls Tribune Co., Inc. v. District Court, 238 M 310, 777 P2d 345, 46 St. Rep. 1292 (1989).

No Preliminary or Probable Cause Hearing — Due Process: Defendant was not denied due process for the state's failure to provide an appearance denominated as a preliminary or probable cause hearing prior to a probation revocation hearing. After a defendant is arrested for violation of probation, he is brought before the court without unnecessary delay for a hearing on the violations charged. No two-stage hearing process is necessary under this statutory system because the reasons for having a preliminary hearing are absent. The revocation hearing is held promptly, before a defendant is returned to prison. The defendant receives notice of the hearing and alleged violations, and the hearing is held before a judge, rather than an administrative body. Section 46-23-1013 (now repealed) sets forth the procedure to follow after the arrest of a probationer for violation of probation. Because the scheme affords due process, the statute is not an unconstitutional violation of due process. St. v. Swan, 220 M 162, 713 P2d 1003, 43 St. Rep. 259 (1986). See also St. v. Kingery, 239 M 160, 779 P2d 495, 46 St. Rep. 1587 (1989).

Credibility of Probationer — Weak Alibi Testimony: Defendant's assertion that admission in probation revocation hearing of inadmissible probation violations had a detrimental impact on his credibility was pure fantasy. The record on appeal disclosed that if anything affected his credibility, it was his own testimony and that of his alibi witnesses that he was not present at the time and place of the alleged assault on his mother-in-law (one of the bases for petition for probation revocation) in the face of her positive identification of him as her assailant. St. v. Steffans, 195 M 395, 636 P2d 836, 38 St. Rep. 1976 (1981).

Evidence of Offenses Not Charged — Harmless Error: Admission in evidence, in probation revocation hearing, of alleged probation violations not contained in the petition to revoke was error but did not affect defendant's substantial rights and must be disregarded where two of the alleged violations were not made a basis of revocation of probation and, although the third was, the State introduced no evidence on the matter and all evidence on it was introduced by defendant. Defendant could not predicate reversible error on testimony he himself introduced. St. v. Steffans, 195 M 395, 636 P2d 836, 38 St. Rep. 1976 (1981).

Offenses Not Charged — Elimination From Consideration: The District Court, sitting without a jury in probation revocation hearing, is presumed to be able to properly evaluate evidence and determine the credibility of witnesses without regard to incompetent evidence, and that ability was demonstrated where the judge eliminated from consideration all alleged probation violations not charged by petition and affidavit for revocation and therefore erroneously admitted at hearing. St. v. Steffans, 195 M 395, 636 P2d 836, 38 St. Rep. 1976 (1981).

Scope of Court's Authority: The sentencing alternatives provided in the predecessor to this section were mutually exclusive, and a District Court lacked authority, upon revocation of a suspended sentence, to require the defendant to serve 60 days in the county jail followed by 34 months on a suspended sentence. St. v. Downing, 181 M 242, 593 P2d 43 (1979), overruled in St. v. Docken, 274 M 296, 908 P2d 213, 52 St. Rep. 1240 (1995).

Revocation — Correct Information: Rigorous standards are important when the trial court is passing upon the State's motion to revoke a deferred or suspended sentence. The trial judge must

have, and the record must reflect that he has, substantially correct information concerning the defendant before he can affect a defendant's substantial rights by entering an order of revocation. St. v. Knapp, 174 M 373, 570 P2d 1138 (1977).

Preliminary Hearing Not Required to Establish Probable Cause: Where probation was revoked by original sentencing judge, petitioner was not denied minimum standards of due process as petitioner was not arrested until a bench warrant was issued pursuant to the final order of revocation after a hearing at which petitioner was represented at every step by counsel. Where no detention is involved, a preliminary hearing to establish probable cause for filing a petition for imposition of final judgment and sentence is not necessary as no rights of the probationer have been violated. In re Meidinger, 168 M 7, 539 P2d 1185 (1975).

Subsequent Arrest for Violation: When petitioner was placed on probation for 1 year on conditions aimed at rehabilitating him, subsequent imposition of judgment after he violated his probation did not put him in jeopardy in violation of the federal or Montana Constitution. In re Williams' Petition, 145 M 45, 399 P2d 732 (1965).

REVOCATION OF DEFERRAL

Possession of Adult Magazine in Violation of Probation — Deferred Sentence Properly Revoked: A condition of Belanger's deferred sentence prohibited Belanger from using, viewing, or possessing erotica, X-rated videos, or adult books or magazines. At a revocation hearing, Belanger's landlord testified about finding an adult sex magazine in Belanger's room, which Belanger's probation officer described as an adult book or magazine. Belanger did not challenge that opinion but argued on appeal that the District Court could not have determined whether the magazine qualified as pornography or erotica without actually seeing the magazine, which was not introduced into evidence. The Supreme Court dismissed Belanger's argument as irrelevant. The District Court determined that the magazine qualified as an adult magazine, and the evidence was sufficient to support that determination. Revocation of Belanger's probation was affirmed. St. v. Belanger, 2008 MT 383, 347 M 61, 196 P3d 1248 (2008).

Due Process Requirements of Written Statement for Revoking Deferred Sentence — Record of Factfinding and Basis of Review Adequate: The District Court revoked Baird's deferred sentence, but Baird asserted that his due process rights were violated because the court failed to advise him of the reasons for the revocation in a written statement as required in 46-18-102 and Gagnon v. Scarpelli, 411 US 778 (1973). The Supreme Court found Baird's reliance of 46-18-102 and Gagnon to be misplaced. Rather, the sentencing court's memorandum combined with the hearing transcript may provide the necessary written statement explaining the evidence relied on and the reason for the revocation decision. Due process is achieved when the oral and written record support accurate factfinding and appellate review. In Baird's case, when read as a whole, the oral and written records provided an adequate basis for review and were adequate to determine that the District Court's decision to revoke the sentence was based on permissible grounds supported by the evidence. Thus, Gagnon and its progeny were adequately addressed, and Baird's sentence revocation was affirmed. St. v. Baird, 2006 MT 266, 334 M 185, 145 P3d 995 (2006). See also Black v. Romano, 471 US 606 (1985), and St. v. Richardson, 2000 MT 72, 299 M 102, 997 P2d 786 (2000).

Sufficient Evidence of Violation of Deferred Sentence Conditions to Warrant Revocation — No Minor Violation of Probation Agreements: As a condition of Baird's sentence for felony stalking, Baird was to obey all laws, not use alcohol or drugs, and have no contact with his ex-wife other than while exchanging their child at the County Sheriff's office. The state subsequently petitioned to revoke Baird's deferred sentence because of alleged probation violations. The District Court considered the evidence and revoked the sentence, and Baird appealed. Baird asserted that any violations were minor and that there was insufficient information to warrant revocation. The Supreme Court disagreed, noting that under St. v. Aune, 2003 MT 3, 314 M 1, 61 P3d 785 (2003), there are no minor violations of probation agreements and that even one violation may be sufficient for revocation. In this case, Baird admitted to using marijuana, and he loitered around the Sheriff's office after the visitation exchanges in order to have contact with his ex-wife and declare his love. These probation violations were sufficient for the District Court to determine that Baird violated probation, and revocation of the deferred sentence was affirmed. St. v. Baird, 2006 MT 266, 334 M 185, 145 P3d 995 (2006).

Proof of Inability to Pay Restitution — Deferment of Sentence Extended to Allow Payment — Error: A probationer sufficiently proved that her failure to continue restitution payments was not caused by lack of a good faith effort to pay and that her income was insufficient to make even the $10 monthly payment that her probation officer was apparently willing to accept. The state's argument that she might soon receive a workers' compensation lump-sum settlement that she

could use to pay the remaining restitution and would receive a "windfall" if her deferred sentence and probation were not extended for 2 years for failure to pay so that she could make further payments had no merit. Disability benefits are not a windfall; they are partial compensation for the loss of earning capacity. In addition, the duty to pay restitution remains until it is fully paid, and restitution may be collected in a civil proceeding at any time, including after the conclusion of state supervision under a sentence. Therefore, the District Court abused its discretion when it did not excuse the probationer's failure to pay, and the order extending the deferred sentence and probation for 2 years was reversed. St. v. Welling, 2002 MT 308, 313 M 67, 59 P3d 1146 (2002).

Stipulation That Witness's Testimony Unnecessary — Due Process Not Violated: When defendant stipulated that the presence and testimony of an out-of-state chemist was not necessary and that a report submitted regarding tests made on defendant could be received in evidence without foundation, defendant could not later complain that his right to confront and cross-examine the chemist at the revocation hearing was denied. St. v. Lange, 237 M 486, 775 P2d 213, 46 St. Rep. 991 (1989).

Failure to Appear for Probation Officer-Ordered Urine Sample — Minimal Grounds Required to Order Testing: It was error for the District Court to dismiss a petition for revocation of suspended sentence based on the defendant's failure to appear for purposes of providing a urine sample because the probation officer did not have some articulable reasons for requesting the test. Under the standard established in St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988), the Supreme Court held that a probation officer's opinion that rehabilitation could not begin until the defendant was free of drugs and the fact that the defendant had not passed a drug test since his arrest constituted sufficient evidence to establish reasonable grounds for requiring a urine sample. St. v. Sigler, 236 M 137, 769 P2d 703, 46 St. Rep. 244 (1989).

State Immune From Suit for Illegal Imprisonment When Imprisonment Later Declared Contrary to Statute: In 1979, petitioner was convicted of issuing a bad check. Her sentence was deferred, and she was placed on probation for 3 years. In 1982, petitioner's deferral was revoked because she was convicted of another crime. As a result of the revocation, she was sentenced to serve 5 years in prison. Later in 1982, the Supreme Court, relying on its interpretation of 53-30-105 (as it read prior to its amendment in 1981) (now repealed) in Crist v. Segna, 191 M 210, 622 P2d 1028, 38 St. Rep. 150 (1981), ordered petitioner's release because at the time of her imprisonment she had accumulated sufficient good time credit on probation that her deferred sentence would have been fully served. Petitioner then sued for damages for illegal imprisonment. The Supreme Court held that the State was immune from suit under 2-9-112 because the sentence imposed on petitioner for her violation of probation was a judicial act. Knutson v. St., 211 M 126, 683 P2d 488, 41 St. Rep. 1258 (1984).

Petition to Revoke — Notice of Violations: One is entitled to prior notice of alleged violations that form the basis of a petition to revoke probation and deferred imposition of sentence. St. v. Steffans, 195 M 395, 636 P2d 836, 38 St. Rep. 1976 (1981), followed in St. v. Nelson, 225 M 215, 731 P2d 1299, 44 St. Rep. 181 (1987).

Revocation of Sentence Deferred or Suspended Longer Than Allowed by Statute — Pre-1983 Law:

Petitioner was convicted of felony theft. On May 22, 1978, he was given a 3-year deferred imposition of sentence on the condition that restitution be made. On August 20, 1979, this deferred sentence was continued and petitioner was ordered to complete restitution by November 5, 1980. This was not done, and a petition to revoke the deferred sentence was filed on January 16, 1981. A hearing on the petition was held May 27, 1981, 3 years and 5 days after the initial deferral. The court revoked the deferred sentence and sentenced petitioner to 3 ½ years in prison, over petitioner's objections that the District Court was without jurisdiction to do so. The District Court contended it retained jurisdiction when the petition to revoke is filed within the deferral time. On a petition for a Writ of Habeas Corpus, the Supreme Court held that this section [as it read prior to the 1983 amendment] grants jurisdiction to revoke suspended sentences or impose sentences following deferral only during the period of the suspended or deferred sentences. This jurisdiction extends only through the running of the suspended or deferred sentence, regardless of whether a petition for revocation has been filed prior to the termination of the suspended or deferred sentence. Felix v. Mohler, 195 M 391, 636 P2d 830, 38 St. Rep. 1881 (1981).

On October 24, 1977, the petitioner received a deferred imposition of sentence and was placed on probation for 1 year. On August 14, 1978, the deferred imposition of sentence was extended for an additional 2 years. On April 4, 1979, the deferred imposition of sentence was again extended for 2 years. On February 2, 1981, petitioner was found guilty of a misdemeanor in Justice's

Court. Based on that conviction, the court revoked its order staying deferment of sentence and sentenced petitioner to 5 years in the state prison for the original crime. In granting his petition for a Writ of Habeas Corpus, the Supreme Court said that 46-18-201 gives the District Judge the authority to defer imposition of sentence for a period not to exceed 3 years. The District Court [under this section as it read prior to the 1983 amendment] can revoke a deferred imposition of sentence only during the 3-year period immediately following the initial sentence deferral. Gonzales v. Blodgett, 193 M 504, 632 P2d 1084, 38 St. Rep. 1159 (1981).

Authority to Revoke: The court has the authority to revoke a deferred sentence and impose a penal sentence upon a showing of sufficient evidence proving a violation of conditions. St. v. Emmett, 171 M 194, 557 P2d 289 (1976).

Constitutionality — Hearing: When a hearing on the revocation of a deferred sentence was conducted prior to the trial on the charges constituting the grounds for revocation, there was no denial of due process by being compelled to elect between exercising the right to remain silent or waiving the right against self-incrimination. St. v. Ryan, 166 M 419, 533 P2d 1076 (1975).

Ground Not Formal Condition: The trial court could revoke the deferred imposition of sentence after the defendant refused to testify against another defendant, even though his cooperation with the State was not made a formal condition of the judgment deferring sentence. St. v. Lintz, 162 M 1080, 509 P2d 13 (1973).

Credit for Time Served:

When the defendant had been confined under the county jail work release program as a condition of the continuation of a deferred sentence, he was entitled to credit for time in such jail upon revocation of deferment and imposition of sentence. Maldonado v. Crist, 162 M 240, 510 P2d 887 (1973).

Prison time previously served as a condition of deferment of sentence must be credited against the prison term imposed upon revocation of the petitioner's deferred imposition of sentence. State ex rel. Bovee v. District Court, 162 M 98, 508 P2d 1056 (1973).

REVOCATION OF SUSPENSION

Authority to Revoke Suspended Sentence Before Suspended Sentence Served: A District Court has the statutory authority to revoke a suspended sentence before a defendant actually begins serving the suspended sentence. St. v. LeDeau, 2009 MT 276, 352 M 140, 215 P3d 672 (2009). See also St. v. Morrison, 2008 MT 16, 341 M 147, 176 P3d 1027 (2008).

Double Jeopardy Not Applicable to Revocation of Parole or Suspended Sentence: LeDeau was released on parole a few months before the unsuspended portion of a sentence for sexual assault was served. Shortly thereafter LeDeau admitted violating the terms of parole, so parole and the suspended sentence were revoked. LeDeau appealed on grounds of double jeopardy, but the Supreme Court affirmed. Parole is a privilege, not a right, and revocation of parole does not constitute punishment for purposes of double jeopardy. When a suspended sentence is imposed, the sentencing court may revoke the suspended sentence upon a showing that any sentencing condition has been violated. A revocation proceeding is not a criminal adjudication, does not require proof of a criminal offense, does not impose punishment for any new offense, and is an act in the performance of the duty of supervision of the offender. Thus, double jeopardy is not applicable to revocation of a suspended sentence. St. v. LeDeau, 2009 MT 276, 352 M 140, 215 P3d 672 (2009).

Revocation of Suspended Sentence Based on Failure to Pay Restitution — Additional Sentence Unauthorized: Striplin was convicted of deceptive credit card practices and was given a suspended sentence conditioned upon payment of restitution and maintaining employment. About 3 years after sentencing, Striplin was charged with violating the terms of the suspended sentence because no restitution payments had been made to the Department of Corrections as ordered and because Striplin did not ever contact the credit card companies to see if the debts had been paid or seek and maintain employment. The District Court revoked Striplin's sentence, and because Striplin did not have the means to pay restitution, the court did not reimpose restitution but instead sentenced Striplin to 30 days in the county jail. Striplin appealed. The Supreme Court agreed that Striplin's sentence should be revoked because of the violations of the sentencing terms. However, the court reversed the 30-day jail sentence on grounds that the sentence was an additional, more burdensome condition that the District Court was without authority to impose pursuant to the version of 46-18-203(7)(a)(ii) that was in effect at the time of sentencing. St. v. Striplin, 2009 MT 76, 349 M 466, 204 P3d 687 (2009), following St. v. Tracy, 2005 MT 128, 327 M 220, 113 P3d 297 (2005).

Incarceration of Mentally Ill Defendant — No Plain Error Review for Alleged Due Process Violation: Following Rovin's parole violations, the District Court revoked Rovin's suspended

sentence and imposed a sentence in the state prison, despite the fact that Rovin suffered from mental illness. Rovin argued for the first time on appeal that incarceration would fail to achieve rehabilitation and thus violated due process, that the Supreme Court should invoke plain error review to address the constitutional violation, and that failure to do so would be a manifest miscarriage of justice. The Supreme Court declined. Rovin failed to demonstrate that the due process claim met the elements for plain error review. The District Court considered sentencing alternatives but rejected community-based treatment over concerns for the safety of Rovin and the public. Rovin was represented at every stage of the proceedings, knowingly and voluntarily admitted the parole violations, and waived the right to appeal by failing to object at trial. Further, a mere assertion that failure to review a claimed error might result in a manifest miscarriage of justice is not sufficient to implicate plain error review. St. v. Rovin, 2009 MT 16, 349 M 57, 201 P3d 780 (2009), following St. v. Mackrill, 2008 MT 297, 345 M 469, 191 P3d 451 (2008).

Improper Reimposition of Illegal Conditions Upon Revocation of Suspended Sentence — Remand to Strike Illegal Conditions: White pleaded guilty to felony theft in February 1994, but imposition of sentence was deferred for 3 years, subject to a number of conditions, one of which prohibited White from possessing and consuming alcohol and patronizing businesses where alcohol was the chief item of sale. In August 1994, White's deferred sentence was revoked for alcohol consumption. The sentencing court imposed a 10-year sentence with all but 30 days suspended, subject to the same conditions imposed with the deferred sentence, plus a fine and additional conditions. In May 1997, White's suspended sentence was revoked for alcohol consumption. White was sentenced to 10 years, all suspended, subject to the same conditions previously imposed, plus White was required to attend Alcoholics Anonymous meetings and to participate in counseling. In October 2006, and again in February 2007, the state filed petitions to revoke White's suspended sentence for alcohol consumption. White moved to dismiss the petitions on grounds that the sentencing court in 1997 had added conditions to the sentence that had the legal effect of continuing the sentence imposed in 1994 that had actually expired in 2004, so the court lacked jurisdiction to consider and rule on the 2006 and 2007 petitions. The court denied the motion to dismiss and sentenced White to 10 years in prison with 5 years suspended, with credit for 5 years served, leaving a balance of 5 years suspended, subject to all conditions previously imposed. White appealed. The Supreme Court noted that under this section, when a court revokes a suspended sentence the court may require the defendant to serve either the sentence imposed or any lesser sentence. Thus, the court was not authorized in 1997 to add new conditions to the newly imposed suspended sentence, nor was the court authorized to reimpose those illegal conditions upon revocation of the sentence in 2007. Therefore, the Supreme Court reversed with instructions to strike all conditions on White's current sentence that were not contained in judgments rendered prior to the 1997 judgment. St. v. White, 2008 MT 464, 348 M 196, 199 P3d 274 (2008).

Delay in Bringing Defendant Before District Court on Petition to Revoke Suspended Sentence Implicated Due Process Rights: Defendant made a threshold showing that plain error review of his claim was appropriate for a delay of 26 months in bringing him before the court on a petition to revoke a suspended sentence. However, delay was only one of several factors for the court to consider in the totality of circumstances approach to unreasonableness of delay, and thus the case was remanded for an evidentiary hearing. St. v. West, 2008 MT 338, 346 M 244, 194 P3d 683, (2008).

Error in Denial of Motion to Withdraw Admissions to Allegations in Revocation Petition: Defendant's admissions to a petition to revoke were held to be involuntary in the county that declined to follow a global plea bargain negotiated in another county where defendant had earlier entered a plea of guilty to a new felony because the Supreme Court held he had done so on the basis of an unenforceable and eventually unfilled promise. St. v. Jones, 2008 MT 331, 346 M 173, 194 P3d 86 (2008).

Correct Finding of No Mental Illness During Revocation Proceeding: During Price's sentence revocation proceedings, the District Court found that Price did not suffer from a mental illness. Noting that under St. v. Boulton, 2006 MT 170, 332 M 538, 140 P3d 482 (2006), the revoking court may consider evidence of a mental disease or defect, the Supreme Court considered the District Court's conclusion and affirmed based on the record that there was no evidence that Price suffered from a mental illness. Several experts testified that Price was personality-disordered but did not suffer from a psychosis, and Price's own actions showed that he wanted to intimidate people and have them believe he was violent. St. v. Price, 2008 MT 319, 346 M 106, 193 P3d 921 (2008).

District Court Authority to Revoke Suspended Sentence for Parole Violation for Which Defendant Not Sanctioned or Punished: Martinez was given a 7-year suspended sentence for felony criminal endangerment, subject to 25 conditions, including a requirement that Martinez notify the probation officer upon a change of residence. Following numerous probation violations, three separate intervention hearings were held to address the violations. One of the probation officers subsequently recommended that Martinez be brought before the District Court for revocation of the suspended sentence. The District Court heard testimony from two probation officers regarding the repeated violations and revoked Martinez's suspended sentence. Martinez appealed on grounds that the probation officer lacked the statutory authority to seek sentence revocation for conduct addressed by the revocation hearings and contended that the revocation violated double jeopardy because it amounted to double punishment for violations addressed by the revocation hearings. The Supreme Court agreed that once a probation officer elects to pursue an intervention hearing under 46-23-1012(3), the officer cannot then also pursue a revocation hearing before the District Court for the same violation. However, Martinez's violation of the requirement to notify the probation officer upon a change of residence occurred after the third intervention hearing, and Martinez was not sanctioned or punished for that violation. That violation in itself was sufficient to support revocation of Martinez's suspended sentence, and even if the District Court considered the history of Martinez's violations in reaching its decision, the court did not abuse its discretion or exceed its statutory authority in revoking the sentence based on that violation alone. Additionally, no double jeopardy violation occurred when the sentence was revoked based on a violation for which Martinez was not previously sanctioned or punished. Thus, revocation of Martinez's suspended sentence was affirmed. St. v. Martinez, 2008 MT 233, 344 M 394, 188 P3d 1034 (2008).

Violation of Single Condition of Probation Sufficient to Warrant Revocation of Suspended Sentence: As conditions of Gillingham's suspended sentence for four counts of sexual assault and one count of assault of a minor, Gillingham was required not to have unsupervised contact with children under the age of 16 or to use any other name. The state sought to revoke Gillingham's suspended sentence based on three violations, including unsupervised contact with children when teaching Sunday school, contact with children when teaching woodworking at a fair, and seeking to establish a different identity under the assumed name of a deceased person. The District Court found sufficient evidence to prove that Gillingham violated all three conditions and revoked his suspended sentence. On appeal, Gillingham argued that the state did not present sufficient evidence of two of the violations and that revocation of his sentence was therefore error. The Supreme Court disagreed. A single violation of the conditions of a suspended sentence is sufficient to support revocation, and evidence that Gillingham taught a church school class to young children in a room separate from other classes was sufficient to warrant revocation. The District Court was affirmed. St. v. Gillingham, 2008 MT 38, 341 M 325, 176 P3d 1075 (2008).

Credit Properly Given for Time Served While Incarcerated Prior to Revocation: In 2001, Damon was sentenced on a felony conviction to the Department of Corrections (DOC) for 10 years with 5 years suspended with conditions and on a misdemeanor conviction to the county detention center for 6 months, with the sentences to run concurrently. Damon began serving the suspended portion of the sentence on June 8, 2005, and several weeks later, he was arrested and charged under a separate cause number with several offenses. Damon pleaded guilty to one count of felony obstruction of justice and received a 10-year suspended sentence with credit for the time served in the detention center following the arrest. In November 2005, Damon was arrested for violating probation conditions in the original case, and the state petitioned to revoke the 5-year suspended sentence in the original case. The District Court revoked the 5-year suspended sentence based on the probation violations and sentenced Damon to 5 years with the DOC with credit for 98 days served in the detention center following arrest for the probation violations, but the court refused to credit Damon for street time served during the probation period following June 8, 2005, or for the time served following the second arrest. Damon challenged the time credited, but the Supreme Court affirmed. Had the District Court credited the 5-year revoked sentence with the time following the second arrest, Damon would have received double credit for those days. Nothing in subsection (7)(b) of this section entitles a defendant to additional credit against a revoked sentence for time served relating solely to a separate offense for which the defendant received a consecutive sentence credited with the same period of time served. Thus, the District Court did not err in crediting Damon's sentence with only a portion of the time served while incarcerated prior to the sentence revocation. St. v. Damon, 2007 MT 276, 339 M 413, 170 P3d 490 (2007), distinguishing St. v. Tracy, 2005 MT 128, 327 M 220, 113 P3d 297 (2005).

Sufficient Statement of Reasons for Granting or Denying Credit for Time Served Prior to Revocation of Sentence: Damon contended that the sentencing court erred by failing to sufficiently state in its written disposition order its reasons for granting or denying credit against Damon's sentence for time that elapsed prior to revocation of Damon's sentence. The Supreme Court disagreed. The disposition order stated that Damon was to receive credit for time incarcerated as a result of an arrest for probation violations, but the court treated the remaining elapsed time, including time that Damon was incarcerated on separate charges unrelated to the suspended sentence, as street time and denied credit against the revoked sentence for the street time because of the early probation violation. The statement was a sufficient explanation of the reasons for allowing and rejecting credit against Damon's sentence for time elapsed prior to the revocation, and the sentence was affirmed. St. v. Damon, 2007 MT 276, 339 M 413, 170 P3d 490 (2007).

Res Judicata Not Bar to Correction of Manifest Error in Prior Decision — Illegal Sentence Reversed: In 1998, when Southwick committed two felonies, 46-18-201 limited commitment to the Department of Corrections (DOC) to 5 years. In 1999, the Legislature amended the statute to allow a longer DOC commitment up to the maximum time that a defendant could be sentenced for a particular offense, provided that all but the first 5 years of commitment are suspended. When Southwick's parole was subsequently revoked in 2003, the District Court revoked the suspended portion of Southwick's commitments to the DOC, even though Southwick had discharged his unsuspended commitments to the DOC, and ordered Southwick to be recommitted to the DOC for an additional 5 years in each case. Southwick petitioned the Supreme Court for a writ of habeas corpus on grounds that the sentence was illegal, but the petition was denied on grounds of res judicata. Southwick also moved the District Court for resentencing on grounds that the sentence was illegal, but the motion was denied, and Southwick appealed. The Supreme Court noted that res judicata generally precludes reviewing an issue already decided and that relitigation of issues in criminal cases is barred if: (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application; (2) the prior determination was on the merits; and (3) the ends of justice would not be served by reaching the merits of the subsequent application. The court also noted that when a criminal defendant is potentially subject to a facially illegal sentence, the ends of justice suggest that res judicata should not bar rehearing the issues even if the first two criteria are met. In this case, the District Court applied a statute that was not in effect at the time that Southwick committed the crimes, which violated the prohibition on ex post facto laws. Because the District Court did not have authority to impose the sentence, the sentence was illegal and facially invalid. The 5-year DOC commitment for each offense was valid, but not the suspended portions following Southwick's commitment. Southwick had discharged the maximum time that he could have been committed to DOC before the petition to revoke was filed, and the District Court had no authority to revoke a suspended commitment that was illegally imposed. Therefore, the Supreme Court vacated the order revoking the suspended portion of Southwick's commitments. St. v. Southwick, 2007 MT 257, 339 M 281, 169 P3d 698 (2007).

Right Against Self-Incrimination Not Violated When Admitting Guilt Not Requirement of Sexual Offender Course: Osborne's suspended sentence was revoked for failure to complete a sexual offender course following imprisonment for sexual intercourse without consent. Citing St. v. Imlay, 249 M 82, 813 P2d 979 (1991), Osborne asserted that the course violated his right against self-incrimination because the course required him to admit guilt of sexual intercourse without consent. The Supreme Court distinguished Imlay and disagreed. Imlay's sexual offender course required Imlay to admit guilt, while Osborne's course was specifically tailored for offenders who did not admit guilt. In addition, Imlay followed all the other conditions of parole, but Osborne did not. Thus, Osborne's right against self-incrimination was not violated, and revocation of Osborne's suspended sentence for failure to complete the sexual offender course was affirmed. St. v. Osborne, 2007 MT 217, 339 M 45, 167 P3d 405 (2007).

Illegal Sentence Challenged During Revocation Proceeding — Court Limited to Lawful Elements of Original Sentence: Seals was convicted of three felony and two misdemeanor drug possessions and was committed to the Department of Corrections for 15 years, with 10 years suspended, to run concurrently. At the time of his arrest, the law in effect limited Seals' imprisonment to 5 years for each count. Upon recognition that the 15-year sentences were outside the parameters of the sentencing statute, the District Court amended Seals' sentence for one count to impose a legal sentence of 5 years, but again imposed sentences of 10 years each, all suspended, to run concurrently with each other and consecutive to the first count. After Seals served the 5 years for count one and was discharged to his suspended sentences, the state moved for revocation for probation violations and recommended that the court revoke Seals' suspended

sentences and commit him to prison for 10 years, 5 suspended, for each count. Seals objected, arguing that the commitment and the consecutive nature of the sentences constituted an illegal increase of his original commitment to the Department of Corrections and was beyond the court's statutory sentencing authority. The state argued that 46-18-401 gave the court discretion to run the sentences imposed upon revocation consecutively or concurrently. In response, the District Court revised the sentences from 10 years to 5 years but retained the consecutive nature of the sentences. On appeal, the Supreme Court reversed, ruling that this section and not 46-18-401 governed sentencing upon revocation. Under this section, the District Court could have required that Seals serve either the originally imposed sentence or a lesser sentence. However, because the originally imposed sentence was illegal, the court ruled that ordering Seals to serve sentences consecutively rather than concurrently resulted in sentences that did not qualify as lesser sentences. St. v. Seals, 2007 MT 71, 336 M 416, 156 P3d 15 (2007).

Suspension of Sentence Following Probation Violation Not Violative of Double Jeopardy — Credit for Time Served Properly Allowed: DeWitt was convicted of two counts of aggravated burglary, found to be a persistent felony offender, and sentenced to three consecutive 10-year sentences. DeWitt appealed, and the Supreme Court remanded with instructions to dismiss one count. While awaiting resentencing, DeWitt was incarcerated for 1,275 days. The District Court then resentenced DeWitt to one 10-year sentence for aggravated burglary and a consecutive 10-year sentence as a persistent felony offender, suspended all but 1,275 days of the 20-year sentence, and gave DeWitt credit for 1,275 days served. Without prison time to serve, DeWitt was immediately released on probation. DeWitt subsequently violated probation, the suspended sentence was revoked, and DeWitt was sentenced to 10 years with 5 years suspended, with credit for 160 days served while awaiting revocation proceedings. DeWitt appealed on grounds that the sentencing court failed to allow credit for the 1,275 days served when the suspended sentence was revoked and the new 10-year sentence was imposed and asserted that his double jeopardy rights were violated by reinstatement of the original sentence. The Supreme Court disagreed with both arguments. When the sentencing court sentenced DeWitt following the probation violation, the court had a 16.5-year suspended sentence to work with, which was more than sufficient to account for the 10-year sentence with 5 years suspended that was imposed. Although a sentencing court must give credit for time served, revocation of a suspended sentence based on a probation violation and reinstatement of the original sentence does not constitute double jeopardy as long as the sentence is within the parameters of the sentence imposed in the initial suspended sentence and credit is allowed for time served. Further, a persistent felony offender designation is not a separate crime carrying a separate sentence, but rather is a statutorily required sentence enhancement that is part of the initial sentence, so the sentencing court could not have "dropped" the persistent felony offender count and sentenced DeWitt only under the aggravated burglary count, thereby limiting the available time on resentencing to 6.5 years. The sentence was not violative of double jeopardy, was within statutory parameters, and was affirmed. St. v. DeWitt, 2006 MT 302, 334 M 474, 149 P3d 549 (2006).

Rejection of Credit for Elapsed Time Served While on Probation: While serving a suspended sentence for a crime in Montana, Miller was convicted of a crime in Indiana and served a 2-year sentence there. Upon release on parole in Indiana, Miller returned to Montana and subsequently violated the terms of the Montana suspension. The suspension was revoked, and Miller was ordered to serve the remainder of the sentence at the state prison. Miller argued that he was entitled to credit for the time served in Indiana against the Montana commitment, but the District Court declined to allow credit for the Indiana time served, and Miller appealed. The Supreme Court affirmed. Montana law does not provide that a defendant is to receive credit on a suspended commitment in Montana for time spent in prison in another state on a separate conviction. The District Court did not order that the Montana and Indiana convictions be merged, so the Montana commitment continued to run while Miller was in prison in Indiana. It was only when Miller violated the terms of the suspended sentence after returning to Montana that the suspension was revoked, and upon revocation, the District Court had the discretion to allow or reject part or all of the time that had elapsed as a credit against the commitment. St. v. Miller, 2006 MT 159, 332 M 472, 139 P3d 839 (2006).

Consideration of Defendant's Mental State During Revocation Proceedings — Commitment to Department of Corrections Affirmed: After Burke admitted violating five probation conditions, the District Court considered several sentencing alternatives during revocation proceedings. In doing so, the court considered Burke's mental condition, allowing a confidential mental health evaluation. The psychologist determined that Burke suffered from several mental conditions requiring medication, but found no indication of organic impairment, mental retardation, or psychoses, and could not say with medical certainty that the mental condition caused Burke to

violate parole. The psychologist opined that Burke understood his legal situation and had the capacity to plan a legal strategy with counsel and recommended placement at the state hospital. The District Court acknowledged Burke's mental condition, but found that the condition did not render Burke unable to appreciate the criminality of his behavior or to conform his behavior to the requirements of the law, so Burke's suspended sentence was revoked, and Burke was committed to the Department of Corrections for the remainder of the original sentence. Burke appealed on grounds that he should instead have been sentenced to the Department of Public Health and Human Services, but the Supreme Court disagreed. The District Court had wide latitude in sentencing Burke, and absent a showing that the District Court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason, resulting in substantial injustice, the sentence was affirmed. St. v. Burke, 2005 MT 250, 329 M 1, 122 P3d 427 (2005).

Lack of Participation in Sexual Offender Programs Warranting Revocation of Suspended Sentence: Van Haele contended that because he was not adequately advised by the District Court that one consequence of a guilty plea was that failure to complete a sexual offender program would be denial of probation status, he should be allowed to withdraw the guilty plea and that the District Court erroneously denied his motion to withdraw the plea. Reviewing the case to determine whether the District Court's findings were erroneous, the Supreme Court disagreed with the factual predicate of Van Haele's argument. It was not Van Haele's failure to complete the prison sex offender program that resulted in Van Haele's denial of admission to an outpatient treatment program, but rather it was Van Haele's recantation of his admission of guilt and his various behavioral problems that placed insurmountable obstacles in the way of acceptance into an outpatient program, although Van Haele's refusal to participate in the prison program contributed to the problem. The District Court had adequate evidence at Van Haele's revocation hearing to determine that the lack of participation in sexual offender programs was adequate to warrant revocation of Van Haele's suspended sentence. St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005).

Refusal to Admit Guilt During Treatment for Sexual Offense to Which Defendant Pleaded Guilty — No Deprivation of Right Against Self-Incrimination: Van Haele was incarcerated for sex crimes to which he pleaded guilty, and part of the sentence required Van Haele to follow a treatment plan. However, Van Haele refused to participate in sex offender treatment on grounds that to do so would require him to admit guilt in violation of the constitutional right against self-incrimination. However, there was no question either of compelling Van Haele to disclose the commission of sexual offenses for which he was not charged or of using any compelled disclosures against him. Rather, Van Haele persisted in refusing to admit guilt during treatment for offenses to which he previously pleaded guilty, so he was not deprived of the right against self-incrimination. St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005), distinguishing St. v. Imlay, 249 M 82, 813 P2d 979 (1991), and St. v. Fuller, 276 M 155, 915 P2d 809 (1996).

No Authority to Add Additional Conditions When Suspended Sentence Revoked: Because Rudolph violated several conditions of a suspended sentence, the court revoked the sentence and added several new conditions. Pursuant to the 1997 version of this section in effect when the offense was committed, the District Court did not abuse its discretion in revoking the sentence; however, once the sentence was revoked, the court could require Rudolph to serve only the sentence imposed or a lesser sentence, but had no authority to add conditions to the newly imposed sentence. The case was remanded for resentencing. St. v. Rudolph, 2005 MT 41, 326 M 132, 107 P3d 496 (2005).

Statutory Conditions for Probation Revocation: When the state files a petition showing probable cause that an offender has violated a condition of a suspended sentence, a District Court may issue an order for a hearing on revocation and an arrest warrant. At the offender's initial appearance, the court must advise the offender of the petition's allegations, the opportunity to appear and present evidence, the opportunity to question adverse witnesses, and the right to counsel. If after a hearing on the petition the court determines that the state has proved by a preponderance of the evidence that the offender violated a condition of the suspended sentence, the court may revoke the suspension. St. v. Megard, 2004 MT 67, 320 M 323, 87 P3d 448 (2004).

Failure to Notify Defendant of State's Intent to Use Evidence of Alleged Violations at Probation Revocation Hearing Considered Due Process Violation — Harmless Error: At a hearing on the revocation of Pedersen's suspended sentence, the District Court allowed the state to introduce drug test results, even though drug use was not alleged prior to the hearing. Pedersen asserted that the failure to notify him that the drug test results would be used was a due process violation. The Supreme Court agreed. Even though a revocation hearing is not

subject to the Montana Rules of Evidence, the hearing must be fundamentally fair, and minimum due process rights, including notice, extend to a revocation hearing. Thus, because Pedersen was not notified in advance, the District Court erred in admitting the drug test results. However, the error was harmless. The District Court's findings did not reference the drug test results, nor did the court rely on the results in revoking the suspended sentence, relying instead on the abundant evidence of Pedersen's violation of four other probation conditions. Therefore, the Supreme Court affirmed the sentence revocation. St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003). See also St. v. Nelson, 225 M 215, 731 P2d 1299 (1987).

Failure to Fulfill Terms of Suspended Sentence by Completing Sex Offender Treatment Program — Revocation of Sentence Proper: A condition of Drube's suspended sentence required enrollment in and completion of a sex offender treatment program. Drube was terminated from the program on numerous grounds, and the District Court revoked the suspended sentence. Drube appealed, asserting that his termination from the program in which he was participating did not give the District Court immediate cause to suspend the sentence and that he should have been given the opportunity to enroll in another program. The Supreme Court disagreed. At the time that the state filed the revocation petition, Drube had not successfully completed a sex offender program, nor was he enrolled in one. Because Drube was in violation of the conditions of the suspended sentence and because the evidence showed that Drube required a more secure or structured setting in which to complete a program because he was unwilling to cooperate with the program that he was in, the District Court did not abuse its discretion in revoking Drube's suspended sentence. St. v. Drube, 2003 MT 138, 316 M 156, 69 P3d 1182 (2003).

Alleged Inadequate Supervision of Parolee No Excuse for Probation Violation: Senn's parole supervision was transferred to Washington state, and after several years the Missoula County Attorney filed a petition to revoke Senn's suspended sentences based on several alleged probation violations. Senn admitted violating some of the probation conditions, but contended that the violations should be excused because of health problems, poverty, arrests in Washington that precluded contact with Montana, a good faith assumption that matters in Montana could be resolved after the criminal issues in Washington were addressed, and the Montana parole officer's failure to provide adequate supervision. The Supreme Court disagreed. Senn's own conduct resulted in the probation violations, and although there was a period when Senn was unsupervised, even when supervised Senn failed to comply with the probation officer's requests. The District Court did not err in revoking Senn's suspended sentences. St. v. Senn, 2003 MT 52, 314 M 348, 66 P3d 288 (2003).

Reasons for Denial of Credit for Time Elapsed Properly Stated in Written Order, Rather Than at Revocation Hearing: Senn contended that the District Court erred in failing to expressly consider at a revocation hearing whether to give Senn credit for time elapsed during Senn's parole. However, pursuant to this section, the District Court is required to state the reasons for allowing or rejecting credit in its order, not at a revocation hearing. In this case, in its written order the District Court listed 10 reasons for denying credit for elapsed time, satisfying the statutory requirements. St. v. Senn, 2003 MT 52, 314 M 348, 66 P3d 288 (2003).

Unauthorized Contact With Minors and Failure to Follow Through With Sexual Offender Treatment Sufficient to Warrant Revocation of Suspended Sentence: Aune's sentences for felony sexual assault were suspended on condition that Aune complete sexual offender treatment and not have contact with minors. Aune moved to North Dakota to be closer to his parents and enrolled in sexual offender treatment there. However, his participation was terminated because he was dishonest with staff and because his wife failed to participate in treatment, which was a condition of participation in the North Dakota program. Further, Aune admitted that he had contact with two minor girls who lived at the farm where Aune worked. Following a hearing and consideration of conflicting evidence, Aune's suspended sentence was revoked by the District Court, and he appealed. The standard for revocation of probation is whether the judge is reasonably satisfied that the conduct of the petitioner has not been what was agreed to if the petitioner was given liberty. The Supreme Court noted that Aune's original sentence did not contain a requirement that Aune complete phases I and II of sexual offender treatment, so to the extent that the revocation was based on Aune's failure to complete phase II, revocation was not supported by the evidence. However, the District Court did not err when it found that Aune violated the condition that he complete and follow through with treatment, which by its terms also required the participation of Aune's wife, and that Aune violated the condition that he not have unauthorized contact with minors. The District Court's revocation of Aune's suspended sentence and sentence to two concurrent terms of 15 years and 259 days in prison for each count of sexual assault were affirmed. St. v. Aune, 2003 MT 3, 314 M 1, 61 P3d 785 (2003), distinguishing St. v. Lundquist, 251 M 329, 825 P2d 204 (1992).

Suspended Sentence Properly Revoked — Remand for Entry of Findings to Support Resentence: The District Court revoked Anderson's suspended sentence and resentenced him to 10 years with 6 years suspended. Anderson appealed on grounds that his failure to comply with sentencing conditions requiring him to maintain employment and perform community service did not rise to a level to support revocation, and that the sentencing judge failed to clearly state the reasons for the sentence. The Supreme Court noted that a single violation of the terms of a suspended sentence is sufficient to support revocation of a suspended sentence. Anderson admitted that he had performed only 4 hours of the required 100 hours of community service since the original sentence was imposed, and had paid only $275 of a total of $1,805 due in restitution. Anderson also had a significant criminal history, was convicted of three additional felonies since beginning probation, and failed to comply with a number of terms and conditions of the suspended sentence. Thus, revocation of Anderson's suspended sentence was not an abuse of discretion. However, the sentencing court's stated reason for resentencing Anderson, namely that it was the state's recommendation, neither informed Anderson of the reasons underlying the sentence nor provided guidance for review. Therefore, the case was remanded for resentencing, and the entry of findings was to be sufficient to support the sentence. St. v. Anderson, 2002 MT 92, 309 M 352, 46 P3d 625 (2002), distinguishing St. v. Lundquist, 251 M 329, 825 P2d 204 (1992).

Plenary Review of Criminal Sentence by Supreme Court Even Though No Objection Made at Sentencing: Brister was sentenced to 20 years for felony sexual assault with 10 years suspended, served the 10-year prison sentence, and then was released and began the 10-year suspended sentence. About 6 years into the suspended sentence, Brister was arrested for felony theft and for violating various parole conditions. The District Court then revoked the suspended sentence and reimposed another 10-year suspended sentence to run consecutively with a 5-year felony theft sentence. The new suspended sentence included 26 additional conditions. Brister did not object to any of the conditions when they were imposed, but filed a motion objecting to the sentence 2 months later, claiming that the conditions were not and could not have been included in the original suspended sentence, and thus violated double jeopardy and ex post facto laws. The state maintained that Brister waived any objections to the conditions by failing to contemporaneously object when the sentence was pronounced, and that the appeal from the sentence was not timely filed. The Supreme Court disagreed and reversed. Under St. v. Lenihan, 184 M 338, 602 P2d 997 (1979), the court will review a sentence imposed in a criminal case if it is alleged that the sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing. Further, Brister provided the District Court with an opportunity to correct any sentencing errors by filing an objection under 46-18-117 (now repealed), which allowed 120 days for correction of an illegal sentence, so Brister retained the right to appeal the purportedly illegal sentence. St. v. Brister, 2002 MT 13, 308 M 154, 41 P3d 314 (2002), overruling St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019 (2000), St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001), and St. v. Smith, 2001 MT 111, 305 M 298, 27 P3d 39 (2001), to the extent that those cases held that failure to raise a contemporaneous objection to an illegal sentence at the time of hearing resulted in waiver of defendant's objection, and followed in St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002). See also St. v. Southwick, 2007 MT 257, 339 M 281, 169 P3d 698 (2007).

Reinstatement of Suspended Sentence With New Conditions Improper: About 6 years into a suspended sentence for felony sexual assault, Brister was arrested for felony theft and for violating various parole conditions. The District Court revoked the suspended sentence and reimposed another 10-year suspended sentence to run consecutively with a 5-year felony theft sentence. The new suspended sentence included 26 additional conditions. Under the 1983 version of this section, in effect at the time that Brister committed the offense, the District Court had two options upon revocation: (1) revoke the suspended sentence and order Brister to serve the remainder of the prison term; or (2) continue the suspended sentence under the original terms. Instead, the court reimposed the suspended sentence conditioned upon multiple new conditions and terms not contained in the original sentence, which was not allowed under the revocation statute. The court had no authority to impose new conditions upon the continuation of Brister's suspended sentence. The Supreme Court remanded for a new disposition hearing to allow the District Court to decide which of the two options to implement. St. v. Brister, 2002 MT 13, 308 M 154, 41 P3d 314 (2002).

Finding of Mental State Not Necessary in Revocation of Suspended Sentence Proceedings: Averill's suspended sentence was revoked after he admitted that he had violated numerous conditions of his probation agreement and after the District Court found that he had also violated several other conditions for which no charges were brought. Averill argued that the District Court erred in finding that he had committed the unadmitted violations because under

45-2-103, he was lacking the requisite mental state to establish guilt and that without having committed the acts either knowingly, purposefully, or negligently, he did not violate parole. However, this section sets forth the requirements applicable to revocation of suspended sentences and makes no reference to intent, mental state, or 45-2-103, so it was not necessary for the court to find that Averill acted knowingly, purposefully, or negligently in order to revoke the suspended sentence. A revocation proceeding is not equivalent to a trial. The burden of proof in a revocation hearing is only a preponderance of the evidence, and the issue is not one of guilt or innocence, but rather whether a condition of a suspended sentence has been violated. Here, the court was reasonably satisfied that Averill's conduct was not what was agreed it would be if Averill was given his liberty, so revocation of the sentence was not an abuse of discretion. St. v. Averill, 2001 MT 161, 306 M 106, 30 P3d 1059 (2001), followed in St. v. Boulton, 2006 MT 170, 332 M 538, 140 P3d 482 (2006).

Probable Cause Hearing Required When Offender Arrested Pursuant to Warrant — Lack of Subject Matter Jurisdiction When Timely Hearing Not Held: Giddings was arrested August 1 on a probation violation warrant issued by his probation officer. The next day while he was still detained, the District Court issued a warrant for his arrest based on the earlier petition to revoke his suspended sentence. A hearing on the petition was held on November 10, Giddings' suspended sentence was subsequently revoked, and he was sentenced to the Department of Corrections for 4 years. Giddings argued on appeal that pursuant to 46-23-1012 as it read prior to the 2001 amendments, the Probation and Parole Bureau was required to hold a probable cause hearing within 36 hours of his arrest and that because no such hearing was held, the District Court lacked subject matter jurisdiction to hold a revocation hearing 3 months later regarding the technical violations of probation alleged in the probation violation report. The state contended that a probable cause hearing is required only when the probationer is dealt with administratively through the probation violator prison diversion program described in 46-23-1012(4) as it read prior to the 2001 amendments and that an administrative probable cause hearing is not required when a probationer is arrested on a bench warrant and is processed through the judicial system. The Supreme Court reversed, applying St. v. Goebel, 2001 MT 73, 305 M 53, 31 P3d 335 (2001), in holding that a hearing by the Probation and Parole Bureau under 46-23-1012(4) as it read prior to the 2001 amendments is mandatory within 36 hours when an offender has been arrested pursuant to a warrant issued by a judge. Because the probable cause hearing was never held, the District Court lacked jurisdiction to hold its revocation hearing later. St. v. Giddings, 2001 MT 76, 305 M 74, 29 P3d 475 (2001), clarified in Gundrum v. Mahoney, 2001 MT 246, 307 M 96, 36 P3d 890 (2001), in which it was held that the 36-hour requirement for a probable cause hearing applies only to probation revocation proceedings under 46-23-1012 and not to parole revocation proceedings under 46-23-1023.

Erroneous Dismissal of Petition to Revoke Sentence Based on Failure to Hold Timely Hearing: Under 46-23-1012, there are two ways that an offender can come into custody for allegations of a probation violation. The first is when a judge issues a warrant for the offender's arrest, and the second is when the offender is arrested by a probation or parole officer or when a probation or parole officer authorizes a law enforcement officer to make the arrest. In this case, Goebel was arrested by a probation and parole officer. Prior to the 2001 amendments, the second sentence of 46-23-1012(4) read: "After the arrest of the defendant *pursuant to this subsection*, a hearings officer for the probation and parole bureau shall hold a hearing within 36 hours of the defendant's arrest" (emphasis added). Goebel contended before the District Court that the petition to revoke his suspended sentence should be dismissed because the state did not hold a hearing within 36 hours of his arrest. The court agreed and dismissed the petition. On appeal, the state argued that the 1999 amendments to 46-23-1012(4) mandated a hearing only in the case of violators who are arrested pursuant to a warrant and that the Legislature left to the discretion of the Probation and Parole Bureau the decision of whether to hold a hearing for every other violator, while Goebel maintained that the phrase "pursuant to this subsection" required the Bureau to hold a hearing in every case of alleged parole violation before proceeding under 46-23-1013 (now repealed). The Supreme Court found the statutory language in subsection (4) to be clear and unambiguous and contrary to the assertions of both parties. Because a defendant may be arrested only under the provisions of subsections (1) and (2), the phrase "after the arrest of the defendant pursuant to this subsection" could not refer to the entirety of 46-23-1012, as Goebel contended, nor could it refer only to subsection (4), as the state contended. Rather, the court held that "this subsection" related back to the reference in the previous sentence to subsection (1), which allows a judge to issue a warrant or notice to appear, so a probable cause hearing by the Probation and Parole Bureau is mandatory only when an offender has been arrested pursuant to a warrant issued by a judge. Because Goebel was not arrested pursuant to a

warrant, the 36-hour rule did not apply. Despite the fact that the Supreme Court found the statute clear and unambiguous, it pointed out that this interpretation rendered the statute illogical because probable cause must be shown before a warrant is issued. It makes little sense to require a second probable cause hearing, while common sense would dictate that there should be a reasonably prompt probable cause hearing when an arrest is made without a warrant. Rather than examine the legislative history to discern the Legislature's intent in using the particular language, the court ascribed the confusion to a legislative drafting error and left correction of the language to the Legislature. St. v. Goebel, 2001 MT 73, 305 M 53, 31 P3d 335 (2001), clarified in Gundrum v. Mahoney, 2001 MT 246, 307 M 96, 36 P3d 890 (2001), in which it was held that the 36-hour requirement for a probable cause hearing applies only to probation revocation proceedings under 46-23-1012 and not to parole revocation proceedings under 46-23-1023, and followed in St. v. Johnson, 2001 MT 277, 307 M 317, 37 P3d 701 (2001).

Revocation of Suspended Sentence Based on Violation of Good Citizenship Probation Standard: A condition of Therriault's probation was that he "conduct himself as a good citizen at all times". When the District Court revoked Therriault's suspended sentence for violating this good citizenship standard, Therriault complained that the standard was too vague to sufficiently warn him of what would constitute a violation of his probation conditions, in violation of his due process rights. The Supreme Court was essentially called upon to determine if Therriault was acting as a good citizen at all times. The court affirmed the sentence revocation, noting that under any reasonable definition of the term, any "good citizen" who was truly concerned about the welfare of a 14-year-old girl from a troubled home would not suggest that, for her own safety, she should take up residence at the home of a convicted sex offender who was on probation and subject to random searches and that this should be accomplished without the supervising probation officer's knowledge and without entertaining the possibility of more suitable living arrangements. St. v. Therriault, 2000 MT 286, 302 M 189, 14 P3d 444, 57 St. Rep. 1185 (2000).

Failure to Complete Sexual Offender Treatment Sufficient to Warrant Suspended Sentence Revocation and Continued Incarceration: Vallier received 5 years for felony assault and 20 years for felony sexual assault of an 11-year-old child, with 10 years suspended if Vallier completed the prison sexual offender program. Vallier failed to complete the program by the time of scheduled discharge of the active sentence, so the District Court revoked the suspended portion of the sentence, further classifying Vallier as a level 3 sexual offender at a high risk to reoffend. On appeal, the Supreme Court affirmed, finding Vallier's failure to complete the sexual offender program of such a nature as to require Vallier's continued incarceration. Sufficient evidence was offered to prove that Vallier continued to be a serious community threat until the treatment was received, and Vallier did not meet the burden of showing that the District Court abused its discretion in revoking the suspended sentence. St. v. Vallier, 2000 MT 225, 301 M 228, 8 P3d 112, 57 St. Rep. 928 (2000).

New Sentence Restriction Added Upon Revocation of Suspended Sentence Stricken: If a District Court finds that a defendant has violated the terms or conditions of a suspended sentence, the court may revoke the suspended sentence and require the defendant to serve either the sentence imposed or any lesser sentence, but nothing in this section authorizes a court to impose additional restrictions when revoking a suspended sentence. (See 2001 amendment to this section, which allows it.) In this case, the District Court originally sentenced Richardson to 20 years in prison for felony sexual assault against a child, with all but 70 days suspended, conditioned in part upon completion of a sex offender treatment program. Richardson failed treatment and admitted violating other conditions of the suspended sentence, so the sentence was revoked, and Richardson was sentenced to prison for the remainder of the 20-year sentence. Additionally, the court conditioned Richardson's parole eligibility upon successful completion of the first two phases of sexual offender treatment in prison. The additional restriction on the sentence was error, and the case was remanded for the limited purpose of striking that condition from the sentence. St. v. Richardson, 2000 MT 72, 299 M 102, 997 P2d 786, 57 St. Rep. 320 (2000), following St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997).

Standard for Revocation of Suspended Sentence — Standard for Review of Revocation: The standard for revoking a suspended sentence requires that the District Court be reasonably satisfied that the conduct of the probationer has not been what the probationer agreed that it would be if liberty were granted. The Supreme Court will review a sentence revocation to determine whether the District Court abused its discretion and whether the court's decision was supported by a preponderance of the evidence in favor of the state. However, this section does not expressly require the court to determine whether the probationer willfully violated the terms of the suspended sentence before the sentence may be revoked. Here, Williams argued that the District Court improperly revoked his suspended sentence because the state's petition did not

allege a violation of the conditions of the suspension. However, Williams' inability to secure sexual offender treatment while on probation frustrated the purpose of probation, which was Williams' rehabilitation. Thus, the District Court did not err in revoking the suspended sentence and requiring Williams to participate in the sexual offender treatment at the state prison to avoid continued frustration of the purpose of the suspension. St. v. Williams, 1999 MT 240, 296 M 258, 993 P2d 1, 56 St. Rep. 943 (1999), following St. v. Kochvi, 671 A2d 115 (N.H. 1996), and St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997), distinguishing Lopez v. Crist, 176 M 352, 578 P2d 312 (1978), and followed in St. v. Averill, 2001 MT 161, 306 M 106, 30 P3d 1059 (2001). However, see St. v. Lee, 2001 MT 176, 306 M 173, 31 P3d 998 (2001), which affirmed Williams to the extent that violations of nonfinancial probationary conditions need not necessarily be willful in order to justify revocation, but reversed the revocation of a suspended sentence when the failure to fulfill the conditions of a suspended sentence was not the fault of the probationer but rather the state.

Suspended Sentence Properly Revoked — No Supreme Court Review of Disparate Sentences: Baisch's sentence was suspended on condition that, among other things, he remain law-abiding, undergo a psychological examination, and complete his graduate equivalency diploma within 1 year. When Baisch's probation officer called Baisch in to inquire as to why he was not meeting appointments in fulfilling his diploma requirements, Baisch became belligerent and was arrested for assault and criminal mischief. The charges were dismissed because of a defect in language, but the state petitioned to revoke the suspended sentence anyway. The state met its burden of showing by a preponderance of the evidence that Baisch violated the terms of probation, and the District Court did not err in reinstating Baisch's 7-year prison term. Baisch's argument that the sentence was too harsh was not appropriate for consideration by the Supreme Court because arguments of that nature are reserved for consideration by the Sentence Review Division. St. v. Baisch, 1998 MT 12, 287 M 191, 953 P2d 1070, 55 St. Rep. 41 (1998), followed in St. v. Senn, 2003 MT 52, 314 M 348, 66 P3d 288 (2003).

"Finding" in Probation Modification Order Not Res Judicata as to Issue of Compliance With Terms of Probation: Lindeman pleaded guilty to charges of sexual abuse and incest and, as a condition of probation, was required to complete a sex offender treatment program and to have no unsupervised contact with minors. After some efforts at treatment, for which the treatment provider issued a letter saying that Lindeman had "graduated" from the program, Lindeman petitioned the District Court for a modification of the previous order in order to allow him to have contact with his minor daughter. In issuing the order, the District Court found that Lindeman had completed the sex offender treatment program. However, Lindeman had not in fact completed a treatment program meeting the standards required in his original probation order, and the treatment provider was not qualified to treat Lindeman because the provider lacked credentials required by the original probation order. Later, when the state sought to revoke Lindeman's probation and impose the suspended sentence based upon Lindeman's failure to complete the treatment program, Lindeman argued that the issue of completion of the program was res judicata under the probation modification order of the District Court. Citing Hollister v. Forsythe, 277 M 23, 918 P2d 665 (1996), the Supreme Court held that the issue of Lindeman's completion of the treatment program was not res judicata because the issues in the probation modification proceeding and the later revocation proceeding were not the same. The Supreme Court pointed out that at the probation modification hearing: (1) the issue of completion of the treatment program was not before the District Court; (2) the hearing was requested by Lindeman to change a condition concerning contact with minors, not completion of the treatment program; (3) the District Court did not remove the condition that Lindeman complete the treatment program; and (4) the "finding" was unnecessary to the District Court's decision to modify the condition of probation. The Supreme Court distinguished St. v. Perry, 232 M 455, 758 P2d 268 (1988), and St. v. Black, 245 M 39, 798 P2d 530 (1990), and noted that the only way that the issue of completion of the treatment program could have been determined by the District Court was through a petition filed pursuant to this section, which did not occur. For these reasons, the Supreme Court held that the "finding" by the District Court was not a conclusive, litigated finding and therefore was not res judicata as to whether Lindeman had completed treatment as required in his probation order. St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997).

Reservation of Right to Specify Ineligibility for Parole Upon Subsequent Revocation of Suspended Sentence — Lack of Authority in District Court: When Lindeman was sentenced for sexual assault and incest, the District Court reserved the right, in the event that Lindeman ever violated a condition of probation and his suspended sentence was imposed, to specify that Lindeman would be ineligible for parole until he completed a sex offender treatment program.

When Lindeman failed to complete the program and the state requested that Lindeman's probation be revoked and the suspended sentence imposed, Lindeman objected to the District Court's imposition of the condition preventing parole. The Supreme Court held that under St. v. Finley, 276 M 126, 915 P2d 208 (1996), the only punishment that the District Court could impose was the suspended sentence or a lesser penalty and that the District Court was without authority to impose the additional condition. The Supreme Court noted that 46-18-202, the statutory provision relied upon by the District Court when it reserved the right to impose the condition, applies only to the original sentence under 46-18-201 and that the District Court had no authority to impose the condition upon subsequently revoking the suspended sentence. St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997), followed, with regard to the impropriety of new sentence restrictions added upon revocation, in St. v. Richardson, 2000 MT 72, 299 M 102, 997 P2d 786, 57 St. Rep. 320 (2000).

"Unique Factors" Alleged by Defendant, Including Long Delay in Filing Petition to Revoke Suspended Sentence — No Abuse of Discretion: Lindeman pleaded guilty to charges of sexual abuse and incest and, as a condition of probation, was required to complete a sex offender treatment program and to have no unsupervised contact with minors. Because Lindeman moved frequently, he changed probation officers several times, and it was not discovered for some time that he had not completed the required treatment program. When the state petitioned the District Court to revoke Lindeman's probation and to impose the suspended sentence, Lindeman argued that the District Court failed to consider "unique factors" of his case and thereby abused its discretion. The Supreme Court held that: (1) notwithstanding Lindeman's argument that his completion of the treatment program was a factor that should have been considered by the District Court, the evidence showed that Lindeman did not complete the treatment program; (2) Lindeman's inability to pay for treatment was not a factor in revocation of his probation because the evidence showed that he failed to complete treatment for other reasons; (3) there was no evidence that Lindeman's alleged terminal illness prevented him from completing treatment; (4) Lindeman's membership in a prayer group did not excuse his having to complete treatment; (5) although the evidence showed that Lindeman's case "fell through the cracks" due at least in part to the many probation officers assigned to Lindeman's case and the failure of those officers to verify Lindeman's completion of the sex offender program, the fact remained that Lindeman was an untreated sex offender who did not follow the conditions of his probation; and (6) whether or not Lindeman followed the other conditions of his probation did not change the fact that he did not follow the treatment condition. In regard to the sixth unique factor, the Supreme Court stated that Lindeman's case was distinguishable on its facts from St. v. Lundquist, 251 M 329, 825 P2d 204 (1992), in which the Supreme Court held that the District Court abused its discretion in revoking the probation of a sex offender who did not complete treatment. St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997).

Reservation of Authority to Attach Additional Conditions to Suspended Sentence Held Error — St. v. Wilson Followed: At the sentencing of Savaria on multiple thefts involving bad checks, the District Court reserved the right to attach additional conditions upon Savaria's suspended sentence. Although Savaria was sentenced before the decision in St. v. Wilson, 279 M 34, 926 P2d 712 (1996), holding that a District Court may not sentence a defendant to a term of imprisonment and reserve the right to impose additional restrictions during the defendant's probation, the state conceded and the Supreme Court agreed that Wilson was applicable to Savaria's case. The Supreme Court therefore struck the reservation from the District Court's judgment. St. v. Savaria, 824 M 216, 945 P2d 24, 54 St. Rep. 852 (1997).

Revocation of Suspension of Part of Sentence While Nonsuspended Part Being Served: The District Court had authority to revoke suspension of part of a sentence when, prior to having begun to serve the suspended part, the prisoner was released on parole before serving the whole of the nonsuspended part of the sentence and violated conditions of probation relating to the suspended part. Christofferson v. St., 272 M 518, 901 P2d 588, 52 St. Rep. 909 (1995), followed in St. v. Morrison, 2008 MT 16, 341 M 147, 176 P3d 1027 (2008).

Alford Plea in Sexual Assault Case — Revocation of Suspended Sentence: In a sexual assault case, the defendant sufficiently raised the issue of the fifth amendment right against self-incrimination to warrant review on appeal. The defendant entered an Alford plea, and sexual offender evaluation and treatment were conditions of the suspended sentence. The District Court did not abuse its discretion when it revoked the defendant's suspended sentence for violations of the conditions of the suspended sentence, including sexual offender evaluation and treatment. St. v. Butler, 272 M 286, 900 P2d 908, 52 St. Rep. 745 (1995).

No Court Assistance in Escaping Plea Bargain Obligations: As a condition of defendant's plea bargain, it was required that he remain a law-abiding citizen, but it was not specifically advised

that he could not possess a firearm. When found to be in possession of a firearm, defendant's suspended sentence was revoked, which defendant appealed. It is impossible for a District Court to inform a defendant of every illegal action that could affect defendant upon entering a guilty plea, nor will the Supreme Court assist an accused criminal in escaping the obligations of a plea bargain after accepting its benefits. St. v. Reynolds, 253 M 386, 833 P2d 153, 49 St. Rep. 463 (1992), followed in St. v. Milinovich, 269 M 68, 887 P2d 214, 51 St. Rep. 1433 (1994). See also St. v. Koepplin, 213 M 55, 689 P2d 921 (1984), and St. v. Radi, 250 M 155, 818 P2d 1203, 48 St. Rep. 903 (1991).

Ex Parte Communication Between Witness and Judge Not Affecting Revocation of Suspended Sentence: Defendant claimed that his due process rights were violated by the District Court's decision to revoke his suspended sentence based on improper ex parte communication between the probation officer and the District Court Judge. However, absent objective evidence that the private communication was intended to or did influence the revocation decision and because the record was replete with evidence in support of revocation, the defendant's rights were not violated and the suspended sentence was properly revoked. St. v. Champagne, 245 M 147, 800 P2d 154, 47 St. Rep. 1932 (1990).

Petition to Revoke Filed After Period of Suspension — Question of Jurisdiction Properly Raised and Sentence Voided: The County Attorney's office petitioned for revocation of Voegele's suspended sentence 2 days after the term of the suspended sentence had expired. While Voegele rightfully asserted that allowing the tardy revocation petition was prejudicial to his punishment, he acknowledged that he was precluded from challenging the District Court's jurisdiction under 46-20-701(2). However, the Supreme Court found that until Voegele obtained new counsel on appeal, no one was aware that the suspended sentence had expired. Under the plain error doctrine, the power of discretionary review was applied to address the arithmetic jurisdictional error and prevent manifest injustice. Voegele was therefore not barred from raising the jurisdictional issue, and the Supreme Court held that the imposition of sentence was void for lack of jurisdiction because the petition to revoke the suspended sentence was filed after the sentence had expired. St. v. Voegele, 243 M 222, 793 P2d 832, 47 St. Rep. 1183 (1990), following St. v. Wilkins, 229 M 78, 746 P2d 588 (1987).

Fleeing Jurisdiction to Avoid Forced Sexual Relationship: The defendant left the state in violation of her parole and argued that the action was justified because she fled to avoid a forced sexual relationship with her foster parent. The Supreme Court ruled that in addition to meeting the requirements of the compulsion statute, the defendant also had to meet the requirements of the complementary doctrine of necessity, which included the duty to turn herself over to the proper authorities upon reaching a place of safety. Since the defendant failed to report to anyone after arriving in California, the lower court was justified in revoking her suspended sentence. The court also held that there were other steps short of fleeing the jurisdiction that the defendant could have taken; therefore, her actions were not justified. St. v. Ottwell, 240 M 376, 784 P2d 402, 46 St. Rep. 2207 (1989).

Revocation Cancels Prior Act of Grace: A District Court's decision to revoke a suspended sentence cancels a prior act of grace and is within the court's discretion. St. v. Rogers, 239 M 327, 779 P2d 927, 46 St. Rep. 1721 (1989); St. v. Kern, 212 M 385, 695 P2d 1300 (1984), followed in St. v. Butler, 272 M 286, 900 P2d 908, 52 St. Rep. 745 (1995).

Revocation of Suspended Sentence Not Violative of Double Jeopardy Clause: Because the revocation proceeding is not a criminal adjudication, does not require proof of a criminal offense, does not impose punishment for any new offense, and is an act in the performance of the duty of judicial supervision of probationary liberty, the double jeopardy clause is inapplicable. St. v. Lange, 237 M 486, 775 P2d 213, 46 St. Rep. 991 (1989), citing St. v. Eckley, 579 P2d 291, 34 Oreg. App. 563 (1978).

Jurisdiction to Revoke Suspended Sentence — DUI Conviction and Failure to Complete Sexual Offender Program: The District Court had jurisdiction to revoke a suspended sentence for sexual assault and to order defendant committed to the state prison after finding that defendant violated the terms and conditions of his suspended sentence by failing to complete a sexual offender program and by his conviction of DUI. St. v. Stangeland, 233 M 230, 758 P2d 776, 45 St. Rep. 1446 (1988).

Revocation of Suspended Portion of Sentence — No Due Process Violation: Defendant was convicted of aggravated assault and sexual intercourse without consent and was sentenced to a term of 40 years in the Montana State Prison. The sentence review board modified the sentence to 40 years with 20 years suspended provided that the defendant successfully complete a sex treatment program. Upon defendant's failure to complete the program, the District Court, following four hearings, ordered the original 40-year sentence to be reinstated. Defendant

appealed, alleging due process violations for failure to follow parole and probation revocation procedures. The Supreme Court, in affirming the revocation, ruled that the right to a speedy trial, while guaranteed in criminal prosecutions, is not applicable in revocation of probation proceedings and that no preliminary hearing is required before a revocation proceeding when detention is not involved. St. v. Friedman, 225 M 373, 732 P2d 1322, 44 St. Rep. 313 (1987). See also St. v. Stangeland, 233 M 230, 758 P2d 776, 45 St. Rep. 1446 (1988), and St. v. Kingery, 239 M 160, 779 P2d 495, 46 St. Rep. 1587 (1989).

Right to Jury Trial — Not Applicable to Suspended Sentence Revocation Proceedings: Since a trial by jury under the seventh amendment to the U.S. Constitution and Art. II, sec. 26, Mont. Const., is guaranteed only in "criminal prosecutions", it does not apply in proceedings for revocation of a suspended sentence. St. v. Watts, 221 M 104, 717 P2d 24, 43 St. Rep. 670 (1986).

Five-Year Suspension Revoked for Failure to Enter Inpatient Alcohol Program: There was substantial evidence to support the revocation of probation and imposition of the original 5-year sentence since defendant failed to comply with a condition that required immediate entry into an inpatient alcohol counseling program. The probation officer fulfilled his duty to advise probationer of the conditions and consequences of a violation. The District Court revoked the suspension pursuant to the discretion granted in 46-18-203 in accordance with the minimum requirements for invoking such discretion. There was no abuse of discretion in the court's consideration of the factors in the original sentencing, except for the sentencing judge's determination that defendant was a dangerous offender. (See 1995 repeal of 46-18-404.) No findings appeared in support of such designation. St. v. Ford, 218 M 215, 707 P2d 16, 42 St. Rep. 1530 (1985).

Proof of Violation of Conditions of Probation Sufficient to Revoke Probation: When defendant, an alcoholic, violated conditions of probation that included a prohibition against drinking, the District Court did not abuse its discretion by the revocation of probation. The Supreme Court held that under Montana statutes, proof of violation of probation conditions is all that is required to support revocation and a court is not required to find that continuation of probationary status would be at odds with the need to protect society and society's interest in defendant's rehabilitation. St. v. Kern, 212 M 385, 695 P2d 1300, 41 St. Rep. 1810 (1984). See also St. v. Lange, 237 M 486, 775 P2d 213, 46 St. Rep. 991 (1989).

Failure to State Reasons for Sentence — Challenge to Revocation of Suspended Sentence: After the defendant was given a suspended prison sentence and ordered to pay restitution, the State moved to revoke the suspension because the defendant failed to make restitution. The defendant opposed the motion to revoke by arguing that the original sentence was invalid because the sentencing court failed to state the reason for the sentence, in violation of the requirements established in St. v. Stumpf, 187 M 225, 609 P2d 298, 37 St. Rep. 673 (1980). [A 1983 amendment required the judge to state reasons for the sentence.] On appeal, the Supreme Court held: (1) that despite the failure of the sentencing court to state its reasons, the sentencing court imposed exactly the sentence requested by the defendant; (2) that the reason for the sentence was apparent from the record; (3) that no prejudice resulted from the court's failure to state its reasons; and (4) that no purpose would be served in vacating the sentence or denying the petition to revoke. St. v. Carson, 208 M 320, 677 P2d 587, 41 St. Rep. 369 (1984).

Deferring Sentence Imposition — Second Deferment: Contention that sentencing court had no jurisdiction to defer imposition of sentence a second time did not affect the court's power to subsequently revoke suspension of part of the sentence and was not validly raised on appeal from the revocation. The conviction and first deferment of imposition of sentence occurred on October 7, 1975. The sentence, part of which was suspended, was imposed on October 28, 1977, within the 3-year period set in October 1975, for deferment of the imposition of sentence. The court could not be held in error for ordering (at August 19, 1977, revocation hearing) deferment for an additional 3 years. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Evidence — Witness Called by Judge: There was no merit to contention that due process was denied at suspended sentence revocation hearing when the judge called a witness to the stand to resolve a conflict in pertinent testimony, for a court may on its own motion call witnesses, and the asserted error was waived because it had not been objected to below. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Inquiry as to Time Served — Letter to Warden From Judge: Letter written by judge who revoked suspended sentence to warden of penitentiary, inquiring as to prison time to be credited against sentence, was not prejudicial. The evidence indicated the letter was written at defendant's instigation and that defendant complimented the judge on judge's efforts in defendant's behalf. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Parolees — Revocation by Court of Suspended Portion of Sentence: This section's provision that a judge who has suspended a sentence may, during the period of the suspended sentence, revoke the suspension does not prohibit revocation prior to the time defendant begins to serve the suspended part of the sentence. Where defendant was sentenced to 10 years with 5 suspended and was paroled less than 5 years later, his 5-year suspension could be revoked even though he was technically on parole and not yet serving the 5 suspended years. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982), followed in St. v. Morrison, 2008 MT 16, 341 M 147, 176 P3d 1027 (2008).

Resisting Police Interference With Fight — Suspension Revoked: In an appeal from a revocation of a suspended sentence, the defendant's conduct in resisting police interference in a barroom fight was inexcusable and his actions gave the District Court ample reason to revoke his suspended sentence. Thus, the Supreme Court refused to overturn the revocation without a showing that the District Court abused its discretion. No such showing was made. St. v. Robinson, 190 M 145, 619 P2d 813, 37 St. Rep. 1830 (1980), followed in St. v. Rogers, 239 M 327, 779 P2d 927, 46 St. Rep. 1721 (1989).

Jurisdiction to Designate Dangerous Offenders: At a previous hearing on the State's petition to revoke defendant's probation, the trial court not only revoked his probation but erroneously designated him as a dangerous offender for purposes of parole eligibility, which function is reserved to the sentencing court. Neither 46-18-404 (now repealed) nor 46-18-203 gave the District Court authority to determine at the revocation hearing that the defendant was a dangerous offender for purposes of parole. In fact, when the sentencing court placed defendant on probation and suspended the 10-year sentence, the effect was to determine that defendant did not represent a substantial danger to society. Smith v. St., 186 M 52, 606 P2d 153 (1980). See also In re Petition of Arledge, 232 M 450, 756 P2d 1169, 45 St. Rep. 1188 (1988).

Jurisdiction Over Proceedings: For violation of parole conditions imposed by the Department of Institutions (now Department of Corrections), the original sentencing court has the implied power and jurisdiction to revoke a suspension of sentence granted by the Sentence Review Division without violating the double jeopardy protection. In fact, the Sentence Review Division lacks jurisdiction over a revocation proceeding initiated by the state. In re Ratzlaff, 172 M 439, 564 P2d 1312 (1977).

Credit for Time:

A person receiving a suspended sentence upon the condition that he serve 9 months in jail is entitled to credit for the time spent in jail upon revocation of the suspended sentence. In re LeDesma, 171 M 54, 554 P2d 751 (1976).

Crediting of elapsed time upon the revocation of a suspended sentence is within the discretion of the trial court. Petition of Doney, 164 M 330, 522 P2d 92 (1974).

Credit for Time in Jail: Time spent in jail under a suspended sentence must be credited to a sentence for violation of probation. In re Hanson, 169 M 80, 544 P2d 816 (1976).

Preliminary Hearing Not Required to Establish Probable Cause: When probation was revoked by the original sentencing judge, the petitioner was not denied minimum standards of due process as the petitioner was not arrested until a bench warrant was issued pursuant to the final order of revocation after a hearing at which the petitioner was represented at every step by counsel. When no detention is involved, a preliminary hearing to establish probable cause for filing a petition for imposition of final judgment and sentence is not necessary as no rights of the probationer have been violated. In re Meidinger, 168 M 7, 539 P2d 1185 (1975).

Commencement of Sentence: When relator was sentenced to 4 years' confinement and the execution of the sentence was then suspended, which suspension was later revoked, the sentence commenced to run for all purposes on the date when judgment of conviction was entered. Any time between the imposition of the suspended sentence and its revocation should have been credited to the relator and failure to do so resulted in his illegal confinement. State ex rel. Wetzel v. Ellsworth, 143 M 54, 387 P2d 442 (1963).

Credit for Time After Judgment: When the relator was sentenced to 4 years' confinement and the execution of the sentence was then suspended, which suspension was later revoked, the sentence commenced to run for all purposes on the date when the judgment of conviction was entered. Any time between the imposition of the suspended sentence and its revocation should have been credited to the relator and failure to do so resulted in his illegal confinement. State ex rel. Wetzel v. Ellsworth, 143 M 54, 387 P2d 442 (1963).

Attorney General's Opinions

Consecutive Suspended or Deferred Sentences — Probationary Period: When a sentencing court imposes a suspended or deferred sentence on more than one count and orders the periods of suspension or deferral to run consecutively, for purposes of probation revocation, the

probationary period for the first count is considered to run before the period on the second and successive counts. 42 A.G. Op. 116 (1988).

Petition to Revoke Suspension or Deferral — May Apply to More Than One Sentence: Conditions of release are a part of the judgment in a case, and there is no prohibition against revoking the uncompleted sentences in a single proceeding where the terms of the judgment have been violated. Thus, if suspended or deferred sentences are to be served consecutively and time remains on more than one period of suspension or deferral, then more than one suspension or deferral may be revoked in the same proceeding. 42 A.G. Op. 116 (1988).

Law Review Articles

Discussion of In re Meidinger, 37 Mont. L. Rev. 265 (1976).

46-18-204. Dismissal after deferred imposition.

Commission Comments

Source: New.

This provision merely codifies the practice which presently exists and provides explicit authorization for withdrawal of a plea of guilty when there has been a deferred imposition of sentence.

Compiler's Comments

2007 Amendment: Chapter 515 in first sentence near middle inserted reference to termination of time remaining on deferred sentence under 46-18-208; and made minor changes in style. Amendment effective May 16, 2007.

1999 Amendment: Chapter 395 in first sentence near middle after "plea of guilty" inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

1989 Amendment: Substituted second and third sentences relating to treatment of order of dismissal as confidential criminal justice information for former second and third sentences that read: "Upon dismissal of the charges, the court shall send an order directing the department of justice to expunge the defendant's record. The order must adequately identify the defendant, such as by sex, race, date of birth, and the current status of the charges to be expunged." Amendment effective April 6, 1989.

1987 Amendment: Inserted last two sentences relating to order to expunge defendant's record.

Case Notes

Dismissal of Previous Deferred Drug Possession Charge — Subsequent Felony Possession Not Chargeable: Tomaskie was convicted of misdemeanor marijuana possession in 1995. Imposition of sentence was deferred, and Tomaskie subsequently fulfilled the conditions of the sentence. In 2003, Tomaskie was arrested again for possession of less than 60 grams of marijuana, but Tomaskie was charged with felony possession based on the prior 1995 conviction. Prior to sentencing on the 2003 charge, Tomaskie notified the court that sentenced him for the 1995 charge, and because the deferred sentence conditions were fulfilled, the court dismissed the 1995 charge. Tomaskie then moved to reduce the 2003 charge to a misdemeanor, but the motion was denied. Tomaskie pleaded guilty but reserved the right to appeal. Tomaskie asserted that because the 1995 conviction was dismissed before he was convicted of the 2003 charge, the 2003 charge should have been reduced to a misdemeanor. The state argued that because the 1995 conviction existed at the time that Tomaskie pleaded guilty to the 2003 charge, the District Court correctly concluded that Tomaskie was convicted at that point and properly denied the motion to amend the charge to a misdemeanor. The Supreme Court agreed with Tomaskie and reversed. In order for there to be a conviction, a sentence must be imposed. The District Court incorrectly determined that when Tomaskie pleaded guilty, he had been convicted. A conviction does not occur until sentence is imposed. Tomaskie was not convicted of a second or subsequent offense under 45-9-102(2) because before the 2003 charge resulted in a conviction, the 1995 conviction was dismissed, and Tomaskie should not have been sentenced as a felon. When the information was charged in the 2003 offense, Tomaskie's prior conviction had not been dismissed, so Tomaskie was properly charged with felony possession, but when the prior conviction was dismissed, the authority to impose a felony sentence was lost. St. v. Tomaskie, 2007 MT 103, 337 M 130, 157 P3d 691 (2007), following St. v. Shults, 169 M 33, 544 P2d 817 (1976), and St. v. Gladue, 209 M 235, 679 P2d 1256 (1984), and distinguishing St. v. Lorash, 238 M 345, 777 P2d 884 (1989), and St. v. Wheeler, 285 M 400, 948 P2d 698 (1997).

No Authority of Courts to Expunge Criminal Records Absent Statutory Authorization: Montana courts have jurisdiction to expunge criminal records pursuant to statute, but absent

explicit legislative authorization, courts have no inherent power to expunge criminal records. St. v. Chesley, 2004 MT 165, 322 M 26, 92 P3d 1212 (2004).

Sheriff Entitled to Consider Confidential Criminal Justice Information in Deciding Whether to Grant Permit for Concealed Weapon: Smith was involved in an incident in 1993 resulting in charges for a number of felonies to which he pleaded guilty. Smith received a deferred imposition of sentence, and after satisfying the conditions of the sentence, the charges were dismissed. In 1995 and 1997, Smith applied for a permit to carry a concealed weapon, but each request was denied by the County Sheriff because of the 1993 incident and because of Smith's criminal history. Smith contended that the Sheriff improperly relied on evidence from Smith's criminal file to establish reasonable cause to deny the applications, because the District Court had dismissed the 1993 charges and ordered the records expunged. However, this section does not provide for record expungement when a charge is dismissed, but rather provides that the record be considered confidential criminal justice information. Pursuant to 44-5-303, the Sheriff was entitled to receive the information and to consider it when exercising the discretion in 45-8-321 regarding whether or not to grant a concealed weapon permit. Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834, 56 St. Rep. 1318 (1999).

Previous DUI Conviction Not to Be Considered for Purposes of Felony DUI — Former Requirement for Expungement of Record Held Self-Executing — Lorash Distinguished — Expungement Applicable to Local Records: Bowles was convicted of DUI in 1977 and did not receive another DUI for 5 years but was convicted of two other DUI offenses after 1982. When Bowles was arrested for DUI in Park County in 1996, Park County charged Bowles with felony DUI, fourth offense, counting the 1977 conviction as one of three prior convictions. Bowles moved for dismissal of the felony charge, contending that the 1977 record should have been expunged pursuant to the 1981 version of 61-8-714(5), and the District Court granted the motion. The Supreme Court held that the District Court properly dismissed the felony charge because the expungement provision in effect at the time, unlike the expungement provision in this section that was litigated in St. v. Lorash, 238 M 345, 777 P2d 884 (1989), was self-executing and did not require the defendant to move the court to have the record of conviction expunged. The requirement for expungement applied to the 1977 conviction, despite the change in the law in 1989 requiring that the record be held as confidential criminal justice information, because the requirement for expungement was self-executing. The Supreme Court also noted that the expungement requirement applied to records of conviction notwithstanding the requirement in 61-11-102 that the Department of Justice maintain records of convictions of licensees. Further, the Supreme Court also held, relying upon St. v. Brander, 280 M 148, 930 P2d 31 (1996), that because "expungement" means to destroy and was without limitation, all traces of the conviction record should have been destroyed, that the record of the 1977 conviction was maintained by the Park County Sheriff in violation of the law, and that the 1977 county conviction record should not have been used as the basis for the felony charge. In response to the state's argument that the expungement requirement, enacted in 1981, applied prospectively only to convictions occurring after the requirement's effective date, the Supreme Court noted that it had rejected that argument in St. v. Reams, 284 M 448, 945 P2d 52, 54 St. Rep. 972 (1997). St. v. Bowles, 284 M 490, 947 P2d 52, 54 St. Rep. 962 (1997).

Limitation on Deferral of Sentence — Constitutionality: The provision of 46-18-201 prohibiting a defendant from receiving a deferred sentence if he has been convicted of a prior felony is not unconstitutional under the due process clause. Defendant who had received a deferred sentence in 1973 and had not attempted to have that conviction dismissed or expunged was not entitled to a deferred sentence after a 1988 conviction. Defendant's argument regarding constitutionality is moot because the 1987 amendment to this section was repealed in 1989. St. v. Lorash, 238 M 345, 777 P2d 884, 46 St. Rep. 1321 (1989), distinguished in St. v. Bowles, 284 M 490, 947 P2d 52, 54 St. Rep. 962 (1997), as to the requirement for a motion for expungement.

Deferred Imposition of Sentence Not Dismissed — "Conviction" for Purposes of Persistent Felony Offender Status: On appeal following conviction for criminal mischief and attempted burglary for which the defendant was sentenced as a persistent felony offender, the defendant argued that a prior conviction and deferred imposition of sentence should not have been considered a "conviction" under the persistent felony offender statutes because he successfully completed probation, even if the record of his prior conviction was not expunged or the sentence dismissed. The Supreme Court held, consistent with the rationale of St. v. Drew, 158 M 214, 490 P2d 230 (1971), that the case should be remanded to District Court to determine whether the prior unrevoked deferred sentence should be dismissed, and directed that if the sentence is dismissed then it should not be considered in determining whether the defendant is a persistent felony offender. St. v. Gladue, 209 M 235, 679 P2d 1256, 41 St. Rep. 669 (1984).

Intent of Legislature: The passage of this section demonstrates the intent of the Legislature in regard to deferred imposition of sentences; if sentence were imposed or executed in any part, then the end advantage to the entire concept of the deferred sentence could not be attained and this section would become inoperative. St. v. Drew, 158 M 214, 490 P2d 230 (1971).

Attorney General's Opinions

Documentation of Offense to Be Destroyed Upon Expungement: When a deferred imposition of sentence results in a dismissal of charges, expungement of defendant's record mandated by this section requires that all documentation and physical or automated entries concerning the expunged offense be physically destroyed or obliterated. 42 A.G. Op. 100 (1988).

46-18-205. Mandatory minimum sentences — restrictions on deferral or suspension.

Compiler's Comments

2007 Amendment: Chapter 483 inserted (4) providing that mandatory minimum sentences do not apply to sentences imposed pursuant to 45-5-503(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), 45-5-603(2)(c), or 45-5-625(4); and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

2001 Amendment: Chapter 312 inserted (2)(h) relating to aggravated promotion of prostitution; and made minor changes in style. Amendment effective October 1, 2001.

Code Commissioner Correction: In (2)(b) after "45-5-202" the Code Commissioner deleted "(3)(a)" to reflect the change made by sec. 16, Ch. 432, L. 1999. The authority for the correction was contained in sec. 14, Ch. 52, L. 1999.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

Effective Date: This section is effective October 1, 1999.

Case Notes

Mandatory Minimum Sentence for Incest Properly Applied — Victims Under Age Sixteen: Bailey was convicted of incest with two victims under 16 years old, and Bailey was more than 3 years older than both victims. The District Court determined that 45-5-507(4) required the imposition of a mandatory minimum sentence of 4 years and sentenced Bailey to 10 years with the Department of Corrections, with 6 years suspended, on each count. Bailey asserted error, but the Supreme Court examined the sentence for legality and affirmed. The 4-year mandatory minimum sentence in 45-5-507(4) clearly applied, and this section did not come into play because none of the exceptions in 46-18-222 to the mandatory minimum sentence for incest existed, so the District Court did not err in sentencing Bailey. St. v. Bailey, 2004 MT 87, 320 M 501, 87 P3d 1032 (2004), following St. v. Fauque, 2000 MT 168, 300 M 307, 4 P3d 651 (2000).

Sentence Allegedly Based on False Information Affirmed if Information Not Material: Allen contended that his due process rights were violated because he was sentenced based on false and prejudicial information regarding the number of his prior felony convictions and because a witness at his trial later recanted testimony that related directly to Allen's crime. The Supreme Court noted that a defendant is protected from being sentenced based on misinformation about the defendant's criminal history; however, due process does not protect against all misinformation, but rather against materially false information. Allen contended that a prior California conviction for car theft was actually a misdemeanor, rather than a felony, and was thus misapplied to his criminal history and that the actual case files and dockets had been destroyed. The court noted that grand theft auto in California was in fact a felony at the time that Allen was convicted, but that the sentencing court had not relied on the California conviction in sentencing anyway. There was other prior conviction information in Allen's record upon which to base the felony offender sentence, so even if the California information was incorrect, it was not material to Allen's sentence. As for the recanted witness testimony, the

Supreme Court noted that the witness ultimately took back the recantation after revealing to law enforcement officers that the recantation was made when the witness was in the same cell block as Allen and was made as a result of intimidation and duress. The recanted testimony was not material to Allen's testimony, and his conviction was affirmed. St. v. Allen, 2001 MT 266, 307 M 253, 37 P3d 655 (2001).

46-18-206. Sexual offenders — electronic monitoring as additional condition of sentence.

Compiler's Comments

Preamble: The preamble attached to Ch. 360, L. 2005, provided: "WHEREAS, the United States Department of Justice has published confirmed statistics that over 60% of serious and violent offenders in state prisons have a history of prior convictions and that the number of prisoners convicted for violent sexual assault has increased by an annual rate of 15% each year since 1980; and

WHEREAS, criminals who commit sexual and violent crimes have shown unusually high recidivism rates, thereby posing an unacceptable level of risk to the community; and

WHEREAS, intensive supervision of sexual or violent offenders is a crucial element to both the rehabilitation of the released convicts and the safety of the surrounding community; and

WHEREAS, mature technological solutions now exist to provide improved supervision and behavioral control of sexual or violent offenders following their release; and

WHEREAS, these solutions can now also provide law enforcement and correctional professionals with significant new tools for electronic correlation of the constantly updated geographical location of supervised sexual or violent offenders following their release with the geographic location of reported crimes, both to possibly link released offenders to crimes or to possibly exclude released offenders from ongoing criminal investigations; and

WHEREAS, continuous 24-hour-a-day, 7-day-a-week electronic monitoring of those convicted of sexual offenses is a valuable and reasonable requirement for those convicts who are placed on probation, who failed to register as sexual or violent offenders as required by law, or who have been released from incarceration while they remain under the active supervision of the state."

Severability: Section 7, Ch. 360, L. 2005, was a severability clause.

Effective Date: Section 8, Ch. 360, L. 2005, provided that this section is effective July 1, 2005.

Case Notes

No General or Inherent Authority of Sentencing Court to Generally Impose Parole Conditions — Parole Condition Related to Sexual Offense Authorized: There is no general or inherent authority for a sentencing court to impose parole conditions. A sentencing court may impose conditions on parole that are authorized by statute only. In this case, all conditions on Burch's suspended sentence for sexual offenses were proper, but only one parole condition, prohibiting Burch from possessing pornography or accessing the Internet, was authorized under 46-18-255. Burch's admission that he used the Internet at work to access pornography while on parole established that Burch violated a condition of his suspended sentence by a preponderance of the evidence. Thus, the sentencing court did not err in revoking Burch's suspended sentence. St. v. Burch, 2008 MT 118, 342 M 499, 182 P3d 66 (2008), followed in St. v. Dennison, 2008 MT 344, 346 M 295, 194 P3d 704, (2008), and St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009), regarding authority of sentencing court.

46-18-207. Sexual offender treatment.

Compiler's Comments

2009 Amendment: Chapter 39 at beginning of (5) substituted "If, following a conviction for a sexual offense as defined in 46-23-502, any portion of a person's sentence is suspended" for "If a person's sentence is suspended pursuant to subsection (4)(b)"; and made minor changes in style. Amendment effective March 20, 2009.

Applicability: Section 3, Ch. 39, L. 2009, provided: "[This act] applies to persons charged with a sexual offense, as defined in 46-23-502, on or after [the effective date of this act]." Effective March 20, 2009.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

Effective Date: Section 30, Ch. 483, L. 2007, provided: "[This act] is effective on passage and approval." Approved May 11, 2007.

Case Notes

Defendant Unable to Complete Residential Treatment Program Not Yet Established — Writ of Habeas Corpus Denied: In 1996, Johnson was sentenced to 10 years for felony aggravated

kidnapping and 40 years for felony sexual intercourse without consent, with the terms to run concurrently. In 2007, 46-18-207 was enacted, which provided in part for the suspension of sentences for inmates who successfully completed the residential sexual offender treatment program established by the legislation. Johnson filed a writ of habeas corpus, asserting that his sentence for sexual intercourse without consent should be suspended because he had completed sex offender treatment programs in Arizona and Montana and further arguing that he was eligible for sexual offender treatment under 46-18-207. The District Court denied the writ and Johnson appealed, but the Supreme Court denied and dismissed the writ. The residential treatment program authorized in 46-18-207 was not yet established as of the date of the writ, so Johnson could not avail himself of the statutorily authorized program or of the benefits of 46-18-207. Additionally, even if Johnson was eligible for the program, placement is within the discretion of the Department of Corrections, and Johnson was ineligible in any case because of his conviction for aggravated kidnapping, which is one of the exceptions to the operation of 46-18-207. Johnson v. Mahoney, 2009 MT 275, 352 M 136, 217 P3d 1025 (2009).

46-18-208. Termination of remaining portion of deferred or suspended sentence — petition.

Compiler's Comments

Effective Date: Section 4, Ch. 515, L. 2007, provided that this section is effective on passage and approval. Approved May 16, 2007.

46-18-212. When no penalty is specified.

Compiler's Comments

Section Not Codified in Part: Part of section 95-2206.3, R.C.M. 1947, a temporary provision within that section, was not codified in the MCA. This provision has not been repealed and is still valid law. Citation may be made to sec. 31, Ch. 513, L. 1973.

Case Notes

Legality of Sentence for Criminal Production or Manufacture of Dangerous Drugs by Accountability: Becker was sentenced to 10 years in prison for accountability for criminal production or manufacture of dangerous drugs. Becker argued on appeal that the 10-year sentence was illegal because 45-9-110 does not set out a punishment for a first-time offense for accountability for criminal production or manufacture, so no statutory authority existed for the 10-year sentence. Absent that authority, Becker contended that this section should apply and that the offense was a misdemeanor punishable by not more than 6 months in the county jail. The Supreme Court agreed that subsections (2) and (3) of 45-9-110 did not provide an applicable sentence for first-time accountability for a criminal production or manufacture offense. However, 45-9-110 carries penalties in excess of 1 year in prison, so a violation of that statute is a felony, and the default penalty in 46-18-213, not this section, applies to violations of 45-9-110. Under 46-18-213, a 10-year sentence for a felony was authorized, and Becker's sentence was therefore affirmed. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005).

46-18-213. When no penalty is specified — felony.

Compiler's Comments

1981 Amendment: Section 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Case Notes

Legality of Sentence for Criminal Production or Manufacture of Dangerous Drugs by Accountability: Becker was sentenced to 10 years in prison for accountability for criminal production or manufacture of dangerous drugs. Becker argued on appeal that the 10-year sentence was illegal because 45-9-110 does not set out a punishment for a first-time offense for accountability for criminal production or manufacture, so no statutory authority existed for the 10-year sentence. Absent that authority, Becker contended that 46-18-212 should apply and that the offense was a misdemeanor punishable by not more than 6 months in the county jail. The Supreme Court agreed that subsections (2) and (3) of 45-9-110 did not provide an applicable sentence for first-time accountability for a criminal production or manufacture offense. However, 45-9-110 carries penalties in excess of 1 year in prison, so a violation of that statute is a felony, and the default penalty in this section, not 46-18-212, applies to violations of 45-9-110. Under this section, a 10-year sentence for a felony was authorized, and Becker's sentence was therefore affirmed. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005).

46-18-219. Life sentence without possibility of release.

Compiler's Comments

2001 Amendment: Chapter 312 inserted (1)(b)(v) relating to aggravated promotion of prostitution; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to offender for references to person; inserted (4) prohibiting deferral or suspension of life sentence; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 432 in (1)(b)(ii) after "45-5-202" deleted "(1)". Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

Coordination Instruction: Section 20, Ch. 482, L. 1995, provided: "If House Bill No. 46 is passed and approved, then the crime of arson, 45-6-103, is deleted from the crimes listed in [subsection (1)(b) of section 1 of this act]." House Bill No. 46 was approved March 13, 1995, as Ch. 124, L. 1995. Therefore, the reference to the crime of arson has been deleted from 46-18-219(1)(b).

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, 46-18-219, enacted as sec. 1 of Senate Bill No. 66, is effective July 1, 1997.

Case Notes

Mandatory Life Sentence Not Violative of Due Process, Cruel and Unusual Punishment, or Separation of Powers — Exception Properly Considered: Webb pleaded guilty to second offense sexual intercourse without consent and was sentenced to life in prison without parole pursuant to this section. Webb appealed the sentence on grounds that the mandatory life sentence violated procedural and substantive due process, the prohibition against cruel and unusual punishment, and the separation of powers doctrine. Webb also asserted that the sentencing court failed to properly consider the exception to mandatory sentencing set out in 46-18-222(3). The Supreme Court affirmed. The sentencing court properly considered the exception and did not abuse its broad discretion in finding no unusual and substantial distress. The sentencing court offered Webb all the procedural due process necessary and did not violate substantive due process because the sentence fit within the statutory sentencing limits. Webb's contention that life without parole was cruel and unusual punishment failed because the sentence was commensurate with the gravity of the crime and consistent with state sentencing and correctional policy. The argument that mandatory sentences violate the separation of powers doctrine also failed because it is in the Legislature's province to distinguish between criminal offenses and to establish punishments, and enactment of this section was based on constitutional principles and Montana public policy. St. v. Webb, 2005 MT 5, 325 M 317, 106 P3d 521 (2005). See also St. v. Bruns, 213 M 372, 691 P2d 817 (1984), and St. v. Dahms, 252 M 1, 825 P2d 1214 (1992).

46-18-220. Sentences for certain offenses committed in official detention — death penalty.

Compiler's Comments

2001 Amendment: Chapter 524 near middle after "shall" inserted "if the provisions of 46-1-401 have been complied with". Amendment effective May 1, 2001.

1999 Amendments — Composite Section: Chapter 52 at beginning substituted "An offender" for "A person serving a sentence of imprisonment in the state prison"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 126 at beginning after "A person" deleted "serving a sentence of imprisonment in the state prison", after "convicted of" inserted "having committed", and after "aggravated kidnapping" substituted "while in official detention, as defined in 45-2-101" for "committed while incarcerated at the state prison". Amendment effective October 1, 1999.

Chapter 491 in two places substituted "a state prison" for "the state prison". Amendment effective April 27, 1999.

A composite section was prepared by the code commissioner because the changes made by Ch. 491 were rendered void by the changes made by Ch. 52 and Ch. 126.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

Collateral References

Application of death penalty to nonhomicide cases. 62 ALR 5th 121.

46-18-221. Additional sentence for offenses committed with dangerous weapon.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 16 near beginning of (1) inserted "other than an offense in which the use of a weapon is an element of the offense"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 524 in (1) and (2) at beginning inserted "If the provisions of 46-1-401 have been complied with"; and made minor changes in style. Amendment effective May 1, 2001.

Preamble: The preamble attached to Ch. 16, L. 2001, provided: "WHEREAS, in State v. Guillaume, 1999 MT 29, 293 Mont. 224, 975 P.2d 312 (1999), the Montana Supreme Court held that as applied to offenses in which the use of a weapon is an element of the offense, the additional sentence for an offense committed with a dangerous weapon violates the double jeopardy provision of Article II, section 25, of the Montana Constitution."

1981 Amendment: Inserted (4) requiring that additional sentences for offenses committed with a dangerous weapon run consecutively.

Case Notes

Enhanced Sentence for Use of Weapon — Apprendi Applied Retroactively Under Harmless Error Test — Enhanced Sentence Without Unanimous Jury Finding Harmless Error: After Adams received an enhanced sentence for use of a weapon during an aggravated assault, Adams appealed on grounds that there was insufficient evidence to support a finding that a weapon was used and that the enhanced sentence violated due process because there was no separate jury finding that a weapon was used, as required by Apprendi v. N.J., 530 US 466 (2000). The 2001 Legislature updated the law to address the Apprendi requirement, but as it read in 1997 during Adams's sentencing, 46-1-401 did not require a separate jury finding, so Adams argued that 46-1-401 was therefore unconstitutional. The Supreme Court held that Apprendi imposes a new obligation on the state and is thus a new rule that applies retroactively to cases pending on direct appeal or not final at the time that the new rule was issued, so Apprendi applied retroactively to Adams's direct appeal. Nevertheless, the Supreme Court affirmed the sentence on both issues. First, there was uncontroverted evidence that a weapon was involved in the crime. Second, the Supreme Court applied Neder v. U.S., 527 US 1 (1999), to determine the proper test to apply when a trial court fails to instruct the jury to make a finding of materiality. Under Neder, the proper test is the harmless error test, i.e., whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Thus, in this case, the question was whether, beyond a reasonable doubt, Adams would have received an enhanced sentence based on the display or use of a weapon had the question been submitted to the jury. Given

evidence that a gun was used was uncontroverted, the result would have been the same, so any error in failing to present the question to the jury was harmless. Adams v. St., 2007 MT 35, 336 M 63, 153 P3d 601 (2007), applying St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001).

Facially Invalid Sentence — Statutory Bar Against Appeal Unconstitutional — Habeas Corpus Relief Granted: Lott was sentenced in 1992 for aggravated kidnapping, sexual intercourse without consent, aggravated burglary, and felony assault, and each sentence was enhanced by 10 years for use of a dangerous weapon. The 5-year limit on appealing the sentences that was in effect at sentencing (now a 1-year limit) expired, so Lott was procedurally barred from challenging the sentences. The Supreme Court subsequently decided in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), that application of the weapons enhancement to a felony offense that itself required proving use of a weapon constituted a double jeopardy violation. Guillaume was held to apply retroactively in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), so Lott's sentence was unconstitutionally enhanced with regard to the aggravated burglary and felony assault convictions. The state asserted that Lott was procedurally barred from raising the issue in a habeas corpus petition because Lott did not raise the issue on direct appeal or in a petition for postconviction relief. After analyzing habeas corpus and postconviction relief in Montana, the Supreme Court noted the constitutional guarantee that the writ of habeas corpus may never be suspended and concluded that as applied to a facially invalid sentence, the procedural bar in 46-22-101 unconstitutionally suspends the writ. Even if Lott had filed a direct appeal or petition for postconviction relief, the double jeopardy argument would have been unavailing because Guillaume and Whitehorn were not decided until well after both filing dates had expired. In order to avoid a grievous wrong and a miscarriage of justice, the Supreme Court granted Lott's petition for habeas corpus and remanded for resentencing pursuant to Guillaume and Whitehorn. Lott v. St., 2006 MT 279, 334 M 270, 150 P3d 337 (2006), followed in St. v. Jackson, 2007 MT 186, 338 M 344, 165 P3d 321 (2007), and St. v. Andersen-Conway, 2007 MT 281, 339 M 439, 171 P3d 678 (2007).

Time for Challenge of Sentence Enhancement Expired — Postconviction Relief Properly Denied: In 2003, Bingman filed a petition for postconviction relief challenging a 1986 sentence enhancement. The District Court denied the petition as untimely, and the Supreme Court affirmed. Under the applicable 1995 version of 46-21-102, a petition for postconviction relief needed to be filed within 5 years of the final sentence (now 1 year), and because Bingman's petition was filed long after the statutory limit, the petition was properly denied. Bingman v. St., 2005 MT 272, 329 M 151, 122 P3d 1235 (2005).

Error in Applying Weapon Enhancement Sentence Without Complying With Statutory Procedure: Following a conviction for negligent homicide, the District Court sentenced Strauss to 20 years in prison plus 10 years for use of a firearm. Strauss contended that the sentence was unlawful because Strauss was not notified of the enhancement before the sentencing hearing and because the jury did not make a separate finding at trial that the enhancing act occurred, as required by 46-1-401. The Supreme Court agreed. It was error to enhance Strauss's sentence without following the statutory procedure in 46-1-401, so the weapon enhancement portion of the sentence was stricken. (See 2001 amendment.) St. v. Strauss, 2003 MT 195, 317 M 1, 74 P3d 1052 (2003).

No Sentence Enhancement for Felony Assault With Weapon or Aggravated Burglary: Sentences on convictions for felony assault with a weapon and aggravated burglary are the only offenses that may not be enhanced under this section. St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002).

Retroactivity of Substantive and Procedural Rules Distinguished — Nichols Rule Prohibiting Retroactive Applicability of Guillaume Sentencing Enhancement Restriction Overruled: Whitehorn was convicted in 1995 of felony assault, criminal endangerment, and possession of dangerous drugs, and the sentencing court added an additional 10-year sentence for use of a weapon. In 1999, the Supreme Court decided St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), which held that enhancing a defendant's sentence for use of a weapon when the underlying offense (felony assault in Guillaume's case) required proof of the use of a weapon violated the constitutional double jeopardy provision. Whitehorn moved for resentencing in light of Guillaume, arguing that the enhanced sentence should be stricken because his underlying offense of felony assault also required proof that he used a weapon. The state initially agreed that Guillaume applied and that resentencing was appropriate, but prior to resentencing, the state changed its position in light of St. v. Aguilar, 1999 MT 159, 295 M 133, 983 P2d 345 (1999), and St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093 (1999), which provided that Guillaume would not be retroactively applied to cases not pending on direct appeal or to cases that were final when that opinion was issued. Whitehorn then filed a petition for postconviction relief

under 46-21-102, arguing that his case was not final because he had not exhausted the 5-year time period for filing for postconviction relief (revised to 1 year in 1997). The District Court agreed that the petition was timely filed under 46-21-102, but, relying on Nichols, denied the petition and held that Whitehorn's case was final and not pending on direct review, and thus concluded that Guillaume could not be retroactively applied. Whitehorn appealed the denial of his petition for postconviction relief. The Supreme Court found that the District Court erred in not retroactively applying Guillaume and reversed, holding that under the common-law doctrine of plain error, Whitehorn was not procedurally barred from raising the retroactivity argument on appeal. The court distinguished between substantive and procedural rules when considering whether to apply a rule change retroactively. In Nichols, the court adopted the retroactivity analysis in Teague v. Lane, 489 US 288 (1989), which stands for the proposition that on collateral review, a new procedural rule of constitutional law will not be applied retroactively if it puts primary, private individual conduct beyond the power of the criminal law to proscribe or if the procedures used to convict the defendant are so implicit in the concept of ordered liberty as to constitute a watershed rule of criminal procedure. In Nichols, the court concluded that Guillaume announced a new rule, but that neither Teague exception applied. However, here the court decided that Guillaume was by its own terms a substantive rule to which the Teague exceptions should not even have been applied (accord, Chambers v. U.S., 22 F3d 939 (9th Cir. 1994)). Partially overruling Nichols and a similar holding in St. v. Wells, 2001 MT 55, 304 M 329, 21 P3d 610 (2001), the court concluded that it was illogical to refuse to extend constitutional protections to citizens simply because their claims are raised by collateral review rather than direct appeal. However, the court retained the Guillaume analysis, clarifying that sentences on convictions for felony assault with a weapon and aggravated burglary are the only offenses that may not be enhanced under this section. St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002). See also Desist v. U.S., 394 US 244 (1969), and Mackey v. U.S., 401 US 667 (1971).

Petition for Postconviction Relief Barred by Seven-Year Lapse: Following remand of St. v. Morrison, 257 M 282, 848 P2d 514 (1993), in 1993, the District Court set forth findings of fact supporting Morrison's 3-year dangerous offender sentence that had been added to Morrison's 20-year prison sentence for sexual intercourse without consent, and Morrison's sentence became final. In 2000, Morrison petitioned the District Court for a writ of habeas corpus, arguing that the 3-year sentence enhancement should be vacated because the use of a weapon had not been charged as a separate offense in the information and that the court relied on false or misleading evidence to support the enhancement. The court treated the petition as one for postconviction relief and denied it as untimely. Morrison appealed, and the Supreme Court affirmed. Under the version of 46-21-102 in effect at the time of Morrison's final conviction in 1993, the statute of limitations required that petitions for postconviction relief be filed within 5 years after conviction became final. Morrison's petition was not filed until 7 years after conviction. Notwithstanding Morrison's argument that the statute of limitations should be equitably tolled, the petition was not timely and the District Court properly dismissed it. Morrison v. Mahoney, 2002 MT 21, 308 M 196, 41 P3d 320 (2002).

Application of Weapon Enhancement Statute to Conviction for Mitigated Deliberate Homicide Not Violative of Double Jeopardy Protection: Park was sentenced to 40 years for mitigated deliberate homicide, plus 10 years for use of a weapon. Citing St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), Park contended on appeal that the imposition of the additional weapon enhancement sentence violated the constitutional prohibition against double jeopardy. The Supreme Court distinguished Guillaume because the offense charged in that case was felony assault, which requires the use of a weapon, while mitigated deliberate homicide does not. The double jeopardy question under Guillaume and its progeny is not whether a weapon was used in the offense, but rather whether the statutory definition of the offense includes the use of a weapon, with the result that defendant is punished twice for the same offense. The court also discounted Park's argument that use of a weapon is implied every time that a deliberate or mitigated homicide occurs. The court has limited the definition of weapon in several cases, and case law also provides numerous instances of homicide when no conceivable weapon caused the death. Park's enhanced sentence for use of a weapon was affirmed. St. v. Park, 2001 MT 157, 306 M 98, 30 P3d 1062 (2001), following St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966 (2000), and St. v. Dunnette, 2000 MT 33, 298 M 208, 996 P2d 379 (2000).

Petition for Postconviction Relief Filed Twelve Years After Conviction Time Barred — Guillaume Inapplicable: Charlo was convicted of aggravated assault in 1986 and sentenced to 20 years plus 10 years for use of a weapon, and the sentence was affirmed in 1987 (see St. v. Charlo, 226 M 213, 735 P2d 278 (1987)). Following the decision in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), Charlo petitioned for postconviction relief in 1999 on grounds

that the imposition of the additional 10-year weapon enhancement sentence violated his double jeopardy rights. (See 2001 amendment to this section by Ch. 16.) The District Court concluded that Guillaume did not apply and that no miscarriage of justice would occur if the court applied the 5-year statute of limitations on postconviction relief provided in 46-21-102 (now 1 year). The Supreme Court concurred. A petition filed 12 years after final conviction clearly violated the statute of limitations in 46-21-102. The court relied on St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000), for the holding that application of the weapon enhancement provision in this section to a conviction in which the underlying offense does not require use of a weapon as an element of the crime does not constitute a double jeopardy violation. The offense of aggravated assault does not require use of a weapon, so Guillaume did not apply. The court also declined to apply the fundamental miscarriage of justice exception in St. v. Redcrow, 1999 MT 95, 294 M 252, 980 P2d 622 (1999). Guillaume was the sole basis of Charlo's petition, so Charlo could not show that the Redcrow exception would apply. St. v. Charlo, 2000 MT 192, 300 M 435, 4 P3d 1201, 57 St. Rep. 761 (2000).

Miscarriage of Justice Exception — Newly Discovered Evidence Necessary to Trigger Waiver of Postconviction Statute of Limitations: Rosales's deferred sentence for felony assault (now assault with a weapon) and use of a weapon was revoked in 1994 because Rosales violated the deferral conditions. He was sentenced to 10 years for assault and an additional 2 years for use of a weapon in violation of this section. About 5 years and 3 months later and about 2 ½ months after the decision in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), Rosales moved to amend the sentence, contending that the additional 2-year sentence for use of a weapon put him in double jeopardy, based on Guillaume. (See 2001 amendment to this section by Ch. 16.) The District Court dismissed the motion because of the running of the 5-year statute of limitations for postconviction relief in 46-21-102 (changed to a 1-year statute of limitations in 1997). On appeal, Rosales asked the Supreme Court to reverse its application of the statute of limitations and the bar against retroactive application of the law as established in a similar case, St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093 (1999), which procedurally barred a defendant from moving the court to amend the sentence based on Guillaume. The Supreme Court declined, holding that the postconviction statute of limitations is a jurisdictional limit on litigation and is waived only when there is a clear miscarriage of justice—one so obvious that the judgment is rendered a complete nullity. The miscarriage of justice exception refers to actual, not legal, innocence and does not apply to postconviction claims unless the defendant alleges newly discovered evidence establishing that the defendant did not commit the offense. The Supreme Court refused to alter the conditions upon which the statute of limitations will be waived, and because the District Court was affirmed on grounds that the statute of limitations had run, Rosales's argument regarding retroactive application of the law was not considered. St. v. Rosales, 2000 MT 89, 299 M 226, 999 P2d 313, 57 St. Rep. 385 (2000).

No Sentence Enhancement for Use of Weapon in Assault on Police Officer: Because a conviction for assault on a police officer requires proof of use of a weapon, an additional sentence for use of a weapon under this section violates the double jeopardy provision of the Montana Constitution. (See 2001 amendment to this section by Ch. 16.) St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000), following St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999).

Application of Weapon Enhancement Statute to Conviction for Criminal Endangerment Not Violative of Double Jeopardy Protection: Keith was sentenced to 10 years in prison plus 10 years for use of a weapon, with 15 years suspended, for criminal endangerment. Keith argued that application of the weapon enhancement statute to the felony conviction for criminal endangerment violated the right to be free from multiple punishments for the same offense, pursuant to St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999). The Supreme Court distinguished Guillaume, noting that unlike the felony assault statute in that case, the definition of criminal endangerment does not require proof of the use of a weapon nor did Keith's use of a weapon raise the crime from a misdemeanor to a felony as in Guillaume. Because the offense of criminal endangerment, by its own terms, does not specifically increase a defendant's punishment for use of a weapon, application of the weapon enhancement statute to a criminal endangerment violation is not a double jeopardy violation. St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000), followed in St. v. Dunnette, 2000 MT 33, 298 M 208, 996 P2d 379, 57 St. Rep. 141 (2000), and St. v. Charlo, 2000 MT 192, 300 M 435, 4 P3d 1201, 57 St. Rep. 761 (2000).

Evidence of Voluntary Mental Impairment Insufficient to Trigger Waiver of Mandatory Minimum Sentence — Hearing Not Required: Keith was sentenced to 10 years in prison plus 10 years for use of a weapon, with 15 years suspended, for criminal endangerment. At the

sentencing hearing, the District Court noted that evidence of Keith's reduced mental capacity was based on Keith's voluntary ingestion of alcohol and prescription drugs and that under 46-18-222(2), the court could not waive the mandatory minimum sentence. Citing numerous cases, the Supreme Court held that the statute does permit the sentencing court to reject the mandatory minimum sentence if the court determines that defendant's mental capacity was significantly impaired during the commission of the offense but that the statute does not apply in cases when the maximum sentence or any sentence greater than the mandatory minimum is imposed. Here, there was no indication that the sentencing court ever intended to sentence Keith to either the 2-year mandatory minimum or to a period less than the 2-year mandatory minimum, so the exceptions did not apply. Further, because the exceptions were not an issue, Keith was not entitled to a hearing pursuant to 46-18-223. Nevertheless, in this case, the sentencing court did hold a hearing on its own motion but did not then abuse its discretion by denying Keith's request for a continuance of the sentencing hearing to allow evidence of Keith's mental capacity. St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000).

Unloaded BB Gun Not Considered Weapon for Purposes of Sentence Enhancement for Use of Dangerous Weapon: Clemo pleaded guilty to robbing a casino by threatening an employee with an unloaded BB pistol and was sentenced to 7 years with 5 years suspended for felony robbery pursuant to 45-5-401, plus an additional 2 years for committing the offense with a dangerous weapon pursuant to this section. Following St. v. Wilson, 282 M 134, 936 P2d 316, 54 St. Rep. 278 (1997), the Supreme Court concluded that Clemo's unloaded BB gun was no more capable of causing harm at the time in question than the inoperable BB gun used in Wilson and thus could not be characterized as a weapon because it was not easily able to produce serious harm when it was used to rob the casino. The case was remanded to vacate the enhanced portion of Clemo's sentence. St. v. Clemo, 1999 MT 323, 297 M 316, 992 P2d 1263, 56 St. Rep. 1292 (1999), distinguishing St. v. Matson, 227 M 36, 736 P2d 971, 44 St. Rep. 874 (1987), and In re R.L.S., 1999 MT 34, 293 M 288, 977 P2d 967, 56 St. Rep. 149 (1999).

Exceptions to General Rule of Retroactivity — Guillaume Inapplicable to Case Finalized Before Adoption of New Constitutional Rule: Although Nichols' conviction, resulting in an enhanced penalty for use of a weapon, was finalized more than 5 years prior to the Supreme Court's decision in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999), which created a new constitutional rule barring enhanced weapon sentences when the underlying offense requires proof of use of a weapon (see 2001 amendment to this section by Ch. 16), Nichols nevertheless argued that the portion of his sentence precluded by Guillaume should be stricken from his sentence. The Supreme Court applied the retroactivity criteria in Teague v. Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989), noting that two exceptions apply to the general rule of retroactivity. The first exception applies when the constitutional rule puts primary, private individual conduct beyond the power of the criminal law to proscribe; the second exception applies when the procedures used to convict the defendant are so implicit in the concept of ordered liberty as to constitute watershed rules of criminal procedure. Finding that Guillaume was not dictated by prior precedent and did not set out a watershed rule, the court held that the new rule did not require retroactive application to cases not pending on direct appeal or to cases that were final when the Guillaume opinion was issued. Not only was Nichols' claim time-barred under the pre-1997 version of 46-21-102, his argument that the sentence should be reduced to prevent a miscarriage of justice also failed because miscarriage of justice refers to actual, not legal, innocence. St. v. Nichols, 1999 MT 212, 295 M 89, 986 P2d 1093, 56 St. Rep. 827 (1999), followed in St. v. Baker, 1999 MT 251, 296 M 253, 989 P2d 335, 56 St. Rep. 987 (1999), and overruled in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002). See also St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Application of Weapon Enhancement Statute to Felony Conviction When Underlying Offense Requires Proof of Weapon Use Unconstitutional Under Montana Double Jeopardy Provision: When presented with the question of whether this section, the weapon enhancement statute, violates the double jeopardy provisions of Art. II, sec. 25, Mont. Const., the Supreme Court held that the Montana Constitution affords greater protection against multiple punishment than the federal constitution and that application of the weapon enhancement statute to felony convictions when the underlying offense requires proof of the use of a weapon violates Montana's constitutional double jeopardy provision (see 2001 amendment to this section by Ch. 16). In the instant case, the only factor raising Guillaume's charge from misdemeanor assault to felony assault (now assault with a weapon) was the use of a weapon. The distinction between the two offenses and the different penalties imposed by each offense is the Legislature's way of punishing a criminal defendant for the use of a weapon in committing an assault. Thus, when the weapon enhancement statute was applied to the felony assault (now assault with a weapon) conviction,

Guillaume was subjected to double punishment—once when the charge was elevated from misdemeanor assault to felony assault (now assault with a weapon) and again when the weapon enhancement statute was applied. This is exactly what double jeopardy was intended to prevent. The state's argument, that double jeopardy did not protect against multiple punishments for the same offense because that protection is not explicit in the constitutional language, failed because the fifth amendment to the U.S. Constitution has been held in N.C. v. Pearce, 393 US 711, 23 L Ed 2d 656, 89 S Ct 2072 (1969), to protect against multiple punishments for the same offense, and the Montana Constitution provides at least the same protection or greater. Further, the fact that legislative modification of the felony assault (now assault with a weapon) statute could achieve the same result as the present sentencing scheme did not mean that double jeopardy did not apply in this case. St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999), distinguishing St. v. Davison, 188 M 432, 614 P2d 489 (1980), and St. v. Zabawa, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996), followed in St. v. Brown, 1999 MT 31, 293 M 268, 975 P2d 321, 56 St. Rep. 139 (1999), St. v. Roullier, 1999 MT 37, 293 M 304, 977 P2d 970, 56 St. Rep. 157 (1999), St. v. Aguilar, 1999 MT 159, 295 M 133, 983 P2d 345, 56 St. Rep. 629 (1999), St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000), St. v. Weitzel, 2000 MT 86, 299 M 192, 998 P2d 1154, 57 St. Rep. 368 (2000), and St. v. Gustafson, 2000 MT 364, 303 M 386, 15 P3d 944, 57 St. Rep. 1554 (2000), and distinguished in St. v. Park, 2001 MT 157, 306 M 98, 30 P3d 1062 (2001). Aguilar was followed in St. v. Gustafson, 2000 MT 364, 303 M 386, 15 P3d 944, 57 St. Rep. 1554 (2000). Guillaume will not be retroactively applied to cases not pending on direct appeal or to cases that were final when that opinion was issued. St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999). Nichols was overruled in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), to the extent that the Supreme Court refused to retroactively apply Guillaume.

Unloaded, Inoperable BB Gun Not "Dangerous Weapon" for Sentence Enhancement Purposes: Defendant pleaded guilty to robbery and received a 15-year prison sentence. The District Court also concluded that the defendant used a dangerous weapon, a gun, in the commission of an offense and increased the sentence by 4 years. The defendant appealed, claiming that despite the victims' fears or beliefs concerning the gun, the undisputed facts established that a "dangerous weapon" was not used during the robbery because examination of the weapon revealed that it was a broken, unloaded, and inoperable BB gun. The Supreme Court agreed and reversed, ruling that District Courts must analyze the weapon itself, not the subjective beliefs and fears of the victims, to determine whether a "dangerous weapon" was used during commission of an offense. (See 2001 amendment to this section by Ch. 16.) St. v. Wilson, 282 M 134, 936 P2d 316, 54 St. Rep. 278 (1997).

"Any Offense" Includes Offenses Having Use of Weapon as Element of Offense: Zabawa argued that applying the weapons enhancement statute to him constituted double jeopardy because the use of a weapon was an element of felony assault (now assault with a weapon) to which he had pleaded guilty and that the use in the statute of "any offense" was ambiguous and should be interpreted to mean only offenses in which the use of a weapon was not an element of the offense. The Supreme Court held that the plain meaning of "any" included all offenses and that there is a presumption that the Legislature enacts a law with knowledge of existing laws and, in the present case, that would mean that the legislature used the term "any" knowing full well that there were offenses for which the use of a weapon was an element of the offense. St. v. Zabawa, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996).

Weapons Enhancement Statute Not Double Jeopardy When Legislative Intent Clear Statute Intended to Impose Cumulative Punishments: Zabawa argued that applying the weapons enhancement statute to him constituted double jeopardy because the use of a weapon was an element of felony assault (now assault with a weapon) to which he had pleaded guilty. The Supreme Court held that applying the weapons enhancement statute did not constitute double jeopardy because the language of the statute clearly showed the Legislature's intent to impose cumulative punishments and that the United States Supreme Court in Mo. v. Hunter, 459 US 359 (1983), had ruled that cumulative punishments imposed in a single trial do not violate the double jeopardy clause of the fifth amendment of the U.S. Constitution. (See 2001 amendment to this section by Ch. 16.) St. v. Zabawa, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996), distinguished in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999). See also St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000).

Error by Original Judge on Maximum Sentence — Improper Guilty Plea: Prior to accepting a plea agreement, defendant was incorrectly advised by the original presiding judge that the maximum sentence possible for two counts of felony assault (now assault with a weapon) arising from the same incident was 30 years rather than 40 years. When the original judge recused

himself, a second judge sentenced the defendant to 40 years. On appeal, the Supreme Court held that the District Court erred in imposing a 40-year sentence and instructed the District Court to modify the sentencing order to provide defendant a sentence no longer than the maximum sentence that had been advised by the original judge. (See 2001 amendment to this section by Ch. 16.) St. v. Brown, 262 M 499, 865 P2d 282, 50 St. Rep. 1658 (1993), overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995), followed in St. v. Roach, 1999 MT 38, 293 M 311, 975 P2d 817, 56 St. Rep. 161 (1999), and distinguished in St. v. Wilson, 1999 MT 52, 293 M 429, 976 P2d 962, 56 St. Rep. 220 (1999).

Enhancement for Single Offense, Not Single Incident: Byers urged the adoption of the California "single incident" rule, which restricts weapons enhancement sentencing considerations to a single period of time. However, the clear language of this section dictates an enhancement of from 2 years to 10 years for each offense and in no way restricts sentencing to a single transaction. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Use of Aggregate Sentence Sufficient: Byers was unequivocally assessed 75 years for each of two counts of deliberate homicide, and the sentence was enhanced by an aggregate of 15 years under this section because a weapon was used. Byers contended that the sentence enhancement constituted a general sentence that should have been divided between the two offenses. The Supreme Court disagreed, noting that the specific term of 15 years was assessed over and above the specific terms of 75 years, so there was nothing general about the sentence. In a situation in which both crimes are the same, the use of an aggregate sentence within the parameters of this section is sufficient. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), overruled in part in St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Sentence for Felony Assault (Now Assault With a Weapon) and Knowing Use of Firearm — Sentence Within Statutory Guideline Not Excessive: Defendant was sentenced to 10 years in prison for felony assault (now assault with a weapon) and to a consecutive term of 10 years with 5 years suspended for the knowing use of a firearm during commission of the offense, was designated a dangerous offender (see 1995 repeal of 46-18-404) for purposes of parole eligibility, and was fined $50,000 to be paid out of proceeds recovered in a pending civil suit. (See 2001 amendment to this section by Ch. 16.) Defendant contended the sentence was excessive given the nature of the offense and his prior record. However, the sentence was within the statutory guidelines for the offense and therefore did not violate the constitutional ban on cruel and unusual punishment. St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992), followed in St. v. DeSalvo, 273 M 343, 903 P2d 202, 52 St. Rep. 1019 (1995).

Knowingly — Alleged Accidental Shooting: Defendant's voluntary act of grabbing for a gun is sufficient to meet the "knowingly" requirement of the enhancement statute. St. v. Longneck, 247 M 95, 804 P2d 1044, 48 St. Rep. 107 (1991).

Supplying Weapon Used in Crime Characterized as Use: The defendant argued that he only supplied the weapon used in a robbery and murder and should not have been sentenced under the weapons enhancement statute. The Supreme Court held that providing the weapon knowing that it would be used in a crime constituted "otherwise using a firearm" under the statute. St. v. Mazurkiewicz, 245 M 172, 799 P2d 1066, 47 St. Rep. 1962 (1990). See also St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939, 56 St. Rep. 1198 (1999).

Standing to Challenge Constitutionality of Weapon Enhancement and Dangerous Offender Statutes: To challenge the constitutionality of a criminal statute or procedure, the defendant must show a direct personal injury resulting from application of the law in question. The Supreme Court held that a defendant had standing to challenge both Montana's weapon enhancement statute and dangerous offender statute (see 1995 repeal of 46-18-404) because he faced direct injury to his liberty interests through application of those laws. St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990), followed in St. v. Mazurkiewicz, 245 M 172, 799 P2d 1066, 47 St. Rep. 1962 (1990), and, with regard to standing to challenge criminal restitution statutes, in St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004).

Applicability to Negligent Homicide: By its terms, the enhancement statute applies to the commission of any offense, including negligent homicide. St. v. Redfern, 228 M 311, 741 P2d 1339, 44 St. Rep. 1547 (1987).

Federal Due Process Rights: Enhancement of sentences did not violate federal due process rights even though the information under which defendant was charged did not allege violation of this section. LaMere v. Risley, 827 F2d 622 (9th Cir. 1987), followed in Nichols v. McCormick, 929 F2d 507 (9th Cir. 1991).

Application of Section 46-18-222 When Maximum Sentence Given: Section 46-18-221 requires a sentence of from 2 to 10 years when a person found guilty of any offense used a firearm

during the commission of the offense. Defendant was sentenced to 10 years under this section. Therefore, 46-18-222, stating when a mandatory minimum sentence does not apply, could not be invoked because defendant was sentenced to the maximum possible sentence under 46-18-221. The purpose of 46-18-222 is to allow a judge who would otherwise have to pronounce the minimum sentence to sentence a defendant to less than the minimum sentence. St. v. Nichols, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986).

Additional Sentence Only for Felony Offenses: This statute applies only to a situation in which the underlying conviction is for a felony. St. v. Trimmer, 214 M 427, 694 P2d 490, 42 St. Rep. 77 (1985), followed and clarified in St. v. Zabawa, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996).

Enhanced Sentence — Ex-Policeman — Homicide by Shooting — No Equal Protection Violation: Defendant convicted of negligent homicide with a revolver was given an extra 10 years for committing the offense with a dangerous weapon. His claim that he was punished for being an ex-policeman and that thus his equal protection rights were violated was clearly without merit. He cited no authority for the claim. Given the evidence produced at trial, holding him to a greater knowledge of the risks inherent in his actions for the purpose of deciding whether to enhance his negligent homicide sentence was unquestionably reasonable and therefore constitutionally sustainable. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Negligent Homicide — Additional Sentence for Knowingly Using Gun Not Prohibited: That defendant was convicted of "negligent" homicide with a gun did not prohibit him from being given an additional sentence for "knowingly" using a dangerous weapon during the offense. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Information Not Required to Allege Use of Weapon: Defendant contended his sentence could not be enhanced under this section because the allegation that a weapon was used was not contained in the information. The information filed in a criminal prosecution need not contain a specific allegation of the use of a dangerous weapon if the charging instrument otherwise properly identifies the crime for which the defendant is charged. The statute is for punishment and not one to define an element of the crime charged. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983). See also St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990), and St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Consecutive Sentence Mandate — Sentences Prior to Enactment of Mandate: Defendant was convicted of negligent homicide and sentenced to 10 years and to an additional consecutive 5 years for the knowing use of a gun while committing the offense. At the time of sentencing, the court had discretion to make the 5 years run either consecutively or concurrently. This section was later amended to require that a sentence run consecutively. Defendant's contention on appeal that it was error to require the 5 years to run consecutively went to the equity of the requirement and not to its legality and should be directed to the Sentence Review Board rather than to the Supreme Court on appeal from the sentence. St. v. Hubbard, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982).

Consistent Mental States — Knowing Use of Dangerous Weapon and Negligent Homicide: There is no conflict between the mental state described in this section, requiring the knowing use of a firearm or other dangerous weapon while engaged in the commission of an offense, and the negligent mental state in the statute making criminal homicide negligent homicide when it is committed negligently. It is not a denial of due process to find one guilty of negligent homicide and to further find that he knowingly used a firearm during commission of the offense and therefore enhance the penalty under this section. St. v. Hubbard, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982).

Additional Penalty for Use of Weapon in Committing Crime — Not Double Jeopardy: A defendant, convicted of an offense committed with a weapon and given an additional sentence under 46-18-221, is not subjected to multiple punishments for the same offense in violation of the double jeopardy clauses of the federal and state constitutions because 46-18-221 does not constitute a separate offense or penalize the defendant for a separate offense; his sentence for an underlying offense is enhanced based upon the existence of an additional factor, the use of a weapon. (See 2001 amendment to this section by Ch. 16.) St. v. Davison, 188 M 432, 614 P2d 489 (1980), cited in St. v. Spurlock, 225 M 238, 731 P2d 1315, 44 St. Rep. 200 (1987), followed in St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988), and St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990), and distinguished in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999).

Sentence Enhanced — Defendant Not Sentenced for Crime Not Charged: Defendant was convicted of the crime of aggravated burglary with a weapon, and the charging document, while

omitting any mention of additional sentencing under 46-18-221, did mention that he was armed with a knife while committing the crime and was sentenced under 46-18-221 for an additional 5 years for the use of the knife. The defendant was not sentenced for a crime with which he was not charged because 46-18-221 does not create a separate substantive offense but enhances the penalty for an underlying offense. The defendant was not denied due process due to the additional sentencing because the jury was instructed on the crime of aggravated burglary with a weapon and found him guilty of that crime. (See 2001 amendment to this section by Ch. 16.) St. v. Davison, 188 M 432, 614 P2d 489 (1980).

Considerations for Application of Mandatory Minimum Sentence: Section 46-18-222, prior to amendment by sec. 1, Ch. 396, L. 1979, provided that although a loaded weapon was involved in the alleged assault, where no serious bodily injury was inflicted on the victim, the mandatory minimum sentence prescribed by law did not apply. It was therefore error to impose the minimum mandatory sentence. St. v. Nelson, 184 M 491, 603 P2d 1050 (1979).

Law Review Articles

Criminal Law: Consecutive Sentences Allowed for Burglary and Larceny Committed in a Single Criminal Transaction, (Morigeau v. St., 149 M 85, 423 P2d 60 (1967)), Swindlehurst, 28 Mont. L. Rev. 254 (1967).

Collateral References

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 8 ALR 5th 775.

Deadly or dangerous weapon: walking cane as deadly or dangerous weapon for purpose of statutes aggravating offenses such as assault and robbery. 8 ALR 4th 842.

46-18-222. Exceptions to mandatory minimum sentences, restrictions on deferred imposition and suspended execution of sentence, and restrictions on parole eligibility.

Compiler's Comments

2007 Amendment: Chapter 483 in introductory clause near end after "46-18-502(3)" inserted "and restrictions on parole eligibility"; in (6) near beginning after "45-5-502(3)" inserted "45-5-503(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), 45-5-603(2)(c), or 45-5-625(4)", after "determines" inserted "based on the findings contained in a sexual offender evaluation report prepared by a qualified sexual offender evaluator pursuant to the provisions of 46-23-509", and after "offender" inserted "while incarcerated, while in a residential treatment facility, or while"; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

1999 Amendment: Chapter 52 throughout section substituted references to judge for references to court and substituted references to offender for references to defendant; in introductory clause before "46-18-219" inserted "mandatory life sentences prescribed by", substituted "46-18-201(1)(b)" for "46-18-201(5) through (7)", and inserted reference to 46-18-205; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

1995 Amendments: Chapter 125 near end of introductory phrase substituted "46-18-201(5) through (7)" for "46-18-201(4) through (6)"; and in (6) substituted "protection of the victim and society" for "protection of society".

Chapter 482 in version effective July 1, 1997, near middle of introductory clause after "state", inserted "and 46-18-219".

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 46-18-222, enacted as sec. 14 of Senate Bill No. 66, are effective July 1, 1997.

1993 Amendment: Chapter 262 at beginning of (5) substituted "in a case in which the threat of bodily injury or actual infliction of bodily injury is an actual element of the crime" for "where applicable"; and made minor changes in style.

1991 Amendment: Inserted (6) providing an exception from the mandatory minimum sentence and allowing deferral or suspension of mandatory sentence of imprisonment for sexual assault involving a person under age 16 if the court concludes treatment in local community is better for rehabilitation of defendant and protection of society; and made minor changes in style.

1987 Amendment: Near end of introductory clause, after "subsections", deleted "(3)" and inserted "(6)".

1983 Amendments: Chapter 392, near end of introductory clause, inserted reference to 46-18-224.

Chapter 532 inserted last sentence of (2) stating that voluntary intoxication or a drugged condition is not an impairment for purposes of subsection (2).

Source: The subsection (2) exception inserted by sec. 1, Ch. 532, L. 1983, is modeled on the Wash. Rev. Code Ann., section 46.61.024, and Ariz. Rev. Stat. Ann., section 28-622.01.

1981 Amendments: Chapter 207 inserted ", and (5)" after "prescribed by subsections (3), (4)" in the first sentence.

Chapter 327 changed the reference to "46-18-502(2)" to "46-18-502(3)" to reflect amendment of that section.

Interim Study Committee Bill: Chapter 327, L. 1981 (HB 12), was introduced at the request of the interim Committee on Corrections Policy and Facility Needs. See committee report, Legislative Council, 1980.

Case Notes

Ten-Year Sentence for Criminal Distribution of Dangerous Drugs Affirmed Despite Finding of Impaired Mental Capacity: Novak was sentenced to 10 years with 6 years suspended for selling 0.06 grams of methamphetamine to an undercover informant, despite a finding that Novak was eligible for an exception to the mandatory minimum sentence because of impaired mental capacity. Novak appealed the sentence, but the Supreme Court affirmed. The fact that Novak was eligible for a sentence exception did not mean that he was entitled to it. The sentencing court's oral pronouncement of sentence complied with statutory requirements by providing adequate reasons for imposing the sentence, and the sentence fell within the parameters of 45-9-101(4) and was not illegal. St. v. Novak, 2008 MT 157, 343 M 292, 183 P3d 887 (2008).

Mandatory Life Sentence Not Violative of Due Process, Cruel and Unusual Punishment, or Separation of Powers — Exception Properly Considered: Webb pleaded guilty to second offense sexual intercourse without consent and was sentenced to life in prison without parole pursuant to 46-18-219. Webb appealed the sentence on grounds that the mandatory life sentence violated procedural and substantive due process, the prohibition against cruel and unusual punishment, and the separation of powers doctrine. Webb also asserted that the sentencing court failed to properly consider the exception to mandatory sentencing set out in subsection (3) of this section. The Supreme Court affirmed. The sentencing court properly considered the exception and did not abuse its broad discretion in finding no unusual and substantial distress. The sentencing court offered Webb all the procedural due process necessary and did not violate substantive due process because the sentence fit within the statutory sentencing limits. Webb's contention that life without parole was cruel and unusual punishment failed because the sentence was commensurate with the gravity of the crime and consistent with state sentencing and correctional policy. The argument that mandatory sentences violate the separation of powers doctrine also failed because it is in the Legislature's province to distinguish between criminal offenses and to establish punishments, and enactment of 46-18-219 was based on constitutional principles and Montana public policy. St. v. Webb, 2005 MT 5, 325 M 317, 106 P3d 521 (2005). See also St. v. Bruns, 213 M 372, 691 P2d 817 (1984), and St. v. Dahms, 252 M 1, 825 P2d 1214 (1992).

Mandatory Minimum Sentence for Incest Properly Applied — Victims Under Age Sixteen: Bailey was convicted of incest with two victims under 16 years old, and Bailey was more than 3 years older than both victims. The District Court determined that 45-5-507(4) required the

imposition of a mandatory minimum sentence of 4 years and sentenced Bailey to 10 years with the Department of Corrections, with 6 years suspended, on each count. Bailey asserted error, but the Supreme Court examined the sentence for legality and affirmed. The 4-year mandatory minimum sentence in 45-5-507(4) clearly applied, and 46-18-205 did not come into play because none of the exceptions in this section to the mandatory minimum sentence for incest existed, so the District Court did not err in sentencing Bailey. St. v. Bailey, 2004 MT 87, 320 M 501, 87 P3d 1032 (2004), following St. v. Fauque, 2000 MT 168, 300 M 307, 4 P3d 651 (2000).

Failure to Raise Sentencing Objections Before District Court — Issue Not Preserved for Appeal: Tucker pleaded guilty to attempted aggravated assault with a weapon. At the sentencing hearing, Tucker argued that one of the sentencing exceptions applied to him because his mental capacity was impaired because of his transsexualism combined with the stress of his fiance's custody battles. The District Court disagreed and added the minimum 2-year weapon enhancement to his sentence. At no time did Tucker complain to the court that its findings were inadequate under 46-18-223 or allege that the sentence was illegal, excessive, or improper. Instead, Tucker argued on appeal that the sentencing court erred as a matter of law in failing to state the reasons why the sentencing exception did not apply. The Supreme Court refused to remand for resentencing because Tucker failed to bring the allegations of sentencing error to the attention of the District Court in a timely manner. The purpose of the contemporaneous objection requirement is to give the District Court the first opportunity to correct any error. Failure to do so constitutes a waiver of the right to appeal the issue. St. v. Tucker, 2000 MT 255, 301 M 466, 10 P3d 832, 57 St. Rep. 1046 (2000).

Failure to Include Written Findings of Fact Regarding Exceptions From Mandatory Minimum Sentence — Reversible Error: The District Court sentenced Sprinkle to 20 years for felony drug offenses pursuant to the mandatory minimum sentence requirement in 45-9-101, concluding that none of the exceptions to mandatory minimum sentencing in this section applied. However, the court failed to comply with 46-18-223, which requires the sentencing court to state in the judgment the reasons for its decision in writing and to identify the facts relied upon in making the decision. On appeal, Sprinkle asserted that he was entitled to an exception to mandatory minimum sentencing because his participation in the drug transaction was relatively minor. Without the required written findings of fact, the Supreme Court had no basis upon which to review the judgment, so the judgment was vacated and remanded for entry of findings of fact to support the conclusion that exceptions to mandatory minimum sentencing did not apply. St. v. Sprinkle, 2000 MT 188, 300 M 405, 4 P3d 1204, 57 St. Rep. 746 (2000).

No Claim to Unconstitutional Effect of Mandatory Minimum Sentence When Defendant Not Subject to Mandatory Minimum: Duffy was sentenced to 20 years for each offense of sexual abuse of his daughters, who were less than 16 years old at the time of the offense. On appeal, Duffy claimed that because of their ages, 45-5-503 and 45-5-507 required a minimum 4-year prison term, which deprived him of equal protection and due process because he did not qualify for the exception to the minimum term in subsection (5) of this section regarding instances involving a lack of serious bodily injury, asserting that he was similarly situated to persons convicted of sexual assault but treated differently because those offenders could qualify for the exception. However, before Duffy could claim standing to complain that he was unconstitutionally affected by the mandatory minimum sentences, he must have been subjected to those sentences, which was not the case here. Thus, Duffy was not affected by the disparate treatment of sex offenders based on the nature of the offenses and lacked standing to challenge the sentencing scheme on equal protection or due process grounds. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000).

Four-Year Mandatory Minimum Sentence for Sexual Intercourse With Minor Properly Applied: By plea agreement, Fauque pleaded guilty to one count of sexual intercourse without consent and one count of sexual assault against his 14-year-old daughter. The District Court concluded that the 4-year minimum sentence provided in 45-5-503 applied and that Fauque had failed to establish entitlement to any exceptions to the mandatory minimum sentence provided in this section. The court sentenced Fauque to 25 years on each count, with all but 4 years suspended and the sentences to run concurrently. Fauque appealed on grounds that a direct conflict existed between the mandatory minimum sentence for sexual intercourse without consent when the victim is less than 16 and the defendant is 3 or more years older contained in 45-5-503 and the 30-day mandatory minimum sentence for sexual intercourse without consent when the victim is less than 16 contained in 46-18-201 (see 1999 amendment and enactment of 46-18-205). The Supreme Court examined the legislative intent of both sentencing provisions and found no conflict in this case. The 4-year mandatory minimum provided in 45-5-503 clearly applied to Fauque, who was 53 years old at the time that he assaulted his 14-year-old daughter

and who did not argue any sentencing exception under this section. The mandatory minimum (now contained in 46-18-205) in 46-18-201 simply disallowed suspension of the first 30 days of a sentence under 45-5-503 under any circumstances, even if an exception existed under this section. Because no exception existed here, 46-18-201 did not come into play, so the Supreme Court affirmed Fauque's 4-year mandatory minimum sentence pursuant to 45-5-503. St. v. Fauque, 2000 MT 168, 300 M 307, 4 P3d 651, 57 St. Rep. 693 (2000).

Evidence of Voluntary Mental Impairment Insufficient to Trigger Waiver of Mandatory Minimum Sentence — Hearing Not Required: Keith was sentenced to 10 years in prison plus 10 years for use of a weapon, with 15 years suspended, for criminal endangerment. At the sentencing hearing, the District Court noted that evidence of Keith's reduced mental capacity was based on Keith's voluntary ingestion of alcohol and prescription drugs and that under subsection (2) of this section, the court could not waive the mandatory minimum sentence. Citing numerous cases, the Supreme Court held that the statute does permit the sentencing court to reject the mandatory minimum sentence if the court determines that defendant's mental capacity was significantly impaired during the commission of the offense but that the statute does not apply in cases when the maximum sentence or any sentence greater than the mandatory minimum is imposed. Here, there was no indication that the sentencing court ever intended to sentence Keith to either the 2-year mandatory minimum or to a period less than the 2-year mandatory minimum, so the exceptions did not apply. Further, because the exceptions were not an issue, Keith was not entitled to a hearing pursuant to 46-18-223. Nevertheless, in this case, the sentencing court did hold a hearing on its own motion but did not then abuse its discretion by denying Keith's request for a continuance of the sentencing hearing to allow evidence of Keith's mental capacity. St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000).

Exceptions to Mandatory Sentencing Not Applicable When Sentence Is Greater Than Minimum Sentence and Findings Not Required: Zabawa argued that the lower court erred in failing to apply to him the exceptions to the mandatory minimum sentence and also erred in failing to include in the judgment a written statement of the reasons that the lower court declined to apply the exceptions. The Supreme Court held that the exceptions do not apply in cases in which the lower court sentences the offender to more than the minimum sentence. In such cases, there is no requirement that the court make findings on why it did not apply the exceptions. St. v. Zabawa, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996), followed in St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000), and St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004).

Statute Inapplicable Notwithstanding Difference Between Oral and Written Sentence: Graveley was convicted of solicitation to commit deliberate homicide. At the sentencing hearing, the District Court announced Graveley's sentence of 40 years in the custody of the Department of Corrections, with the first 10 years in a prison environment. The District Court's written judgment omitted the reference to the first 10 years. The Supreme Court held that a review of the oral record showed that the District Court was not predisposed to sentencing Graveley to the 10-year minimum sentence. The Supreme Court held that the District Court's oral pronouncement did not amount to a 10-year sentence, but a 40-year sentence with 10 years in a prison environment, and that the District Court reiterated the 40-year sentence in writing. Because this was not a minimum sentence, the Supreme Court held that this section was inapplicable. St. v. Graveley, 275 M 519, 915 P2d 184, 53 St. Rep. 239 (1996).

Impairment of Mental Capacity Insufficient to Constitute Defense — Suspension of Sentence Proper: Defendant was convicted of attempt (deliberate homicide) and use of a dangerous weapon, for which he was sentenced to 10 years and 2 years, respectively. The District Court, after examining defendant's mental capacity at the time of the offense, held that incarceration was not appropriate in light of defendant's stellar community service record, the nature of the offense, the unlikelihood that defendant would ever attempt to harm the victim again, and defendant's remorse and lack of a previous criminal record. The court suspended both sentences, except for 15 days already served, and added a sentence of 4,000 hours of community service, citing St. v. Arbgast, 202 M 220, 656 P2d 828 (1983), as authority for suspending the mandatory minimum sentences. The Supreme Court distinguished Arbgast but affirmed the sentence suspension because defendant's mental capacity at the time of the offense was significantly impaired, but not so impaired as to constitute a defense. St. v. Niemi, 252 M 531, 830 P2d 1280, 49 St. Rep. 141 (1992).

Exception Properly Applied to Mandatory Sentence for Sexual Intercourse Without Consent: The state contended that the District Court erred in applying the exception contained in subsection (5) of this section when suspending all but 30 days of a sentence for sexual intercourse without consent because no serious bodily injury was inflicted on the victim. The Supreme Court

cited numerous federal cases in resolving the ambiguity between 45-5-503(2) and subsection (5) of this section, concluding that because the threat or infliction of bodily harm may, depending on the circumstances, be an element of the offense of sexual intercourse without consent, the exception to the minimum sentence when no serious bodily harm was inflicted is applicable to that offense. Ambiguity regarding the applicability of the exception must be resolved in favor of leniency. St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991), followed in St. v. Van Robinson, 248 M 528, 813 P2d 967, 48 St. Rep. 558 (1991).

Application of Section 46-18-222 When Maximum Sentence Given: Section 46-18-221 requires a sentence of from 2 to 10 years when a person found guilty of any offense used a firearm during the commission of the offense. Defendant was sentenced to 10 years under this section. Therefore, 46-18-222, stating when a mandatory minimum sentence does not apply, could not be invoked because defendant was sentenced to the maximum possible sentence under 46-18-221. The purpose of 46-18-222 is to allow a judge who would otherwise have to pronounce the minimum sentence to sentence a defendant to less than the minimum sentence. St. v. Nichols, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986), followed in St. v. Graveley, 275 M 519, 915 P2d 184, 53 St. Rep. 239 (1996). See also St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Maximum Sentence Imposed — Refusal of Hearing on Exception to Mandatory Minimum Sentence — No Error: Since defendant was given the maximum sentence for negligent homicide, there was no chance he would be given less than the mandatory minimum and it was therefore not error to refuse a hearing on whether one of the exceptions to imposing the mandatory minimum sentence was applicable to him. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984). See also St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994), and St. v. DeSalvo, 273 M 343, 903 P2d 202, 52 St. Rep. 1019 (1995).

Sentence in Excess of Mandatory Minimum Imposed After Finding of Mitigating Circumstance: Defendant was convicted of mitigated deliberate homicide. At the sentencing hearing, defense counsel asked that 46-18-222 be applied to defendant and that the 2-year minimum sentence for mitigated deliberate homicide not be imposed. The trial judge applied the provision of 46-18-222 relating to impaired mental capacity to defendant but sentenced defendant to more than the mandatory minimum sentence for mitigated deliberate homicide. The Supreme Court affirmed the sentence, ruling that since the trial judge had given consideration to defendant's situation and had given specific reasons for the sentence imposed, the trial judge's failure to state specifically that 46-18-222 did not apply did not constitute reversible error. St. v. Zampich, 205 M 231, 667 P2d 955, 40 St. Rep. 1235 (1983).

Killing Person Who Killed Defendant's Friend — Unusual or Substantial Duress Not Found: Defendant was convicted of negligent homicide after a shootout. At the trial he stated that he only intended to "wing" the victim, that victim had shot defendant's friend so defendant shot victim, that defendant only intended to wound victim, that "nobody sticks a gun in my face and gets away with it", that victim deserved to die and did not deserve to live, and that victim killed defendant's friend, so defendant killed victim. Defendant also had the presence of mind to temporarily incapacitate victim by kicking him in the groin and killed victim while victim was running away from defendant and posed no immediate threat to defendant. Although the circumstances of the shootout imposed a certain amount of duress upon defendant, it was not unusual or substantial so as to allow application of this section and except defendant from the mandatory minimum sentence. St. v. Hubbard, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982).

Level of Impairment — Applicability of Section: This section is only applicable to bring a convicted defendant under the exceptions to mandatory minimum sentencing provisions. The degree of impairment contemplated in this section is not significant enough to constitute a defense to the prosecution or to require commitment and is to be considered separately from conviction and from any claims made under 46-14-311 and 46-14-312. St. v. Doney, 194 M 22, 636 P2d 1377, 38 St. Rep. 1707 (1981).

Finding of No Mitigating Factors Supported in Record — Alcohol and Sexual Problems: Where the trial court considered defendant's drinking and sexual problems but concluded that those conditions did not excuse defendant from accountability for his acts, and the evidence presented at the hearing and in the presentence investigation report supported the trial court's conclusion, there was no abuse of discretion in sentencing defendant as a persistent felony offender. [A 1983 amendment provided that voluntary intoxication is not a mental capacity impairment under this section.] St. v. Metz, 184 M 533, 604 P2d 102 (1979).

Considerations for Application of Mandatory Minimum Sentence: Section 46-18-222, prior to amendment by sec. 1, Ch. 396, L. 1979, provided that although a loaded weapon was involved in

the alleged assault, where no serious bodily injury was inflicted on the victim, the mandatory minimum sentence prescribed by law did not apply. It was therefore error to impose the minimum mandatory sentence. St. v. Nelson, 184 M 491, 603 P2d 1050 (1979).

46-18-223. Hearing to determine application of exceptions.

Case Notes

Failure to Raise Sentencing Objections Before District Court — Issue Not Preserved for Appeal: Tucker pleaded guilty to attempted aggravated assault with a weapon. At the sentencing hearing, Tucker argued that one of the sentencing exceptions applied to him because his mental capacity was impaired because of his transsexualism combined with the stress of his fiance's custody battles. The District Court disagreed and added the minimum 2-year weapon enhancement to his sentence. At no time did Tucker complain to the court that its findings were inadequate under this section or allege that the sentence was illegal, excessive, or improper. Instead, Tucker argued on appeal that the sentencing court erred as a matter of law in failing to state the reasons why the sentencing exception did not apply. The Supreme Court refused to remand for resentencing because Tucker failed to bring the allegations of sentencing error to the attention of the District Court in a timely manner. The purpose of the contemporaneous objection requirement is to give the District Court the first opportunity to correct any error. Failure to do so constitutes a waiver of the right to appeal the issue. St. v. Tucker, 2000 MT 255, 301 M 466, 10 P3d 832, 57 St. Rep. 1046 (2000).

Failure to Include Written Findings of Fact Regarding Exceptions From Mandatory Minimum Sentence — Reversible Error: The District Court sentenced Sprinkle to 20 years for felony drug offenses pursuant to the mandatory minimum sentence requirement in 45-9-101, concluding that none of the exceptions to mandatory minimum sentencing in 46-18-222 applied. However, the court failed to comply with this section, which requires the sentencing court to state in the judgment the reasons for its decision in writing and to identify the facts relied upon in making the decision. On appeal, Sprinkle asserted that he was entitled to an exception to mandatory minimum sentencing because his participation in the drug transaction was relatively minor. Without the required written findings of fact, the Supreme Court had no basis upon which to review the judgment, so the judgment was vacated and remanded for entry of findings of fact to support the conclusion that exceptions to mandatory minimum sentencing did not apply. St. v. Sprinkle, 2000 MT 188, 300 M 405, 4 P3d 1204, 57 St. Rep. 746 (2000).

Evidence of Voluntary Mental Impairment Insufficient to Trigger Waiver of Mandatory Minimum Sentence — Hearing Not Required: Keith was sentenced to 10 years in prison plus 10 years for use of a weapon, with 15 years suspended, for criminal endangerment. At the sentencing hearing, the District Court noted that evidence of Keith's reduced mental capacity was based on Keith's voluntary ingestion of alcohol and prescription drugs and that under 46-18-222(2), the court could not waive the mandatory minimum sentence. Citing numerous cases, the Supreme Court held that the statute does permit the sentencing court to reject the mandatory minimum sentence if the court determines that defendant's mental capacity was significantly impaired during the commission of the offense but that the statute does not apply in cases when the maximum sentence or any sentence greater than the mandatory minimum is imposed. Here, there was no indication that the sentencing court ever intended to sentence Keith to either the 2-year mandatory minimum or to a period less than the 2-year mandatory minimum, so the exceptions did not apply. Further, because the exceptions were not an issue, Keith was not entitled to a hearing pursuant to this section. Nevertheless, in this case, the sentencing court did hold a hearing on its own motion but did not then abuse its discretion by denying Keith's request for a continuance of the sentencing hearing to allow evidence of Keith's mental capacity. St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000).

Exceptions to Mandatory Sentencing Not Applicable When Sentence Is Greater Than Minimum Sentence and Findings Not Required: Zabawa argued that the lower court erred in failing to apply to him the exceptions to the mandatory minimum sentence and also erred in failing to include in the judgment a written statement of the reasons that the lower court declined to apply the exceptions. The Supreme Court held that the exceptions do not apply in cases in which the lower court sentences the offender to more than the minimum sentence. In such cases, there is no requirement that the court make findings on why it did not apply the exceptions. St. v. Zabawa, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996), followed in St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000), and St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004).

Sentence in Excess of Mandatory Minimum Imposed After Finding of Mitigating Circumstance: Defendant was convicted of mitigated deliberate homicide. At the sentencing

hearing, defense counsel asked that 46-18-222 be applied to defendant and that the 2-year minimum sentence for mitigated deliberate homicide not be imposed. The trial judge applied the provision of 46-18-222 relating to impaired mental capacity to defendant but sentenced defendant to more than the mandatory minimum sentence for mitigated deliberate homicide. The Supreme Court affirmed the sentence, ruling that since the trial judge had given consideration to defendant's situation and had given specific reasons for the sentence imposed, the trial judge's failure to state specifically that 46-18-222 did not apply did not constitute reversible error. St. v. Zampich, 205 M 231, 667 P2d 955, 40 St. Rep. 1235 (1983).

Admissible Testimony — Testimony Claimed to Be Retrial of More Serious Prior Charge: Mitigated deliberate homicide conviction was reversed, and a negligent homicide plea bargain was made at a second trial following remand. It was not error to admit, in presentence hearing under this section, testimony claimed by defendant to constitute a retrial of the original mitigated deliberate homicide charge. St. v. Hubbard, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982).

Finding of No Mitigating Factors Supported in Record — Alcohol and Sexual Problems: Where the trial court considered defendant's drinking and sexual problems but concluded that those conditions did not excuse defendant from accountability for his acts, and the evidence presented at the hearing and in the presentence investigation report supported the trial court's conclusion, there was no abuse of discretion in sentencing defendant as a persistent felony offender. St. v. Metz, 184 M 533, 604 P2d 102 (1979).

46-18-224. Additional sentence for offense committed while carrying a handgun loaded with armor-piercing ammunition.

Compiler's Comments

2001 Amendment: Chapter 524 in (1) at beginning inserted "If the provisions of 46-1-401 have been complied with"; and made minor changes in style. Amendment effective May 1, 2001.

Case Notes

Record Not Reflective of Defendant's Ability to Pay Restitution — Remand: After pleading guilty to three counts of illegal branding, Mikesell was ordered to pay restitution, based in part on evidence of Mikesell's net worth. However, the record did not reflect all of Mikesell's liabilities and his ability to pay restitution from a ranching operation that was losing money. Mikesell was entitled to have the restitution award supported by evidence, and the Supreme Court reversed and remanded for further findings regarding Mikesell's ability to pay restitution and the setting of restitution payments accordingly. St. v. Mikesell, 2004 MT 146, 321 M 462, 91 P3d 1273 (2004).

46-18-225. Sentencing of nonviolent felony offenders — criteria — alternatives to be considered — court to state reasons for imprisonment.

Compiler's Comments

2005 Amendment: Chapter 517 in (1) at end of first sentence inserted "or a day reporting program provided for in 53-1-203"; and made minor changes in style. Amendment effective July 1, 2006.

1999 Amendment: Chapter 52 inserted (1) requiring consideration of alternatives to imprisonment for nonviolent felony offenders; in (2) in introductory clause substituted "sentencing judge" for "court"; in (2)(f) after "criminal act or" inserted "if the offender has a prior history of conviction for a criminal act, the offender"; inserted (3) requiring the sentencing judge to state reasons why alternatives to prison were not selected; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

1997 Amendment: Chapter 189 in introductory clause, in (1), and in (2) substituted "a state prison" for "the state prison or the women's correctional system".

1995 Amendments: Chapter 482 in version effective July 1, 1997, in introductory clause, after "offender", inserted "to whom 46-18-219 does not apply".

Chapter 546 in introductory clause, (1), and (2) substituted "women's correctional system" for "women's correctional center". Amendment effective July 1, 1995.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 46-18-225, enacted as sec. 15 of Senate Bill No. 66, are effective July 1, 1997.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 10 throughout section substituted references to the Women's Correctional Center for references to a women's correctional facility; and made minor changes in style.

Effective Date: Section 8, Ch. 794, L. 1991, provided: "[This act] is effective July 1, 1991."

Case Notes

Prison Sentence Affirmed Given Sentencing Court's Adequate Consideration of Prison Alternatives for Nonviolent Offender: Shults was sentenced to 50 years in prison as a persistent felony offender after being convicted of felony theft and felony escape. Shults appealed on grounds that the sentence should be remanded for further consideration of alternative punishment because Shults was a nonviolent offender. The Supreme Court declined to remand the sentence, noting that the sentencing court provided a 10-page statement explaining its reasons for imposing the prison sentence, including a recitation of Shults's 18-year criminal history — the commission of crimes that resulted in suffering for numerous victims, Shults's numerous unsuccessful opportunities to reform, and the fact that Shults continually used his intelligence and skills to try to subvert the justice system. The sentencing court clearly considered alternatives to prison and explained why incarceration was chosen. The findings were not clearly erroneous, and the court did not abuse its broad discretion in imposing the prison sentence, which the Supreme Court affirmed. St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

Use of Weapon by Person in Group Robbery but No Evidence That Defendant Used Weapon — Sentence as Violent Offender Reversed: Ferguson was one of a group of persons that attempted a robbery. It was uncontested that someone in the group brandished a knife, but testimony was conflicting whether it was Ferguson. Nevertheless, the trial court enhanced Ferguson's sentence because he was part of a crime of violence when a knife was used. However, the mere finding that someone in the group used a knife did not rise to the level of a finding that Ferguson used a knife. Thus, the Supreme Court reversed that part of Ferguson's sentence and remanded for sentencing Ferguson as a nonviolent offender. St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

No Evidence That Corporal Punishment Caused Mental Health Condition of Victim — Violent Felony Offender Designation Reversed: The sentencing court determined that Mason's excessive use of force in punishing a child with a belt constituted a violent offense and caused the child to develop a serious mental health condition, so Mason was designated a violent felony offender. However, the state produced no evidence that Mason caused the child's mental health condition or that the belt was used in a manner capable of producing death. Because the belt was not a deadly weapon, Mason's conduct did not satisfy the definition of crime of violence in 46-18-104. The violent felony offender designation was reversed. St. v. Mason, 2003 MT 371, 319 M 117, 82 P3d 903 (2003).

Error in Refusing to Classify Defendant as First-Time, Nonviolent Offender Following Conviction for Criminal Endangerment: Hocevar was convicted of criminal endangerment, which required a finding that her conduct created a substantial risk of death or serious bodily injury. The District Court refused Hocevar's request to be treated as a first-time, nonviolent felony offender because she committed a crime of violence. However, the definition of crime of violence in 46-18-104 means a crime in which an offender causes a serious bodily injury or death. Given the various options that were available to the jury, it could not be determined on appeal

whether the jury found that Hocevar actually caused a substantial risk of death or merely caused a risk of serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. In light of the uncertainty, the District Court committed reversible error in concluding that Hocevar committed an act of violence and in refusing to classify Hocevar as a first-time, nonviolent felony offender. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Misdemeanor Offender Not Entitled to Consideration of Mandatory Sentencing Requirement Applicable to Nonviolent Felony Offenders: Renee was sentenced to incarceration for three misdemeanor violations. On appeal, Renee contended that because the misdemeanors were nonviolent offenses, the District Court erred in not complying with 46-18-201 by considering alternatives to sentencing for Renee's nonviolent offenses. However, the plain language of 46-18-104(3) applies only to defendants who commit a particular kind of felony that is nonviolent. Therefore, a misdemeanor offender is not entitled to have a sentencing court consider the mandatory sentencing requirements of 46-18-201 and this section, which apply only to felony offenders. St. v. Renee, 1999 MT 135, 294 M 527, 983 P2d 893, 56 St. Rep. 545 (1999).

Nonviolent Felony Offenders Not Similarly Situated With Misdemeanor Offenders — No Equal Protection Violation in Different Felony and Misdemeanor Sentencing Schemes: Renee contended that Montana's nonviolent felony offender sentencing statutes violated his equal protection rights to physical liberty as a misdemeanor offender because both kinds of offenders may be subject to imprisonment, thus both felony and misdemeanor offenders are similarly situated classes dealt with unequally under the law. The Supreme Court disagreed. Relying on Tigner v. Tex., 310 US 141, 84 L Ed 1124, 60 S Ct 879 (1940), the court found that the constitution does not require that things that are different in fact or opinion be treated in law as though they were the same. Misdemeanor and felony offenders are not similarly situated because of differences in the quality and duration of punishment, as well as the long-term effects on an individual's liberty interest brought about by a felony conviction as compared to that for a misdemeanor conviction. Renee failed to make the necessary threshold showing that misdemeanor and nonviolent felony offenders are similarly situated, so the equal protection challenge failed. St. v. Renee, 1999 MT 135, 294 M 527, 983 P2d 893, 56 St. Rep. 545 (1999), distinguishing In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997).

District Court Required to Consider Alternatives — Alternative Sentences Allowed to Be Imposed: Alden pleaded guilty to several offenses, and at the sentencing hearing, the District Court considered but rejected alternatives to terms of imprisonment. The District Court's rejection was based upon testimony and written documents. Because there was testimony supporting Alden's contention that he should not have been sentenced to prison, Alden appealed the sentence. The Supreme Court held that the standard applicable to the exercise of the District Court's discretion is whether the law was incorrectly applied or whether the District Court's findings are clearly erroneous. The Supreme Court noted that the applicable statutes require the District Court to consider an alternative to imprisonment but only allow and do not require the District Court to impose that alternative. The Supreme Court found that the District Court had considered the alternatives but that the presentence investigation, Alden's admission, the absence of a reason or excuse for the offenses, the risk that Alden would reoffend, the need to protect society, the seriousness of the crime charged, and the ineffective nature of prior treatment all supported the District Court's view that imprisonment was necessary notwithstanding testimony supporting an opposite view. For these reasons, the Supreme Court affirmed the sentence. St. v. Alden, 282 M 45, 934 P2d 210, 54 St. Rep. 234 (1997).

Sexual Abuse — Failure of District Court to Consider Sentencing Alternatives — No Objection — Sentence Not Illegal or Violation of Due Process: Swoboda pleaded guilty to sexual abuse of children, was classified as a nondangerous offender, and was sentenced to 15 years with the Department of Corrections. On appeal, she claimed as error the District Court's failure to consider alternatives to incarceration. The Supreme Court noted that she had not objected at sentencing to the District Court's failure and declined to review the judgment. The Supreme Court noted that in the past, it had made an exception and reviewed such a failure of the District Court when the state conceded the failure of the District Court or when the sentence was illegal. Here, however, the Supreme Court noted that the sentence was not beyond the District Court's jurisdiction. Citing St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep 310 (1996), the Supreme Court also held that the failure of the District Court was not a manifest miscarriage of justice and would not leave unsettled the question of the fundamental fairness of the trial or the proceedings. St. v. Swoboda, 276 M 479, 918 P2d 296, 53 St. Rep. 478 (1996).

Requirements for Sentencing Nonviolent Felony Offenders Mandatory: Savaria was convicted in District Court on seven counts of felony theft and was sentenced to 10 years in the state prison.

Savaria appealed, claiming that the District Court had failed to consider the obligations imposed upon a District Court by 46-18-201 and this section in sentencing a nonviolent felony offender. The Supreme Court held that those considerations are mandatory and that under the circumstances, the District Court failed to properly sentence Savaria. St. v. Savaria, 274 M 197, 906 P2d 215, 52 St. Rep. 1153 (1995).

No Error in Trial Court's Considering Wishes of Victim: Stevens contended that the trial court erred in analyzing the law and sentencing him, a nonviolent offender, to a term of imprisonment. The Supreme Court held that although the statute establishing criteria for sentencing nonviolent offenders does not list the victim's wishes as a factor to be considered, neither does it prohibit consideration of the victim's wishes. Therefore, there had been no error on the trial court's part. St. v. Stevens, 273 M 452, 904 P2d 590, 52 St. Rep. 1078 (1995).

Failure to State Reasons for Not Selecting Alternatives to Imprisonment Must Be Objected to if Sentence Not Illegal: Nelson argued that the lower court failed to consider alternatives to imprisonment for a nonviolent offender as required by statute. The Supreme Court held that the lower court had failed to consider alternatives as required but that the sentence imposed by the lower court was not in excess of the maximum allowed by law and therefore was not illegal. The Supreme Court further held that since the sentence was not illegal, Nelson could not raise the consideration of alternatives on appeal when he had failed to object to the sentence when it was entered. St. v. Nelson, 274 M 11, 906 P2d 663, 52 St. Rep. 1069 (1995), distinguishing St. v. Lenihan, 184 M 338, 602 P2d 997 (1979), and St. v. Hatfield, 256 M 340, 846 P2d 1025 (1993), and following St. v. Arlington, 265 M 127, 875 P2d 307 (1994). Nelson was followed, with respect to the District Court's failure to consider alternatives being raised for the first time on appeal, in St. v. Harper, 284 M 185, 943 P2d 1255, 54 St. Rep. 837 (1997). Nelson was followed, with respect to the exception arising when a defendant alleges that a sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing, in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999).

Procedure for Considering Alternatives to Prison for Nonviolent Offender: Because the District Court did not consider alternatives to prison as required by 46-18-201, did not take into account the criteria contained in 46-18-201 and this section that require examination of alternatives to prison, and did not, as required by 46-18-201, state its reasons why alternatives to imprisonment were not selected, the prison sentence was vacated and the case remanded. St. v. Pence, 273 M 223, 902 P2d 41, 52 St. Rep. 937 (1995).

Failure to Consider Sentencing Alternatives to Incarceration for Nonviolent Felony Offense — Remand: Criminal sentencing alternatives are strictly matters of statute in Montana. Section 46-18-201 requires a trial court to consider alternatives to imprisonment when sentencing a nonviolent felony offender, and this section sets out 10 criteria that the court must consider. The court has no discretion in making these considerations. Therefore, when the court in this case considered pertinent facts concerning defendant's background but did not specifically consider any alternatives to incarceration, failure to consider the sentencing alternatives warranted remand for resentencing. St. v. Lamere, 272 M 355, 900 P2d 926, 52 St. Rep. 828 (1995), following St. v. Stevens, 259 M 114, 854 P2d 336 (1993).

Sentence of Imprisonment of Dangerous Offender — No Need to Consider Alternatives: After a conviction for kidnapping and assault, when the District Court clearly articulated numerous reasons for designating the defendant as a dangerous offender (see 1995 repeal of 46-18-404) and its reasons were fully supported by the record, the court's reasons for designating the defendant a dangerous offender are sufficient to rule out alternatives to imprisonment. By its findings, the court, as a practical matter, satisfied the requirements of statutory criteria for sentencing. St. v. Eichenlaub, 272 M 332, 901 P2d 90, 52 St. Rep. 786 (1995).

Failure to State Reasons for Not Selecting Alternatives to Imprisonment as Error: The Supreme Court reversed a lower court's sentence for a nonviolent felony offender because the lower court had failed to state its reasons for not selecting alternatives to imprisonment and failed to indicate that it had examined the statutory sentencing criteria. St. v. Stevens, 259 M 114, 854 P2d 336, 50 St. Rep. 707 (1993).

46-18-230. Legislative findings — cost of criminal proceedings.

Compiler's Comments

Effective Date: Section 4, Ch. 180, L. 2009, provided that this section is effective July 1, 2009.

46-18-231. Fines in felony and misdemeanor cases.

Compiler's Comments

2007 Amendment: Chapter 483 in (1)(b)(viii) after "45-5-503(2)" substituted "through (4)" for "and (3)"; inserted (1)(b)(ix) including the crime of incest; inserted (1)(b)(x) including the crimes

of prostitution, promotion of prostitution, or aggravated promotion of prostitution when the prostitute was 12 years of age or younger and the prostitute's client was 18 years of age or older at the time of the offense; inserted (1)(b)(xi) including the crime of sexual abuse of children; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to sentencing judge for references to court and substituted references to offender for references to defendant and person; in (1)(a) at beginning inserted exception clause; in (1)(b) after "provided in" substituted "the following sections" for "45-5-103, 45-5-202(3), 45-5-302(2), 45-5-303(2), 45-5-401(2), 45-5-502(3), 45-5-503(2) and (3), 45-9-101(2), (3), and (5)(d), 45-9-102(4), 45-9-103(2), and 45-9-109"; inserted (1)(b)(i) through (1)(b)(xi) listing various crimes; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 395 in (1) near beginning of first sentence and in (2) inserted "or nolo contendere". Amendment effective October 1, 1999.

Chapter 432 inserted (1)(b)(iii) referring to 45-5-213. Amendment effective October 1, 1999.

A composite section was prepared by the code commissioner by adding "assault with a weapon" to the reference to 45-5-213 inserted by Ch. 432 to reflect the changes made by Ch. 52, pursuant to sec. 14, Ch. 52, L. 1999.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

1991 Amendments: Chapter 42 in (1) changed subsection reference to 45-9-102.

Chapter 519 near end of (1) inserted "45-9-109"; and made minor changes in style.

1989 Amendment: In (1) inserted reference to 45-9-101(5)(d). Amendment effective April 20, 1989.

1987 Amendments: Chapter 370 in (1), near beginning of second sentence, changed "45-5-202(2)" to "45-5-202(3)".

Chapter 610 in second sentence of (1) substituted reference to 45-5-103 for reference to 45-5-103(2).

1981 Amendment: Section 7, Ch. 198, L. 1981, provided in part:

"(2) There is added to those sections listed in subsection (1) of section 1 [46-18-231], following the language in those sections specifying the term of imprisonment for which an offender may be imprisoned, the words "and may be fined not more than $50,000" or other similar language allowing the court to fine the offender a maximum of $50,000 in addition to a term of imprisonment. The code commissioner shall change the listed sections in accordance with this section and may make minor incidental adjustments consistent with this section as may be necessary to reflect the intent of this section without changing the meaning of the listed sections as amended by this section.

(3) There is added to those sections listed in subsection (4) of this section, following any language in those sections specifying the term of imprisonment for which an offender may be imprisoned but without specifying a fine that may be ordered to be paid, the words "or shall be punished by a fine of not more than $50,000 or by both such fine and imprisonment", or other similar language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment. The code commissioner shall change the listed sections in accordance with this section and may make minor incidental adjustments consistent with this section as may be necessary to reflect the intent of this section without changing the meaning of the listed sections as amended by this section.

(4) 13-27-205, 13-27-206, 19-11-207 [renumbered 19-18-207], 20-9-435, 23-5-106 [now repealed], 30-13-142, 32-1-236, 32-1-473, 32-1-505, 45-5-104, 45-5-204, 45-5-105, 45-5-201, 45-5-203, 45-5-204, 45-5-304, 45-5-505, 45-5-603, 45-5-613, 45-5-621, 45-6-101 through 45-6-103, 45-6-204, 45-6-301, 45-6-316, 45-6-317, 45-6-325, 45-6-327, 45-7-101, 45-7-102,

45-7-201, 45-7-206 through 45-7-208, 45-8-106, 45-8-215, 45-8-318, 45-8-334, 45-8-335, 45-9-101(4), 45-9-102(4), 45-9-103(3), 45-9-107, 46-18-213, 46-18-502, 46-31-204, 50-38-107, 61-3-604, 81-5-102, and 81-9-118."

Interim Study Committee Bill: Chapter 198, L. 1981 (SB 14), was introduced at the request of the interim Committee on Corrections Policy and Facility Needs. See committee report, Legislative Council, 1980.

Case Notes

Defendant's Objection to Fine Raised for First Time on Appeal Not Considered — Trial Court's Failure to Abide by Statutory Sentencing Requirements Not Reversible Error if Sentence Would Have Been Legal — Not Reviewable on Appeal Under Lenihan Rule: Kotwicki argued on appeal that the $25,000 fine imposed by the trial court was illegal because the trial court did not abide by the statutory requirements of this section to make a determination of the defendant's ability to pay the fine. The Supreme Court held that the defendant was not entitled to raise the issue of an illegal sentence for the first time on appeal because in the case before it, the trial court, had it reviewed the statutory requirements, could have legally imposed the fine and therefore the trial court's sentence was not illegal. The Supreme Court further held that the Lenihan rule of being able to raise, for the first time on appeal, the issue of an illegal sentence depends on whether the defendant raises a plausible allegation that the sentence is illegal and held that although Kotwicki alleged an illegal sentence, he failed to present a colorable claim that his sentence fell outside statutory parameters and warranted review. St. v. Kotwicki, 2007 MT 17, 335 M 344, 151 P3d 892 (2007), clarifying St. v. Lenihan, 184 M 338, 602 P2d 997 (1979), and St. v. McLeod, 2002 MT 348, 313 M 358, 61 P3d 126 (2002), and followed in St. v. Park, 2008 MT 429, 347 M 462, 198 P3d 321 (2008), and St. v. Jones, 2008 MT 440, 347 M 512, 199 P3d 216 (2008).

Criminal Fines Distinct From Other Court-Imposed Compensatory Financial Obligations — Fisher Overruled: The plain meaning of "fine" in 46-18-403 does not encompass fees, costs, charges, or other court-imposed financial obligations. Criminal fines are punitive in nature and are distinct from other court-imposed financial obligations associated with a criminal proceeding that are compensatory in nature, such as an assessment of fees for probationary supervision or a charge to defray a local government's costs in administering the criminal justice system. Voerding v. St., 2006 MT 125, 332 M 262, 136 P3d 502 (2006), overruling St. v. Fisher, 2003 MT 33, 314 M 222, 65 P3d 223 (2003), to the extent that Fisher suggests that the term "fine" in 46-18-403(2) encompasses other types of court-imposed financial obligations, such as fees, charges, and costs. See also St. v. VanWinkle, 2008 MT 208, 344 M 175, 186 P3d 1258 (2008).

Imposition of Mandatory Statutory Fine Without Specifying Payment Schedule or Consideration of Ability to Pay Not Erroneous: Mingus was convicted of DUI and fined the statutory minimum $1,000, as required in 61-8-731. The fine was statutorily mandated and clearly within statutory parameters. Mingus asserted error because the sentencing court did not inquire into his ability to pay, as required in this section, or establish a payment schedule, as allowed in 46-18-234. The Supreme Court disagreed. Ability to pay and consideration of a payment schedule apply only to discretionary fines, not statutorily mandated fines. When a fine is mandated, the sentencing court has no discretion whether to impose the fine, irrespective of defendant's ability to pay, nor is a sentencing court required to establish a payment schedule or specify when a mandatory fine must be paid under 61-8-731. St. v. Mingus, 2004 MT 24, 319 M 349, 84 P3d 658 (2004).

Failure of Sentencing Court to Consider Defendant's Financial Resources and Ability to Pay Fine — Reversible Error: This section requires that the sentencing judge, prior to sentencing, consider whether a defendant will be able to pay a fine, taking into account the defendant's financial resources and the nature of the burden that payment of the fine would impose. McLeod contended that the sentencing court failed to consider whether payment of a $1,000 fine for a drug conviction would conflict with McLeod's ability to pay child support. The Supreme Court examined the record and agreed that the sentencing judge did not consider McLeod's financial resources and the nature of the burden that payment of the fine would impose. The imposition of the fine was reversed for a further determination of whether McLeod had the ability to pay the fine. St. v. McLeod, 2002 MT 348, 313 M 358, 61 P3d 126 (2002).

Conditioning Suspended Portion of Incarceration Sentence Upon Entering Into Plan to Pay Fine in Installments: The court conditioned suspension of half the incarceration term upon defendant's entering into a plan for payment of a fine in installments. The court did not impose the fine as a condition on the suspended portion of the incarceration term. Thus, the Sentence Review Board's elimination of the suspended portion of the incarceration term did not eliminate the obligation to pay the fine. St. v. George, 2002 MT 300, 313 M 11, 59 P3d 1151 (2002).

Fine of Vacation Pay and Sick Leave Pay Absent Showing of Ability to Pay — Remand: The District Court fined defendant his vacation pay and sick leave pay as part of his sentence. Prior to entry of judgment but after the court made known its intention to levy the fine, defendant's attorney notified the court that it held a prior lien on defendant's vacation pay and sick leave pay. Because it was not clear from the record that defendant would be able to pay the fine levied by the court, the Supreme Court remanded for further proceedings on that part of the order that levied the fine, in accordance with this section. St. v. Sullivan, 266 M 313, 880 P2d 829, 51 St. Rep. 827 (1994).

Law Review Articles

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine. 31 ALR 3d 926.

46-18-232. Payment of costs by defendant.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 180 in (1) in first sentence after "service" inserted "costs of prosecution, and the cost of pretrial, probation, or community service supervision", at beginning of second sentence after "costs" inserted "in addition to those allowable under 25-10-201", after "prosecution" inserted "or other agency", and at end inserted "or $100 per felony case or $50 per misdemeanor case, whichever is greater"; in (2) in second sentence after "defendant" inserted "the future ability of the defendant to pay costs"; and made minor changes in style. Amendment effective July 1, 2009.

Interim Study Committee Bill: Chapter 198, L. 1981 (SB 14), was introduced at the request of the interim Committee on Corrections Policy and Facility Needs. See committee report, Legislative Council, 1980.

Case Notes

Imposition of Mandatory Statutory Fine Without Specifying Payment Schedule or Consideration of Ability to Pay Not Erroneous: Mingus was convicted of DUI and fined the statutory minimum $1,000, as required in 61-8-731. The fine was statutorily mandated and clearly within statutory parameters. Mingus asserted error because the sentencing court did not inquire into his ability to pay, as required in 46-18-231, or establish a payment schedule, as allowed in 46-18-234. The Supreme Court disagreed. Ability to pay and consideration of a payment schedule apply only to discretionary fines, not statutorily mandated fines. When a fine is mandated, the sentencing court has no discretion whether to impose the fine, irrespective of defendant's ability to pay, nor is a sentencing court required to establish a payment schedule or specify when a mandatory fine must be paid under 61-8-731. St. v. Mingus, 2004 MT 24, 319 M 349, 84 P3d 658 (2004).

Improper Imposition of District Court Costs Based on Local Court Rule: Blackwell pleaded guilty to DUI pursuant to a plea agreement on the day of trial. The District Court assessed Blackwell one-half of the jury costs, including 1 day of salary of the District Court Clerk, pursuant to the court's local rule rather than state sentencing statutes. Blackwell appealed the assessment, and the Supreme Court reversed. Although costs of jury service could have been imposed under this section, the statute does not authorize imposition of any portion of a Clerk's salary as costs. The District Court erred in relying on its local rule instead of applying this section, so the order assessing costs was vacated. St. v. Blackwell, 2001 MT 198, 306 M 267, 32 P3d 771 (2001).

Conditions Imposed in Written Judgment and Sentence Different From Those Imposed in Oral Sentence — Lane, Waters, and Simpson Reviewed — Test to Determine Which New Conditions Lawful or Unlawful — Payment of Restitution and Costs: Johnson was sentenced orally for writing bad checks and later contended that four of the conditions imposed in the written judgment and sentence by the District Court were unlawful under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), because they were not announced orally when she was sentenced in open court. The Supreme Court reviewed its decisions in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142 (1999), and St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361 (1999), and reasoned that a written sentence would be held unlawful only if it substantively increased the defendant's loss of liberty or the defendant's sacrifice of property. Under this test, the Supreme Court held that two of the four penalties not mentioned by the District Court in its oral pronouncement of Johnson's sentence were unlawful, those being the restitution ordered to the Missoula County jail of money expended for Johnson's medical care and the requirement that Johnson pay for the costs of her prosecution in District Court. The Supreme Court held that the other two parts of the written sentence, the requirement that Johnson make restitution from

money earned in prison and the imposition of certain "civil" restrictions as conditions of Johnson's suspended sentence, such as the requirement that Johnson stay out of gambling casinos, were lawfully imposed because they did not increase the amount of money that Johnson was ordered to pay or increase Johnson's deprivation of liberty in addition to those penalties imposed orally. The requirement for payment from prison earnings only specified where the money was to come from, and the "civil" restrictions were largely mentioned by the District Court at Johnson's sentencing hearing. St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Cost of Jury Selection and Prosecution Improperly Charged to Indigent Defendant: It was determined that Winterrowd was indigent, so counsel was appointed for him from the public defender's office. After being informed that Winterrowd had received a social security settlement and would no longer be considered indigent, the public defender moved to withdraw. Trial was continued to allow Winterrowd to obtain counsel. About 1 week before the scheduled hearing, Winterrowd moved for another continuance because the settlement had not arrived and he had not yet retained counsel. The state objected, arguing that Winterrowd had not demonstrated due diligence and that his claim that he would receive a settlement was unsupported by documentation. The trial court did not rule on the continuance motion. At the start of trial, Winterrowd again moved for a continuance, but the motion was denied. The trial proceeded through voir dire, with Winterrowd acting pro se. Following a break, the court granted the motion to continue and excused the jurors but ordered Winterrowd to pay the costs incurred in summoning the jurors and in prosecuting him. After granting the public defender's motion to withdraw, it was error for the court to charge Winterrowd with the costs when he was unable to obtain counsel. St. v. Winterrowd, 1998 MT 74, 288 M 208, 957 P2d 522, 55 St. Rep. 307 (1998).

Payment of Justice's Court Cost Imposed as Judgment of District Court Held Improper — Smith Reaffirmed: Morales was charged with assaulting a sports official, in violation of 45-5-211, after striking a basketball referee. Upon his conviction in Justice's Court, Morales appealed to District Court. Upon his conviction, the District Court ordered Morales to pay the costs of the trial in Justice's Court. The Supreme Court reaffirmed its holding in Billings v. Smith, 281 M 133, 932 P2d 1058 (1997), and held that a trial de novo in District Court has the effect of erasing any debt for costs in Justice's Court incurred before the appeal to District Court. St. v. Morales, 284 M 238, 943 P2d 1286, 54 St. Rep. 862 (1997).

Justice's Court Costs May Not Be Imposed as Part of District Court Sentence: Smith appealed his conviction in Justice's Court to District Court. The District Court found Smith guilty and as part of the sentence imposed the costs incurred in the Justice's Court proceedings. The Supreme Court held that an appeal to a District Court from a Justice's Court was a trial de novo and that only the costs of the District Court proceedings could be imposed as part of the sentence. Billings v. Smith, 281 M 133, 932 P2d 1058, 54 St. Rep. 96 (1997).

Expenses of Investigation Not Recoverable as Costs — Exception for Money Paid by Undercover Agents: Defendants Richard and David Fertterer were convicted of felony criminal mischief for illegally killing game. They contended on appeal that they could not be required to pay the costs of the investigation incurred by the state prior to the filing of the information. Citing Masanovich v. School District No. 1, 178 M 138, 582 P2d 1234 (1978), and St. v. Haynes, 633 P2d 38 (Oreg. App. 1981), the Supreme Court held that the costs of investigation were not recoverable because there was no statutory authority for the charge, as there is for other costs. However, the court made an exception, recognized in another Oregon case, for money paid directly to defendants by undercover agents. In this case, the state was allowed to recover guide service fees and other expenses paid to the Fertterers. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Jury Costs, Including Venue Change, Properly Chargeable — Insufficient Record: Defendants Richard and David Fertterer were convicted of felony criminal mischief for illegally killing game. They contended on appeal that they could not be required to pay the costs of the jury trial, especially those costs involving a change of venue that Fertterers claimed was made necessary by extensive pretrial publicity caused by the state. The Supreme Court held that there was no factual record to support Fertterers' charges and that no motion had been made by them at trial on the matter and no hearing requested. The Supreme Court concluded that the plain language of the statute authorized the charging of the costs. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Imposition of Trial Costs Not Unconstitutional: Defendant contended that this section and 46-18-233 are unconstitutional because they leave it to the discretion of the judge whether to impose costs of prosecution, thus permitting discrimination in violation of equal protection of the law. In striking down defendant's argument, the Supreme Court held that it is within the trial

court's discretion to impose prosecution, jury, and counsel costs on defendant. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Constitutionality: Defendant was convicted of deliberate homicide and was assessed costs and expenses as part of his sentence. Defendant contended that 46-18-232 was unconstitutional since it enhanced punishment in retribution for a defendant's exercise of a fundamental constitutional right. Statutes that allow a discretionary imposition of costs have been upheld against due process arguments. The statute does no more than deprive a financially able defendant of available funds that, in fairness, should be remitted to the public coffers. St. v. Weinberger, 204 M 278, 665 P2d 202, 40 St. Rep. 844 (1983).

46-18-233. Fine or costs as condition on suspended or deferred sentence.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Imposition of Trial Costs Not Unconstitutional: Defendant contended that 46-18-232 and this section are unconstitutional because they leave it to the discretion of the judge whether to impose costs of prosecution, thus permitting discrimination in violation of equal protection of the law. In striking down defendant's argument, the Supreme Court held that it is within the trial court's discretion to impose prosecution, jury, and counsel costs on defendant. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

46-18-234. When payment of fine or costs due.

Case Notes

Imposition of Mandatory Statutory Fine Without Specifying Payment Schedule or Consideration of Ability to Pay Not Erroneous: Mingus was convicted of DUI and fined the statutory minimum $1,000, as required in 61-8-731. The fine was statutorily mandated and clearly within statutory parameters. Mingus asserted error because the sentencing court did not inquire into his ability to pay, as required in 46-18-231, or establish a payment schedule, as allowed in this section. The Supreme Court disagreed. Ability to pay and consideration of a payment schedule apply only to discretionary fines, not statutorily mandated fines. When a fine is mandated, the sentencing court has no discretion whether to impose the fine, irrespective of defendant's ability to pay, nor is a sentencing court required to establish a payment schedule or specify when a mandatory fine must be paid under 61-8-731. St. v. Mingus, 2004 MT 24, 319 M 349, 84 P3d 658 (2004).

46-18-235. Disposition of money collected as fines and costs.

Compiler's Comments

2005 Amendment: Chapter 232 at beginning of introductory clause inserted exception clause; and made minor changes in style. Amendment effective October 1, 2005.

2001 Amendment: Chapter 585 in (1) substituted "by the clerk of district court to:

(a) the state treasurer for deposit into the state general fund" for "by a district court to the county general fund of the county in which the court is held, except that:

(a) if the costs assessed include any district court expense listed in 3-5-901, the money collected from assessment of these costs must be paid to the state for deposit into the state general fund to the extent that the expenses were paid by the state"; in (1)(b) after "chapter 9 or 10" substituted "and at the court's discretion" for "the court may order the money paid into"; and made minor changes in style. Amendment effective July 1, 2002.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in (1)(a) in version effective July 1, 2002, the code commissioner changed "state treasurer" to "department of revenue".

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1995 Amendments — Composite Section: Chapter 509 deleted (1)(c) that read: "(c) if the fine was imposed for a violation of 45-5-206, 50% of the amount collected must be deposited in the state special revenue fund for use of the department of family services in the battered spouses and domestic violence grant program created by 52-6-101"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1)(c) substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995. The Ch. 546 amendment in (1)(c) was rendered void by the Ch. 509 amendment.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments: Chapter 296 near beginning of first sentence, after "court", deleted "except money collected by a justice's court"; at beginning of (1) inserted "by a district court"; in (1)(b), after "chapter 9", inserted "or 10"; in (1)(c), after "collected", deleted "except for fines collected by a justice court and distributed pursuant to 3-10-601"; and inserted (2) concerning payment by a Justice's Court.

Chapter 704 near middle of (1)(a) substituted "state" for "department of commerce". Amendment effective July 1, 1991.

1989 Amendment: In (2) substituted "drug forfeiture account" for "drug forfeiture fund".

1987 Amendments: Chapter 553 inserted (3) relating to disposition of a fine imposed for violation of 45-5-206.

Chapter 557 near beginning, after "court", inserted "except money collected by a justice's court".

1985 Amendments: Chapter 680 inserted (1) providing that money collected by a court as fines and costs under 46-18-231 and 46-18-232 must be paid the county general fund.

Chapter 1, Sp. L. 1985, amended Ch. 680, L. 1985, by substituting "department of commerce" for "supreme court administrator" in (1).

1983 Amendment: Inserted exception at end of section relating to fines imposed for violating Title 45, chapter 9.

Case Notes

Order That Defendant Pay "Assessments" to Community Entities as Part of Sentence for Sexual Assault Illegal: As part of Krum's sentence for two counts of felony sexual assault, the District Court ordered Krum to pay a $5,000 assessment to the Park County Court Automation Fund, $2,500 to the Tri-County Network for Domestic Violence, and $2,500 to the Park County Big Brothers and Sisters in order to give back to society and to those who assist victims of these types of crimes. Krum appealed the assessments, and the Supreme Court reversed. Although the sentencing court had authority to fine Krum up to $50,000 for each conviction, the court did not include a fine per se in Krum's sentence, but instead ordered the payment of assessments to the community entities. However, this section provides that all fines and costs collected from a criminal defendant be paid to the Department of Revenue for deposit in the general fund, and a District Court may not redirect money collected from a defendant simply by labeling the money as an assessment instead of a fine. The state argued that the assessments were authorized as a condition of sentencing pursuant to 46-18-202 because the assessments were reasonably related to the underlying crimes, but the Supreme Court held that 46-18-202 does not provide the necessary authority for imposing assessments in the first place. The assessments were not limitations on Krum's conduct and could not be considered restitution because the money was not payable to the victims. Thus, the assessment portion of the sentence was unauthorized and illegal. The remainder of the sentence was affirmed, but the case was remanded with instructions to strike the illegal assessments from the sentence. St. v. Krum, 2007 MT 229, 339 M 154, 168 P3d 658 (2007), followed in St. v. Stephenson, 2008 MT 64, 342 M 60, 179 P3d 502 (2008), to the extent that a fine or surcharge payable to the community service program that is imposed without statutory authority is illegal. Stephenson was followed in St. v. VanWinkle, 2008 MT 208, 344 M 175, 186 P3d 1258 (2008).

46-18-236. Imposition of charge upon conviction or forfeiture — administration.

Compiler's Comments

2009 Amendment: Chapter 374 in (7)(c) at end substituted "account provided for in 53-9-113" for "state general fund to be used to provide services to crime victims as provided in Title 53, chapter 9, part 1". Amendment effective July 1, 2009, and terminates June 30, 2015.

2005 Amendment: Chapter 361 in (1)(c) increased charge imposed upon certain convictions from $25 to $50. Amendment effective October 1, 2005.

2001 Amendments — Composite Section: Chapter 118 in middle of (7)(c) substituted language requiring payment to the crime victims compensation and assistance program for services provided in Title 53, chapter 9, part 1, for former language requiring payment to "crime victims compensation and assistance account established in 53-9-109"; and made minor changes in style. Amendment effective March 23, 2001.

Chapter 449 in (1) near middle of introductory clause after "jurisdiction on a" substituted "person" for "defendant"; in (1)(c) increased charge from $10 to $25; in two places in (2) substituted "person" for "defendant"; in (5) near middle of first sentence after "collected" inserted "under subsections (1)(a) and (1)(b)" and in third sentence near beginning after "district court" inserted "or justice's court"; in (7)(a) near middle after "program" inserted "including a program

operated by a private, nonprofit organization"; and made minor changes in style. Amendment effective July 1, 2001.

Preamble: The preamble attached to Ch. 118, L. 2001, provided: "WHEREAS, the 1995 Legislature in Senate Bill No. 83 changed funding for the crime victims compensation and assistance program from an earmarked special revenue account to the general fund; and

WHEREAS, the crime victims compensation and assistance program has been supported entirely by general fund money since fiscal year 1996; and

WHEREAS, repealing section 53-9-109 is necessary in order to clarify the conflict that currently exists between actual appropriation practices and the law."

1999 Amendments — Composite Section: (Both versions) Chapter 398 inserted (1)(c) adding collection of additional $10 for each misdemeanor or felony charge for certain offenses; inserted (7)(a) through (7)(c) regarding disposition of charge collected under subsection (1)(c); and made minor changes in style. Amendment effective July 1, 1999.

(Temporary version) Chapter 411 in second sentence in (6)(b) after "salaries of its" inserted "county attorney and"; and made minor changes in style. Amendment effective July 1, 1999, and terminates July 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

1991 Amendment: In (1)(a) increased charge for misdemeanor from $10 to $15. Amendment effective July 1, 1991.

1987 Amendment: Near beginning of (5), after "subsection (1)", inserted "except those collected by a justice's court" and in third sentence deleted reference to a Justice's Court as a court of original jurisdiction; and in first sentence of (6)(b), after "district", deleted "or justices'".

1986 Amendment: In (1)(a) and (1)(b) substituted "for each" for "in each" and "charge" for "case"; in (3) inserted "and must be imposed in addition to any fine"; in (4) substituted language requiring this section's charge to be collected from the first installment if allowed to be paid in installments for "The total of the charge imposed by this section and any fine assessed may not exceed the maximum fine authorized by law for the offense"; in (5) inserted last sentence relating to disposition of a charge paid to a court that sits in a consolidated city-county government; at beginning of (6) deleted "On or before the 10th day of each month, the county finance officer or treasurer shall remit to the state treasurer for deposit to the state general fund $10 for each misdemeanor case and the greater of $20 or 10% of the fine levied in each felony case. A county may retain up to 10% of the funds remitted to the state treasurer to cover only the costs of administering this section"; and inserted (6)(b) concerning charges collected under subsection (1) by District or Justices' Courts.

Case Notes

No Error in Allowing Parole Officer to Set Restitution Schedule — Refusal to Waive Administrative Fees Proper: Denham contended that it was error for the sentencing court to delegate the scheduling of monthly restitution payments to a parole officer because the version of 46-18-244 in effect at the time of the crime did not provide for that delegation of authority. The Supreme Court held that the amendments to the statute were purely procedural and did not constitute retroactive legislation, impair Denham's rights, or impose additional duties on Denham, so allowing the parole officer to set the restitution schedule was not error. Denham also appealed the $60,099 restitution and the 10% administrative fee and minimal surcharges. However, Denham assured the court at sentencing of his ability to pay the restitution amount, so it was reasonable to assume that he also had the ability to pay the administrative fee and surcharges. The sentencing court was affirmed. St. v. Denham, 2005 MT 26, 326 M 24, 107 P3d 1263 (2005).

Attorney General's Opinions

Conviction Charge as Penalty — Distribution: The charge imposed on criminal defendants by this section is a penalty or a forfeiture. 42 A.G. Op. 63 (1988).

Collection of Charge Upon Forfeiture of Bail Bond: In order to collect the additional charge required by 46-18-236 in the event the offender posts bail and chooses not to appear, a court may exercise its power under 46-9-302 and increase the bail schedule for minor offenses in a like amount. 41 A.G. Op. 59 (1986).

46-18-237. Garnishment — report by supervising authority.

Compiler's Comments

2003 Amendment: Chapter 272 throughout section substituted references to person for references to prisoner; in (1) near middle of introductory clause after "corrections" inserted "or a person supervised by the department"; and in (2) near middle of first sentence after "report to

the" substituted "office of victims services in the department of justice" for "board of crime control". Amendment effective October 1, 2003.

Retroactive Applicability: Section 10, Ch. 272, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who have an unpaid restitution obligation on [the effective date of this act]." Effective October 1, 2003.

Severability: Section 6, Ch. 475, L. 1997, was a severability clause.

Effective Date: Section 7, Ch. 475, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 1, 1997.

Administrative Rules

ARM 20.12.109 Referral to collection agency — garnishment.

Case Notes

Order for Restitution Upon Imposition of Deferred or Suspended Sentence — 1999 Amendments to Sentencing Statute Clarified: Heath was convicted of theft and possession of burglary tools and sentenced to 10 years in prison with 2 years suspended upon conditions, including payment of restitution. Heath appealed on grounds that the 1999 amendments to 46-18-201 no longer allowed a sentencing court to impose restitution as a condition of a suspended or deferred sentence. Upon amendment in 1999, an internal reference in 46-18-201(5) was not changed to reflect the renumbering of the other subsections, which resulted in an ambiguity in the plain language of the 46-18-201, potentially rendered 46-18-251(2) and this section meaningless, created uncertain directives for payment of restitution for all victims in 46-18-241(1) and 46-18-244(2), and created a potentially absurd application of 46-18-201(1). Because of the potentially absurd consequences of the 1999 amendment, the Supreme Court looked beyond the words of the statute and inquired whether the Legislature intended to make any change in the substance and effect of 46-18-201. The court concluded that the 1999 amendment was a simple codification error that resulted in a cross-reference problem that was completely inconsistent with legislative intent to authorize sentencing courts to impose restitution when necessary for rehabilitation or for the protection of the victim or society if there is an appropriate correlation to the offense committed. Heath's argument failed, and the imposition of restitution as a condition of Heath's suspended sentence was affirmed. (Note: The erroneous internal reference in 46-18-201(5) was deleted in 2003.) St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004), followed in St. v. McDanold, 2004 MT 167, 322 M 31, 97 P3d 1076 (2004), and St. v. McIntire, 2004 MT 238, 322 M 496, 97 P3d 576 (2004).

46-18-241. Condition of restitution.

Commission Comments

Source: Sections 46-18-241 through 46-18-249 are loosely based on Article 3, Sentencing, Part 6, Restitution, of the Uniform Law Commissioners' Model Sentencing and Corrections Act, approved in 1978.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 66 in (1) in second sentence after "paid" inserted "whether or not the offender is under state supervision" and at beginning of third sentence inserted "If the offender is under state supervision, payment of restitution"; in (2)(a) near beginning before "offender" deleted "court shall require the" and after "46-18-245" deleted "if the offender is able to pay"; and made minor changes in style. Amendment effective March 25, 2009.

Chapter 374 in (2)(b) and (2)(c) at end of second sentence after "paid" inserted exception clause; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2015.

2003 Amendment: Chapter 272 in (1) near beginning of first sentence after "shall" inserted "as part of the sentence", near middle after "victim" deleted "of the offense", after "pecuniary loss" deleted "as a result of the offense", and at end after "economic loss" deleted "as a result of the crime" and in second sentence after "offender" inserted "or the offender's estate" and at end inserted "and is a condition of any probation or parole"; inserted (2)(b) concerning collection and payment of restitution; in (2)(c) at beginning of first sentence substituted "In a misdemeanor case, payment of restitution and of the cost of supervising the payment of restitution" for "Payment" and after "court" inserted "until the offender has fully paid the restitution and the cost of supervising the payment of restitution" and at end of second sentence after "46-18-245" inserted "which shall disburse the restitution to the person or entity to whom the court ordered restitution to be paid"; and made minor changes in style. Amendment effective October 1, 2003.

Retroactive Applicability: Section 10, Ch. 272, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who have an unpaid restitution obligation on [the effective date of this act]." Effective October 1, 2003.

1997 Amendment: Chapter 181 in (1), in first sentence before "restitution", inserted "full" and inserted second sentence regarding the ongoing duty to pay restitution; in (2), at beginning of first sentence after "court", substituted "shall" for "may", near middle, after "46-18-245", inserted "if the offender is able to pay", and at end, after "$5", deleted "or more than $250"; in (3), at beginning of first sentence after "If", inserted "at any time", near middle, after "is not", deleted "and will not be", after "restitution" deleted "during the period of state supervision", and at end substituted "during the time that the offender is unable to pay" for "commensurate with the amount of restitution that would have been imposed" and inserted second sentence setting out community service credit against restitution.

1995 Amendments: Chapter 125 in (1) substituted "shall require" for "may require" and at end inserted phrase relating to pecuniary loss; and inserted (3) allowing community service in lieu of restitution.

Chapter 310 at end of (1) inserted "including a person suffering an economic loss as a result of the crime".

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Applicability: Section 43, Ch. 125, L. 1995, provided: "[Sections 10 [46-18-201], 13 [46-18-241], and 21 [46-18-302]] apply to trials for and sentences imposed for crimes that were committed on or after [the effective date of this act]." Effective October 1, 1995.

1989 Amendment: Inserted (2) relating to payment of cost of supervising the making of restitution.

Administrative Rules

Title 20, chapter 12, ARM Restitution.

Case Notes

Expenses Recoverable in Civil Action Properly Imposed as Restitution — Sufficient Evidence of Restitution Amount: Essig was convicted of stalking and sentenced to pay restitution of $5,582.03, including counseling expenses for the victim's children, blood testing for one of the children, and the cost of six memory cards for a digital camera. Essig contested the restitution and the amount, but the Supreme Court affirmed. Under 46-18-243, pecuniary loss includes general damages that a person could recover in a civil action against the defendant. In this case, the evidence showed that the expenses could have been recovered in a civil action by the victim and thus were legally imposed as restitution. The value of the various items was supported by the evidence and their inclusion as restitution was not erroneous. St. v. Essig, 2009 MT 340, 353 M 99, 218 P3d 838 (2009).

Sufficient Connection Between Victim of Vehicle Accident and Evidence Tampering to Warrant Defendant's Payment of Victim's Funeral Expenses as Restitution: Sherman was thrown from her car in a vehicle accident, and as she lay in the road, she was struck and killed by Ness's vehicle. Ness did not stop and subsequently repaired and washed his car in an effort to conceal evidence of the accident. Ness was convicted of tampering with evidence and ordered to pay $3,500 for Sherman's funeral expenses as restitution. Ness challenged the restitution on grounds that because Sherman was not a victim of the evidence tampering conviction, there was no nexus between the crime and the restitution. The Supreme Court disagreed. Pursuant to St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116 (2000), classification of a person as a victim for purposes of ordering restitution does not depend on the person's relationship to the elements of the crime for which the defendant is convicted. In this case, restitution for Sherman's funeral expenses was not wholly unrelated to Ness's crime, and the expenses were based on Ness's involvement, which created a nexus between restitution and the crime. Because the funeral expenses were paid to Sherman's estate directly out of the crime victims compensation account, that account was entitled to $3,500 restitution. St. v. Ness, 2009 MT 300, 352 M 317, 216 P3d 773 (2009).

Mitigation of Damages as Restitution for Criminal Activity — Additional Restitution of Loss of Income Warranted: Kalal was convicted of theft of a tractor; he received a 2-year deferred sentence and was ordered to pay restitution for the value of the tractor and other stolen property. Kalal satisfied the restitution obligation, but Petranek, the victim of the theft, sought additional restitution for loss of income because he had anticipated using the tractor for various income-producing activities, including building a fence, building a cabin, and seeding land for grass production and farming. The District Court noted that other tractors could be rented, but that Petranek's limited availability to work on projects presented serious impediments to

renting a tractor. The court thus determined that Petranek suffered a loss of income for summer grazing and cabin rental in the amount of $15,960. Kalal appealed, but the Supreme Court affirmed. Applying precedents from the fields of tort and contract law, the court recognized that an injured person is not expected to do what is unreasonable or impracticable, so the applicable standard is what would a reasonable and prudent person be expected to do, if capable, under the circumstances. While recognizing the duty to mitigate damages, the District Court correctly reasoned that no reasonable person could be expected to spend money or time that the person does not have to mitigate an injury for which the person is not responsible. Therefore, under these circumstances and given the impracticability and expense of renting and transporting a tractor a long distance for short periods of time, the restitution award of $15,960 for Petranek's loss of income was reasonable. St. v. Kalal, 2009 MT 103, 350 M 128, 204 P3d 1240 (2009).

Drug Task Force Considered Victim of Drug Offense — Restitution to Task Force as Part of Plea Agreement Affirmed: As part of a plea agreement on a drug charge, Jones agreed to pay $125 in restitution to the Eastern Montana Drug Task Force. Jones later appealed the restitution condition on grounds that it was illegal because the task force was not a victim of the drug distribution offense. The Supreme Court disagreed. Because Jones agreed in the plea agreement to pay restitution to the task force, the task force was a victim, as defined in 46-18-243(2)(a)(vi), to whom the sentencing court could require Jones to pay restitution. St. v. Jones, 2008 MT 440, 347 M 512, 199 P3d 216 (2008), distinguishing St. v. Krum, 2007 MT 229, 339 M 154, 168 P3d 658 (2007).

Defendant Not Involved in Initial Vehicle Theft or Damage — Restitution Not Owing: Seghetti stole a vehicle and picked up Breeding and another friend for a ride, during which the vehicle was damaged while Seghetti was driving. Seghetti then revealed that the vehicle was stolen, and Breeding suggested driving the vehicle to California. During the trip, Breeding and Seghetti shared the driving. California police stopped the vehicle for a broken turn signal, and Breeding and Seghetti were subsequently charged with and convicted of felony theft. At sentencing, the District Court ordered that Breeding pay restitution for damage to the vehicle. Asserting that he was not driving when the damage occurred and thus was not responsible for the damage, Breeding appealed the restitution order. The Supreme Court reversed. Without a causal connection between Breeding's commission of theft and the damage inflicted earlier by Seghetti, there was no basis for requiring Breeding to pay restitution for that damage, so the District Court was ordered to strike the restitution requirement from Breeding's sentence. St. v. Breeding, 2008 MT 162, 343 M 323, 184 P3d 313 (2008).

Restitution Obligations Not Discharged Upon Fulfillment of Criminal Sentence: As a condition of sentences for theft, burglary, and deceptive practices, Brown was ordered to pay restitution. Upon completion of his prison sentences, Brown was released without having paid restitution in full. Brown was subsequently imprisoned following conviction for other criminal offenses, and the Department of Corrections began garnishing Brown's prison wages to satisfy the unpaid restitution obligations from the previous sentences. Brown requested that the District Court waive payment of the restitution on grounds that the Department lacked authority to garnish his prison wages to pay restitution obligations from sentences that were previously discharged. The court agreed and ordered the Department to cease garnishment and to reimburse any money collected to satisfy those obligations. The state appealed, and the Supreme Court reversed. Unlike the other conditions of Brown's sentences, the restitution obligations were civil judgments required by this section to be paid in full, and those obligations were not discharged or fulfilled by virtue of Brown's completion of the criminal sentences and discharge from prison. Pursuant to 46-18-244, the Department was authorized to garnish Brown's prison wages to satisfy the previously unpaid restitution. St. v. Brown, 2008 MT 115, 342 M 476, 182 P3d 75 (2008).

Reimbursement to Insurer That Reimbursed Victim Affirmed: An insurer that reimbursed a victim for pecuniary loss had the right of subrogation to the extent of the reimbursement, and the District Court did not abuse its discretion in ordering defendant to pay restitution to the insurer to make the insurer whole. St. v. Sharp, 2006 MT 301, 334 M 470, 148 P3d 625 (2006).

Imposition of Restitution Based on Documented Losses Not Violative of Constitutional Prohibition Against Excessive Fines: As set out in St. v. Good, 2004 MT 296, 323 M 378, 100 P3d 644 (2004), a restitution award violates the constitutional prohibition against excessive fines if the award is grossly disproportional to the gravity of the offense. Here, Kuykendall was convicted of criminal endangerment and ordered to pay restitution of over $10,000 to a peace officer who was injured during the crime. Kuykendall asserted that the restitution amount was grossly disproportional to the crime of criminal endangerment, but the Supreme Court disagreed. The amount of loss suffered by the officer was documented and was not refuted by

Kuykendall at trial. The sentencing court relied on the only evidence presented at the sentencing hearing, and the amount of restitution ordered was directly related to the amount of loss and thus was not grossly disproportional. The restitution amount was not excessive and was affirmed. St. v. Kuykendall, 2006 MT 110, 332 M 180, 136 P3d 983 (2006).

Improper Order to Pay Child Support as Condition of Sentence for Possession of Dangerous Drugs: Erickson entered a plea agreement on drug charges, and although it was not part of the agreement, the sentencing court ordered that Erickson also forfeit one-third of his prison earnings as restitution to be paid toward Erickson's delinquent child support. Erickson never invited or acquiesced to the child support order. On appeal, the Supreme Court held that possession of dangerous drugs is a victimless crime for which restitution cannot be owed and also noted that the amount of restitution must be determined and fixed. The court agreed with Erickson that there was no connection between drug crimes and the failure to pay child support, so ordering payment of child support arrearages as restitution was not an appropriate condition of sentencing for a drug crime. However, in this case, the sentencing court made it clear that the order to pay child support was in lieu of requiring Erickson to pay cleanup costs associated with a clandestine drug lab, attorney costs, or jury costs. The sentencing court could have imposed both costs and restitution if not for the imposition of the illegal child support obligation, so the Supreme Court was unable to determine what sentence would have been imposed if the law had been correctly applied. The case was remanded for resentencing on whether Erickson must pay restitution and costs. St. v. Erickson, 2005 MT 276, 329 M 192, 124 P3d 119 (2005).

Restitution Amount Set by Sentencing Court Rather Than Jury — No Error: After the jury found Field guilty of theft by deception, the District Court imposed restitution in the amount of $17,632.67. Field contended that under Apprendi v. N.J., 530 US 466 (2000), any fact that increases a penalty for a crime above the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt and that because the restitution amount was set by the court rather than by the jury, Field should not be required to pay restitution in the court-ordered amount. The Supreme Court held that the Apprendi rule does not apply to restitution because restitution is not a criminal punishment, but rather is a civil remedy administered for convenience by courts that have entered criminal convictions. Thus, once the jury found Field guilty of theft by deception, the District Court was free to apply the maximum statutory sentences and to order Field to pay an appropriate amount of restitution. St. v. Field, 2005 MT 181, 328 M 26, 116 P3d 813 (2005). See also U.S. v. George, 403 F3d 470 (7th Cir. 2005).

No Prejudice in Property Valuation When Less Than Full Restitution Required: The total losses incurred by individuals and businesses in a fire started by Gilbert was $5,721,684.57. In calculating the value of a building destroyed in the fire for establishing restitution, the District Court used replacement value rather than actual value. Gilbert contended that failure to use actual value was reversible error under St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000). The Supreme Court agreed that actual value should have been used but that Gilbert failed to show that any prejudice resulted from the error. Gilbert's presentence investigation report adequately documented Gilbert's financial resources and future ability to pay restitution, and Gilbert was ordered to pay only $24,000 in restitution, which was but a minuscule fraction of the losses. Any error by the District Court in using replacement value for the building did not prejudice Gilbert because he was not required to pay full restitution. St. v. Gilbert, 2004 MT 368, 324 M 530, 106 P3d 127 (2004), following St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Restitution Order Proper Given Defendant's Ability to Pay: The sentencing court ordered Thaut to pay $69,457 in restitution. Thaut appealed the award on grounds that the court failed to meet statutory requirements establishing Thaut's financial resources and future ability to pay and on grounds that due process rights were violated when the court failed to consider several factors in Thaut's ability to pay, including Thaut's age and short time to work following parole, minimum wage employment history, lack of assets and ability to acquire assets in the future, and mental health issues related to an alleged prior head injury. However, the presentence investigation and supplemental presentence investigation provided adequate documentation regarding Thaut's ability to pay restitution and to work hard to earn a living. Further, Thaut had no documented physical limitations and was unemployed only because he was incarcerated. The District Court's determination that Thaut had the ability to pay medical expenses, a grant from the Board of Crime Control, and property damages was amply supported by the record, and the Supreme Court affirmed. St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004).

Restitution Order Reimbursing Victim for Mortgage Payments and Cost of Installing Surveillance Equipment Not Unconstitutional Excessive Fine or Cruel and Unusual Punishment: Good was found guilty of assault and as part of his sentence was ordered to pay restitution to the

victim of approximately $6,000. Good argued that restitution constituted an excessive fine and cruel and unusual punishment. The Supreme Court held that although by nature all fines are punitive, the test to determine if the fine is excessive is whether the fine is grossly disproportional. When the amount of restitution is geared directly to the amount of the victim's loss caused by the defendant's illegal activity, proportionality is built into the order. The Supreme Court also held that in the instant case, there was a finding that the defendant was not indigent and had the means to pay the restitution and therefore the order did not constitute cruel and unusual punishment. St. v. Good, 2004 MT 296, 323 M 378, 100 P3d 644 (2004).

Improper Inclusion of Social Security Benefits When Determining Income for Purposes of Restitution: An order that Social Security benefits be included in appellant's net income for purposes of determining the amount of net income to be paid as restitution improperly burdened appellant's Social Security benefits. Including Social Security benefits in income conflicts with 42 U.S.C. 407(a), which provides that the benefits cannot be subjected to execution, levy, attachment, garnishment, or other legal process. The order was an improper attempt to subject the benefits to "other legal process". St. v. Eaton, 2004 MT 283, 323 M 287, 99 P3d 661 (2004).

Review of Legality of Imposing Restitution — Failure to Raise Issue Below: If a defendant appeals a sentence in a criminal case on the grounds that it is illegal or exceeds statutory mandates, the issue may be reviewed even if no objection was made at the time of sentencing. Therefore, defendant's claim that an order to pay restitution as a condition to a suspended sentence was illegal was not waived by his failure to raise the issue below and would be reviewed on appeal. St. v. Eaton, 2004 MT 283, 323 M 287, 99 P3d 661 (2004).

Restitution Properly Ordered When Dismissed Charges Related to Charge for Which Defendant Convicted: McIntire was charged with felony burglary, misdemeanor theft, and misdemeanor forgery. Pursuant to a plea agreement, McIntire pleaded guilty to the burglary charge and the other charges were dismissed. The trial court ordered McIntire to pay restitution, but McIntire contended that because the forgery charges were dismissed, restitution could not be ordered to compensate for the forged checks and that the court lacked authority to impose restitution when there was no longer a victim with respect to the dismissed forgery charges. The Supreme Court disagreed. The victim was the same for both crimes, and the burglary was directly connected to the forgery, constituting an ongoing criminal transaction, so dismissal of the forgery charges did not deprive the court of authority to impose a restitution obligation on McIntire for the checks stolen from the victim during the burglary and for the pecuniary loss from the subsequent forgery of those checks. St. v. McIntire, 2004 MT 238, 322 M 496, 97 P3d 576 (2004).

Question Whether Restitution Connected to Crime — Remand for Reconsideration of Restitution: McDanold assisted in kidnapping and assaulting Berry, who was later killed by another man who was also involved in the kidnapping and assault. Although McDanold did not kill Berry, upon McDanold's conviction, the District Court ordered McDanold to pay restitution to Berry's parents and to the crime victims compensation fund. On appeal, McDanold contended that the sentencing court improperly ordered the restitution because the expenses were unrelated to McDanold's crimes and also asserted that he had been double-billed for some expenses that had been paid by the crime victims compensation fund. The state contended that there was an arguable connection between McDanold's offenses and the pecuniary losses to Berry's parents and to the fund. The Supreme Court remanded for reconsideration of restitution, including the parents' claims and whether they had indeed been compensated in part by the crime victims compensation fund. St. v. McDanold, 2004 MT 167, 322 M 31, 97 P3d 1076 (2004).

Costs Directly Related to Defendant's Criminal Conduct Properly Included in Restitution Calculation: Thompson was a maintenance worker at a commercial building and had keys to the entire building. Thompson was convicted of stealing and then pawning tools from the maintenance room in the building and was ordered to pay restitution, including the costs of rekeying the entire building. Thompson contended that requiring payment of the cost of rekeying the building went beyond recovery for any pecuniary losses and was an abuse of discretion. The Supreme Court disagreed. The reason the building was rekeyed was a direct result of Thompson's criminal conduct, and the expense was an out-of-pocket loss directly related to the thefts, so including those special damage expenses in the restitution calculation was proper. St. v. Thompson, 2004 MT 131, 321 M 332, 91 P3d 12 (2004).

Order for Restitution Upon Imposition of Deferred or Suspended Sentence — 1999 Amendments to Sentencing Statute Clarified: Heath was convicted of theft and possession of burglary tools and sentenced to 10 years in prison with 2 years suspended upon conditions, including payment of restitution. Heath appealed on grounds that the 1999 amendments to 46-18-201 no longer allowed a sentencing court to impose restitution as a condition of a

suspended or deferred sentence. Upon amendment in 1999, an internal reference in 46-18-201(5) was not changed to reflect the renumbering of the other subsections, which resulted in an ambiguity in the plain language of the 46-18-201, potentially rendered 46-18-237 and 46-18-251(2) meaningless, created uncertain directives for payment of restitution for all victims in 46-18-244(2) and subsection (1) of this section, and created a potentially absurd application of 46-18-201(1). Because of the potentially absurd consequences of the 1999 amendment, the Supreme Court looked beyond the words of the statute and inquired whether the Legislature intended to make any change in the substance and effect of 46-18-201. The court concluded that the 1999 amendment was a simple codification error that resulted in a cross-reference problem that was completely inconsistent with legislative intent to authorize sentencing courts to impose restitution when necessary for rehabilitation or for the protection of the victim or society if there is an appropriate correlation to the offense committed. Heath's argument failed, and the imposition of restitution as a condition of Heath's suspended sentence was affirmed. (Note: The erroneous internal reference in 46-18-201(5) was deleted in 2003.) St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004), followed in St. v. McDanold, 2004 MT 167, 322 M 31, 97 P3d 1076 (2004), and St. v. McIntire, 2004 MT 238, 322 M 496, 97 P3d 576 (2004).

Restitution Adequately Documented in PSI Report and Information Submitted by Victim: Heath contended that the presentence investigation report (PSI) contained insufficient information to document his ability to pay restitution and the victim's pecuniary loss, citing St. v. Brown, 263 M 223, 867 P2d 1098 (1994), St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866 (1999), and St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000). The Supreme Court distinguished Brown, Hilgers, and Pritchett on grounds that the PSI report deficiencies in those cases were not present in Heath's case. Rather, the court followed St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003), and St. v. Dunkerson, 2003 MT 234, 317 M 228, 76 P3d 1085 (2003), finding that the PSI report adequately addressed Heath's employability, assets and debts, and capability of paying restitution. The valuation of the victim's pecuniary loss was adequately provided in documentation submitted by the victim and, coupled with expert testimony on the value of recovered items, provided substantial credible evidence upon which to base the restitution amount. St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Failure of Presentence Report to Document Restitution Concerns — Payment of Restitution at Discretion of Probation Officer Improper: Following a sexual assault conviction, Flanagan was ordered to pay for all offense-related medical and counseling costs, after payment by the victim's insurance, and all future costs for the next 2 years. Flanagan asserted that the restitution plan was illegal based on St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000), because the presentence investigation report did not document Flanagan's monthly expenses or address his future ability to pay restitution and because the development of a restitution schedule was left to the discretion of the probation officer. The Supreme Court agreed and remanded for addition to the presentence report of documentation of Flanagan's monthly expenses and future ability to pay restitution and to allow the District Court to hold a hearing to enter a sentence and judgment addressing Flanagan's ability to pay and the time of restitution payments. St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003).

Proof of Inability to Pay Restitution — Deferment of Sentence Extended to Allow Payment — Error: A probationer sufficiently proved that her failure to continue restitution payments was not caused by lack of a good faith effort to pay and that her income was insufficient to make even the $10 monthly payment that her probation officer was apparently willing to accept. The state's argument that she might soon receive a workers' compensation lump-sum settlement that she could use to pay the remaining restitution and would receive a "windfall" if her deferred sentence and probation were not extended for 2 years for failure to pay so that she could make further payments had no merit. Disability benefits are not a windfall; they are partial compensation for the loss of earning capacity. In addition, the duty to pay restitution remains until it is fully paid, and restitution may be collected in a civil proceeding at any time, including after the conclusion of state supervision under a sentence. Therefore, the District Court abused its discretion when it did not excuse the probationer's failure to pay, and the order extending the deferred sentence and probation for 2 years was reversed. St. v. Welling, 2002 MT 308, 313 M 67, 59 P3d 1146 (2002).

District Court Error in Postponing Determination of Restitution: The District Court provided that as a condition of probation, restitution would be an amount stipulated by counsel and approved by the court. The Supreme Court held that 46-18-242 and this section require the trial court to establish the amount of restitution and terms of payment at the time of sentencing and remanded the case to the District Court for a determination of restitution. Gilbert v. St., 2002 MT 258, 312 M 189, 59 P3d 24 (2002).

Imposition of Restitution Upon Satisfaction of Statutory Procedures: Benoit was convicted of felony theft for falsifying voided transactions and customer discounts while employed at a restaurant over a 1 ½-year period. Benoit was ordered to pay $15,933.90 in restitution to the employer, based on calculations by the business manager who examined transaction records during the time that Benoit was on duty, and estimated the business's pecuniary losses. Benoit contested the restitution award on grounds that documentation of the victim's pecuniary loss was not provided in the presentence investigation or at the restitution hearing and that because the restitution amounts were speculative, the District Court had no authority to impose restitution. The Supreme Court noted that a sentencing court is required to impose a sentence that includes full restitution if the victim is found to have sustained a pecuniary loss, but restitution may not be imposed unless the procedures in 46-18-242 through 46-18-249 and this section are satisfied. Failure of a presentence investigation to document a victim's loss and the offender's financial resources and ability to pay restitution, as required in 46-18-242, renders the judgment illegal, but that information was included in the presentence report in this case. Therefore, the District Court did have authority to impose restitution. Further, although the actual losses resulting from Benoit's admitted theft could not be determined with certainty, the method employed in calculating the loss was reasonable based on the best evidence available under the circumstances. The employer was entitled to recover its estimated pecuniary losses, plus reasonable out-of-pocket expenses incurred in cooperating in the investigation and prosecution of the case, including wages paid to three employees who assisted in calculating restitution. St. v. Benoit, 2002 MT 166, 310 M 449, 51 P3d 495 (2002), followed in St. v. O'Connor, 2009 MT 222, 351 M 329, 212 P3d 276 (2009), with regard to reasonableness of the method employed in calculating the loss based on the best evidence available under the circumstances.

No Abuse of Discretion in Imposing Sentence Greater Than Sentence Suggested in Plea Agreement — Sentence Adequately Explained: Wells was charged with DUI, negligent vehicular assault, operation of a motor vehicle without insurance, and driving with a revoked license. Wells entered a plea agreement in which he pleaded guilty to negligent vehicular assault and driving with a revoked license and agreed to pay restitution, and the prosecution agreed to recommend a 5-year sentence with all but 18 months suspended. At the sentencing hearing, Wells' probation officer disagreed with the recommended sentence, stating that 18 months was an insufficient time for Wells to deal with his alcohol and drug problems and that restitution was unlikely given Wells' work and drug abuse history. The sentencing court considered the testimony and the evidence and imposed a 5-year sentence without any time suspended. Wells appealed on grounds that the sentence was not adequately explained and was erroneous. Under St. v. Stumpf, 187 M 225, 609 P2d 298 (1980), the sentencing court has the discretion to impose the maximum sentence allowed by law but should provide any rationale for the sentence. Here, the court provided a rationale, explaining the nature of the offense and the degree of harm done by Wells and describing Wells' history of drug abuse and inability to pay restitution as well as a concern for future harm to society. Wells was informed that the judge was not bound by the terms of the plea agreement and retained the authority to impose a greater or lesser sentence than recommended, within the statutory limits for the offense. The sentence was adequately explained and within statutory limits and was thus affirmed. St. v. Wells, 2001 MT 112, 305 M 303, 27 P3d 47 (2001).

Payment of Child Support Improper Condition of Sentence for Felony DUI — Victim and Correlation to Underlying Offense Necessary for Imposition of Restitution: Horton was arrested for DUI, and a search of his driving record revealed nine prior DUI convictions. A further search showed that Horton also owed more than $47,000 in back child support. Horton was charged with felony DUI, with driving with a suspended or revoked license, as a habitual traffic offender operating a motor vehicle, and with felony nonsupport. By plea agreement, Horton agreed to plead guilty to the traffic offenses in exchange for dismissal of the nonsupport charge. The plea agreement stated that the state would recommend a 13-month sentence to be served in prerelease, followed by 4 years of probation, and, as a condition of the probationary sentence, provided that Horton would also make regular child support payments plus an additional sum monthly toward the support arrearage. As set out in the agreement, Horton pleaded guilty to the traffic offenses, and the nonsupport charge was dismissed. At sentencing, the habitual traffic offender charge was subsequently dismissed for failure of the state to prove that a valid habitual offender designation was in place at the time of the offense, and in addition, Horton's counsel objected to the court ordering payment of any child support arrearage, arguing that because the nonsupport charge had been dismissed, Horton would be paying restitution on a count for which he had not been convicted. Nevertheless, the court ordered Horton to pay support and promised to revoke his probation and sentence him to 4 years in prison with no parole if support was not

paid. On appeal, Horton argued that the District Court abused its discretion and exceeded statutory mandates when it required him to pay restitution for an offense that was dismissed, citing St. v. Brown, 263 M 223, 867 P2d 1098 (1994), for the position that restitution is statutorily limited to the victim of the crime and that because there was no victim who sustained pecuniary or economic loss as a result of the felony DUI or driving with a suspended or revoked license, restitution was inappropriate. The state argued that Horton was attempting to receive the benefit of the plea agreement—having the felony nonsupport charge dismissed—without holding up his end of the bargain by paying child support. The Supreme Court noted that a plea agreement is subject to contract law and that the court will not assist a defendant in escaping the obligations of a plea agreement once its benefits are received. However, the court also pointed out that a District Court's authority to impose sentences in criminal cases is defined and constrained by statute. The statutory authority for payment of restitution is in 46-18-201, which limits payment of restitution to the victim of a crime for which a defendant is convicted, and because Horton was not convicted of nonsupport, there was no victim to whom Horton could be ordered to pay restitution. The state also contended that ordering Horton to pay child support was proper because under 46-18-202(1), a sentencing court may impose any condition reasonably related to the objectives of rehabilitation and the protection of the victim and society. The Supreme Court noted that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), a sentencing condition must have some correlation or connection to the underlying offense, but there was no correlation or connection between Horton's conviction for DUI and ordering him to pay child support. Thus, the Supreme Court ordered that the portion of Horton's sentence requiring payment of child support be stricken. St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), followed in St. v. Setters, 2001 MT 101, 305 M 253, 25 P3d 893 (2001).

Conditions Imposed in Written Judgment and Sentence Different From Those Imposed in Oral Sentence — Lane, Waters, and Simpson Reviewed — Test to Determine Which New Conditions Lawful or Unlawful — Payment of Restitution and Costs: Johnson was sentenced orally for writing bad checks and later contended that four of the conditions imposed in the written judgment and sentence by the District Court were unlawful under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), because they were not announced orally when she was sentenced in open court. The Supreme Court reviewed its decisions in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142 (1999), and St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361 (1999), and reasoned that a written sentence would be held unlawful only if it substantively increased the defendant's loss of liberty or the defendant's sacrifice of property. Under this test, the Supreme Court held that two of the four penalties not mentioned by the District Court in its oral pronouncement of Johnson's sentence were unlawful, those being the restitution ordered to the Missoula County jail of money expended for Johnson's medical care and the requirement that Johnson pay for the costs of her prosecution in District Court. The Supreme Court held that the other two parts of the written sentence, the requirement that Johnson make restitution from money earned in prison and the imposition of certain "civil" restrictions as conditions of Johnson's suspended sentence, such as the requirement that Johnson stay out of gambling casinos, were lawfully imposed because they did not increase the amount of money that Johnson was ordered to pay or increase Johnson's deprivation of liberty in addition to those penalties imposed orally. The requirement for payment from prison earnings only specified where the money was to come from, and the "civil" restrictions were largely mentioned by the District Court at Johnson's sentencing hearing. St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Restitution Proper for Ambulance and Towing Charges Related to Hit and Run and High-Speed Chase: LaTray was convicted of DUI, operating a vehicle without proof of insurance, operating a vehicle while a habitual traffic offender, leaving the scene of an accident, and criminal endangerment. The charges stemmed from a hit-and-run accident and subsequent high-speed chase, which ended when LaTray lost control of his car, went into a ditch, and rolled the vehicle. Officials at the scene called an ambulance as a precautionary measure and called a tow truck to remove LaTray's vehicle from the ditch. As restitution, the sentencing court ordered LaTray to pay the costs of the ambulance and tow truck. LaTray appealed on grounds that restitution is limited to pecuniary losses suffered by direct victims, as defined in terms of the offenses for which he was convicted, asserting that the ambulance company and towing service were not victims of his offenses, so restitution could not be ordered for their reimbursement. The Supreme Court disagreed. The plain language of this section does not limit restitution to a victim defined in terms of the offense or to a loss arising directly from the criminal conduct. Also, St. v. Morgan, 198 M 391, 646 P2d 1177 (1982), makes it clear that classification of a victim for restitution purposes does not depend on the individual's relationship to the elements of the crime

for which a defendant is sentenced. Further, restitution is not confined to the amount by which a defendant is enriched at a victim's expense, but rather the restitution statute empowers courts to impose restitution for economic loss as a result of a crime. Here, the ambulance and towing companies suffered an economic loss in out-of-pocket expenses for services for which they were not reimbursed, and the losses were the direct result of LaTray's criminal conduct, which created a situation for which the services were reasonably necessary for the safety of the public or LaTray himself. The restitution order was affirmed. St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116, 57 St. Rep. 1098 (2000). See also St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407 (1999).

Failure to Document Defendant's Financial Resources and Ability to Pay Restitution and Victim's Pecuniary Loss — Restitution Sentence Improper: The general mandate to sentencing courts is that a sentence must include full restitution whenever it is found that the victim of an offense has sustained a pecuniary loss, subject to mandatory detailed statutory procedures and qualifications. Here, although the District Court received some evidence of these amounts during the sentencing hearing, the failure of the presentence investigation report to document the victim's pecuniary loss, as well as the defendant's financial resources and future ability to pay restitution, provided the court no authority to impose a sentence of restitution and rendered its judgment illegal. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000), following St. v. Brown, 263 M 223, 867 P2d 1098 (1994), and St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866 (1999), and distinguished in St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Sentence of Restitution Based on Defendant's Indigency Constituting Due Process Violation: Pritchett entered the garage of a former employer in an effort to return two hunting rifles that he had stolen and pawned to support his gambling habit. Pritchett dropped his flashlight and, unable to find it in the dark, lit a cigarette lighter, which ignited a leaking propane bottle and caused an explosion that destroyed the garage and its contents. Pritchett was convicted of burglary and ordered to pay restitution of $63,569.25. Noting that the amount of restitution was "enormous", the probation officer who prepared the presentence investigation report stated that Pritchett should receive a 20-year suspended sentence to allow adequate time to pay off the restitution. The District Court adopted the sentencing recommendation exactly as proposed. Although the court did not expressly state that it was sentencing Pritchett to the maximum term to provide sufficient time to pay the ordered restitution, there was sufficient evidence in the record to show that the length of the sentence was based on Pritchett's indigency because, given Pritchett's limited financial resources, no shorter time would allow payment of restitution. Under St. v. Farrell, 207 M 483, 676 P2d 168 (1984), basing a prison term on a defendant's indigency is a violation of the right to due process. Thus, the Supreme Court vacated the sentence and remanded for further proceedings. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000).

Defendant Not Responsible for Restitution in Excess of Damages Caused by Criminal Conduct: During the course of a drug investigation, Beavers admitted accepting stolen property in exchange for illegal drugs. The District Court ordered Beavers to pay restitution to the victims of the thefts, even though Beavers did not actually steal the property. Under St. v. Blanchard, 270 M 11, 889 P2d 1180 (1995), an accused is liable for restitution for offenses to which the accused has admitted guilt, been found guilty, or has agreed to pay restitution, so Beavers was not responsible for restitution for offenses she did not commit. Beavers' admission of the offense of receiving stolen property was sufficient to satisfy the causal standard of this section, that the victim suffered loss as a result of Beavers' offense, so the court did not abuse its discretion in ordering restitution; however, Beavers was required to pay restitution only for the property that formed the basis of the offense, not for property that was stolen by others but not received and possessed by Beavers. When stolen property is recovered, the amount of restitution owed is the difference between the value of the property taken and the salvage value of the property returned, and the state has the burden of establishing those values. The case was remanded for calculation of the amount of restitution owed. St. v. Beavers, 2000 MT 145, 300 M 49, 3 P3d 614, 57 St. Rep. 567 (2000).

When Restitution Owing: Under 46-18-201, the sentencing court is required to provide for full restitution by a defendant to the victim of a criminal offense who sustains a pecuniary loss. Here, Hilgers' issuance of more than 50 bad checks and stealing cash and diverting checks and money orders from his employer in an amount exceeding $33,500 clearly qualified as a pecuniary loss. The court found the state's witnesses more credible than Hilgers, providing adequate support in the record as to the amount owing. The restitution amount was not clearly erroneous and was affirmed on appeal. However, the Supreme Court remanded for lack of documentation,

as required under 46-18-242, regarding Hilgers' financial resources and future ability to pay restitution, finding the information in the presentence report regarding Hilgers' age, education, assets and obligations, and marital and employment status inadequate in addressing Hilgers' resources and ability to pay the amount in question. St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866, 56 St. Rep. 1146 (1999), following St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996), distinguishing St. v. Brown, 263 M 223, 867 P2d 1098, 51 St. Rep. 24 (1994), followed in St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000), and distinguished in St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Inclusion in Restitution of Costs Related to Pecuniary Loss — Wages Paid to Embezzler Not Recoverable as Pecuniary Loss: Under this section, a sentencing court may include in restitution costs paid by the victim as a result of defendant's criminal act as long as the costs are considered pecuniary loss, as defined by 46-18-243. This loss may include economic loss as a result of the crime, out-of-pocket losses, such as medical expenses, and reasonable out-of-pocket expenses incurred by the victim in filing charges or in cooperating in the investigation and prosecution of the offense. Here, Brewer embezzled over $96,000 and was ordered to pay restitution, but argued that the fact that this section excludes general damages militated against the inclusion in the restitution obligation of amounts beyond the total stolen from the employer. Brewer improperly characterized the employer's out-of-pocket losses as general damages. The employer paid accounting firms, employees, labor contractors, a software company, and a locksmith more than $15,000 in an attempt to reconstruct books and repair damage resulting from Brewer's crime. Those expenses were all considered out-of-pocket losses within the context of this section and were properly includable in the restitution calculation. However, wages paid to Brewer over the course of employment did not constitute pecuniary loss and were not recoverable as restitution. St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407, 56 St. Rep. 1090 (1999). See also St. v. Morgan, 198 M 391, 646 P2d 1177 (1982), and St. v. Korang, 237 M 390, 773 P2d 326, 46 St. Rep. 892 (1989).

Interest Properly Imposed on Restitution Obligation: Brewer embezzled over $96,000 and was ordered to pay restitution to the employer, including 10% interest on the restitution obligation. Brewer contended that interest in this case was per se an abuse of discretion insofar as it exceeded the employer's pecuniary loss. The issue of whether interest may be properly applied to restitution under this section was a case of first impression in Montana. Interest is not expressly provided for by the restitution statute, which provides for restitution to a victim who suffers a pecuniary loss, defined in 46-18-243 as special damages, but not general damages, that a person could recover in a civil action arising out of the facts constituting the criminal activity. Interest is a special damage available in a civil action under 27-1-210 and thus was properly applied to Brewer's restitution. However, interest is not allowed on damages such as pain and suffering, mental anguish or suffering, or punitive damages. St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407, 56 St. Rep. 1090 (1999).

No Evidence That Victim Will Be Unjustly Enriched — Credit Against Restitution Properly Denied: Kober stole money from the Montana State University-Bozeman student health service and was ordered to pay restitution. Because the stolen money was considered taxable income, Kober was also charged with failing to properly report income for state income tax purposes. From the proceeds of the subsequent sale of the family home, Kober paid $46,004.67 to the Department of Revenue to satisfy its lien for back income taxes. Because the money was placed in the general fund from which the University System receives part of its funding, Kober maintained that the University System would benefit from the payment of the back income taxes and that in order to avoid a windfall unjustly enriching the university, the restitution amount should be offset by $46,004.67. However, Kober did not establish that any of the $46,004.67 would actually be distributed to or benefit Montana State University-Bozeman or the student health service, so the District Court properly denied Kober's request for a credit against restitution. St. v. Kober, 1999 MT 264, 296 M 425, 989 P2d 399, 56 St. Rep. 1076 (1999).

Chapter 7 Bankruptcy Discharge Held Not to Discharge Restitution Obligation: After Woods was convicted and sentenced for writing a bad check, he was given a Chapter 7 discharge in bankruptcy. Woods then argued to the Supreme Court that the requirement that he make restitution was also discharged. Citing Kelly v. Robinson, 479 US 36 (1986), the Supreme Court held that Woods's Chapter 7 discharge did not discharge his restitution obligation. In making its ruling, the Supreme Court distinguished Pennsylvania Dept. of Public Welfare v. Davenport, 495 US 552 (1990), in which the U.S. Supreme Court held that Chapter 13 bankruptcy discharges do in fact discharge restitution obligations but also noted that the result in Davenport had been overturned by legislation enacted by the U.S. Congress. St. v. Woods, 286 M 355, 951 P2d 981, 54 St. Rep. 1445 (1997).

Requiring Defendant to Pay Restitution for Admitted Offenses for Which Defendant Is Not Charged or Convicted: Blanchard argued that the lower court erred in requiring him, as part of the plea bargain, to pay restitution for offenses that he admitted committing but for which he was never charged or convicted. The Supreme Court held that the issue is one of first impression in Montana but that other jurisdictions have held that an accused is liable for restitution for offenses admitted to even if the accused is not charged or convicted of the crimes and especially in cases in which the accused has agreed to pay the restitution as part of a plea bargain. The Supreme Court also held that the lower court had not erred in ordering the restitution when it was intended to serve a rehabilitative purpose. St. v. Blanchard, 270 M 11, 889 P2d 1180, 52 St. Rep. 54 (1995), and followed in St. v. Beavers, 2000 MT 145, 300 M 49, 3 P3d 614, 57 St. Rep. 567 (2000).

Inability to Pay Restitution — Not Violative of Equal Protection in Light of State Correctional Policy and Previous Offenses: A defendant convicted of felony theft was sentenced to 5 years in the state prison with 2 years suspended and, in addition, was ordered to pay restitution. The defendant asserted on appeal that he was sentenced to a prison term because of his indigency, in violation of his right to equal protection. However, the District Judge specifically noted the prison term was necessary to protect the property of others and that the defendant's criminal record contained three previous misdemeanor thefts. The Supreme Court found these to be sufficient reasons to support incarceration and upheld the state's correctional policy outlined in 46-18-101. The court noted that the sentence was well within the parameters of punishment for felony theft in 45-6-301. Finding no abuse of discretion or violation of the defendant's constitutional rights, the District Court was affirmed. St. v. Carroll, 220 M 466, 716 P2d 212, 43 St. Rep. 531 (1986).

Collateral References

Persons or entities entitled to restitution as "victim" under state criminal restitution statute. 92 ALR 5th 35.

Measure and elements of restitution to which victim is entitled under state criminal statute. 15 ALR 5th 391, §7(k) superseded by 44 ALR 6th 301, §12(a), (b) superseded by 45 ALR 6th 435.

46-18-242. Investigation and report of victim's loss.

Compiler's Comments

2003 Amendment: Chapter 272 in (1) in introductory clause after "victim" deleted "of the offense" and after "loss" deleted "as a result of the offense"; in (1)(a) substituted "a list of the offender's assets" for "documentation of the offender's financial resources and future ability to pay restitution"; in (1)(b) at beginning substituted "an affidavit that specifically describes" for "documentation of", after "loss" inserted "and the replacement value in dollars of the loss", and at end after "victim" deleted "or by the board of crime control if compensation for the victim's loss has been reimbursed by the state"; in (2) near middle after "court" substituted "shall accept" for "may receive" and after "evidence of" deleted "the offender's ability to pay and"; and made minor changes in style. Amendment effective October 1, 2003.

The amendments to this section made by Ch. 114, L. 2003, were rendered void by sec. 9, Ch. 272, L. 2003, a coordination section.

Retroactive Applicability: Section 10, Ch. 272, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who have an unpaid restitution obligation on [the effective date of this act]." Effective October 1, 2003.

2001 Amendment: Chapter 118 at end of (1)(b) substituted "reimbursed by the state" for "reimbursed by the crime victims compensation and assistance account". Amendment effective March 23, 2001.

Preamble: The preamble attached to Ch. 118, L. 2001, provided: "WHEREAS, the 1995 Legislature in Senate Bill No. 83 changed funding for the crime victims compensation and assistance program from an earmarked special revenue account to the general fund; and

WHEREAS, the crime victims compensation and assistance program has been supported entirely by general fund money since fiscal year 1996; and

WHEREAS, repealing section 53-9-109 is necessary in order to clarify the conflict that currently exists between actual appropriation practices and the law."

1995 Amendment: Chapter 125 near beginning of (1) substituted reference to victim's pecuniary loss for "restitution may be a proper condition of a deferred or suspended sentence"; at end of (1)(b) inserted reference to Board of Crime Control and crime victims compensation and assistance account; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Case Notes

Report Containing List of Victim's Medical Expenses Insufficient to Serve as Victim-Submitted Affidavit: A presentence investigation report set out the medical expenses paid by or on behalf of a crime victim, but no documentation or evidence of payment was included. The Supreme Court concluded that the report was not sufficient in form and substance to serve as the victim-submitted affidavit of medical expenses required under 46-18-242(1)(b) to form the basis for establishing the amount of restitution owed by defendant for the victim's medical expenses. St. v. Hunt, 2009 MT 265, 352 M 70, 214 P3d 1234 (2009). See also McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

Affidavit Required: The state charged Smietanka with the felony offense of sexual intercourse without consent. Smietanka and the state subsequently entered into a plea agreement pursuant to which the state agreed to amend the information to charge misdemeanor offenses of assault and negligent endangerment and eliminate the sexual intercourse without consent offense. The state further agreed to recommend that the District Court sentence Smietanka to a 6-month suspended sentence on each count, with the sentences to run concurrently, and with credit for 200 days for time served in jail. In return, Smietanka agreed to plead guilty to the two misdemeanor offenses and to pay a fine, public defender fees, and costs as determined by the court. Smietanka appeared in District Court and pleaded guilty to the two misdemeanor offenses. The court accepted the guilty pleas and proceeded directly to sentencing. The state then recommended a 6-month suspended sentence on the assault offense and a concurrent 12-month suspended sentence on the negligent endangerment offense, with 200 days credit for time served. The state also requested that the court impose restitution payable to the Montana Department of Justice's crime victims compensation program (CVCP). In support of its request for restitution, the state presented the court with a letter from the CVCP stating that the victim of Smietanka's offenses had filed an application for compensation benefits. The state also called a Deputy County Attorney as a witness, who testified that she had called the CVCP, verified that the CVCP paid $765.98 on behalf of the victim, and made a handwritten notation to that effect at the bottom of the CVCP letter. The District Court sentenced Smietanka on the assault offense to a 6-month suspended term in the Jefferson County jail. It deferred imposition of sentence on the negligent endangerment offense for 2 years. Smietanka was given credit against his sentences for 200 days of time served in jail. The court also imposed restitution of $765.98, public defender fees of $1,000, and various fees and surcharges. The court entered judgment on the convictions and sentences, and Smietanka appealed. Smietanka contended that the state failed to present the District Court with an affidavit from the CVCP specifically describing its alleged pecuniary loss and the state conceded that it failed to present the required affidavit describing the nature of the expenses for which it requested reimbursement. In light of this concession, the District Court erred in ordering Smietanka to pay restitution without adequate documentary support as required by this section. St. v. Smietanka, 2008 MT 357, 346 M 353, 195 P3d 797, (2008).

Determination of Restitution When Amount of Actual Loss Unknown: McMaster admitted taking money from Wright, but the actual amount could not be determined. The District Court received several restitution recommendations ranging from $12,914 proposed in the presentence investigation report to $334,425 based on a cash flow analysis. After considering testimony from numerous experts and from McMaster and Wright, the Court set restitution at $30,000, and McMaster appealed, but the Supreme Court affirmed. As established in St. v. Benoit, 2002 MT 166, 310 M 449, 51 P3d 495 (2002), a victim may recover losses even though the actual losses are uncertain if the losses are calculated by use of reasonable methods based on the best available evidence. Nothing requires a court or victim to substantiate a restitution calculation with documentation, nor is a court circumscribed from relying on victim testimony presented at a sentencing hearing. The court properly considered McMaster's written statement and Wright's nonexpert undocumented testimony presented at the sentencing hearing. Substantial evidence supported the court's findings and the court did not abuse its discretion when it set restitution at $30,000. St. v. McMaster, 2008 MT 268, 345 M 172, 190 P3d 302 (2008).

Adequate Information in Presentence Investigation Report to Meet Statutory Requirements for Restitution Payments: Kuykendall asserted that his sentence imposing restitution was illegal because the sentencing court failed to consider his financial resources and future ability to pay restitution. Noting the 2003 amendments to this section, the Supreme Court disagreed. The presentence investigation report stated that Kuykendall was unemployed and had no income, no assets, and no debt, and it detailed the losses suffered by the victim. That information was adequate to meet the statutory requirements for setting out Kuykendall's ability to pay restitution. St. v. Kuykendall, 2006 MT 110, 332 M 180, 136 P3d 983 (2006).

Imposition of Restitution Based on Documented Losses Not Violative of Constitutional Prohibition Against Excessive Fines: As set out in St. v. Good, 2004 MT 296, 323 M 378, 100 P3d 644 (2004), a restitution award violates the constitutional prohibition against excessive fines if the award is grossly disproportional to the gravity of the offense. Here, Kuykendall was convicted of criminal endangerment and ordered to pay restitution of over $10,000 to a peace officer who was injured during the crime. Kuykendall asserted that the restitution amount was grossly disproportional to the crime of criminal endangerment, but the Supreme Court disagreed. The amount of loss suffered by the officer was documented and was not refuted by Kuykendall at trial. The sentencing court relied on the only evidence presented at the sentencing hearing, and the amount of restitution ordered was directly related to the amount of loss and thus was not grossly disproportional. The restitution amount was not excessive and was affirmed. St. v. Kuykendall, 2006 MT 110, 332 M 180, 136 P3d 983 (2006).

Restitution Improper Absent Documentation of Victim's Loss: This section requires the sentencing court to consider some documentation of a victim's pecuniary loss, and restitution may not be imposed unless this statutory requirement is satisfied. In this case, absent evidence of the victim's loss in the presentence investigation report or at the sentencing hearing, it was improper to order Hirt to pay restitution to the victim of a sexual assault. St. v. Hirt, 2005 MT 285, 329 M 267, 124 P3d 147 (2005). See also St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000).

Joint and Several Liability for Restitution Properly Imposed: Following conviction for three counts of burglary, the District Court found Workman jointly and severally liable for the full amount of restitution to the burglary victims and ordered Workman to pay restitution in the amount of $26,840.33. Workman was accompanied in the burglaries by four accomplices, and Workman argued that he should be held responsible only for his proportionate share as divided among all the defendants. That argument was rejected, and Workman appealed on grounds that restitution was improperly imposed. Workman relied on the 2001 version of this section, contending that the required documentation of his financial resources was inaccurate, and on the 2001 version of 46-18-244, arguing that the sentencing court failed to establish a payment schedule or set the amount of installment payments. The Supreme Court noted that both the required documentation and payment schedule provisions were deleted by the 2003 Legislature and are no longer required. Workman's argument that restitution should be apportioned among his accomplices also failed because the fate of the accomplices was immaterial to the court's authority to impose restitution. Under the 2003 versions of the restitution laws and given that Workman stipulated that he owed the full amount, the District Court properly held Workman jointly and severally liable for the pecuniary loss suffered by his victims. St. v. Workman, 2005 MT 22, 326 M 1, 107 P3d 462 (2005).

No Prejudice in Property Valuation When Less Than Full Restitution Required: The total losses incurred by individuals and businesses in a fire started by Gilbert was $5,721,684.57. In calculating the value of a building destroyed in the fire for establishing restitution, the District Court used replacement value rather than actual value. Gilbert contended that failure to use actual value was reversible error under St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000). The Supreme Court agreed that actual value should have been used but that Gilbert failed to show that any prejudice resulted from the error. Gilbert's presentence investigation report adequately documented Gilbert's financial resources and future ability to pay restitution, and Gilbert was ordered to pay only $24,000 in restitution, which was but a minuscule fraction of the losses. Any error by the District Court in using replacement value for the building did not prejudice Gilbert because he was not required to pay full restitution. St. v. Gilbert, 2004 MT 368, 324 M 530, 106 P3d 127 (2004), following St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

No Standing to Raise Constitutionality of Restitution Statutes Absent Showing of Direct Personal Injury: The 2003 Legislature amended the state restitution statutes, and Thaut sought to challenge the constitutionality of the amendments on numerous grounds. However, Thaut was unable to show a direct personal injury resulting from application of the restitution laws. Pursuant to St. v. Krantz, 241 M 501, 788 P2d 298 (1990), and Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140 (1996), Thaut lacked standing to challenge the constitutionality of the restitution statutes, and the Supreme Court declined to address the issue. St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004). See also St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), in which defendant established direct economic injury and thus standing to challenge the constitutionality of repayment conditions on equal protection grounds through the District Court's order to repay $2,398 in costs of appointed counsel.

Restitution Order Proper Given Defendant's Ability to Pay: The sentencing court ordered Thaut to pay $69,457 in restitution. Thaut appealed the award on grounds that the court failed to meet statutory requirements establishing Thaut's financial resources and future ability to pay and on grounds that due process rights were violated when the court failed to consider several factors in Thaut's ability to pay, including Thaut's age and short time to work following parole, minimum wage employment history, lack of assets and ability to acquire assets in the future, and mental health issues related to an alleged prior head injury. However, the presentence investigation and supplemental presentence investigation provided adequate documentation regarding Thaut's ability to pay restitution and to work hard to earn a living. Further, Thaut had no documented physical limitations and was unemployed only because he was incarcerated. The District Court's determination that Thaut had the ability to pay medical expenses, a grant from the Board of Crime Control, and property damages was amply supported by the record, and the Supreme Court affirmed. St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004).

Failure of Sentencing Court to Establish Restitution Amount — Reversible Error: Following conviction for burglarizing casinos, Eixenberger was ordered by the District Court to pay restitution for losses and damages sustained by the casinos in a sum to be determined, plus interest. Eixenberger challenged the restitution award amount, and the Supreme Court reversed. It was error for the sentencing court to order payment of restitution in an amount to be determined rather than to specify the total amount, as required in 46-18-244. The presentence investigation report also failed to document the victims' pecuniary losses and Eixenberger's resources and ability to pay, as required by this section, so further sentencing proceedings were warranted on remand. St. v. Eixenberger, 2004 MT 127, 321 M 298, 90 P3d 453 (2004).

Restitution Adequately Documented in PSI Report and Information Submitted by Victim: Heath contended that the presentence investigation report (PSI) contained insufficient information to document his ability to pay restitution and the victim's pecuniary loss, citing St. v. Brown, 263 M 223, 867 P2d 1098 (1994), St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866 (1999), and St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000). The Supreme Court distinguished Brown, Hilgers, and Pritchett on grounds that the PSI report deficiencies in those cases were not present in Heath's case. Rather, the court followed St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003), and St. v. Dunkerson, 2003 MT 234, 317 M 228, 76 P3d 1085 (2003), finding that the PSI report adequately addressed Heath's employability, assets and debts, and capability of paying restitution. The valuation of the victim's pecuniary loss was adequately provided in documentation submitted by the victim and, coupled with expert testimony on the value of recovered items, provided substantial credible evidence upon which to base the restitution amount. St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Restitution Sentence Proper Despite Failure to List Pecuniary Loss in Presentence Investigation Report — Remand to Determine Restitution When Amount Undetermined: Following Dunkerson's conviction for theft and burglary, the District Court ordered restitution for the victim. The presentence investigation (PSI) report listed the loss as an undetermined amount. Failure of a PSI report to document a victim's pecuniary loss and the offender's ability to pay renders a restitution sentence illegal, although a full evidentiary hearing can vitiate the need for loss documentation in a PSI report. Here, the PSI report noted that the victim needed more time to accurately account for restitution owed, which satisfied the loss requirement of this section, so the District Court did not err in ordering restitution even though the amount of restitution was not in the PSI report. However, the court did err by not specifying the amount owed and the time and method of payment, so the case was remanded to determine the amount and method of payment pursuant to 46-18-244. St. v. Dunkerson, 2003 MT 234, 317 M 228, 76 P3d 1085 (2003).

Failure of Presentence Report to Document Restitution Concerns — Payment of Restitution at Discretion of Probation Officer Improper: Following a sexual assault conviction, Flanagan was ordered to pay for all offense-related medical and counseling costs, after payment by the victim's insurance, and all future costs for the next 2 years. Flanagan asserted that the restitution plan was illegal based on St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000), because the presentence investigation report did not document Flanagan's monthly expenses or address his future ability to pay restitution and because the development of a restitution schedule was left to the discretion of the probation officer. The Supreme Court agreed and remanded for addition to the presentence report of documentation of Flanagan's monthly expenses and future ability to pay restitution and to allow the District Court to hold a hearing to enter a sentence and judgment addressing Flanagan's ability to pay and the time of restitution payments. St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003).

District Court Error in Postponing Determination of Restitution: The District Court provided that as a condition of probation, restitution would be an amount stipulated by counsel and approved by the court. The Supreme Court held that 46-18-241 and this section require the trial court to establish the amount of restitution and terms of payment at the time of sentencing and remanded the case to the District Court for a determination of restitution. Gilbert v. St., 2002 MT 258, 312 M 189, 59 P3d 24 (2002).

Imposition of Restitution Upon Satisfaction of Statutory Procedures: Benoit was convicted of felony theft for falsifying voided transactions and customer discounts while employed at a restaurant over a 1 ½-year period. Benoit was ordered to pay $15,933.90 in restitution to the employer, based on calculations by the business manager who examined transaction records during the time that Benoit was on duty, and estimated the business's pecuniary losses. Benoit contested the restitution award on grounds that documentation of the victim's pecuniary loss was not provided in the presentence investigation or at the restitution hearing and that because the restitution amounts were speculative, the District Court had no authority to impose restitution. The Supreme Court noted that a sentencing court is required to impose a sentence that includes full restitution if the victim is found to have sustained a pecuniary loss, but restitution may not be imposed unless the procedures in 46-18-241 through 46-18-249 are satisfied. Failure of a presentence investigation to document a victim's loss and the offender's financial resources and ability to pay restitution, as required in this section, renders the judgment illegal, but that information was included in the presentence report in this case. Therefore, the District Court did have authority to impose restitution. Further, although the actual losses resulting from Benoit's admitted theft could not be determined with certainty, the method employed in calculating the loss was reasonable based on the best evidence available under the circumstances. The employer was entitled to recover its estimated pecuniary losses, plus reasonable out-of-pocket expenses incurred in cooperating in the investigation and prosecution of the case, including wages paid to three employees who assisted in calculating restitution. St. v. Benoit, 2002 MT 166, 310 M 449, 51 P3d 495 (2002), followed in St. v. O'Connor, 2009 MT 222, 351 M 329, 212 P3d 276 (2009), with regard to reasonableness of the method employed in calculating the loss based on the best evidence available under the circumstances.

Failure to Document Victim's Pecuniary Loss and Offender's Financial Resources and Ability to Pay Restitution — Restitution Condition Vacated: Muhammad was convicted of sexual intercourse without consent with a minor. One condition of sentencing was a requirement that Muhammad pay $5,000 in restitution. Under 46-18-201, a sentencing judge shall require a defendant to pay full restitution to a victim if the judge finds that the victim has sustained a pecuniary loss. Imposition of restitution is subject to detailed statutory procedures and qualifications, which include documented evidence of the victim's loss and the offender's ability to pay. The sentencing court is required to specify the amount, method, and time of each payment to the victim. Here, the presentence investigation did not document the victim's pecuniary loss or Muhammad's future ability to pay restitution, nor did the sentencing court consider Muhammad's future ability to pay because the relevant evidence was not presented to the court. Therefore, the Supreme Court held that the restitution condition of the sentence was illegal, and that condition was vacated. St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002), following St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000), and followed in St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007).

Failure to Document Defendant's Financial Resources and Ability to Pay Restitution and Victim's Pecuniary Loss — Restitution Sentence Improper: The general mandate to sentencing courts is that a sentence must include full restitution whenever it is found that the victim of an offense has sustained a pecuniary loss, subject to mandatory detailed statutory procedures and qualifications. Here, although the District Court received some evidence of these amounts during the sentencing hearing, the failure of the presentence investigation report to document the victim's pecuniary loss, as well as the defendant's financial resources and future ability to pay restitution, provided the court no authority to impose a sentence of restitution and rendered its judgment illegal. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000), following St. v. Brown, 263 M 223, 867 P2d 1098 (1994), and St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866 (1999), and distinguished in St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

When Restitution Owing: Under 46-18-201, the sentencing court is required to provide for full restitution by a defendant to the victim of a criminal offense who sustains a pecuniary loss. Here, Hilgers' issuance of more than 50 bad checks and stealing cash and diverting checks and money orders from his employer in an amount exceeding $33,500 clearly qualified as a pecuniary loss. The court found the state's witnesses more credible than Hilgers, providing adequate

support in the record as to the amount owing. The restitution amount was not clearly erroneous and was affirmed on appeal. However, the Supreme Court remanded for lack of documentation, as required under this section, regarding Hilgers' financial resources and future ability to pay restitution, finding the information in the presentence report regarding Hilgers' age, education, assets and obligations, and marital and employment status inadequate in addressing Hilgers' resources and ability to pay the amount in question. St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866, 56 St. Rep. 1146 (1999), following St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996), distinguishing St. v. Brown, 263 M 223, 867 P2d 1098, 51 St. Rep. 24 (1994), followed in St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000), and distinguished in St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Financial Resources and Future Ability to Pay Restitution Properly Considered: In imposing interest on Brewer's restitution obligation, Brewer contended that the court did not properly consider her financial resources and future ability to pay restitution or specify the amount, method, and time of each payment, as required by 46-18-244. At the sentencing hearing, Brewer testified that: (1) she had obtained two jobs; (2) because her husband's wages covered the household expenses, she intended to put all her wages toward restitution; and (3) she had already made nearly $6,000 in restitution payments and intended to continue the payments. Based on this testimony, the District Court properly considered Brewer's financial resources and future ability to pay restitution in ordering repayment according to a schedule of repayment arrived at with the probation officer. St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407, 56 St. Rep. 1090 (1999).

Presentence Investigation Inadequate to Support Restitution — Restitution Order Inadequate: Brown was convicted of felony criminal endangerment and negligent homicide after killing one pedestrian and injuring another when he lost control of his vehicle. The District Court ordered Brown to make restitution to the one victim and to the families of both victims. The presentence investigation report contained no documentation of the pecuniary loss of either victim and inadequate documentation of Brown's financial resources, especially his future earning capacity. The Supreme Court noted that as probable consequences of these errors, the District Court's order for restitution did not require Brown to pay a specific amount at a specific time. For these reasons, the Supreme Court held that the order could not lawfully be made and remanded the case to the District Court. St. v. Brown, 263 M 223, 867 P2d 1098, 51 St. Rep. 24 (1994), distinguished in St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866, 56 St. Rep. 1146 (1999), in which the failure of the presentence investigation to set forth the amount of restitution was not considered fatal because defendant was given a hearing and because defendant had entered a plea bargain providing that the amount was to be agreed upon by the parties prior to sentencing and if the parties were unable to agree on an amount, it would be determined by the court, and St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004), and followed in St. v. Rinkenbach, 2003 MT 348, 318 M 499, 82 P3d 8 (2003).

Restitution Proper Only if Sentence Deferred or Suspended: The Supreme Court vacated the lower court's restitution order on the basis that no portion of the defendant's sentence was deferred or suspended as is required by the statute before restitution can be ordered. St. v. Mazurkiewicz, 245 M 172, 799 P2d 1066, 47 St. Rep. 1962 (1990), distinguished in St. v. Bourne, 259 M 274, 855 P2d 222, 50 St. Rep. 791 (1993), in which restitution was clearly attendant to conditions of parole if and when parole occurred.

Collateral References

Propriety, measure, and elements of restitution to which victim is entitled under state criminal statute — cruelty to, killing, or abandonment of, animals. 45 ALR 6th 435.

Measure and elements of restitution to which victim is entitled under state criminal statute — payment for installation of alarm or locks or change of locks due to burglary, attempted burglary, or felonious breaking and entering. 44 ALR 6th 301.

46-18-243. Definitions.

Compiler's Comments

2003 Amendment: Chapter 272 in definition of pecuniary loss in (a) near middle after "limitation" deleted "the money equivalent of loss resulting from property taken, destroyed, broken, or otherwise harmed and", inserted (b) including full replacement cost, and inserted (c) including future medical expenses; in definition of victim inserted (a)(v) to include the crime victims compensation and assistance program to the extent that it has reimbursed a victim for pecuniary loss and inserted (a)(vi) to include any person or entity whom the offender has voluntarily agreed to reimburse as part of a plea bargain; and made minor changes in style. Amendment effective October 1, 2003.

Retroactive Applicability: Section 10, Ch. 272, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who have an unpaid restitution obligation on [the effective date of this act]." Effective October 1, 2003.

1997 Amendment: Chapter 26 in definition of victim, in (a)(iii) after "in this state", inserted "or that incurs costs or losses during the commission or investigation of an escape, as defined in 45-7-306, or during the apprehension or attempted apprehension of the escapee". Amendment effective February 21, 1997.

Applicability: Section 3, Ch. 26, L. 1997, provided: "[This act] applies to escapes occurring after [the effective date of this act]." Effective February 21,1997.

1995 Amendment: Chapter 125 at end of (1)(a) inserted reference to loss of income and expenses related to services, court proceedings, and funeral and burial or crematory services; in (2)(a)(i)(A) and (2)(a)(i)(B) substituted "the commission of an offense" for "criminally injurious conduct"; inserted (2)(a)(i)(C) relating to attempted apprehension of suspect; inserted (2)(a)(ii) relating to victim's estate or immediate family; inserted (2)(a)(iii) relating to governmental entity; inserted (2)(b) excluding those accountable for crime from definition of victim; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Case Notes

Expenses Recoverable in Civil Action Properly Imposed as Restitution — Sufficient Evidence of Restitution Amount: Essig was convicted of stalking and sentenced to pay restitution of $5,582.03, including counseling expenses for the victim's children, blood testing for one of the children, and the cost of six memory cards for a digital camera. Essig contested the restitution and the amount, but the Supreme Court affirmed. Under 46-18-243, pecuniary loss includes general damages that a person could recover in a civil action against the defendant. In this case, the evidence showed that the expenses could have been recovered in a civil action by the victim and thus were legally imposed as restitution. The value of the various items was supported by the evidence and their inclusion as restitution was not erroneous. St. v. Essig, 2009 MT 340, 353 M 99, 218 P3d 838 (2009).

Sufficient Connection Between Victim of Vehicle Accident and Evidence Tampering to Warrant Defendant's Payment of Victim's Funeral Expenses as Restitution: Sherman was thrown from her car in a vehicle accident, and as she lay in the road, she was struck and killed by Ness's vehicle. Ness did not stop and subsequently repaired and washed his car in an effort to conceal evidence of the accident. Ness was convicted of tampering with evidence and ordered to pay $3,500 for Sherman's funeral expenses as restitution. Ness challenged the restitution on grounds that because Sherman was not a victim of the evidence tampering conviction, there was no nexus between the crime and the restitution. The Supreme Court disagreed. Pursuant to St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116 (2000), classification of a person as a victim for purposes of ordering restitution does not depend on the person's relationship to the elements of the crime for which the defendant is convicted. In this case, restitution for Sherman's funeral expenses was not wholly unrelated to Ness's crime, and the expenses were based on Ness's involvement, which created a nexus between restitution and the crime. Because the funeral expenses were paid to Sherman's estate directly out of the crime victims compensation account, that account was entitled to $3,500 restitution. St. v. Ness, 2009 MT 300, 352 M 317, 216 P3d 773 (2009).

Restitution Proper for Felony Criminal Endangerment: As part of Perkins' plea agreement on a charge of felony criminal endangerment, the state was allowed to seek restitution, and the sentencing court assessed $5,947 in restitution. Perkins appealed. The state conceded that $78.44 was not supported by documentation, but the Supreme Court held that there was sufficient legal authority for the sentencing court to impose restitution as part of the sentence. Therefore, the restitution award was affirmed but was reduced by $78.44. St. v. Perkins, 2009 MT 150, 350 M 387, 208 P3d 386 (2009).

Mitigation of Damages as Restitution for Criminal Activity — Additional Restitution of Loss of Income Warranted: Kalal was convicted of theft of a tractor; he received a 2-year deferred sentence and was ordered to pay restitution for the value of the tractor and other stolen property. Kalal satisfied the restitution obligation, but Petranek, the victim of the theft, sought additional restitution for loss of income because he had anticipated using the tractor for various income-producing activities, including building a fence, building a cabin, and seeding land for grass production and farming. The District Court noted that other tractors could be rented, but that Petranek's limited availability to work on projects presented serious impediments to renting a tractor. The court thus determined that Petranek suffered a loss of income for summer grazing and cabin rental in the amount of $15,960. Kalal appealed, but the Supreme Court

affirmed. Applying precedents from the fields of tort and contract law, the court recognized that an injured person is not expected to do what is unreasonable or impracticable, so the applicable standard is what would a reasonable and prudent person be expected to do, if capable, under the circumstances. While recognizing the duty to mitigate damages, the District Court correctly reasoned that no reasonable person could be expected to spend money or time that the person does not have to mitigate an injury for which the person is not responsible. Therefore, under these circumstances and given the impracticability and expense of renting and transporting a tractor a long distance for short periods of time, the restitution award of $15,960 for Petranek's loss of income was reasonable. St. v. Kalal, 2009 MT 103, 350 M 128, 204 P3d 1240 (2009).

Drug Task Force Considered Victim of Drug Offense — Restitution to Task Force as Part of Plea Agreement Affirmed: As part of a plea agreement on a drug charge, Jones agreed to pay $125 in restitution to the Eastern Montana Drug Task Force. Jones later appealed the restitution condition on grounds that it was illegal because the task force was not a victim of the drug distribution offense. The Supreme Court disagreed. Because Jones agreed in the plea agreement to pay restitution to the task force, the task force was a victim, as defined in 46-18-243(2)(a)(vi), to whom the sentencing court could require Jones to pay restitution. St. v. Jones, 2008 MT 440, 347 M 512, 199 P3d 216 (2008), distinguishing St. v. Krum, 2007 MT 229, 339 M 154, 168 P3d 658 (2007).

Determination of Restitution When Amount of Actual Loss Unknown: McMaster admitted taking money from Wright, but the actual amount could not be determined. The District Court received several restitution recommendations ranging from $12,914 proposed in the presentence investigation report to $334,425 based on a cash flow analysis. After considering testimony from numerous experts and from McMaster and Wright, the Court set restitution at $30,000, and McMaster appealed, but the Supreme Court affirmed. As established in St. v. Benoit, 2002 MT 166, 310 M 449, 51 P3d 495 (2002), a victim may recover losses even though the actual losses are uncertain if the losses are calculated by use of reasonable methods based on the best available evidence. Nothing requires a court or victim to substantiate a restitution calculation with documentation, nor is a court circumscribed from relying on victim testimony presented at a sentencing hearing. The court properly considered McMaster's written statement and Wright's nonexpert undocumented testimony presented at the sentencing hearing. Substantial evidence supported the court's findings and the court did not abuse its discretion when it set restitution at $30,000. St. v. McMaster, 2008 MT 268, 345 M 172, 190 P3d 302 (2008).

Defendant Not Involved in Initial Vehicle Theft or Damage — Restitution Not Owing: Seghetti stole a vehicle and picked up Breeding and another friend for a ride, during which the vehicle was damaged while Seghetti was driving. Seghetti then revealed that the vehicle was stolen, and Breeding suggested driving the vehicle to California. During the trip, Breeding and Seghetti shared the driving. California police stopped the vehicle for a broken turn signal, and Breeding and Seghetti were subsequently charged with and convicted of felony theft. At sentencing, the District Court ordered that Breeding pay restitution for damage to the vehicle. Asserting that he was not driving when the damage occurred and thus was not responsible for the damage, Breeding appealed the restitution order. The Supreme Court reversed. Without a causal connection between Breeding's commission of theft and the damage inflicted earlier by Seghetti, there was no basis for requiring Breeding to pay restitution for that damage, so the District Court was ordered to strike the restitution requirement from Breeding's sentence. St. v. Breeding, 2008 MT 162, 343 M 323, 184 P3d 313 (2008).

Reimbursement to Insurer That Reimbursed Victim Affirmed: An insurer that reimbursed a victim for pecuniary loss had the right of subrogation to the extent of the reimbursement, and the District Court did not abuse its discretion in ordering defendant to pay restitution to the insurer to make the insurer whole. St. v. Sharp, 2006 MT 301, 334 M 470, 148 P3d 625 (2006).

Restitution Owing Under Youth Court Act — Market Value Versus Replacement Cost — Deduction of Salvage Value From Restitution Amount: T.M.R., a youth, stole a vehicle from his friend's parents' garage and went for a joyride. The vehicle was destroyed, and the youth was placed on probation and ordered to pay restitution. The parties disagreed on the amount of restitution owed. The Supreme Court noted that prior to the 2003 amendments to adult sentencing statutes, restitution was consistently based on market value if it could be ascertained. Unlike the adult sentencing statutes, the Montana Youth Court Act was not amended in 2003 to include replacement cost as a way to determine restitution. Thus, the court concluded that the more equitable and consistent approach to determine restitution under the Act was to measure damages based on market value. The court noted that the victims received $500 in salvage value for the vehicle and also held that the restitution amount should be reduced by the amount of salvage received. In re T.M.R., 2006 MT 246, 334 M 64, 144 P3d 809 (2006).

Restitution Proper for Insurance Fraud: Borsberry was convicted of insurance fraud and ordered to pay restitution of $22,997.52 to the insurer in repayment of the fraudulently obtained amount. Borsberry appealed on grounds that restitution was not proper because the insurer was not a victim who suffered a pecuniary loss. The Supreme Court disagreed. Borsberry's policy contained a provision that his policy would be voided if a fraudulent claim was filed. The insurer paid the fraudulent claim under a reservation of rights and suffered a pecuniary loss based on Borsberry's criminal activity. Under Tyler v. Fireman's Fund Ins. Co., 255 M 174, 841 P2d 538 (1992), insurance payments made under fraudulent claims entitle the insurer to restitution in the amount of the payments. The restitution fell within statutory parameters and was affirmed. St. v. Borsberry, 2006 MT 126, 332 M 271, 136 P3d 993 (2006).

No Prejudice in Property Valuation When Less Than Full Restitution Required: The total losses incurred by individuals and businesses in a fire started by Gilbert was $5,721,684.57. In calculating the value of a building destroyed in the fire for establishing restitution, the District Court used replacement value rather than actual value. Gilbert contended that failure to use actual value was reversible error under St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000). The Supreme Court agreed that actual value should have been used but that Gilbert failed to show that any prejudice resulted from the error. Gilbert's presentence investigation report adequately documented Gilbert's financial resources and future ability to pay restitution, and Gilbert was ordered to pay only $24,000 in restitution, which was but a minuscule fraction of the losses. Any error by the District Court in using replacement value for the building did not prejudice Gilbert because he was not required to pay full restitution. St. v. Gilbert, 2004 MT 368, 324 M 530, 106 P3d 127 (2004), following St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Cost of Installing Surveillance Equipment Subject to Restitution as Pecuniary Loss Incurred in Cooperation in Investigation of Offense: Good, convicted of assault, argued that the District Court erred in requiring him to pay restitution for surveillance equipment installed by Huseby at the insistence of law enforcement officials after Huseby was assaulted and subjected to other abuse by Good, who lived next door to him at the time. Prior to his conviction for assault, Good had obtained a court order for the removal of the equipment as an invasion of his family's privacy. The Supreme Court held that the cost of the surveillance equipment did fit the statutory definition of pecuniary loss in this section as a cost incurred in cooperating with law enforcement in the investigation of an offense and therefore was a cost for which restitution could be ordered. St. v. Good, 2004 MT 296, 323 M 378, 100 P3d 644 (2004).

Mortgage Payments Subject to Restitution as Pecuniary Losses That Would Be Compensable in Civil Action: Good, convicted of assault, argued that the District Court erred in requiring him to pay restitution for mortgage payments made by Huseby on his former residence, which Huseby was unable to rent, when Huseby moved from that residence and purchased a new home after being assaulted and subjected to other abuse by Good, who lived next door to him at the time. The Supreme Court held that although Good may not have been able to predict that his behavior would lead to Huseby's moving, Good's abominable behavior was the proximate cause of the move and would have been compensable in civil court and therefore was subject to a restitution order as a pecuniary loss as defined in this section. St. v. Good, 2004 MT 296, 323 M 378, 100 P3d 644 (2004).

Restitution Properly Ordered When Dismissed Charges Related to Charge for Which Defendant Convicted: McIntire was charged with felony burglary, misdemeanor theft, and misdemeanor forgery. Pursuant to a plea agreement, McIntire pleaded guilty to the burglary charge and the other charges were dismissed. The trial court ordered McIntire to pay restitution, but McIntire contended that because the forgery charges were dismissed, restitution could not be ordered to compensate for the forged checks and that the court lacked authority to impose restitution when there was no longer a victim with respect to the dismissed forgery charges. The Supreme Court disagreed. The victim was the same for both crimes, and the burglary was directly connected to the forgery, constituting an ongoing criminal transaction, so dismissal of the forgery charges did not deprive the court of authority to impose a restitution obligation on McIntire for the checks stolen from the victim during the burglary and for the pecuniary loss from the subsequent forgery of those checks. St. v. McIntire, 2004 MT 238, 322 M 496, 97 P3d 576 (2004).

Question Whether Restitution Connected to Crime — Remand for Reconsideration of Restitution: McDanold assisted in kidnapping and assaulting Berry, who was later killed by another man who was also involved in the kidnapping and assault. Although McDanold did not kill Berry, upon McDanold's conviction, the District Court ordered McDanold to pay restitution to Berry's parents and to the crime victims compensation fund. On appeal, McDanold contended

that the sentencing court improperly ordered the restitution because the expenses were unrelated to McDanold's crimes and also asserted that he had been double-billed for some expenses that had been paid by the crime victims compensation fund. The state contended that there was an arguable connection between McDanold's offenses and the pecuniary losses to Berry's parents and to the fund. The Supreme Court remanded for reconsideration of restitution, including the parents' claims and whether they had indeed been compensated in part by the crime victims compensation fund. St. v. McDanold, 2004 MT 167, 322 M 31, 97 P3d 1076 (2004).

Liability of Illegal Branding Defendant for Cost of Boarding Confiscated Livestock With Livestock Commission: When Mikesell was investigated for illegal branding of livestock on his property, the cattle were seized and taken to the Miles City Livestock Commission. Mikesell pleaded guilty to three counts of illegal branding, and the cost of the feed bill at the Livestock Commission was assessed as restitution. Mikesell contended that the feed cost should not be assessed because the cattle remained at the Livestock Commission long after he had requested that the cattle be released to him. However, the prosecution did not allow release of the cattle to Mikesell because they did not belong to him. Because the cost was associated with the illegal branding charges, Mikesell was responsible for the cost of feeding the cattle until the parties came to an agreement on the cattle's disposition. St. v. Mikesell, 2004 MT 146, 321 M 462, 91 P3d 1273 (2004).

No Restitution Owing for Loss of Cattle Unassociated With Criminal Illegal Branding Charge: Mikesell pleaded guilty to three counts of illegal branding of cattle pastured on his property. As part of restitution, the trial court also found that Mikesell owed $30,000 for 55 cattle that were missing after being pastured on Mikesell's land. On appeal, the Supreme Court reversed. The loss of the 55 cattle from possible drowning or other untimely demise was a civil matter and was not associated with the illegal branding for which Mikesell was guilty. Because the loss did not arise from Mikesell's criminal activity, he was not responsible for restitution for the lost cattle. St. v. Mikesell, 2004 MT 146, 321 M 462, 91 P3d 1273 (2004).

Costs Directly Related to Defendant's Criminal Conduct Properly Included in Restitution Calculation: Thompson was a maintenance worker at a commercial building and had keys to the entire building. Thompson was convicted of stealing and then pawning tools from the maintenance room in the building and was ordered to pay restitution, including the costs of rekeying the entire building. Thompson contended that requiring payment of the cost of rekeying the building went beyond recovery for any pecuniary losses and was an abuse of discretion. The Supreme Court disagreed. The reason the building was rekeyed was a direct result of Thompson's criminal conduct, and the expense was an out-of-pocket loss directly related to the thefts, so including those special damage expenses in the restitution calculation was proper. St. v. Thompson, 2004 MT 131, 321 M 332, 91 P3d 12 (2004).

Out-of-Pocket Cleanup Expenses Properly Included as Part of Restitution Owed: Following Dunkerson's conviction for theft and burglary, the District Court included $7,180 for the victim's cleanup costs as part of the restitution. Dunkerson contended that the amount was erroneous because he provided testimony that a professional cleaner would charge only $960. The Supreme Court disagreed, noting that the cleanup faced by the victim could not be likened to the professional cleaning of a home that had not been burglarized. This section allows a victim to recover all special damages, including out-of-pocket expenses. The District Court's findings were not clearly erroneous, and the award was affirmed. St. v. Dunkerson, 2003 MT 234, 317 M 228, 76 P3d 1085 (2003).

Payment of Child Support Improper Condition of Sentence for Felony DUI — Victim and Correlation to Underlying Offense Necessary for Imposition of Restitution: Horton was arrested for DUI, and a search of his driving record revealed nine prior DUI convictions. A further search showed that Horton also owed more than $47,000 in back child support. Horton was charged with felony DUI, with driving with a suspended or revoked license, as a habitual traffic offender operating a motor vehicle, and with felony nonsupport. By plea agreement, Horton agreed to plead guilty to the traffic offenses in exchange for dismissal of the nonsupport charge. The plea agreement stated that the state would recommend a 13-month sentence to be served in prerelease, followed by 4 years of probation, and, as a condition of the probationary sentence, provided that Horton would also make regular child support payments plus an additional sum monthly toward the support arrearage. As set out in the agreement, Horton pleaded guilty to the traffic offenses, and the nonsupport charge was dismissed. At sentencing, the habitual traffic offender charge was subsequently dismissed for failure of the state to prove that a valid habitual offender designation was in place at the time of the offense, and in addition, Horton's counsel objected to the court ordering payment of any child support arrearage, arguing that because the nonsupport charge had been dismissed, Horton would be paying restitution on a count for which

he had not been convicted. Nevertheless, the court ordered Horton to pay support and promised to revoke his probation and sentence him to 4 years in prison with no parole if support was not paid. On appeal, Horton argued that the District Court abused its discretion and exceeded statutory mandates when it required him to pay restitution for an offense that was dismissed, citing St. v. Brown, 263 M 223, 867 P2d 1098 (1994), for the position that restitution is statutorily limited to the victim of the crime and that because there was no victim who sustained pecuniary or economic loss as a result of the felony DUI or driving with a suspended or revoked license, restitution was inappropriate. The state argued that Horton was attempting to receive the benefit of the plea agreement—having the felony nonsupport charge dismissed—without holding up his end of the bargain by paying child support. The Supreme Court noted that a plea agreement is subject to contract law and that the court will not assist a defendant in escaping the obligations of a plea agreement once its benefits are received. However, the court also pointed out that a District Court's authority to impose sentences in criminal cases is defined and constrained by statute. The statutory authority for payment of restitution is in 46-18-201, which limits payment of restitution to the victim of a crime for which a defendant is convicted, and because Horton was not convicted of nonsupport, there was no victim to whom Horton could be ordered to pay restitution. The state also contended that ordering Horton to pay child support was proper because under 46-18-202(1), a sentencing court may impose any condition reasonably related to the objectives of rehabilitation and the protection of the victim and society. The Supreme Court noted that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), a sentencing condition must have some correlation or connection to the underlying offense, but there was no correlation or connection between Horton's conviction for DUI and ordering him to pay child support. Thus, the Supreme Court ordered that the portion of Horton's sentence requiring payment of child support be stricken. St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), followed in St. v. Setters, 2001 MT 101, 305 M 253, 25 P3d 893 (2001).

Restitution Proper for Ambulance and Towing Charges Related to Hit and Run and High-Speed Chase: LaTray was convicted of DUI, operating a vehicle without proof of insurance, operating a vehicle while a habitual traffic offender, leaving the scene of an accident, and criminal endangerment. The charges stemmed from a hit-and-run accident and subsequent high-speed chase, which ended when LaTray lost control of his car, went into a ditch, and rolled the vehicle. Officials at the scene called an ambulance as a precautionary measure and called a tow truck to remove LaTray's vehicle from the ditch. As restitution, the sentencing court ordered LaTray to pay the costs of the ambulance and tow truck. LaTray appealed on grounds that restitution is limited to pecuniary losses suffered by direct victims, as defined in terms of the offenses for which he was convicted, asserting that the ambulance company and towing service were not victims of his offenses, so restitution could not be ordered for their reimbursement. The Supreme Court disagreed. The plain language of 46-18-241 does not limit restitution to a victim defined in terms of the offense or to a loss arising directly from the criminal conduct. Also, St. v. Morgan, 198 M 391, 646 P2d 1177 (1982), makes it clear that classification of a victim for restitution purposes does not depend on the individual's relationship to the elements of the crime for which a defendant is sentenced. Further, restitution is not confined to the amount by which a defendant is enriched at a victim's expense, but rather the restitution statute empowers courts to impose restitution for economic loss as a result of a crime. Here, the ambulance and towing companies suffered an economic loss in out-of-pocket expenses for services for which they were not reimbursed, and the losses were the direct result of LaTray's criminal conduct, which created a situation for which the services were reasonably necessary for the safety of the public or LaTray himself. The restitution order was affirmed. St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116, 57 St. Rep. 1098 (2000). See also St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407 (1999).

Use of Replacement Cost, Rather Than Market Value, of Converted Property Resulting in Erroneous Calculation of Restitution: Pritchett entered the garage of a former employer in an effort to return two hunting rifles that he had stolen and pawned to support his gambling habit. Pritchett dropped his flashlight and, unable to find it in the dark, lit a cigarette lighter, which ignited a leaking propane bottle and caused an explosion that destroyed the garage and its contents. Pritchett was convicted of burglary and ordered to pay restitution. In calculating the victim's pecuniary loss, the District Court used replacement cost, rather than actual market value, of the garage and its contents. Pritchett argued on appeal that this method of valuation resulted in a significant overstatement of his restitution obligation. The Supreme Court found that the appropriate civil action arising out of Pritchett's destruction of the garage would be an action for conversion of personal property, the loss of which is presumed to be the value of the property at the time of conversion under 27-1-320. Thus, when personal property is converted,

the restitution must be based on the market value of the goods converted. The District Court's use of the replacement cost of the items was an incorrect measure of the restitution obligation, constituting reversible error. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000).

Inclusion in Restitution of Costs Related to Pecuniary Loss — Wages Paid to Embezzler Not Recoverable as Pecuniary Loss: Under 46-18-241, a sentencing court may include in restitution costs paid by the victim as a result of defendant's criminal act as long as the costs are considered pecuniary loss, as defined by this section. This loss may include economic loss as a result of the crime, out-of-pocket losses, such as medical expenses, and reasonable out-of-pocket expenses incurred by the victim in filing charges or in cooperating in the investigation and prosecution of the offense. Here, Brewer embezzled over $96,000 and was ordered to pay restitution, but argued that the fact that 46-18-241 excludes general damages militated against the inclusion in the restitution obligation of amounts beyond the total stolen from the employer. Brewer improperly characterized the employer's out-of-pocket losses as general damages. The employer paid accounting firms, employees, labor contractors, a software company, and a locksmith more than $15,000 in an attempt to reconstruct books and repair damage resulting from Brewer's crime. Those expenses were all considered out-of-pocket losses within the context of 46-18-241 and were properly includable in the restitution calculation. However, wages paid to Brewer over the course of employment did not constitute pecuniary loss and were not recoverable as restitution. St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407, 56 St. Rep. 1090 (1999). See also St. v. Morgan, 198 M 391, 646 P2d 1177 (1982), and St. v. Korang, 237 M 390, 773 P2d 326, 46 St. Rep. 892 (1989).

Interest Properly Imposed on Restitution Obligation: Brewer embezzled over $96,000 and was ordered to pay restitution to the employer, including 10% interest on the restitution obligation. Brewer contended that interest in this case was per se an abuse of discretion insofar as it exceeded the employer's pecuniary loss. The issue of whether interest may be properly applied to restitution under 46-18-241 was a case of first impression in Montana. Interest is not expressly provided for by the restitution statute, which provides for restitution to a victim who suffers a pecuniary loss, defined in this section as special damages, but not general damages, that a person could recover in a civil action arising out of the facts constituting the criminal activity. Interest is a special damage available in a civil action under 27-1-210 and thus was properly applied to Brewer's restitution. However, interest is not allowed on damages such as pain and suffering, mental anguish or suffering, or punitive damages. St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407, 56 St. Rep. 1090 (1999).

Victims' Families Ineligible for Restitution: Brown was convicted of felony criminal endangerment and negligent homicide after killing one pedestrian and injuring another when he lost control of his vehicle. The District Court ordered Brown to make restitution to the one victim and to the families of both victims. The Supreme Court held that the families of the victims do not qualify for restitution under the definition of "victim". (See 1995 amendment.) St. v. Brown, 263 M 223, 867 P2d 1098, 51 St. Rep. 24 (1994).

Restitution Allowed for Period Longer Than Charged Offense: Defendant was charged with theft and tampering with public records over a 2-year period. All but 6 months of her 20-year sentence were suspended on the condition that she repay the money she stole at work over a 5-year period. She argued the amount was not substantiated by evidence because she was not being tried for her activities during the first 3 years and that in essence, she was sentenced for criminal activity for which she was not convicted. There was evidence in the sentencing hearing that her crimes were spread out over a 5-year period. The restitution order was proper. St. v. Korang, 237 M 390, 773 P2d 326, 46 St. Rep. 892 (1989).

Collateral References

Persons or entities entitled to restitution as "victim" under state criminal restitution statute. 92 ALR 5th 35.

46-18-244. Type and time of payment — defenses — ensuring payment.

Compiler's Comments

2003 Amendment: Chapter 272 in (1) at end after "amount" substituted "of restitution that the offender shall pay" for "to be paid and the method and time of payment and may permit payment in installments"; in (2) deleted former first two sentences that read: "In determining the amount, method, and time of each installment payment, the court shall consider the financial resources and future ability of the offender to pay. The court shall provide for payment to a victim of the full amount of the pecuniary loss caused by the offense", at beginning inserted "In the proceeding for the determination of the amount of restitution", and at end after "loss"

substituted "for which the victim seeks compensation" for "sought to be compensated by the restitution order"; deleted former (3)(c) that read: "(c) payment of up to one-third of the offender's prison earnings"; inserted (6) concerning collection of restitution in the case of a felony offense; inserted (7) requiring the department of revenue to intercept state and federal tax refunds in order to pay restitution; and made minor changes in style. Amendment effective October 1, 2003.

Retroactive Applicability: Section 10, Ch. 272, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who have an unpaid restitution obligation on [the effective date of this act]." Effective October 1, 2003.

2001 Amendment: Chapter 284 in (1) after "specify" substituted "the total amount to be paid and the method and time of payment" for "the amount, method, and time of each payment to the victim"; and in (2) near middle of first sentence before "payment" inserted "installment". Amendment effective October 1, 2001.

1997 Amendment: Chapter 181 in (1), in first sentence after "time of", inserted "each" and deleted second sentence that read: "The court may not establish a payment schedule extending beyond the period of state supervision over the offender"; in (2), in first sentence after "time of", inserted "each" and at beginning of second sentence, after "court", substituted "shall" for "may" and after "victim" substituted "of the full amount" for "up to but not in excess"; in (4), near middle after "services", inserted "to the victim"; and inserted (5) regarding remedial measures that may be taken if necessary to preserve property or assets that could be used to satisfy an anticipated restitution order.

1995 Amendment: Chapter 125 at end of (1) substituted "period of state supervision over the offender" for "period for which the sentence has been suspended or deferred under 46-18-201"; inserted (3) relating to methods of payment of restitution; inserted (4) allowing restitution in services in lieu of money or restitution to a third person; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Administrative Rules

Title 20, chapter 12, ARM Restitution.

Case Notes

Restitution Obligations Not Discharged Upon Fulfillment of Criminal Sentence: As a condition of sentences for theft, burglary, and deceptive practices, Brown was ordered to pay restitution. Upon completion of his prison sentences, Brown was released without having paid restitution in full. Brown was subsequently imprisoned following conviction for other criminal offenses, and the Department of Corrections began garnishing Brown's prison wages to satisfy the unpaid restitution obligations from the previous sentences. Brown requested that the District Court waive payment of the restitution on grounds that the Department lacked authority to garnish his prison wages to pay restitution obligations from sentences that were previously discharged. The court agreed and ordered the Department to cease garnishment and to reimburse any money collected to satisfy those obligations. The state appealed, and the Supreme Court reversed. Unlike the other conditions of Brown's sentences, the restitution obligations were civil judgments required by 46-18-241 to be paid in full, and those obligations were not discharged or fulfilled by virtue of Brown's completion of the criminal sentences and discharge from prison. Pursuant to this section, the Department was authorized to garnish Brown's prison wages to satisfy the previously unpaid restitution. St. v. Brown, 2008 MT 115, 342 M 476, 182 P3d 75 (2008).

Open-Ended Restitution Condition Reversed: As a condition of Meyers' sentence for assaulting his child, it was ordered that Meyers pay restitution to all the victims in an amount to remain open until the victims received any help that they needed. However, this section requires that the sentencing court specify the total amount of restitution that the offender shall pay. Thus, it was reversible error for the sentencing court to leave the amount of restitution open, and the Supreme Court remanded for reimposition of the restitution requirement in a specified amount. St. v. Meyers, 2007 MT 230, 339 M 160, 168 P3d 645 (2007).

Restitution Payment Schedule Not Required: Pursuant to the 2003 amendments to this section, a sentencing court is not required to set a restitution payment schedule. St. v. Kuykendall, 2006 MT 110, 332 M 180, 136 P3d 983 (2006).

Improper Order to Pay Child Support as Condition of Sentence for Possession of Dangerous Drugs: Erickson entered a plea agreement on drug charges, and although it was not part of the agreement, the sentencing court ordered that Erickson also forfeit one-third of his prison earnings as restitution to be paid toward Erickson's delinquent child support. Erickson never invited or acquiesced to the child support order. On appeal, the Supreme Court held that possession of dangerous drugs is a victimless crime for which restitution cannot be owed and also

noted that the amount of restitution must be determined and fixed. The court agreed with Erickson that there was no connection between drug crimes and the failure to pay child support, so ordering payment of child support arrearages as restitution was not an appropriate condition of sentencing for a drug crime. However, in this case, the sentencing court made it clear that the order to pay child support was in lieu of requiring Erickson to pay cleanup costs associated with a clandestine drug lab, attorney costs, or jury costs. The sentencing court could have imposed both costs and restitution if not for the imposition of the illegal child support obligation, so the Supreme Court was unable to determine what sentence would have been imposed if the law had been correctly applied. The case was remanded for resentencing on whether Erickson must pay restitution and costs. St. v. Erickson, 2005 MT 276, 329 M 192, 124 P3d 119 (2005).

No Error in Allowing Parole Officer to Set Restitution Schedule — Refusal to Waive Administrative Fees Proper: Denham contended that it was error for the sentencing court to delegate the scheduling of monthly restitution payments to a parole officer because the version of this section in effect at the time of the crime did not provide for that delegation of authority. The Supreme Court held that the amendments to the statute were purely procedural and did not constitute retroactive legislation, impair Denham's rights, or impose additional duties on Denham, so allowing the parole officer to set the restitution schedule was not error. Denham also appealed the $60,099 restitution and the 10% administrative fee and minimal surcharges. However, Denham assured the court at sentencing of his ability to pay the restitution amount, so it was reasonable to assume that he also had the ability to pay the administrative fee and surcharges. The sentencing court was affirmed. St. v. Denham, 2005 MT 26, 326 M 24, 107 P3d 1263 (2005).

Joint and Several Liability for Restitution Properly Imposed: Following conviction for three counts of burglary, the District Court found Workman jointly and severally liable for the full amount of restitution to the burglary victims and ordered Workman to pay restitution in the amount of $26,840.33. Workman was accompanied in the burglaries by four accomplices, and Workman argued that he should be held responsible only for his proportionate share as divided among all the defendants. That argument was rejected, and Workman appealed on grounds that restitution was improperly imposed. Workman relied on the 2001 version of 46-18-242, contending that the required documentation of his financial resources was inaccurate, and on the 2001 version of this section, arguing that the sentencing court failed to establish a payment schedule or set the amount of installment payments. The Supreme Court noted that both the required documentation and payment schedule provisions were deleted by the 2003 Legislature and are no longer required. Workman's argument that restitution should be apportioned among his accomplices also failed because the fate of the accomplices was immaterial to the court's authority to impose restitution. Under the 2003 versions of the restitution laws and given that Workman stipulated that he owed the full amount, the District Court properly held Workman jointly and severally liable for the pecuniary loss suffered by his victims. St. v. Workman, 2005 MT 22, 326 M 1, 107 P3d 462 (2005).

No Prejudice in Property Valuation When Less Than Full Restitution Required: The total losses incurred by individuals and businesses in a fire started by Gilbert was $5,721,684.57. In calculating the value of a building destroyed in the fire for establishing restitution, the District Court used replacement value rather than actual value. Gilbert contended that failure to use actual value was reversible error under St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000). The Supreme Court agreed that actual value should have been used but that Gilbert failed to show that any prejudice resulted from the error. Gilbert's presentence investigation report adequately documented Gilbert's financial resources and future ability to pay restitution, and Gilbert was ordered to pay only $24,000 in restitution, which was but a minuscule fraction of the losses. Any error by the District Court in using replacement value for the building did not prejudice Gilbert because he was not required to pay full restitution. St. v. Gilbert, 2004 MT 368, 324 M 530, 106 P3d 127 (2004), following St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Restitution Order Proper Given Defendant's Ability to Pay: The sentencing court ordered Thaut to pay $69,457 in restitution. Thaut appealed the award on grounds that the court failed to meet statutory requirements establishing Thaut's financial resources and future ability to pay and on grounds that due process rights were violated when the court failed to consider several factors in Thaut's ability to pay, including Thaut's age and short time to work following parole, minimum wage employment history, lack of assets and ability to acquire assets in the future, and mental health issues related to an alleged prior head injury. However, the presentence investigation and supplemental presentence investigation provided adequate documentation regarding Thaut's ability to pay restitution and to work hard to earn a living. Further, Thaut had

no documented physical limitations and was unemployed only because he was incarcerated. The District Court's determination that Thaut had the ability to pay medical expenses, a grant from the Board of Crime Control, and property damages was amply supported by the record, and the Supreme Court affirmed. St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004).

Failure of Sentencing Court to Establish Restitution Amount — Reversible Error: Following conviction for burglarizing casinos, Eixenberger was ordered by the District Court to pay restitution for losses and damages sustained by the casinos in a sum to be determined, plus interest. Eixenberger challenged the restitution award amount, and the Supreme Court reversed. It was error for the sentencing court to order payment of restitution in an amount to be determined rather than to specify the total amount, as required in this section. The presentence investigation report also failed to document the victims' pecuniary losses and Eixenberger's resources and ability to pay, as required by 46-18-242, so further sentencing proceedings were warranted on remand. St. v. Eixenberger, 2004 MT 127, 321 M 298, 90 P3d 453 (2004).

Failure of Sentencing Court to Establish Restitution Payment Schedule — Reversible Error: The District Court ordered that Heath pay restitution "on a schedule to be supervised and regulated by the Adult Probation and Parole Field Services". The Supreme Court held that this payment method did not comply with the statutory requirement that the District Court set the amount, method, and time of each payment to the victim and remanded for an amendment to the judgment that properly addressed the method and time of Heath's restitution payments. St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Order for Restitution Upon Imposition of Deferred or Suspended Sentence — 1999 Amendments to Sentencing Statute Clarified: Heath was convicted of theft and possession of burglary tools and sentenced to 10 years in prison with 2 years suspended upon conditions, including payment of restitution. Heath appealed on grounds that the 1999 amendments to 46-18-201 no longer allowed a sentencing court to impose restitution as a condition of a suspended or deferred sentence. Upon amendment in 1999, an internal reference in 46-18-201(5) was not changed to reflect the renumbering of the other subsections, which resulted in an ambiguity in the plain language of the 46-18-201, potentially rendered 46-18-237 and 46-18-251(2) meaningless, created uncertain directives for payment of restitution for all victims in 46-18-241(1) and subsection (2) of this section, and created a potentially absurd application of 46-18-201(1). Because of the potentially absurd consequences of the 1999 amendment, the Supreme Court looked beyond the words of the statute and inquired whether the Legislature intended to make any change in the substance and effect of 46-18-201. The court concluded that the 1999 amendment was a simple codification error that resulted in a cross-reference problem that was completely inconsistent with legislative intent to authorize sentencing courts to impose restitution when necessary for rehabilitation or for the protection of the victim or society if there is an appropriate correlation to the offense committed. Heath's argument failed, and the imposition of restitution as a condition of Heath's suspended sentence was affirmed. (Note: The erroneous internal reference in 46-18-201(5) was deleted in 2003.) St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004), followed in St. v. McDanold, 2004 MT 167, 322 M 31, 97 P3d 1076 (2004), and St. v. McIntire, 2004 MT 238, 322 M 496, 97 P3d 576 (2004).

Restitution Adequately Documented in PSI Report and Information Submitted by Victim: Heath contended that the presentence investigation report (PSI) contained insufficient information to document his ability to pay restitution and the victim's pecuniary loss, citing St. v. Brown, 263 M 223, 867 P2d 1098 (1994), St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866 (1999), and St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000). The Supreme Court distinguished Brown, Hilgers, and Pritchett on grounds that the PSI report deficiencies in those cases were not present in Heath's case. Rather, the court followed St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003), and St. v. Dunkerson, 2003 MT 234, 317 M 228, 76 P3d 1085 (2003), finding that the PSI report adequately addressed Heath's employability, assets and debts, and capability of paying restitution. The valuation of the victim's pecuniary loss was adequately provided in documentation submitted by the victim and, coupled with expert testimony on the value of recovered items, provided substantial credible evidence upon which to base the restitution amount. St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Reimbursement Costs for Court-Appointed Attorney Proper: Defendant contended that the District Court improperly required victim restitution in an incest case because the court did not specify an amount of total restitution, consider the victim's pecuniary loss, or consider defendant's financial resources or ability to pay, as required in this section. The Supreme Court held that defendant had mischaracterized the issue, noting that the District Court had not ordered any amount for victim restitution, but rather had ordered defendant to pay an amount in reimbursement costs for defendant's court-appointed attorney, and had correctly considered

defendant's resources as set out in the presentence investigation report, as provided in 46-8-113. Payment of reimbursement costs was affirmed. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

Restitution Sentence Proper Despite Failure to List Pecuniary Loss in Presentence Investigation Report — Remand to Determine Restitution When Amount Undetermined: Following Dunkerson's conviction for theft and burglary, the District Court ordered restitution for the victim. The presentence investigation (PSI) report listed the loss as an undetermined amount. Failure of a PSI report to document a victim's pecuniary loss and the offender's ability to pay renders a restitution sentence illegal, although a full evidentiary hearing can vitiate the need for loss documentation in a PSI report. Here, the PSI report noted that the victim needed more time to accurately account for restitution owed, which satisfied the loss requirement of 46-18-242, so the District Court did not err in ordering restitution even though the amount of restitution was not in the PSI report. However, the court did err by not specifying the amount owed and the time and method of payment, so the case was remanded to determine the amount and method of payment pursuant to this section. St. v. Dunkerson, 2003 MT 234, 317 M 228, 76 P3d 1085 (2003).

Use of Market Value to Determine Value of Lost Property — Exception — Use of Hearsay Testimony Proper to Establish Market Value: Dunkerson contended that the District Court erred in accepting a burglary victim's hearsay testimony regarding valuation of some of the lost property when the valuation was not based on market value. The Supreme Court agreed that replacement value should be used only if market value cannot be determined, even though under St. v. Bingman, 229 M 101, 745 P2d 342 (1987), hearsay testimony is admissible during sentencing. The case was remanded so the District Court could receive appropriate testimony to establish the market value of property for which market value was not previously established. St. v. Dunkerson, 2003 MT 234, 317 M 228, 76 P3d 1085 (2003).

Failure of Presentence Report to Document Restitution Concerns — Payment of Restitution at Discretion of Probation Officer Improper: Following a sexual assault conviction, Flanagan was ordered to pay for all offense-related medical and counseling costs, after payment by the victim's insurance, and all future costs for the next 2 years. Flanagan asserted that the restitution plan was illegal based on St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000), because the presentence investigation report did not document Flanagan's monthly expenses or address his future ability to pay restitution and because the development of a restitution schedule was left to the discretion of the probation officer. The Supreme Court agreed and remanded for addition to the presentence report of documentation of Flanagan's monthly expenses and future ability to pay restitution and to allow the District Court to hold a hearing to enter a sentence and judgment addressing Flanagan's ability to pay and the time of restitution payments. St. v. Flanagan, 2003 MT 123, 316 M 1, 68 P3d 796 (2003).

Deferral of Sentence to Allow Payment of Restitution Not Violative of Due Process Rights: Benoit was charged with felony theft and entered a nonbinding plea agreement to plead guilty in exchange for a recommendation for a 2-year deferred sentence, based on the possible imposition of various conditions, including the payment of restitution. Benoit was then convicted and ordered to repay $15,933.90 in restitution. At the restitution hearing, Benoit admitted that with her current take-home salary and expenses, the restitution could not be repaid in 2 years, so the sentencing court sentenced Benoit to a 6-year deferred sentence to allow time to pay the restitution, but gave Benoit the opportunity to withdraw the guilty plea after 2 years if restitution was paid within that time. Benoit appealed on grounds that increasing the deferred sentence was a violation of due process, citing St. v. Farrell, 207 M 483, 676 P2d 168 (1984), and St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000), and asserted that the sentence should be remanded for determination of a length of sentence consistent with the charge and Benoit's history instead of the ability to pay restitution. The Supreme Court distinguished Farrell and Pritchett, noting that Benoit's sentence was not based on indigency, and coupled with the fact that Benoit was given the opportunity to withdraw the guilty plea prior to the termination of the 6-year deferred sentence, Benoit's due process rights were not violated through imposition of the conditional 6-year deferred sentence. St. v. Benoit, 2002 MT 166, 310 M 449, 51 P3d 495 (2002).

Failure to Document Victim's Pecuniary Loss and Offender's Financial Resources and Ability to Pay Restitution — Restitution Condition Vacated: Muhammad was convicted of sexual intercourse without consent with a minor. One condition of sentencing was a requirement that Muhammad pay $5,000 in restitution. Under 46-18-201, a sentencing judge shall require a defendant to pay full restitution to a victim if the judge finds that the victim has sustained a pecuniary loss. Imposition of restitution is subject to detailed statutory procedures and qualifications, which include documented evidence of the victim's loss and the offender's ability

to pay. The sentencing court is required to specify the amount, method, and time of each payment to the victim. Here, the presentence investigation did not document the victim's pecuniary loss or Muhammad's future ability to pay restitution, nor did the sentencing court consider Muhammad's future ability to pay because the relevant evidence was not presented to the court. Therefore, the Supreme Court held that the restitution condition of the sentence was illegal, and that condition was vacated. St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002), following St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000), and followed in St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007).

Conditions Imposed in Written Judgment and Sentence Different From Those Imposed in Oral Sentence — Lane, Waters, and Simpson Reviewed — Test to Determine Which New Conditions Lawful or Unlawful — Payment of Restitution and Costs: Johnson was sentenced orally for writing bad checks and later contended that four of the conditions imposed in the written judgment and sentence by the District Court were unlawful under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), because they were not announced orally when she was sentenced in open court. The Supreme Court reviewed its decisions in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142 (1999), and St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361 (1999), and reasoned that a written sentence would be held unlawful only if it substantively increased the defendant's loss of liberty or the defendant's sacrifice of property. Under this test, the Supreme Court held that two of the four penalties not mentioned by the District Court in its oral pronouncement of Johnson's sentence were unlawful, those being the restitution ordered to the Missoula County jail of money expended for Johnson's medical care and the requirement that Johnson pay for the costs of her prosecution in District Court. The Supreme Court held that the other two parts of the written sentence, the requirement that Johnson make restitution from money earned in prison and the imposition of certain "civil" restrictions as conditions of Johnson's suspended sentence, such as the requirement that Johnson stay out of gambling casinos, were lawfully imposed because they did not increase the amount of money that Johnson was ordered to pay or increase Johnson's deprivation of liberty in addition to those penalties imposed orally. The requirement for payment from prison earnings only specified where the money was to come from, and the "civil" restrictions were largely mentioned by the District Court at Johnson's sentencing hearing. St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Failure to Document Defendant's Financial Resources and Ability to Pay Restitution and Victim's Pecuniary Loss — Restitution Sentence Improper: The general mandate to sentencing courts is that a sentence must include full restitution whenever it is found that the victim of an offense has sustained a pecuniary loss, subject to mandatory detailed statutory procedures and qualifications. Here, although the District Court received some evidence of these amounts during the sentencing hearing, the failure of the presentence investigation report to document the victim's pecuniary loss, as well as the defendant's financial resources and future ability to pay restitution, provided the court no authority to impose a sentence of restitution and rendered its judgment illegal. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000), following St. v. Brown, 263 M 223, 867 P2d 1098 (1994), and St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866 (1999), and distinguished in St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Failure to Specify Amount, Method, and Time of Payment — Restitution Order Invalid: The District Court ordered defendant to make restitution payments according to a schedule to be determined by defendant's probation officer. However, this section requires the court to specify the amount, method, and time of payments, after considering the defendant's financial resources and future ability to pay. Thus, the court failed to comply with the statutory requirements by leaving that determination to the discretion of the probation officer, invalidating the restitution order. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000).

Use of Replacement Cost, Rather Than Market Value, of Converted Property Resulting in Erroneous Calculation of Restitution: Pritchett entered the garage of a former employer in an effort to return two hunting rifles that he had stolen and pawned to support his gambling habit. Pritchett dropped his flashlight and, unable to find it in the dark, lit a cigarette lighter, which ignited a leaking propane bottle and caused an explosion that destroyed the garage and its contents. Pritchett was convicted of burglary and ordered to pay restitution. In calculating the victim's pecuniary loss, the District Court used replacement cost, rather than actual market value, of the garage and its contents. Pritchett argued on appeal that this method of valuation resulted in a significant overstatement of his restitution obligation. The Supreme Court found that the appropriate civil action arising out of Pritchett's destruction of the garage would be an action for conversion of personal property, the loss of which is presumed to be the value of the

property at the time of conversion under 27-1-320. Thus, when personal property is converted, the restitution must be based on the market value of the goods converted. The District Court's use of the replacement cost of the items was an incorrect measure of the restitution obligation, constituting reversible error. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000).

When Restitution Owing: Under 46-18-201, the sentencing court is required to provide for full restitution by a defendant to the victim of a criminal offense who sustains a pecuniary loss. Here, Hilgers' issuance of more than 50 bad checks and stealing cash and diverting checks and money orders from his employer in an amount exceeding $33,500 clearly qualified as a pecuniary loss. The court found the state's witnesses more credible than Hilgers, providing adequate support in the record as to the amount owing. The restitution amount was not clearly erroneous and was affirmed on appeal. However, the Supreme Court remanded for lack of documentation, as required under 46-18-242, regarding Hilgers' financial resources and future ability to pay restitution, finding the information in the presentence report regarding Hilgers' age, education, assets and obligations, and marital and employment status inadequate in addressing Hilgers' resources and ability to pay the amount in question. St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866, 56 St. Rep. 1146 (1999), following St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996), distinguishing St. v. Brown, 263 M 223, 867 P2d 1098, 51 St. Rep. 24 (1994), followed in St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000), and distinguished in St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

Financial Resources and Future Ability to Pay Restitution Properly Considered: In imposing interest on Brewer's restitution obligation, Brewer contended that the court did not properly consider her financial resources and future ability to pay restitution or specify the amount, method, and time of each payment, as required by this section. At the sentencing hearing, Brewer testified that: (1) she had obtained two jobs; (2) because her husband's wages covered the household expenses, she intended to put all her wages toward restitution; and (3) she had already made nearly $6,000 in restitution payments and intended to continue the payments. Based on this testimony, the District Court properly considered Brewer's financial resources and future ability to pay restitution in ordering repayment according to a schedule of repayment arrived at with the probation officer. St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407, 56 St. Rep. 1090 (1999).

Inclusion in Restitution of Costs Related to Pecuniary Loss — Wages Paid to Embezzler Not Recoverable as Pecuniary Loss: Under 46-18-241, a sentencing court may include in restitution costs paid by the victim as a result of defendant's criminal act as long as the costs are considered pecuniary loss, as defined by 46-18-243. This loss may include economic loss as a result of the crime, out-of-pocket losses, such as medical expenses, and reasonable out-of-pocket expenses incurred by the victim in filing charges or in cooperating in the investigation and prosecution of the offense. Here, Brewer embezzled over $96,000 and was ordered to pay restitution, but argued that the fact that 46-18-241 excludes general damages militated against the inclusion in the restitution obligation of amounts beyond the total stolen from the employer. Brewer improperly characterized the employer's out-of-pocket losses as general damages. The employer paid accounting firms, employees, labor contractors, a software company, and a locksmith more than $15,000 in an attempt to reconstruct books and repair damage resulting from Brewer's crime. Those expenses were all considered out-of-pocket losses within the context of 46-18-241 and were properly includable in the restitution calculation. However, wages paid to Brewer over the course of employment did not constitute pecuniary loss and were not recoverable as restitution. St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407, 56 St. Rep. 1090 (1999). See also St. v. Morgan, 198 M 391, 646 P2d 1177 (1982), and St. v. Korang, 237 M 390, 773 P2d 326, 46 St. Rep. 892 (1989).

Presentence Investigation Inadequate to Support Restitution — Restitution Order Inadequate: Brown was convicted of felony criminal endangerment and negligent homicide after killing one pedestrian and injuring another when he lost control of his vehicle. The District Court ordered Brown to make restitution to the one victim and to the families of both victims. The presentence investigation report contained no documentation of the pecuniary loss of either victim and inadequate documentation of Brown's financial resources, especially his future earning capacity. The Supreme Court noted that as probable consequences of these errors, the District Court's order for restitution did not require Brown to pay a specific amount at a specific time. For these reasons, the Supreme Court held that the order could not lawfully be made and remanded the case to the District Court. St. v. Brown, 263 M 223, 867 P2d 1098, 51 St. Rep. 24 (1994), distinguished in St. v. Hilgers, 1999 MT 284, 297 M 23, 989 P2d 866, 56 St. Rep. 1146 (1999), in which the failure of the presentence investigation to set forth the amount of restitution was not

considered fatal because defendant was given a hearing and because defendant had entered a plea bargain providing that the amount was to be agreed upon by the parties prior to sentencing and if the parties were unable to agree on an amount, it would be determined by the court, and St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004), and followed in St. v. Rinkenbach, 2003 MT 348, 318 M 499, 82 P3d 8 (2003).

Inability to Pay Restitution — Not Violative of Equal Protection in Light of State Correctional Policy and Previous Offenses: A defendant convicted of felony theft was sentenced to 5 years in the state prison with 2 years suspended and, in addition, was ordered to pay restitution. The defendant asserted on appeal that he was sentenced to a prison term because of his indigency, in violation of his right to equal protection. However, the District Judge specifically noted the prison term was necessary to protect the property of others and that the defendant's criminal record contained three previous misdemeanor thefts. The Supreme Court found these to be sufficient reasons to support incarceration and upheld the state's correctional policy outlined in 46-18-101. The court noted that the sentence was well within the parameters of punishment for felony theft in 45-6-301. Finding no abuse of discretion or violation of the defendant's constitutional rights, the District Court was affirmed. St. v. Carroll, 220 M 466, 716 P2d 212, 43 St. Rep. 531 (1986).

Collateral References

Measure and elements of restitution to which victim is entitled under state criminal statute. 15 ALR 5th 391, §7(k) superseded by 44 ALR 6th 301, §12(a), (b) superseded by 45 ALR 6th 435.

46-18-245. Supervision of payment.

Compiler's Comments

2003 Amendment: Chapter 272 inserted first sentence requiring the department to supervise the payment of restitution for a felony offense, at beginning of second sentence inserted "For a misdemeanor offense" and near middle after "order a" deleted "probation officer", and in third sentence near beginning after "victim" inserted "of a misdemeanor" and after "employee of the" substituted "office of victims services, as defined in 53-9-103" for "board of crime control"; and made minor changes in style. Amendment effective October 1, 2003.

Retroactive Applicability: Section 10, Ch. 272, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who have an unpaid restitution obligation on [the effective date of this act]." Effective October 1, 2003.

1995 Amendment: Chapter 125 at end inserted sentence relating to supervision of restitution by employee of Board of Crime Control.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Administrative Rules

Title 20, chapter 12, ARM Restitution.

ARM 20.12.106 Collection of restitution.

46-18-246. Waiver or modification of payment.

Compiler's Comments

2009 Amendment: Chapter 66 at end of first sentence inserted "or amount to be paid pursuant to 46-18-241(2)(a)" and in third sentence after "restitution" inserted "or the amount to be paid pursuant to 46-18-241(2)(a)". Amendment effective March 25, 2009.

1997 Amendment: Chapter 181 in third sentence, after "imposition", inserted "of restitution" and after "amount" inserted "of the victim's pecuniary loss, or" and in fourth sentence, at end, deleted "but not beyond the period provided for in 46-18-244"; and made minor changes in style.

1995 Amendment: Chapter 125 at end substituted "period provided for in 46-18-244" for "period for which the sentence has been suspended or deferred under 46-18-201"; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Case Notes

No Evidence That Victim Will Be Unjustly Enriched — Credit Against Restitution Properly Denied: Kober stole money from the Montana State University-Bozeman student health service and was ordered to pay restitution. Because the stolen money was considered taxable income, Kober was also charged with failing to properly report income for state income tax purposes. From the proceeds of the subsequent sale of the family home, Kober paid $46,004.67 to the Department of Revenue to satisfy its lien for back income taxes. Because the money was placed in the general fund from which the University System receives part of its funding, Kober maintained that the University System would benefit from the payment of the back income taxes and that in order to avoid a windfall unjustly enriching the university, the restitution amount

should be offset by $46,004.67. However, Kober did not establish that any of the $46,004.67 would actually be distributed to or benefit Montana State University-Bozeman or the student health service, so the District Court properly denied Kober's request for a credit against restitution. St. v. Kober, 1999 MT 264, 296 M 425, 989 P2d 399, 56 St. Rep. 1076 (1999).

46-18-247. Default.

Compiler's Comments

1997 Amendment: Chapter 181 in (2) deleted second sentence that read: "If confinement is ordered, the court, after entering the order, may reduce the term of confinement and, in accordance with the provisions of 46-18-246, waive satisfaction of the restitution order."

1995 Amendment: Chapter 125 in (2), in second sentence after "may", deleted "at any time, for good cause shown" and inserted reference to 46-18-246; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Case Notes

Restitution Obligations Not Discharged Upon Fulfillment of Criminal Sentence: As a condition of sentences for theft, burglary, and deceptive practices, Brown was ordered to pay restitution. Upon completion of his prison sentences, Brown was released without having paid restitution in full. Brown was subsequently imprisoned following conviction for other criminal offenses, and the Department of Corrections began garnishing Brown's prison wages to satisfy the unpaid restitution obligations from the previous sentences. Brown requested that the District Court waive payment of the restitution on grounds that the Department lacked authority to garnish his prison wages to pay restitution obligations from sentences that were previously discharged. The court agreed and ordered the Department to cease garnishment and to reimburse any money collected to satisfy those obligations. The state appealed, and the Supreme Court reversed. Unlike the other conditions of Brown's sentences, the restitution obligations were civil judgments required by 46-18-241 to be paid in full, and those obligations were not discharged or fulfilled by virtue of Brown's completion of the criminal sentences and discharge from prison. Pursuant to 46-18-244, the Department was authorized to garnish Brown's prison wages to satisfy the previously unpaid restitution. St. v. Brown, 2008 MT 115, 342 M 476, 182 P3d 75 (2008).

Proof of Inability to Pay Restitution — Deferment of Sentence Extended to Allow Payment — Error: A probationer sufficiently proved that her failure to continue restitution payments was not caused by lack of a good faith effort to pay and that her income was insufficient to make even the $10 monthly payment that her probation officer was apparently willing to accept. The state's argument that she might soon receive a workers' compensation lump-sum settlement that she could use to pay the remaining restitution and would receive a "windfall" if her deferred sentence and probation were not extended for 2 years for failure to pay so that she could make further payments had no merit. Disability benefits are not a windfall; they are partial compensation for the loss of earning capacity. In addition, the duty to pay restitution remains until it is fully paid, and restitution may be collected in a civil proceeding at any time, including after the conclusion of state supervision under a sentence. Therefore, the District Court abused its discretion when it did not excuse the probationer's failure to pay, and the order extending the deferred sentence and probation for 2 years was reversed. St. v. Welling, 2002 MT 308, 313 M 67, 59 P3d 1146 (2002).

46-18-248. Rights of state for crime victims compensation and assistance.

Compiler's Comments

2001 Amendment: Chapter 118 in (1) substituted "state crime victims compensation and assistance program as provided in Title 53, chapter 9, part 1" for "crime victims compensation and assistance account established in 53-9-109", substituted "state" for "account", and before "payment" deleted "account's"; in (2) substituted "state" for "crime victims compensation and assistance account"; and made minor changes in style. Amendment effective March 23, 2001.

Preamble: The preamble attached to Ch. 118, L. 2001, provided: "WHEREAS, the 1995 Legislature in Senate Bill No. 83 changed funding for the crime victims compensation and assistance program from an earmarked special revenue account to the general fund; and

WHEREAS, the crime victims compensation and assistance program has been supported entirely by general fund money since fiscal year 1996; and

WHEREAS, repealing section 53-9-109 is necessary in order to clarify the conflict that currently exists between actual appropriation practices and the law."

1995 Amendment: Chapter 18 throughout section substituted reference to crime victims compensation and assistance account for reference to crime victims' compensation account; and made minor changes in style.

46-18-249. Civil actions by victim.

Compiler's Comments

2001 Amendment: Chapter 284 throughout section in five places before "civil action" inserted "separate"; at beginning of (1) inserted first sentence treating court-ordered payment to victim as a civil judgment against the offender and at beginning of second sentence substituted "However, 46-18-241 through 46-18-248 and this section do not limit" for "Sections 46-18-241 through 46-18-249 do not limit"; in (3) near beginning of first sentence after "victim" inserted "under a restitution order contained in a criminal sentence, including an amount or amounts paid in a civil proceeding to enforce payment of a restitution order contained in a criminal sentence"; and made minor changes in style. Amendment effective October 1, 2001.

Retroactive Applicability: Section 3, Ch. 284, L. 2001, provided: "[Section 2] [46-18-249] applies retroactively, within the meaning of 1-2-109, to restitution ordered to be paid prior to [the effective date of this act]." Effective October 1, 2001.

Case Notes

Restitution Obligations Not Discharged Upon Fulfillment of Criminal Sentence: As a condition of sentences for theft, burglary, and deceptive practices, Brown was ordered to pay restitution. Upon completion of his prison sentences, Brown was released without having paid restitution in full. Brown was subsequently imprisoned following conviction for other criminal offenses, and the Department of Corrections began garnishing Brown's prison wages to satisfy the unpaid restitution obligations from the previous sentences. Brown requested that the District Court waive payment of the restitution on grounds that the Department lacked authority to garnish his prison wages to pay restitution obligations from sentences that were previously discharged. The court agreed and ordered the Department to cease garnishment and to reimburse any money collected to satisfy those obligations. The state appealed, and the Supreme Court reversed. Unlike the other conditions of Brown's sentences, the restitution obligations were civil judgments required by 46-18-241 to be paid in full, and those obligations were not discharged or fulfilled by virtue of Brown's completion of the criminal sentences and discharge from prison. Pursuant to 46-18-244, the Department was authorized to garnish Brown's prison wages to satisfy the previously unpaid restitution. St. v. Brown, 2008 MT 115, 342 M 476, 182 P3d 75 (2008).

Proof of Inability to Pay Restitution — Deferment of Sentence Extended to Allow Payment — Error: A probationer sufficiently proved that her failure to continue restitution payments was not caused by lack of a good faith effort to pay and that her income was insufficient to make even the $10 monthly payment that her probation officer was apparently willing to accept. The state's argument that she might soon receive a workers' compensation lump-sum settlement that she could use to pay the remaining restitution and would receive a "windfall" if her deferred sentence and probation were not extended for 2 years for failure to pay so that she could make further payments had no merit. Disability benefits are not a windfall; they are partial compensation for the loss of earning capacity. In addition, the duty to pay restitution remains until it is fully paid, and restitution may be collected in a civil proceeding at any time, including after the conclusion of state supervision under a sentence. Therefore, the District Court abused its discretion when it did not excuse the probationer's failure to pay, and the order extending the deferred sentence and probation for 2 years was reversed. St. v. Welling, 2002 MT 308, 313 M 67, 59 P3d 1146 (2002).

46-18-250. Victim's location unknown — payments to restitution fund — use of restitution fund.

Compiler's Comments

2009 Amendment: Chapter 374 in (3) near middle of first and second sentences after "deposit in the" substituted "account provided for in 53-9-113" for "state general fund"; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2015.

2001 Amendment: Chapter 118 in first sentence in (3) substituted "crime victims compensation and assistance program in the department of justice for deposit in the state general fund" for "crime victims compensation and assistance account, established in 53-9-109" and at end substituted "state" for "account" and in middle of second sentence substituted "program in the department of justice for deposit in the state general fund" for "account"; and made minor changes in style. Amendment effective March 23, 2001.

Preamble: The preamble attached to Ch. 118, L. 2001, provided: "WHEREAS, the 1995 Legislature in Senate Bill No. 83 changed funding for the crime victims compensation and assistance program from an earmarked special revenue account to the general fund; and

WHEREAS, the crime victims compensation and assistance program has been supported entirely by general fund money since fiscal year 1996; and

WHEREAS, repealing section 53-9-109 is necessary in order to clarify the conflict that currently exists between actual appropriation practices and the law."

1995 Amendment: Chapter 18 in (3), in two places, substituted reference to crime victims compensation and assistance account for reference to crime victims' compensation account; and made minor changes in style.

46-18-251. Allocation of fines, costs, restitution, and other charges.

Compiler's Comments

2009 Amendment: Chapter 374 in (1) near beginning of first sentence before "offender" inserted "misdemeanor" and inserted second sentence regarding restitution and payment of other fines and costs paid by felony offenders; in (3)(b) near middle after "deposit in the" substituted "account provided for in 53-9-113" for "state general fund"; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2015.

2001 Amendment: Chapter 118 in (3)(b) substituted "crime victims compensation and assistance program in the department of justice for deposit in the state general fund" for "crime victims compensation and assistance account provided for in 53-9-109", substituted "state" for "account", and at end inserted "provided pursuant to Title 53, chapter 9, part 1"; and made minor changes in style. Amendment effective March 23, 2001.

Preamble: The preamble attached to Ch. 118, L. 2001, provided: "WHEREAS, the 1995 Legislature in Senate Bill No. 83 changed funding for the crime victims compensation and assistance program from an earmarked special revenue account to the general fund; and

WHEREAS, the crime victims compensation and assistance program has been supported entirely by general fund money since fiscal year 1996; and

WHEREAS, repealing section 53-9-109 is necessary in order to clarify the conflict that currently exists between actual appropriation practices and the law."

1999 Amendment: Chapter 398 in (1) at beginning inserted exception clause; and in (2) near beginning inserted reference to 46-18-236(7)(b). Amendment effective July 1, 1999.

1997 Amendments: Chapter 181 inserted (3) regarding application of money paid as restitution; and made minor changes in style.

Chapter 186 inserted (2)(b) regarding payment of supervisory fees; inserted (3) specifying the order of payment of money received as restitution; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Case Notes

Criminal Fines Distinct From Other Court-Imposed Compensatory Financial Obligations — Fisher Overruled: The plain meaning of "fine" in 46-18-403 does not encompass fees, costs, charges, or other court-imposed financial obligations. Criminal fines are punitive in nature and are distinct from other court-imposed financial obligations associated with a criminal proceeding that are compensatory in nature, such as an assessment of fees for probationary supervision or a charge to defray a local government's costs in administering the criminal justice system. Voerding v. St., 2006 MT 125, 332 M 262, 136 P3d 502 (2006), overruling St. v. Fisher, 2003 MT 33, 314 M 222, 65 P3d 223 (2003), to the extent that Fisher suggests that the term "fine" in 46-18-403(2) encompasses other types of court-imposed financial obligations, such as fees, charges, and costs. See also St. v. VanWinkle, 2008 MT 208, 344 M 175, 186 P3d 1258 (2008).

Order for Restitution Upon Imposition of Deferred or Suspended Sentence — 1999 Amendments to Sentencing Statute Clarified: Heath was convicted of theft and possession of burglary tools and sentenced to 10 years in prison with 2 years suspended upon conditions, including payment of restitution. Heath appealed on grounds that the 1999 amendments to 46-18-201 no longer allowed a sentencing court to impose restitution as a condition of a suspended or deferred sentence. Upon amendment in 1999, an internal reference in 46-18-201(5) was not changed to reflect the renumbering of the other subsections, which resulted in an ambiguity in the plain language of the 46-18-201, potentially rendered 46-18-237 and subsection (2) of this section meaningless, created uncertain directives for payment of restitution for all victims in 46-18-241(1) and 46-18-244(2), and created a potentially absurd application of 46-18-201(1). Because of the potentially absurd consequences of the 1999 amendment, the Supreme Court looked beyond the words of the statute and inquired whether the Legislature intended to make any change in the substance and effect of 46-18-201. The court concluded that the 1999 amendment was a simple codification error that resulted in a cross-reference problem that was completely inconsistent with legislative intent to authorize sentencing courts to impose

restitution when necessary for rehabilitation or for the protection of the victim or society if there is an appropriate correlation to the offense committed. Heath's argument failed, and the imposition of restitution as a condition of Heath's suspended sentence was affirmed. (Note: The erroneous internal reference in 46-18-201(5) was deleted in 2003.) St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004), followed in St. v. McDanold, 2004 MT 167, 322 M 31, 97 P3d 1076 (2004), and St. v. McIntire, 2004 MT 238, 322 M 496, 97 P3d 576 (2004).

46-18-255. Sentence upon conviction — restriction on employment and residency.

Compiler's Comments

2001 Amendment: Chapter 390 inserted (2) concerning restrictions on residency in proximity to certain areas; and made minor changes in style. Amendment effective April 28, 2001.

Applicability: Section 3, Ch. 390, L. 2001, provided: "[This act] applies to persons sentenced after [the effective date of this act]." Effective April 28, 2001.

1995 Amendment: Chapter 407 near beginning inserted "or violent".

Effective Date: Section 13, Ch. 293, L. 1989, provided: "[This act] is effective July 1, 1989."

Case Notes

No General or Inherent Authority of Sentencing Court to Generally Impose Parole Conditions — Parole Condition Related to Sexual Offense Authorized: There is no general or inherent authority for a sentencing court to impose parole conditions. A sentencing court may impose conditions on parole that are authorized by statute only. In this case, all conditions on Burch's suspended sentence for sexual offenses were proper, but only one parole condition, prohibiting Burch from possessing pornography or accessing the Internet, was authorized under this section. Burch's admission that he used the Internet at work to access pornography while on parole established that Burch violated a condition of his suspended sentence by a preponderance of the evidence. Thus, the sentencing court did not err in revoking Burch's suspended sentence. St. v. Burch, 2008 MT 118, 342 M 499, 182 P3d 66 (2008), followed in St. v. Dennison, 2008 MT 344, 346 M 295, 194 P3d 704, (2008), and St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009), regarding authority of sentencing court.

Youth Court Adjudication Not Considered Conviction — No Authority to Require Adjudicated Youth to Register as Sexual or Violent Offender Under Pre-2007 Law: In 1998, 16-year-old Hastings was adjudicated a delinquent youth in Youth Court, admitting one offense of sexual intercourse without consent, and was committed to the Department of Corrections (DOC). When Hastings turned 18 in 2000, his case was transferred to District Court until age 25 based on the parties' stipulation that Hastings had not completed sex offender treatment or paid restitution and was at high risk to reoffend. The District Court then determined that Hastings had violated the conditions of the Youth Court order and committed Hastings to the DOC and also required that Hastings register as a level 2 sex offender. Hastings initially registered as a sex offender, but failed to update registration after moving and was subsequently charged with failure to maintain registration. Hastings moved to dismiss the charge, asserting that he had not been convicted of a sexual offense and that neither the commitment order nor statutes required him to register after discharging his sentence. The motion was denied, and Hastings appealed. The Supreme Court reversed. Although the Youth Court had the authority to require sex offender registration pursuant to 41-5-1513, no requirement was made in this case. Because the Youth Court adjudication did not constitute a conviction, the District Court could not impose registration requirements under 46-18-201. (Note that the 2007 Legislature amended 46-23-502 to include an adjudicated youth in the definition of a sexual or violent offender.) The District Court's opinion that 41-5-1513 suggests a wholesale incorporation of sexual offender registry into the Montana Youth Court Act was erroneous, and absent statutory authority, a court may not impose a registration requirement. Failure to grant Hastings' motion to dismiss was error, and the case was remanded for dismissal. St. v. Hastings, 2007 MT 294, 340 M 1, 171 P3d 726 (2007), distinguishing St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), and St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

Attorney General's Opinions

Exemption of Juvenile Delinquents From Sexual Offender Registration: A juvenile who is adjudicated delinquent under the Montana Youth Court Act and whose case has not been transferred to District Court under 41-5-206 is exempt from the registration requirements of the Sexual Offender Registration Act, 46-18-254 (now repealed); 46-18-255; and Title 46, ch. 23, part 5. 43 A.G. Op. 45 (1989).

46-18-256. Sexually transmitted disease testing — test procedure.

Compiler's Comments

2002 Amendment: Chapter 22 in (1) near beginning inserted "except an offense under 45-5-301 through 45-5-303". Amendment effective August 21, 2002.

Applicability: Section 9, Ch. 22, Sp. L. August 2002, provided: "[This act] applies to convictions on or after [the effective date of this act]." Effective August 21, 2002.

1997 Amendment: Chapter 550 at end of (5) substituted "youth in need of intervention" for "youth in need of supervision". Amendment effective July 1, 1997.

1993 Amendment: Chapter 71 substituted (1) concerning required testing for former subsection that read: "A person convicted of a sexual offense, as defined in 46-23-502, may, following entry of judgment, be administered a standard test to determine whether the person suffers from a sexually transmitted disease, as defined in 50-18-101"; inserted (4) regarding counseling of minor victims; inserted (5) defining convicted; and in (6) inserted reference to Title 50, chapter 16, part 10. Amendment effective February 23, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 71, L. 1993, provided: "It is the intent of the legislature to amend 46-18-256 and 50-18-101 in order to comply with federal requirements of the Crime Control Act of 1990 that requires states to enact laws related to human immunodeficiency virus (HIV) testing of certain convicted offenders or be subject to reduced federal funding.

Upon the request of the victim or the victim's representatives, testing and the test results must be made available for the victim's information. Testing information may or may not reveal exposure to the HIV virus. If exposed, the victim can seek medical treatment and take steps to protect others from the further spread of the epidemic.

This bill is intended to be a benefit to public health and safety by attempting to control and limit the potential spread and impact of disease. It is not intended to add additional sanctions or penalties for conviction of sexual abuse offenses or to make criminals of the victims of disease."

Retroactive Applicability: Section 3, Ch. 71, L. 1993, provided: "[Section 1] [amending 46-18-256] applies retroactively, within the meaning of 1-2-109, to persons convicted prior to [the effective date of this act] [effective February 23, 1993] who are, at the time a test is sought, in jail, prison, or other incarceration; on probation or parole; or otherwise still under state supervision for a sexual offense defined in 46-23-502."

Retroactive Applicability: Section 2, Ch. 504, L. 1991, provided: "[Section 1] [46-18-256] applies retroactively, within the meaning of 1-2-109, to persons convicted prior to [the effective date of this act] [April 20, 1991] who are, at the time a test is sought, in jail, prison, or other incarceration; on probation or parole; or otherwise still under state supervision for a sexual offense defined in 46-23-502."

Effective Date: Section 3, Ch. 504, L. 1991, provided that this section is effective on passage and approval. Approved April 20, 1991.

Collateral References

State statutes or regulations expressly governing disclosure of fact that person has tested positive for human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS). 12 ALR 5th 149.

46-18-261. Recovery of suppression and investigation expenses for fires caused by arson.

Compiler's Comments

2007 Amendment: Chapter 449 in (1) near middle after "enforcement" substituted "agencies, governmental fire agencies organized under Title 7, chapter 33, and the state" for "and firefighting agencies"; and in (5) near beginning after "enforcement" substituted "agency or governmental fire" for "or firefighting". Amendment effective June 1, 2007.

Part 3
Death Penalty

Part Case Notes

Claims Raised on Direct Appeal Barred by Statute or Res Judicata on Petition for Postconviction Relief: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel,

were summarily dismissed. Although res judicata prevents claims raised on appeal from being raised again in a petition for postconviction relief, Dawson argued that three of his claims for postconviction relief could not have been raised on direct appeal because they required evidence not found in the record and thus should not have been subject to summary judgment. The District Court concluded that the issues could have been raised on direct appeal and were not preserved through objection at trial and so were barred by res judicata and 46-21-105. The Supreme Court examined all three of Dawson's claims before affirming that 46-21-105 was properly applied to two of the claims and that no prejudice resulted from the application of res judicata to the third. Lastly, Dawson raised Kills On Top v. St., 279 M 384, 928 P2d 182 (1996), as grounds for reconsideration of several other claims based on serving the "ends of justice". The Supreme Court felt no compulsion to reconsider any of Dawson's claims to serve those ends because the claims were barred by res judicata. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

Death Row Not Considered Cruel and Unusual Punishment — Delay Attributed to Defendant's Appeals: Citing Lackey v. Tex., 514 US 1045, 131 L Ed 2d 304, 115 S Ct 1421 (1995), Gollehon claimed that his right to be free from cruel and unusual punishment was violated by the amount of time that he spent on death row and by the number of sentencing hearings in his capital murder case. The Supreme Court declined to apply Lackey because the majority of the delay in Gollehon's case was caused by his own pursuit of constitutional and statutory rights in state and federal courts and was not caused by the state. Gollehon's claim for relief was denied. Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395, 56 St. Rep. 811 (1999). See also St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996).

Unconstitutional Retroactive Application of New Death Penalty Statute: Defendant was sentenced to death under a statute (later found unconstitutional) that mandated the death penalty. A new death penalty statute was passed providing for consideration of aggravating and mitigating circumstances during sentencing. Defendant was then resentenced to death under the new statute. In effect, the new statute added a sentencing "trial" at which the judge could consider evidence at the trial on guilt. This violated due process because counsel for defendant at the trial on guilt would have handled the trial differently had he known the evidence would also be used at the sentencing stage. The District Court was instructed to grant habeas corpus unless the state vacated the death sentence. Coleman v. McCormick, 874 F2d 1280 (9th Cir. 1989).

Life Sentence Followed by Death Sentence on Retrial: Defendant who was given a life sentence at his first deliberate homicide trial could not be given a death sentence at retrial because it placed him in double jeopardy. The life sentence constituted acquittal as to aggravating circumstances that would have justified the death penalty. Fitzpatrick v. McCormick, 869 F2d 1247 (9th Cir. 1989).

Aggravating Circumstances Related to Sentencing — Jury Determination Not Required: Defendant argued that the aggravating circumstances with which the trial court justified the death penalty were equivalent to a finding of malice and that he was therefore entitled to have a jury determine facts constituting the aggravating circumstances. The Supreme Court held that defendant was not entitled to a jury determination because the aggravating circumstances were related to sentencing only and were not elements of the crime charged. Capital sentencing procedures do not require jury participation. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Defendant's Right to Limit Appeal: Defendant clearly expressed his intent to pursue only those appellate issues which must be reviewed as a matter of law. The Supreme Court affirmed his right to do so after finding that defendant was adjudged competent to make such a choice, holding that his decision must be respected if it is made competently, voluntarily, intelligently, and with full knowledge of the consequences. St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988).

No Right to Second Psychiatric Examination: Defendant was convicted of aggravated kidnapping and deliberate homicide, pursuant to pleas of guilty, and was sentenced to death. Judgment was affirmed by the Supreme Court. Subsequently, defendant filed a motion for an additional psychiatric evaluation based on the case of Ake v. Okla., 470 US 68, 84 L Ed 2d 53, 105 S Ct 1087 (1985), which was decided after arguments in defendant's case. The Supreme Court distinguished the facts of defendant's case from the facts in Ake and denied defendant's motion. The Supreme Court found that defendant had already been afforded his right to access to a competent psychiatrist for the preparation of a defense based on his mental condition and was not entitled to an additional psychiatric examination. The Ake decision lacks direct application to Montana's capital sentencing proceedings and defendant's case. St. v. Smith, 217 M 453, 705 P2d 1110, 42 St. Rep. 1348 (1985).

Capital Sentence Requested by Defendant — No Basis for Resentencing: Defendant pleaded guilty to two counts of aggravated kidnapping and two counts of deliberate homicide. Defendant requested the death penalty. After sentencing, defendant had second thoughts and on appeal sought a resentencing. The Supreme Court held there was no basis for resentencing because: (1) sentencing was not tainted by reliance on prior Canadian convictions obtained without counsel; (2) inclusion of juvenile offenses as adult offenses in presentence report was not error; (3) a court-ordered presentence interview was not violative of the fifth amendment; (4) recommendation for the death penalty in the presentence report was not improper; (5) no judicial error was committed in the extent of review of mitigating factors and no unconstitutional limit was placed on the court's consideration of mitigating circumstances; (6) no error was found in the court's denial of defendant's motion for additional psychiatric evaluation; (7) defendant was not required to be present at proceedings occurring after the verdict; (8) jury participation is not constitutionally required in capital sentencing procedures; (9) no indication was found that the trial court imposed the death penalty out of passion or prejudice; and (10) the sentence was not excessive or disproportionate. St. v. Smith, 217 M 461, 705 P2d 1087, 42 St. Rep. 463 (1985) (Smith I). A habeas corpus petition was conditionally granted in Smith v. McCormick, 917 F2d 1153 (9th Cir. 1990), a subsequent resentencing of death was reversed and remanded for preparation of a new presentence investigation, St. v. Smith, 261 M 419, 863 P2d 1000 (1993) (Smith II), and following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

1983 Amendments Not Bill of Attainder: Chapter 411, L. 1983, amended 46-19-103 to allow the defendant to choose death by lethal injection as an alternative to hanging. Section 7 makes the act applicable to death sentences whether first pronounced before or after its effective date, making the act specifically retroactive. The act is not a bill of attainder as argued by the defendant who was convicted before the effective date of the act and sentenced to death after its effective date. St. v. Fitzpatrick, 211 M 341, 684 P2d 1112, 41 St. Rep. 1400 (1984).

Death Penalty Not Disproportionate to Deliberate Homicide: When a life has been taken by an offender, it cannot be said that the punishment of death is invariably disproportionate to the crime. McKenzie v. Osborne, 195 M 26, 640 P2d 368, 38 St. Rep. 1745 (1981), followed in St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988).

Death Penalty — Facially Neutral — Discrimination to Be Shown: Petitioner challenged Montana's death penalty statutes as arbitrary and discriminatory. Montana has instituted sentencing procedures that focus on the character of the defendant and the circumstances of the crime. In doing this, arbitrariness is conclusively removed from sentencing. As regards discrimination, the disproportionate impact of a facially neutral law will not make the law unconstitutional unless discriminatory intent or purpose is found. Montana's law is facially neutral, and no allegation of discriminatory intent was raised. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Constitutionality of Former Death Sentence Statute: Section 94-5-105, R.C.M. 1947 (now repealed), which provided a procedure for the imposition of a sentence of death for a conviction of deliberate homicide, was constitutional on its face. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Increase of Sentence After New Trial — Due Process: The defendant, who had been sentenced to 100 years' imprisonment for deliberate homicide, was not denied due process of law when, after a new trial on the same charge, he was sentenced to death. The due process clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of vindictiveness. When the District Court Judge was replaced for the new trial and sentencing and the new judge stated his reasons for imposing the death penalty with clarity, the threat of vindictiveness was not a realistic likelihood. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Sentencing Under Statutes Amended After Date of Crime: The sentencing of the defendant to death for a conviction of aggravated kidnapping under statutes amended after section 94-5-304, R.C.M. 1947 (now repealed), was declared unconstitutional did not violate the constitutional prohibition against ex post facto laws. The amendments were ameliorative in nature and did not deprive defendant of a substantial right or immunity that he possessed at the time the crime was committed. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Constitutionality:

Montana's statutory scheme for imposing the death penalty meets the standards established by the U.S. Supreme Court. The penalty is not cruel and unusual simply because Montana's criminal statutes allow its imposition in this case for the crime of aggravated kidnapping but not

for the crime, as committed here, of deliberate homicide. St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 1134 (1979).

In light of recent U.S. Supreme Court decisions (Woodson v. N. C., 428 US 280, 49 L Ed 2d 944, 96 S Ct 2978 (1976); Coker v. Ga., 433 US 584, 53 L Ed 2d 982, 97 S Ct 2861 (1977); Roberts v. La., 431 US 633, 52 L Ed 2d 637, 97 S Ct 1993 (1977)), section 94-5-304, R.C.M. 1947 (since repealed), as it existed at the time of the defendant's trial, was unconstitutional on its face as a mandatory death penalty statute. St. v. Coleman, 177 M 1, 579 P2d 732 (1978).

While the statutes did not provide for the jury in the bifurcated sentencing procedure, they were within the constitutional boundaries of recent U.S. Supreme Court cases. The sentence of death in this case was rested on a narrowly defined type of murder or kidnapping. The former statute provided for the sentencing judge to consider mitigating circumstances. In addition, appellate judicial review and other sentence review was provided. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

By an earlier decision of the U.S. Supreme Court, statutes allowing the sentencer discretion as to whether to impose the death penalty were unconstitutional; although the conviction would be upheld, a sentence of death made at the discretion of the court under a former statute was unconstitutional and would be commuted to life imprisonment. St. v. Rhodes, 164 M 455, 524 P2d 1095 (1974).

Retroactive Application of Death Penalty Provisions — No Ex Post Facto Violation: Where after the commission of the crime of homicide, the U.S. Supreme Court found the death penalty statute unconstitutional and the state Legislature took only the procedural step of redefining the punishment, not the crime, there is no ex post facto violation in upholding the previous death penalty imposed, since the defendant had "fair warning" of the consequences of homicide. St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 1134 (1979).

Review of Death Sentence — Disproportionate Application: The Supreme Court, in reviewing a death sentence to determine whether it is disproportionate, reviews the circumstances of the crime of which the defendant is accused and in light of those circumstances, the judgment and the sentence thereupon imposed. It examines cases involving similar crimes, for the single purpose, making certain that as far as the defendant in this particular case is concerned, there has been no discriminatory action on the part of the sentencing judge and no abuse of discretion by the sentencing judge and that the sentencing judge has considered and applied fairly and without discrimination the applicable law. The Supreme Court looks for the even-handed application of death sentences without regard to sex, color, creed, or race or any other discriminating consideration. When this has occurred, as here, the death sentence must be upheld. St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 1134 (1979).

Requisites of a Valid Death Penalty: The U.S. Supreme Court seems to have established three general criteria that are requisite to a valid death penalty statutory scheme: (1) there must be at least one statutory aggravating circumstance before a death sentence may be considered; (2) the defense must be afforded the opportunity to bring before the sentencing body at a separate sentencing hearing any mitigating circumstances relating to the individual defendant; and (3) there must be available prompt judicial review of the sentencing decision by a court of statewide jurisdiction. The statutory scheme in existence at the time of commission of the crimes charged in the instant case met the above criteria. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Prospective Juror's View of Death Penalty: Two prospective jurors were properly excluded under the exception to the general rule of Witherspoon v. Ill., 391 US 510, 20 L Ed 2d 776, 88 S Ct 1770 (1968), because they were irrevocably committed to voting against conviction because of the possibility of a death penalty. St. v. Coleman, 177 M 1, 579 P2d 732 (1978).

Part Law Review Articles

The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity, Eklund, 65 Mont. L. Rev. 135 (2004).

Montana's Death Penalty After State v. McKenzie, Tweeten, 38 Mont. L. Rev. 209 (1977).

Criminal Law: Consecutive Sentences Allowed for Burglary and Larceny Committed in a Single Criminal Transaction, (Morigeau v. St., 149 M 85, 423 P2d 60 (1967)), Swindlehurst, 28 Mont. L. Rev. 254 (1967).

The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, Goodpaster, 58 N.Y.U. L. Rev. 299-362 (May 1983).

46-18-301. Hearing on imposition of death penalty.

Compiler's Comments

1997 Amendment: Chapter 378 inserted (2) setting a statutory time for sentencing and limiting extensions to one of up to 60 days; and made minor changes in style. Amendment effective April 24, 1997.

Severability: Section 8, Ch. 378, L. 1997, was a severability clause.

Case Notes

Burden to Mitigate: Petitioner, under a sentence of death, alleged error in that the burden in sentencing rests on him to show mitigation. The mitigating factors regarding the death penalty sentence have no bearing on guilt or innocence. It is permissible to allow facts pertinent only to the question of punishment to be determined by a judge rather than by a jury, and the State need not prove such facts beyond a reasonable doubt. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Jury Not Involved in Sentencing — Different Factors Required: Petitioner claimed he was denied constitutional rights because the jury was not involved in the sentencing determination; he was sentenced to hang. The factor of overriding importance in sentencing schemes is that the trial and sentencing must be bifurcated, with different factors considered at each. The factors considered by a judge in imposing the death penalty are not elements of the crime. There is no constitutional requirement that a jury make the determination to impose the death penalty. Petitioner's claim was properly dismissed. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

46-18-302. Evidence that may be received.

Compiler's Comments

2003 Amendment: Chapter 154 in (1)(a) at beginning inserted "Subject to subsection (1)(b)"; inserted (1)(b) providing that evidence of an aggravating circumstance may not be admitted or considered unless the defendant pleaded guilty to the offense and admitted the aggravating circumstance or the trier of fact found beyond a reasonable doubt that the aggravating circumstance existed; and made minor changes in style. Amendment effective October 1, 2003.

1995 Amendment: Chapter 125 in first sentence inserted third clause referring to harm caused to victim or victim's family; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Applicability: Section 43, Ch. 125, L. 1995, provided: "[Sections 10 [46-18-201], 13 [46-18-241], and 21 [46-18-302]] apply to trials for and sentences imposed for crimes that were committed on or after [the effective date of this act]." Effective October 1, 1995.

Case Notes

No Prejudice From Alleged Ineffective Assistance of Counsel During Sentencing Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the sentencing phase. Dawson alleged that counsel was ineffective in failing to: (1) present crucial mitigating evidence to the sentencing court; (2) conduct an adequate sentencing investigation; and (3) move the sentencing court for reconsideration of its conclusion that Dawson posed a substantial and continuing threat and had no chance for rehabilitation. On the first point, Dawson contended that counsel should have offered the statement of the state's key witness regarding another man whom she saw near the crime scene, which Dawson maintained would have bolstered his defense theory that he acted under duress or coercion. However, the statement was vague, and Dawson never offered information concerning the involvement of others. Neither the jury nor the sentencing court accepted the defense theory, and Dawson could not demonstrate prejudice because of counsel's failure to offer the statement. Counsel's decision not to present or argue evidence of Dawson's drug use as a mitigating factor did not constitute ineffective assistance, given counsel's determination that evidence of drug use would have been inflammatory and prejudicial and would have been an aggravating rather than mitigating factor. Failure of counsel to present evidence at sentencing of Dawson's good behavior in jail also did not constitute ineffective assistance because that evidence was presented at the

guilt phase and was thus considered at the sentencing phase as well. Second, Dawson's assertion that counsel overlooked demonstrations of remorse found in the records of the staff that conducted his psychiatric examination, which would have served to rebut the findings by the sentencing court regarding his lack of remorse, did not constitute prejudice because the court's finding was based on the court's own observations of Dawson throughout the lengthy proceedings. It was also reasonable for counsel not to investigate Dawson's medical and school records, absent any evidence that further investigation would have been beneficial. Dawson's argument that counsel erred in failing to interview boyhood friends to develop or determine the existence of mitigating evidence also failed. Counsel did present letters from Dawson's mother, sister, and former spouses, and the failure to further investigate boyhood friends did not constitute ineffective assistance. Third, counsel's failure to move the sentencing court for reconsideration of its conclusion that Dawson posed a substantial and continuing threat and had no chance for rehabilitation was not ineffective assistance given the findings in St. v. Dawson, 233 M 345, 761 P2d 352 (1988), that evidence supported the sentencing court's finding of aggravating factors and that the death sentence was appropriate. The District Court did not err when it found that Dawson did not receive ineffective assistance at sentencing. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

Consideration of Victim Impact Statement Not Reversible Error: The District Court considered the oral statements of the victim's father before sentencing the defendant to death. The Supreme Court held that the lower court's consideration of the victim impact statement was not error because the statement was considered by a judge, not a jury, and the statement was not written and was short and unemotional. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Defendant's Silence Considered in Sentencing — No Error: Trial judge's observation of defendant's silence at trial as a factor in imposing the death sentence did not constitute improper consideration of defendant's constitutional right to remain silent. The sentencing order contained a finding that defendant demonstrated no remorse or genuine concern for human life. The finding could be seen as an expression of the absence of a mitigating factor, and in light of several other factors warranting imposition of the death sentence, the presence of the finding in the sentencing order was not significant. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Reference to Victim Impact Information by Sentencing Judge Not Cruel and Unusual Punishment: Defendant claimed the death sentence was improper because the sentencing judge referred to the victim impact information contained in the presentence investigation report. Defendant cited the holding in Booth v. Maryland, 482 US 496, 96 L Ed 2d 440, 107 S Ct 2529 (1987), that it was a violation of the eighth amendment of the U.S. Constitution (similar to Art. II, sec. 22, Mont. Const.) for a sentencing jury to refer to information in a victim impact statement during the sentencing stage of a capital murder trial. The Montana Supreme Court held that Booth was factually distinguishable from Montana sentencing procedures, noting that a judge rather than a jury performs sentencing under Montana law. Furthermore, the judge may be allowed to hear and rule on the admissibility of evidence that the jury is not allowed to hear, yet he is still responsible for sentencing. Absent evidence that the judge was adversely affected by victim impact information, there was no constitutional violation. St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988), followed in St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988), and Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Presentence Report Properly Used by Judge: Defendant's contention that hearsay tainted the presentence report was without merit. Section 46-18-112 authorizes a complete investigation into the background of the defendant and does not limit hearsay. The District Court's reliance upon the recommendation of the probation officer was not error. Section 46-18-302 authorizes the sentencing judge to consider the widest possible scope of inquiry when determining the sentence to be imposed. The court followed the position established in St. v. Smith, 217 M 461, 705 P2d 1087, 42 St. Rep. 463 (1985), regarding the sentencing judge's discretion to use the presentence report and sentencing recommendations. St. v. D.B.S., 216 M 234, 700 P2d 630, 42 St. Rep. 770 (1985).

Capital Sentence Requested by Defendant — No Basis for Resentencing: Defendant pleaded guilty to two counts of aggravated kidnapping and two counts of deliberate homicide. Defendant requested the death penalty. After sentencing, defendant had second thoughts and on appeal sought a resentencing. The Supreme Court held there was no basis for resentencing because: (1) sentencing was not tainted by reliance on prior Canadian convictions obtained without counsel; (2) inclusion of juvenile offenses as adult offenses in presentence report was not error; (3) a

court-ordered presentence interview was not violative of the fifth amendment; (4) recommendation for the death penalty in the presentence report was not improper; (5) no judicial error was committed in the extent of review of mitigating factors and no unconstitutional limit was placed on the court's consideration of mitigating circumstances; (6) no error was found in the court's denial of defendant's motion for additional psychiatric evaluation; (7) defendant was not required to be present at proceedings occurring after the verdict; (8) jury participation is not constitutionally required in capital sentencing procedures; (9) no indication was found that the trial court imposed the death penalty out of passion or prejudice; and (10) the sentence was not excessive or disproportionate. St. v. Smith, 217 M 461, 705 P2d 1087, 42 St. Rep. 463 (1985) (Smith I). A habeas corpus petition was conditionally granted in Smith v. McCormick, 917 F2d 1153 (9th Cir. 1990), a subsequent resentencing of death was reversed and remanded for preparation of a new presentence investigation, St. v. Smith, 261 M 419, 863 P2d 1000 (1993) (Smith II), and following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

46-18-303. Aggravating circumstances.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to offender for references to defendant and person; inserted (1)(a)(vi) regarding certain sexual crimes when the victim is less than 18 years old; deleted former (9) that read: "(9) The offense was deliberate homicide and was committed by a person during the course of committing sexual assault, sexual intercourse without consent, deviate sexual conduct, or incest, and the victim was less than 18 years of age"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 126 in (1)(a)(i) substituted "while in official detention, as defined in 45-2-101" for "serving a sentence of imprisonment in the state prison"; in (1)(a)(ii) after "by a" substituted "person" for "defendant"; inserted (1)(a)(vi) regarding a deliberate homicide committed by a person during the course of committing sexual assault, sexual intercourse without consent, deviate sexual conduct, or incest if the victim was under 18 years of age; in (3) after "committed while" substituted "in official detention, as defined in 45-2-101" for "incarcerated at the state prison"; deleted former (9) that read: "(9) The offense was deliberate homicide and was committed by a person during the course of committing sexual assault, sexual intercourse without consent, deviate sexual conduct, or incest, and the victim was less than 18 years of age"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 491 in (1)(a)(i) and (3) substituted "a state prison" for "the state prison". Amendment effective April 27, 1999.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

The amendments to (1)(a)(i) and (3) by Ch. 491 were rendered void by the amendments made by Ch. 126 and were not codified.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

1997 Amendment: Chapter 312 inserted (10) concerning the offense of sexual intercourse without consent when the convicted person has a prior conviction for that offense and during each offense inflicted serious bodily injury on a person; and made minor changes in style.

1989 Amendment: Inserted (9) concerning deliberate homicide during course of sexual crime involving a minor.

1987 Amendment: At end of (7), after "death of the victim", inserted remainder of subsection referring to death of a rescuer.

1985 Amendment: Inserted (8) including as aggravating circumstances an offense committed at the State Prison by a person convicted of deliberate homicide or found to be a persistent felon.

Case Notes

Constitutional Standard Applicable to Aggravating Circumstance Regarding Offense Committed as Part of Scheme or Operation and Regarding Aggravated Kidnapping: Each statutory aggravating circumstance under this section must satisfy a constitutional standard derived from Furman v. Ga., 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972), requiring that the aggravating circumstance not be so vague that it fails to channel the discretion of the sentencing court, resulting in arbitrary and capricious sentencing. The circumstance set out in subsection (5) of this section satisfies the constitutional standard by narrowing the class of persons eligible for the death penalty in two respects: (1) the offense must be committed as part of a planned undertaking or systematic plan; and (2) the scheme or operation must contemplate the death of more than one person. The circumstance set out in subsection (7) of this section also satisfies the constitutional requirement by providing the death of the victim as the factor that narrows the class of persons who have committed the predicate felony of aggravated kidnapping. Defendant's argument that an aggravating factor is required to narrow the class of persons who have committed two predicate felonies was in error because the aggravating factors set out in this section are independent of each other and each one, by itself, is sufficient to justify imposition of the death penalty. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993). (Smith II). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996)(Smith III).

Prison Inmate — Aggravating Circumstances Applicable to Conviction for Deliberate Homicide by Accountability: A prison inmate who was convicted of killing another inmate contended that the aggravating circumstances of subsections (1) and (2) of this section did not apply because he was found not guilty of deliberate homicide, but guilty of deliberate homicide by accountability. However, the jury was clearly and correctly instructed that the offense of deliberate homicide by accountability requires a deliberate homicide and a finding that the defendant acted with common purpose before or during the homicide. The jury did not find defendant not guilty of deliberate homicide, but found only that he did not act alone during the crime, thus allowing the conviction of both men involved in the crime without having to determine which man struck the fatal blow. Because defendant was convicted of deliberate homicide by accountability, the sentencing consideration of whether to use the death penalty for the conviction was not double jeopardy, nor was consideration of aggravating circumstances an error. St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993), distinguishing Enmund v. Fla., 458 US 782, 73 L Ed 2d 1140, 102 S Ct 3368 (1981).

Not Error to Consider Lack of Remorse as Aggravating Factor: The defendant in a multiple homicide case moved to have his death sentence set aside on the basis that the trial court relied on the defendant's lack of remorse as an aggravating factor justifying the death penalty. The Supreme Court held that there was no error because the lack of remorse relates to the propriety of the death sentence even though it is not statutorily enumerated as an aggravating circumstance. St. v. Langford, 248 M 420, 813 P2d 936, 48 St. Rep. 492 (1991). The petition for postconviction relief was denied in St. v. Langford, 249 M 385, 819 P2d 151, 48 St. Rep. 620 (1991).

Evidence of Torture and Lying in Wait or Ambush: A finding of aggravating circumstances was justified upon evidence of homicide by means of torture and lying in wait or ambush. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Defendant on Parole — Questionable Aggravating Circumstance for Purpose of Death Penalty: This section fails to address whether deliberate homicide committed by a parolee from this or any other state constitutes an aggravating circumstance for purposes of the death penalty. St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988), distinguished in St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998).

Evidence of "Lying in Wait" and That "The Offense Was Aggravated Kidnapping Which Resulted in the Death of the Victim": The evidence in the record clearly proved that sufficient aggravating circumstances existed to warrant imposition of the death penalty in that the crime of deliberate homicide had been "committed by a person lying in wait or ambush" and the crime of aggravated kidnapping "resulted in the death of the victim". St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Lying in Wait: When the defendant had robbed a bank and in the course of his escape drove his automobile into a coulee, stopped his machine, and shortly thereafter shot and killed one of his pursuers, an instruction that homicide committed by lying in wait constituted murder in the first degree under a former section was proper. St. v. Jackson, 71 M 421, 230 P 370 (1924).

Collateral References

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like—post-Gregg cases. 67 ALR 4th 942.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like—post-Gregg cases. 67 ALR 4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-Gregg cases. 66 ALR 4th 417.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-Gregg cases. 65 ALR 4th 838.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-Gregg cases. 63 ALR 4th 478.

46-18-304. Mitigating circumstances.

Compiler's Comments

1995 Amendment: Chapter 18 at beginning of (2) substituted "The court may consider any" for "Any"; and made minor changes in style.

Case Notes

Applicability of Brady Rule — Evidence of Accomplice's Rape, Criminal History, and Violent Background Insufficient for New Trial: In a postconviction relief proceeding, petitioner claimed that the state's failure at the first trial to disclose the accomplice's criminal history or sexual assault allegation was prejudicial and warranted a new trial. The Supreme Court found this argument completely without merit. Although the evidence may have been helpful in impeaching the accomplice's testimony, in no way could the failure to disclose this information reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Even in the absence of the accomplice's testimony, there was an overwhelming abundance of other accomplice testimony and corroborative evidence to establish petitioner's guilt. The state did not violate Brady with regard to the guilt phase of petitioner's trial because any favorable information that the state failed to disclose was not material to petitioner's guilt or innocence. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Proper Finding of Nonexistence of Mitigating Factors in Prison Homicide — Death Penalty Affirmed: Johnson did not dispute the District Court's finding that two aggravating circumstances existed, but contended that the court's conclusion, that there were no mitigating circumstances sufficiently substantial to call for leniency, was in error. The trial court is not required to make findings on each piece of purportedly mitigating evidence produced; it is only required to consider all aggravating and mitigating evidence presented. Johnson's version of the circumstances surrounding the murder, which if believed may have indicated that some degree of leniency was appropriate, was not credible. Having considered Johnson's proposed mitigating circumstances and rejected them, the District Court's decision was affirmed. St. v. Johnson, 1998 MT 289, 291 M 501, 969 P2d 925, 55 St. Rep. 1186 (1998).

No Error in Analyzing Mitigating Circumstances: The District Court did not err in analyzing mitigating circumstances by: (1) considering every enumerated mitigating factor rather than only those that were raised by defendant; (2) failing to consider, as mitigating evidence, defendant's testimony that the homicide victim was the aggressor; (3) failing to make independent findings on defendant's justifiable use of force defense; (4) failing to find that sentences in other cases did not constitute a mitigating circumstance; (5) failing to consider whether the death sentence in this case was disproportionate or excessive, which is the province of the Supreme Court; and (6) not making findings on each piece of purportedly mitigating evidence produced by defendant. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998), following St. v. Smith, 280 M 158, 931 P2d 1272 (1996), and distinguishing St. v. Korell, 213 M 316, 690 P2d 992 (1984).

Duty of Prosecution to Give Defendant All Requested Exculpatory Information — Applicability of Brady Rule — Remand for Resentencing: Under Brady v. Md., 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963), the prosecution is required to give a criminal defendant all requested exculpatory information material either to the defendant's guilt or to punishment. Under U.S. v. Bagley, 473 US 667, 87 L Ed 2d 481, 105 S Ct 3375 (1985), the prosecution must

also deliver to the defendant all evidence significant for impeachment purposes. In order to require reversal of a defendant's conviction or sentence, a Brady violation must relate to material information. The standard for materiality was set out in Kyles v. Whitley, 514 US 419, 131 L Ed 2d 490, 115 S Ct 1555, 63 USLW 4303 (1995), holding that the defendant must show that there is a reasonable probability that had the information been provided, the result would have been different. The effect of suppressed Brady material must be considered collectively rather than on an item-by-item basis. In the present case, defendant raised numerous issues in an attempt to show that the state had failed to disclose certain materials. After examining each issue, the Supreme Court found that all but two were immaterial and that those two would not have affected the outcome of the trial even if they had been disclosed. However, there was a reasonable probability that had that information been provided to the defendant, the result of the sentencing hearing could have been different if the undisclosed information could have been used to support defendant's contention of mitigating circumstances. Therefore, the court vacated the sentences and remanded for resentencing. Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995), followed in Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), and St. v. Buckles, 1999 MT 79, 294 M 95, 979 P2d 177, 56 St. Rep. 331 (1999). See also Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000), holding that it was harmless error for the District Court to fail to address new claims in its Findings of Fact, Conclusions of Law and Order dismissing petitioner's amended petition for postconviction relief.

Applicability of "Catchall" Mitigating Circumstance to Postoffense Conduct: The enormously broad "catchall" mitigating circumstance in subsection (8) of this section reflects the Legislature's intent to permit a defendant to raise any and all facts and evidence that might mitigate against the death penalty, including evidence of conduct during incarceration subsequent to the offense. Evidence may include any evidence required in a presentence investigation under 46-18-112 relative to a defendant's characteristics, circumstances, needs, and potentialities. In this case, the sentencing court erred by failing to order a presentence investigation and report that included consideration of defendant's admission of guilt, contrition, commitment to rehabilitation, and conduct while incarcerated, which were all relevant as mitigating evidence. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993) (Smith II), following Lockett v. Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978), Skipper v. S.C., 476 US 1, 90 L Ed 2d 1, 106 S Ct 1669 (1986), and Smith v. McCormick, 914 F2d 1153 (9th Cir. 1990). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

District Court Not Precluded From Considering Any Mitigating Factor: A District Court in a capital case may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that a defendant proffers as a basis for a sentence less than death. In this case, the District Court did not err in its consideration of mitigating evidence of defendant's family background and the testimony of a codefendant concerning the circumstances of the offense. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993), following Lockett v. Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978), and Skipper v. S.C., 476 US 1, 90 L Ed 2d 1, 106 S Ct 1669 (1986). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

Consideration of "Catchall" of Mitigating Circumstances: The trial court reviewed in detail the first seven elements comprising mitigating circumstances under this section and found no evidence of any of the elements. Gollehon presented evidence of childhood abuse under the catchall element of subsection (8) of this section, and the court properly considered the evidence without passion or prejudice and with consideration of whether the sentence was proportional to the crime, as required by 46-18-310. It was not error for the court to then conclude that the evidence was insufficient to preclude the death penalty. St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993).

Absence of Prior Criminal History — Death Sentence Affirmed: The absence of a prior criminal history was insufficient to warrant leniency when the nature of the capital crimes for which defendant was convicted was weighed against the lack of a significant criminal history. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988), followed in St. v. Langford, 248 M 420, 813 P2d 936, 48 St. Rep. 492 (1991).

Mitigating Circumstances Not Sufficiently Substantial to Warrant Leniency: The Supreme Court affirmed the death penalty after finding the trial court properly considered and rejected 21 items defendant alleged as mitigating circumstances, including defendant's physical and mental disabilities, expression of remorse and desire to reform, lack of violent crimes in his past criminal

record, the effect of an injury sustained during commission of the crimes, and miscellaneous personal problems. St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988).

Significant History of Prior Criminal Activity: The District Court's finding that no mitigating circumstances existed in favor of the defendant was upheld when the defendant had a long history of prior criminal activity and no other facts existed in mitigation of the penalty. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Collateral References

Propriety of imposing capital punishment on mentally retarded individuals. 20 ALR 5th 177.

46-18-305. Effect of aggravating and mitigating circumstances.

Compiler's Comments

2003 Amendment: Chapter 154 near middle of first sentence after "death if" substituted "the trier of fact found beyond a reasonable doubt, or the defendant pleaded guilty to the offense and admitted to, one or more aggravating circumstances" for "it finds one or more of the aggravating circumstances"; and made minor changes in style. Amendment effective October 1, 2003.

Case Notes

Finding of Aggravating Circumstance and No Mitigating Circumstance — Mandatory Death Sentence: Upon finding a single aggravating circumstance, that defendant had previously been convicted of homicide, and finding no mitigating circumstances sufficient to call for leniency, the District Court was statutorily required to sentence defendant to death. Further, under a death penalty scheme like Montana's, it is not required that a death penalty be reversed or that a new sentencing hearing be conducted if one of several aggravating circumstances found to exist is subsequently held to be inapplicable, as long as the inapplicability of one aggravating circumstance does not render the death penalty arbitrary or capricious. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998).

Failure to Establish Standard Governing Weighing of Aggravating and Mitigating Factors Not Unconstitutional Allocation of Burden of Proof: As set out in Zant v. Stephens, 462 US 862, 77 L Ed 2d 235, 103 S Ct 2733 (1983), the fact that this section fails to establish a standard governing the District Court's weighing of aggravating and mitigating factors does not mean it is constitutionally flawed. Imposition of the death sentence is required if the court finds one or more aggravating circumstances and finds no mitigating circumstances sufficiently substantial to call for leniency. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993)(Smith II), distinguishing People v. Young, 814 P2d 834 (Colo. 1991). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

Verbatim Adoption of Proposed Findings in Death Penalty Sentencing — Reversal Not Required: The Supreme Court does not condone a District Court's verbatim adoption of proposed findings, especially when weighing aggravating and mitigating circumstances in a matter as grave as imposition of the death penalty. However, findings and conclusions that are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and that are supported by evidence will not be overturned simply because the District Court relied on proposed findings and conclusions submitted by counsel, nor are findings adopted in that manner so inherently flawed that the prevailing party must be reversed. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993), distinguishing Patterson v. St., 513 S2d 1257 (Fla. 1987).

Substantial Evidence of Aggravating Circumstances: There was substantial evidence to support the following factual findings in the sentencing order: (1) the victim died as a result of beatings; (2) defendant knew the victim was married and had a family; (3) the victim pleaded for his life with defendant and accomplices, to no avail; (4) defendant's demeanor at trial and at the sentencing hearing exhibited no remorse; (5) defendant could have removed himself from the entire episode and saved the victim's life on more than one occasion, but failed to do so; (6) two aggravating circumstances applied, namely that the offense of deliberate homicide was committed by means of torture and the offense of aggravated kidnapping resulted in the death of the victim; (7) the mitigating circumstance that defendant acted under the domination of another person did not apply; (8) evidence did not show that defendant was substantially impaired by his drinking; (9) defendant was an accomplice in a deliberate homicide committed by another person; and (10) the only possible mitigating circumstance was insubstantial to call for leniency. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Death Penalty Upon Finding of Aggravating Circumstances — Not Cruel and Unusual Punishment: Defendant maintained that 46-18-305 allowed the imposition of cruel and unusual punishment because it did not sufficiently narrow the class of death-eligible defendants. The

Supreme Court disagreed, noting that this argument was previously rejected in St. v. McKenzie, 186 M 481, 608 P2d 428 (1980). St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Burden to Mitigate: Petitioner, under a sentence of death, alleged error in that the burden in sentencing rests on him to show mitigation. The mitigating factors regarding the death penalty sentence have no bearing on guilt or innocence. It is permissible to allow facts pertinent only to the question of punishment to be determined by a judge rather than by a jury, and the State need not prove such facts beyond a reasonable doubt. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981), followed in St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993). See also Walton v. Ariz., 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047 (1990) (Smith II). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

Jury Not Involved in Sentencing — Different Factors Required: Petitioner claimed he was denied constitutional rights because the jury was not involved in the sentencing determination; he was sentenced to hang. The factor of overriding importance in sentencing schemes is that the trial and sentencing must be bifurcated, with different factors considered at each. The factors considered by a judge in imposing the death penalty are not elements of the crime. There is no constitutional requirement that a jury make the determination to impose the death penalty. Petitioner's claim was properly dismissed. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Mitigation Insufficient to Offset Aggravation: Aggravating and mitigating factors to be considered by the sentencing court in death penalty cases do not mandate the death penalty upon the finding of an aggravating circumstance, but rather require consideration of whatever mitigating circumstances are found to be present. The District Court found that the aggravating factor (death of the victim of aggravated kidnapping) was not offset by the mitigating factor (lack of a prior criminal record), and the Supreme Court affirmed that decision. St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 1134 (1979).

Requirement of "Sufficiently Substantial" Mitigating Factors: The statutory language allowing consideration of only "sufficiently substantial" mitigating factors is not an encroachment upon the discretion of the judge when he passes sentence on capital cases in violation of Lockett v. Ohio, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954 (1978), since it only requires the factor to have some substance or weight. St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 1134 (1979).

46-18-306. Specific written findings of fact.

Case Notes

No Requirement That Written Findings Be Filed Concurrently With Oral Imposition of Death Sentence: Nothing in this section requires the District Court to file its written findings concurrently with its oral imposition of the death sentence. A 1-week delay in filing of written findings did not constitute reversible error. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993) (Smith II), distinguishing Christopher v. Fla., 583 S2d 642 (Fla. 1991). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

46-18-307. Automatic review of sentence.

Case Notes

Prison Murder — Death Sentence Not Imposed Under Influence of Passion, Prejudice, or Arbitrary Factors: Johnson was convicted of killing another prison inmate and contended on appeal that the death sentence was imposed under the influence of passion, prejudice, or other arbitrary factors because the District Court predicated its sentence on Montana's correctional policy, as set forth in 46-18-101, but that the policy does not expressly provide for death as punishment for any crime. The Supreme Court agreed that the statute does not expressly discuss death as a punishment for criminal conduct, but noted that, being a general declaration of state correctional policy, the statute also does not discuss most of the sentencing options allowed by law. Notwithstanding the fact that the death sentence has been affirmed as constitutional, the District Court's findings reflected its consideration of the general statutory principles that a sentence be based primarily on the crime committed, the prospects of rehabilitation, the circumstances under which the crime was committed, and the offender's criminal history. The circumstances of this crime, coupled with Johnson's long history of assaultive and predatory behavior both in and out of prison, were reflected in the court's analysis and showed that the court carefully and dispassionately considered all the evidence before it concluded that the death penalty was appropriate. St. v. Johnson, 1998 MT 289, 291 M 501, 969 P2d 925, 55 St. Rep. 1186 (1998).

Sentence Imposed Same Day as Sentencing Hearing — No Influence of Passion, Prejudice, or Other Arbitrary Factor: Despite defendant's contention that the death sentence was based on his lack of rehabilitation, when the District Court took evidence before it into account in determining to impose the death sentence and examined aggravating and mitigating circumstances in a thorough and detailed manner, the fact that the sentence was imposed on the same day as the sentencing hearing did not constitute the influence of passion, prejudice, or any other arbitrary factor. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998).

Statutory Narrowing of Class of Death-Eligible Persons: The Supreme Court specifically held that subsection (7) of this section genuinely narrowed the class of death-eligible persons and was an appropriate aggravating circumstance for the death penalty. St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988).

Postconviction Relief — On New Ground After Automatic Review — Not Barred: Petitioner was convicted of deliberate homicide, aggravated kidnapping, and robbery and was sentenced to death. His sentence was automatically reviewed by the Supreme Court. Petitioner then filed for postconviction relief under Title 46, ch. 21, part 1, and the State moved to dismiss the issues raised as res judicata. The court held that res judicata cannot be invoked by the State so as to deprive a litigant of the right to file a petition for postconviction relief, if the petitioner has a new basis or ground for coming before the court. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981). See also Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999).

Right to Postconviction Relief Petition After Automatic Review: A defendant sentenced to death is entitled to an automatic sentence review under 46-18-307, et seq. This automatic review does not stand in the place of postconviction relief, and after the automatic review, a defendant may petition for postconviction relief under Title 46, ch. 21. Coleman v. St., 194 M 428, 633 P2d 624, 38 St. Rep. 1352 (1981).

Expeditious Review of Death Sentence: When the death penalty has been imposed in a case, the Legislature has directed the Supreme Court, because of the nature of the penalty involved, to undertake expeditiously the functions of reviewing the record to determine if any errors have been committed resulting in imposition of an illegal sentence and to determine if the sentence is appropriate under the circumstances. St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 1134 (1979).

46-18-308. Time for review — consolidation with appeal.

Compiler's Comments

Montana Rules For Automatic Review of a Death Sentence: These rules were adopted by Montana Supreme Court order dated September 13, 1984, effective October 1, 1984. The order and rules appear at 41 St. Rep. 1960. They are reprinted below. An incorrect Rule 8 reference to "174 Mont." has been changed to "147 Mont.".

"Rule 1. Purpose and scope of rules. (1) These rules govern procedures for the conduct of the automatic review of death sentences and associated appeals by the Montana Supreme Court under sections 46-18-310, MCA.

(2) Unless otherwise provided in these rules violation of these procedural rules will not entitle a party to relief absent a showing that the violation has caused significant prejudice to the party's right to a fair hearing.

(3) If no procedure is specifically prescribed by these rules, the Court shall proceed in conformance with the applicable statute or rule governing appellate practice in criminal cases.

Rule 2. Initiation of automatic review. (1) When a district court imposes a sentence of death, the county attorney shall within five days file in the district court a notice of automatic review. The notice shall state that the Supreme Court will conduct an automatic review of the death sentence in accordance with sections 46-18-307 through 46-18-310, MCA, and these rules, and that a defendant wishing to present issues other than those specified in section 46-18-310, MCA, must file a notice of appeal under Rule 5 of these rules.

(2) The filing of a notice of automatic review serves the same purpose and has the same effect as the filing of a notice of appeal under section 46-20-201, MCA, and [former] Rule 4, M.R.App.Civ.P. (now M.R.App.P., now superseded).

(3) The county attorney shall serve copies of the notice of automatic review on both the defendant and his counsel, if any, and also upon the attorney general. The county attorney shall file an additional copy with the clerk of the Supreme Court.

(4) In cases where co-defendants were tried jointly in the district court and both received death sentences, the automatic review of the death sentences shall proceed separately before the Supreme Court. The county attorney shall file and serve separate notices of automatic review for each co-defendant in compliance with subsection (3) of this rule.

Rule 3. Docketing. The clerk of the Supreme Court shall docket the automatic review without fee and shall assign a docket number to the automatic review upon filing of the notice of automatic review by the county attorney under Rule 2. If a notice of appeal is filed, the clerk shall assign a separate docket number to the appeal, but shall note on the docket that the appeal and automatic review are consolidated for purposes of proceedings in the Supreme Court.

Rule 4. Record for automatic review. (1) The record for automatic review must include both the district court clerk's record and the transcript of proceedings from the district court.

(2) On the day the notice of automatic review is filed, the county attorney shall order a transcript of all recorded proceedings in the district court. The county shall pay the cost of the transcript.

(3) The clerk of the district court shall forward the entire record to the clerk of the Supreme Court within ten days after receipt of the transcript.

Rule 5. Appeals. (1) A defendant who wishes to seek review of issues of law pertaining to his trial or sentence other than those specified in section 46-18-310, MCA, shall file a notice of appeal within twenty days after imposition of sentence.

(2) If no notice of appeal is timely filed, the Supreme Court will consider no issues other than those presented on automatic review pursuant to section 46-18-310, MCA.

(3) Upon a showing of good and sufficient reason for the failure to file within twenty days, the Supreme Court may grant a motion to allow a defendant to file a notice of appeal out of time. No such motion will be considered by the Court if filed more than sixty days after the date of imposition of sentence.

Rule 6. Briefs. (1) Automatic review without appeal. If no notice of appeal has been filed, the defendant may file an opening brief within twenty days of the filing of the record on automatic review with the clerk of the Supreme Court which shall address the issues set forth in section 46-18-310, MCA. The state shall file a brief expressing its views on the issues set forth in section 46-18-310, MCA, within twenty days of service of the defendant's brief, if any, or within forty days of the filing of the record on appeal if the defendant chooses to file no brief. The defendant may file a reply brief, which shall be limited to the rebuttal of the state's argument, within ten days of service of the state's brief.

(2) Automatic review combined with appeal. If the defendant files a timely notice of appeal, he shall file his opening brief within thirty days after the filing of the record with the clerk of the Supreme Court. The defendant's opening brief shall address the issues specified in section 46-18-310, MCA, and all other issues arising from the trial and sentencing for which review is sought. The state shall file a responding brief within thirty days after service of the defendant's opening brief. The defendant may file a reply brief within fourteen days after service of the state's brief.

(3) Untimely notice of appeal. If the Supreme Court grants a defendant's motion for leave to file a notice of appeal out of time, the order granting the motion shall provide a briefing schedule for the parties.

Rule 7. Action by the Court. (1) The Court shall hear oral argument en banc in any case governed by these rules on the next calendar commencing more than thirty days after the filing of the state's brief.

(2) If no notice of appeal has been filed, the Court may review only the issues specified by section 46-18-310, MCA. If the defendant has filed a notice of appeal, the Court shall also consider all issues presented by the defendant in his brief, subject to the rules of law governing the preservation in the district court of questions for review on appeal.

Rule 8. Service. Defendants in automatic review cases shall comply with Supreme Court Rule II, 147 Mont. at xxiv.

Rule 9. Stays. The trial court shall enter a stay of execution of a death sentence upon the filing of a notice of automatic review. The stay expires upon issuance of remittitur on the Supreme Court's order affirming, vacating, or modifying the sentence. If the stay expires upon affirmance of a death sentence after the date set for execution of sentence has passed or within five days prior to the execution date, the execution date will be vacated, and the Supreme Court will remand the case to the district court for the setting of a new execution date in compliance with section 46-19-103, MCA.

Rule 10. Suspension of Rules. In the interest of expediting proceedings for automatic review, or for other good cause, the Supreme Court may suspend the operation of these rules and order proceedings in accordance with its direction.

Rule 11. Title and effective date. (1) These rules may be cited as "Montana Rules for Automatic Review of a Death Sentence."

(2) These rules take effect on October 1, 1984, and they govern the automatic review of death sentence imposed after their effective date."

Case Notes

Expeditious Review of Death Sentence: When the death penalty has been imposed in a case, the Legislature has directed the Supreme Court, because of the nature of the penalty involved, to undertake expeditiously the functions of reviewing the record to determine if any errors have been committed resulting in imposition of an illegal sentence and to determine if the sentence is appropriate under the circumstances. St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 1134 (1979).

46-18-310. Supreme court's determination as to sentence.

Compiler's Comments

2003 Amendment: Chapter 154 in (1)(b) near beginning after "supports the" inserted "trier of fact's finding of the existence or nonexistence of the aggravating circumstances enumerated in 46-18-303 and the sentencing", after "nonexistence of the" deleted "aggravating or", and after "enumerated in" deleted "46-18-303 and"; and made minor changes in style. Amendment effective October 1, 2003.

1997 Amendment: Chapter 302 in (1)(c), in two places, substituted "other cases" for "similar cases" and inserted "in which a sentencing hearing was held pursuant to 46-18-301, whether the sentence imposed was death or a sentence other than death"; and inserted (2) requiring the sentencing court's factfindings to be upheld unless they are clearly erroneous and prohibiting the Supreme Court from substituting its judgment for that of the sentencing court with respect to witness credibility, drawing evidentiary inferences, and resolving conflicts in evidence. Amendment effective April 17, 1997.

Case Notes

Capacity of Defendant to Withdraw Appeals — Rees Standard: Dawson was convicted of a capital crime and sentenced to death, and after years of appeals, Dawson decided to fire his attorneys, discontinue all appeals, and proceed with imposition of the death penalty. Dawson filed a pro se motion in state and federal courts to dismiss all pending appeals, and the Supreme Court considered whether to grant the motion. To decide whether a person under a death sentence has the mental competence to waive the right to further judicial review, the court applied the federal standard in Rees v. Payton, 384 US 312 (1966). The standard is whether the defendant has the capacity to appreciate the defendant's position and make a rational choice with respect to continuing or abandoning further litigation or whether the defendant is suffering from a mental disease, disorder, or defect that may substantially affect the defendant's capacity in the premises. After examining the record, the Supreme Court determined that Dawson did not suffer from a mental disease, disorder, or defect, that he had the capacity to appreciate his position, that he had made a rational choice to abandon further litigation, and that his motion to dismiss the appeal was voluntarily made. Once Dawson's competency was determined and the voluntariness of his action was established, Dawson was protected by his right to privacy from further medical examination and evaluation and from testimony from his doctor, and was entitled to the individual autonomy to make his private decision. Absent any showing that Dawson was denied any right while incarcerated or evidence of prison conditions that would cause him to abandon his desire to live, the Supreme Court dismissed Dawson's appeal and remanded to the District Court for execution of the original death sentence. St. v. Dawson, 2006 MT 69, 331 M 444, 133 P3d 236 (2006). See also Rumbaugh v. Procunier, 753 F2d 395 (5th Cir. 1985), and Dennis v. Budge, 378 F3d 880 (9th Cir. 2004).

Right of Defendant to Waive Counsel: Dawson was convicted of a capital crime and sentenced to death, and after years of appeals, Dawson decided to fire his attorneys, discontinue all appeals, and proceed with imposition of the death penalty. Dawson filed a pro se motion in state and federal courts to dismiss all pending appeals, and the Supreme Court considered whether to grant the motion. A defendant has a constitutionally guaranteed right to the assistance of counsel, but that right does not prohibit a defendant from rejecting the assistance of counsel. A defendant may be granted a request for self-representation if the waiver of the right to counsel is unequivocal, voluntary, knowing, and intelligent. The court examined the record and determined that Dawson's request to waive counsel met the criteria. Dawson was allowed to discharge his counsel, and an attorney was appointed to act as standby counsel. St. v. Dawson, 2006 MT 69, 331 M 444, 133 P3d 236 (2006).

Newly Discovered Evidence — Accomplice's Affidavit as to Ambiguity of Petitioner's Grunt — Insufficient for Postconviction Relief: In a postconviction relief proceeding, petitioner claimed that newly discovered evidence in the form of an accomplice's affidavit warranted a new trial.

The Supreme Court held that the ambiguous interpretation of petitioner's grunt in response to whether he agreed that the victim should be killed was not probative of innocence and was only relevant to the imposition of the death penalty. Therefore, the evidence was rendered moot when petitioner's death penalty sentence was vacated on appeal. Kills on Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Criteria Necessary to Establish Brady Violation: The suppression by the prosecution of material evidence favorable to the accused violates the due process rights of the accused, pursuant to Brady v. Md., 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963), including failing to disclose an agreement with a prosecution witness in exchange for testimony if the agreement provides tangible benefits. When there is no agreement, there is no duty to disclose. To establish a Brady violation, the petitioner must establish that: (1) the state possessed evidence, including impeachment evidence, favorable to the defense; (2) the petitioner did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. Here, Gollehon asserted that pretrial and posttrial agreements by the state with a prosecution witness prejudiced Gollehon's due process rights because if the jury had known of the agreements, the credibility of the witness would have been in doubt. However, aside from a guarantee of the witness's safety, which was disclosed to the jury at trial, Gollehon could not establish a Brady violation through the existence of an undisclosed pretrial agreement. Further, in order for posttrial assistance to be relevant, there must have been an agreement for parole before trial in order to support a Brady violation. In the absence of evidence of a pretrial agreement, there can be no Brady violation because no evidence was suppressed from the jury. Gollehon's claim for relief was denied. Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395, 56 St. Rep. 811 (1999), followed in St. v. Johnson, 2005 MT 318, 329 M 497, 125 P3d 1096 (2005). See also Giglio v. U.S., 405 US 150, 766 L Ed 2d 104, 92 S Ct 763 (1972), Alderson v. Zant, 22 F3d 1541 (11th Cir. 1994), and Mills v. Singletary, 63 F3d 999 (11th Cir. 1995).

Death Row Not Considered Cruel and Unusual Punishment — Delay Attributed to Defendant's Appeals: Citing Lackey v. Tex., 514 US 1045, 131 L Ed 2d 304, 115 S Ct 1421 (1995), Gollehon claimed that his right to be free from cruel and unusual punishment was violated by the amount of time that he spent on death row and by the number of sentencing hearings in his capital murder case. The Supreme Court declined to apply Lackey because the majority of the delay in Gollehon's case was caused by his own pursuit of constitutional and statutory rights in state and federal courts and was not caused by the state. Gollehon's claim for relief was denied. Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395, 56 St. Rep. 811 (1999). See also St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996).

Deliberate Homicide by Accountability Proportional to Other Capital Crimes — Death Sentence Affirmed: The senseless, calculated, brutal, and deliberate homicide of a prison inmate by two other inmates wielding baseball bats, when compared to other cases decided in Montana, the 9th Circuit, and the U.S. Supreme Court, led the Montana Supreme Court to conclude that the death penalty was appropriate. When considering proportionality, the court examined the gravity of the offenses, the brutality with which they were committed, and the existence of any factors meriting leniency, with the purpose of making certain that there was no discriminatory action on the part of the sentencing judge. Because imposition of the death sentence was not random or arbitrary, the constitutional prohibition against cruel and unusual punishment was not violated. St. v. Johnson, 1998 MT 289, 291 M 501, 969 P2d 925, 55 St. Rep. 1186 (1998); St. v. Turner, 262 M 39, 864 P2d 235, 50 St. Rep. 1267 (1993); St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993).

Proper Finding of Nonexistence of Mitigating Factors in Prison Homicide — Death Penalty Affirmed: Johnson did not dispute the District Court's finding that two aggravating circumstances existed, but contended that the court's conclusion, that there were no mitigating circumstances sufficiently substantial to call for leniency, was in error. The trial court is not required to make findings on each piece of purportedly mitigating evidence produced; it is only required to consider all aggravating and mitigating evidence presented. Johnson's version of the circumstances surrounding the murder, which if believed may have indicated that some degree of leniency was appropriate, was not credible. Having considered Johnson's proposed mitigating circumstances and rejected them, the District Court's decision was affirmed. St. v. Johnson, 1998 MT 289, 291 M 501, 969 P2d 925, 55 St. Rep. 1186 (1998).

Proportionality of Death Penalties in Prison Homicide: Sattler was sentenced to death after killing another inmate while incarcerated. Consistent with its role in reviewing whether the sentence was disproportionate to the penalty in similar cases, the Supreme Court reviewed the

only two similar existing cases, St. v. Gollehon, 262 M 1, 864 P2d 249 (1993), and St. v. Turner, 262 M 39, 864 P2d 235 (1993). Despite a variance in the number of aggravating circumstances between the cases, given that the brutality and gravity of the homicides in each case were substantially similar, coupled with defendant's lack of acceptance of responsibility by continually asserting that the homicide was justified because he was defending himself, Sattler's death penalty was not disproportionate or excessive to the penalty imposed in the similar cases. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998).

Accomplice to Felony Murder — Review for Compliance With Proportionality and Individualized Treatment Standards: Vernon Kills On Top contended upon review of his death penalty for felony murder that the sentence violated both the constitutional requirement for individualized punishment and the proportionality requirement. In analyzing the imposition of a death sentence, the Supreme Court will apply both federal and state constitutional standards derived from the eighth amendment to the U.S. Constitution and Art. II, sec. 22, Mont. Const. Although these constitutional provisions contain no explicit prohibition against disproportionate sentences and no express mandate for individualized punishment, the cruel and unusual punishment clauses ban sentences that are grossly disproportionate to the crime for which the defendant was convicted. As set out in Enmund v. Fla., 458 US 782 (1981), the death penalty is unique in its severity and irrevocability, so the state is required to focus on the defendant's personal intent, character, and culpability, not merely on the defendant's role as an accomplice. Because Vernon was not present when the killing occurred, did not inflict the death-causing injuries, and actually sought to avoid the killing, the sentence of death imposed on Vernon was disproportionate and thus was vacated. This reasoning does not preclude imposition of a death sentence upon an accomplice to felony murder; however, each case will be reviewed on the basis of its unique facts to ensure that the death sentence is not disproportionate to the degree of the defendant's culpability. Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), reversing St. v. Kills On Top, 243 M 56, 793 P2d 1273 (1990), and distinguishing Tison v. Ariz., 481 US 137 (1987).

Findings Relied Upon for Death Sentence Unsupported by Evidence — Felony Murder: Upon review of a death sentence, several statements from a previous opinion on Vernon Kills On Top's culpability for a homicide in which he did not directly participate were found to be unsupported by the record. The standard of review used by the Supreme Court pursuant to this section in such cases is broader than the clearly erroneous standard and includes whether the findings are supported by the evidence (see 1997 amendment). Applying that standard, the court found, on independent constitutional grounds, that because Vernon was not present when the killing occurred, did not inflict the death-causing injuries, and actually sought to avoid the killing, the sentence of death imposed on Vernon should be vacated. Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996).

Consideration of "Catchall" of Mitigating Circumstances: The trial court reviewed in detail the first seven elements comprising mitigating circumstances under 46-18-304 and found no evidence of any of the elements. Gollehon presented evidence of childhood abuse under the catchall element of 48-18-304(8), and the court properly considered the evidence without passion or prejudice and with consideration of whether the sentence was proportional to the crime, as required by this section. It was not error for the court to then conclude that the evidence was insufficient to preclude the death penalty. St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993).

Constitutionality of Death Sentence: Imposition of the death sentence is constitutional under the review criteria of this section. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Federal Court Decision Regarding Statute Similar to Montana's Not Binding on Montana Courts: The defendant challenged the constitutionality of Montana's death penalty on the basis of a federal court decision that held that a similar statute of another state was unconstitutional. The Supreme Court held that the decision was not binding on Montana and also noted that the federal decision had been appealed to the federal Supreme Court. St. v. Kills On Top, 241 M 378, 787 P2d 336, 47 St. Rep. 366 (1990).

Factors Properly Considered and Sentence Affirmed:

District Court imposition of the death sentence was affirmed after finding: (1) defendant's race was not a factor in the verdict or sentencing; (2) there was no error in consideration of statements made by the victim's father (distinguishing Booth v. Md., 482 US 496, 96 L Ed 2d 440, 107 S Ct 2529 (1987)); (3) the sentence was not imposed under passion, prejudice, or any arbitrary factor; (4) the sentencing court properly considered aggravating and mitigating circumstances; (5) under the standard set out in Tison v. Ariz., 481 US 137, 95 L Ed 2d 127, 107 S

Ct 1676 (1987), and in Enmund v. Fla., 458 US 782, 73 L Ed 2d 1140, 102 S Ct. 3368 (1982), the death sentence did not constitute excessive or cruel and unusual punishment and was warranted for defendant who was a major participant in the deliberate homicide and who exhibited a reckless indifference for human life; and (6) considering the gravity of the offenses, the brutality with which they were carried out, and the existence of any factors meriting leniency, the death sentence was not disproportionate or excessive to others imposed in similar cases. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

The death penalty was affirmed after review showed: (1) there was no influence of passion, prejudice, or any other arbitrary factor in sentencing; (2) the trial court properly considered aggravating and mitigating circumstances; and (3) the sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Abduction Resulting in Death of Victim — Capital Punishment Not Disproportionate: The death penalty was not disproportionate or excessive in a case where defendant abducted a young boy at gunpoint, later replacing the boy with another hostage who was eventually killed. The circumstances were comparable to the four capital punishment cases previously considered in Montana, and although the circumstances were not identical, the crime was properly classified as both heinous and perverse and of sufficient magnitude to qualify for capital punishment. St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988).

Defendant's Right to Limit Appeal: Defendant clearly expressed his intent to pursue only those appellate issues which must be reviewed as a matter of law. The Supreme Court affirmed his right to do so after finding that defendant was adjudged competent to make such a choice, holding that his decision must be respected if it is made competently, voluntarily, intelligently, and with full knowledge of the consequences. St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988).

Capital Sentence Requested by Defendant — No Basis for Resentencing: Defendant pleaded guilty to two counts of aggravated kidnapping and two counts of deliberate homicide. Defendant requested the death penalty. After sentencing, defendant had second thoughts and on appeal sought a resentencing. The Supreme Court held there was no basis for resentencing because: (1) sentencing was not tainted by reliance on prior Canadian convictions obtained without counsel; (2) inclusion of juvenile offenses as adult offenses in presentence report was not error; (3) a court-ordered presentence interview was not violative of the fifth amendment; (4) recommendation for the death penalty in the presentence report was not improper; (5) no judicial error was committed in the extent of review of mitigating factors and no unconstitutional limit was placed on the court's consideration of mitigating circumstances; (6) no error was found in the court's denial of defendant's motion for additional psychiatric evaluation; (7) defendant was not required to be present at proceedings occurring after the verdict; (8) jury participation is not constitutionally required in capital sentencing procedures; (9) no indication was found that the trial court imposed the death penalty out of passion or prejudice; and (10) the sentence was not excessive or disproportionate. St. v. Smith, 217 M 461, 705 P2d 1087, 42 St. Rep. 463 (1985) (Smith I). A habeas corpus petition was conditionally granted in Smith v. McCormick, 917 F2d 1153 (9th Cir. 1990), a subsequent resentencing of death was reversed and remanded for preparation of a new presentence investigation, St. v. Smith, 261 M 419, 863 P2d 1000 (1993) (Smith II), and following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

Cases to Be Set Forth in Final Opinion: Defendant pleaded guilty to two counts of deliberate homicide and two counts of aggravated kidnapping. The District Court imposed the death sentence, and notice of appeal was filed. Prior to submission of briefs and prior to review, defendant petitioned the Supreme Court, asking what cases it would consider in its decision on his appeal. The Supreme Court held that this section requires only that the cases considered in deciding whether the death penalty is disproportionate be set forth in the final opinion. Beyond this statutory mandate, the court refused to create an affirmative duty to predisclose the cases that would be considered on appeal. St. v. Smith, 211 M 379, 41 St. Rep. 1434 (1984).

Knowledge of Sentencing Judge: Coleman petitioned for a Writ of Habeas Corpus as an original proceeding, asking the Supreme Court to vacate his death sentence and remand his cause for resentencing as to the aggravated kidnapping conviction by a District Court Judge other than the judge who had twice sentenced him to death. Coleman contends that during a plea bargaining session, at which the judge was present, his original counsel stated that he believed Coleman was guilty of deliberate homicide and sexual intercourse without consent, based on a sodium amytal examination Coleman underwent. At the same time, counsel stated he thought the State would have difficulty proving Coleman committed aggravated kidnapping. The

Supreme Court found this was not equivalent to an admission of the aggravated kidnapping. The court said that guilt was determined by the jury. The death sentence was based on the finding of guilt on the aggravated kidnapping charge. There was no indication counsel's remarks influenced the judge. Coleman v. Risley, 203 M 237, 663 P2d 1154, 40 St. Rep. 418 (1983), followed in St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993) (Smith II). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

Death Penalty — Facially Neutral — Discrimination to Be Shown: Petitioner challenged Montana's death penalty statutes as arbitrary and discriminatory. Montana has instituted sentencing procedures that focus on the character of the defendant and the circumstances of the crime. In doing this, arbitrariness is conclusively removed from sentencing. As regards discrimination, the disproportionate impact of a facially neutral law will not make the law unconstitutional unless discriminatory intent or purpose is found. Montana's law is facially neutral, and no allegation of discriminatory intent was raised. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Review Requirements — Consideration of Hearing Transcript and Other Sentences: Petitioner contended that he was denied meaningful appellate sentence review in that the court did not consider the transcript of the sentencing hearing or a compilation, which he submitted, of sentences imposed for crimes committed throughout the state. The transcript was before the court and considered. The court compared petitioner's sentence with those of other capital defendants, and that is all that was required. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Evidence of "Lying in Wait" and That "The Offense Was Aggravated Kidnapping Which Resulted in the Death of the Victim": The evidence in the record clearly proved that sufficient aggravating circumstances existed to warrant imposition of the death penalty in that the crime of deliberate homicide had been "committed by a person lying in wait or ambush" and the crime of aggravated kidnapping "resulted in the death of the victim". St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Sentence Not Excessive or Disproportionate — Aggravated Kidnapping: A sentence of death for aggravated kidnapping which resulted in the death of the victim when the defendant abducted the victim while making a night deposit and shot him twice in the head after driving him outside of town was not excessive or disproportionate to the penalty imposed in similar cases. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Sentence Not Excessive or Disproportionate — Deliberate Homicide: A sentence of death for deliberate homicide when the defendant abducted the victim and shot him twice in the head was not excessive or disproportionate to the penalty imposed in similar cases, especially in light of the existence of aggravating circumstances under 46-18-303. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Significant History of Prior Criminal Activity: The District Court's finding that no mitigating circumstances existed in favor of the defendant was upheld when the defendant had a long history of prior criminal activity and no other facts existed in mitigation of the penalty. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Arbitrary Factors Not Found: The defendant argued that the sentence imposed was a result of passion, prejudice, or other arbitrary factors. He argued that the sentence given to his accomplice in this crime, when compared to his own, reflects the prejudice inherent in the sentencing. However, the defendant was also found guilty of aggravated kidnapping, a charge finally dropped against his accomplice. It was for this crime that the death penalty was imposed. The defendant, a black man, also argued that his race was a factor operating to his prejudice with respect to the imposition of the death penalty. The defendant speculated as to various possible factors evidencing such prejudice, but speculation was not sufficient to establish this claim. The court examined the sentence and determined it was not imposed as a result of passion, prejudice, or other arbitrary factors or because of race. St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 1134 (1979).

Similar Cases — Vacated Sentences Considered: The Supreme Court, in fulfilling its duty to compare "similar cases" to assure that sentencing is not excessive or disproportionate to those other sentences, may include for comparison similar cases in which the sentence has been imposed by the District Court, even though the sentence has been vacated on appeal. St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 1134 (1979).

Part 4
Factors That Reduce Sentence

Part Case Notes

Modification of Original Sentence as Dangerous Offender Not Allowed: At the time of Moorman's original sentencing in 1982, 46-18-404 (now repealed) did not allow a District Court in a revocation proceeding to add new terms or conditions to a defendant's original sentence. The court could not impose a dangerous offender designation upon revocation of a suspended sentence when the original sentence was silent on the issue or designated the defendant as nondangerous. However, Moorman was designated a dangerous offender when originally sentenced. Under the version of 46-18-203 in effect at the time of sentencing, the court could revoke the suspension or impose sentence and order Moorman committed but could not modify the sentence. Therefore, Moorman's original dangerous offender designation remained a part of his sentence upon the subsequent revocation of his suspended sentence. St. v. Moorman, 279 M 330, 928 P2d 145, 53 St. Rep. 1173 (1996).

46-18-401. Consecutive sentences.

Commission Comments

Source: Model Sentencing Act, sections 19, 21 and 22, General Laws of Massachusetts Chapter 279, Section 27.

The merger is not mandatory, but is in the discretion of the judge, although the language suggests that in most instances the merger should occur. The result of this approach is a unified sentence rather than a multiplicity of sentences.

Subsection [(4)] is included in an attempt to avoid consecutive sentences where only a single criminal episode was involved.

Compiler's Comments

1995 Amendment: Chapter 372 deleted (5) that read: "(5) Except as provided in this subsection, whenever a prisoner is sentenced for an offense committed while he was imprisoned in the state prison or while he was released on parole or under the supervised release program, the new sentence runs consecutively with the remainder of the original sentence. The prisoner starts serving the new sentence when the original sentence has expired or when he is released on parole under chapter 23, part 2, of this title in regard to the original sentence, whichever is sooner. In the latter case, the sentences run concurrently from the time of his release on parole"; and made minor changes in style. Amendment effective April 12, 1995.

1989 Amendment: In (1)(a), after "remaining term", substituted "may not" for "shall" and after "other term" deleted "except as provided in subsection (5)"; in (1)(b) substituted "may not" for "shall"; in (2), near beginning, substituted "whether or not it merges" for "merging" and near end substituted "any sentence that is merged" for "the sentences being merged"; in (4) substituted "must run consecutively" for "shall run concurrently"; and made minor change in punctuation.

1981 Amendment: Substituted "supervised release program" for "prisoner furlough program" in the middle of (5).

Administrative Rules

ARM 20.25.304 Additional consecutive sentences.

Case Notes

Credit Properly Given for Time Served While Incarcerated Prior to Revocation: In 2001, Damon was sentenced on a felony conviction to the Department of Corrections (DOC) for 10 years with 5 years suspended with conditions and on a misdemeanor conviction to the county detention center for 6 months, with the sentences to run concurrently. Damon began serving the suspended portion of the sentence on June 8, 2005, and several weeks later, he was arrested and charged under a separate cause number with several offenses. Damon pleaded guilty to one count of felony obstruction of justice and received a 10-year suspended sentence with credit for the time served in the detention center following the arrest. In November 2005, Damon was arrested for violating probation conditions in the original case, and the state petitioned to revoke the 5-year suspended sentence in the original case. The District Court revoked the 5-year suspended sentence based on the probation violations and sentenced Damon to 5 years with the DOC with credit for 98 days served in the detention center following arrest for the probation violations, but the court refused to credit Damon for street time served during the probation period following June 8, 2005, or for the time served following the second arrest. Damon challenged the time credited, but the Supreme Court affirmed. Had the District Court credited the 5-year revoked sentence with the time following the second arrest, Damon would have

received double credit for those days. Nothing in 46-18-203(7)(b) entitles a defendant to additional credit against a revoked sentence for time served relating solely to a separate offense for which the defendant received a consecutive sentence credited with the same period of time served. Thus, the District Court did not err in crediting Damon's sentence with only a portion of the time served while incarcerated prior to the sentence revocation. St. v. Damon, 2007 MT 276, 339 M 413, 170 P3d 490 (2007), distinguishing St. v. Tracy, 2005 MT 128, 327 M 220, 113 P3d 297 (2005).

Illegal Sentence Challenged During Revocation Proceeding — Court Limited to Lawful Elements of Original Sentence: Seals was convicted of three felony and two misdemeanor drug possessions and was committed to the Department of Corrections for 15 years, with 10 years suspended, to run concurrently. At the time of his arrest, the law in effect limited Seals' imprisonment to 5 years for each count. Upon recognition that the 15-year sentences were outside the parameters of the sentencing statute, the District Court amended Seals' sentence for one count to impose a legal sentence of 5 years, but again imposed sentences of 10 years each, all suspended, to run concurrently with each other and consecutive to the first count. After Seals served the 5 years for count one and was discharged to his suspended sentences, the state moved for revocation for probation violations and recommended that the court revoke Seals' suspended sentences and commit him to prison for 10 years, 5 suspended, for each count. Seals objected, arguing that the commitment and the consecutive nature of the sentences constituted an illegal increase of his original commitment to the Department of Corrections and was beyond the court's statutory sentencing authority. The state argued that this section gave the court discretion to run the sentences imposed upon revocation consecutively or concurrently. In response, the District Court revised the sentences from 10 years to 5 years but retained the consecutive nature of the sentences. On appeal, the Supreme Court reversed, ruling that 46-18-203 and not this section governed sentencing upon revocation. Under 46-18-203, the District Court could have required that Seals serve either the originally imposed sentence or a lesser sentence. However, because the originally imposed sentence was illegal, the court ruled that ordering Seals to serve sentences consecutively rather than concurrently resulted in sentences that did not qualify as lesser sentences. St. v. Seals, 2007 MT 71, 336 M 416, 156 P3d 15 (2007).

Public Policy for Consecutive Sentencing Unless Otherwise Ordered by Court: Auld was on parole for a felony violation in Hawaii when he was convicted of criminal endangerment and witness tampering in Montana. The Montana court sentenced Auld to 6 months imprisonment for criminal endangerment and 10 years imprisonment for witness tampering, to run concurrently with each other but consecutively with any sentence imposed by the State of Hawaii. Auld appealed on grounds that the language of subsection (1) of this section does not allow a consecutive sentence to be imposed when the previous conviction originates from a court in another state. The Supreme Court disagreed that subsection (1) contains the decisive language relevant to this issue and instead cited subsection (4) of this section as a clear indication that Montana public policy is to have sentences, wherever imposed, run consecutively unless otherwise ordered by a court. St. v. Auld, 2006 MT 189, 333 M 125, 142 P3d 753 (2006).

Rejection of Credit for Elapsed Time Served While on Probation: While serving a suspended sentence for a crime in Montana, Miller was convicted of a crime in Indiana and served a 2-year sentence there. Upon release on parole in Indiana, Miller returned to Montana and subsequently violated the terms of the Montana suspension. The suspension was revoked, and Miller was ordered to serve the remainder of the sentence at the state prison. Miller argued that he was entitled to credit for the time served in Indiana against the Montana commitment, but the District Court declined to allow credit for the Indiana time served, and Miller appealed. The Supreme Court affirmed. Montana law does not provide that a defendant is to receive credit on a suspended commitment in Montana for time spent in prison in another state on a separate conviction. The District Court did not order that the Montana and Indiana convictions be merged, so the Montana commitment continued to run while Miller was in prison in Indiana. It was only when Miller violated the terms of the suspended sentence after returning to Montana that the suspension was revoked, and upon revocation, the District Court had the discretion to allow or reject part or all of the time that had elapsed as a credit against the commitment. St. v. Miller, 2006 MT 159, 332 M 472, 139 P3d 839 (2006).

Credit Allowed for Time Served Concurrently With Other Sentences: Tracy's original sentence in Cascade County was for 10 years suspended with the Department of Corrections, to run concurrently with two other sentences that Tracy received in Yellowstone County. When Tracy violated his release conditions, the District Court in Cascade County revoked the original 10-year sentence but declined to give Tracy credit for the time served in detention pursuant to the Yellowstone County sentences. On appeal, the Supreme Court held that, when read together,

46-18-203 and this section require that Tracy be given credit for time spent in a detention center or on home arrest on all the sentences that were being served concurrently. The case was remanded to calculate and grant appropriate credit. St. v. Tracy, 2005 MT 128, 327 M 220, 113 P3d 297 (2005).

Presumption of Punishment for Going to Trial Based on Difference Between Pretrial Offer and Actual Sentence — Remand: As set out in St. v. Baldwin, 192 M 521, 629 P2d 222 (1981), when a District Court becomes involved in plea negotiations and an offer is made, any difference in the sentencing after trial must point out the factors justifying an increased sentence, and failure to enumerate the factors leads to the presumption that a greater sentence has been imposed for a vindictive purpose. Here, when the District Court failed to justify having an 11-year sentence run consecutively rather than concurrently with another sentence, the Baldwin standard requiring an explanation for imposing a harsher sentence than that offered in plea negotiations was not met, constituting reversible error. The case was remanded for resentencing. St. v. Hall, 2003 MT 253, 317 M 356, 77 P3d 239 (2003).

Maximum Allowable Sentence Imposed for Each Conviction to Run Consecutively — Sentence Lawful: On rehearing, petitioner was sentenced to 40 years for robbery, life imprisonment for aggravated kidnapping, and life imprisonment for deliberate homicide, with the sentences to run consecutively. On appeal, the Supreme Court held that the sentences fall within the applicable statutory parameters and that the court lawfully sentenced the petitioner. To the extent that the complaints relate to the equity of the sentence, those complaints are properly addressed to the Sentence Review Division of the court. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Multiple Negligent Homicides Arising Out of Same Act — Consecutive Sentences Allowed: Defendant was sentenced to two consecutive 10-year sentences for the deaths of two men in a drunken driving accident. Defendant appealed on double jeopardy grounds, claiming that the convictions arose out of a single act and that the District Court could only impose concurrent sentences. The Supreme Court held that because two people were killed in the accident, two distinct offenses of negligent homicide were committed. Montana law not only authorizes consecutive sentences for multiple offenses but presumptively requires them. St. v. Weigle, 285 M 341, 947 P2d 1053, 54 St. Rep. 1182 (1997).

Lack of Knowledge of Consecutive Sentence Not Proved — No Basis for Withdrawal of Guilty Plea: Allen pleaded guilty to one count of homicide during a prison riot. After being sentenced to a 25-year consecutive term, he moved to withdraw his plea on the basis that he did not know that the law required a consecutive term in his case. The Supreme Court held that the evidence indicated that he was aware of consequences of his plea. The Supreme Court advises District Courts to avoid this issue in the future by specifically referring to the consecutive sentence requirement in this section when interrogating a defendant with respect to entering a guilty plea. St. v. Allen, 265 M 293, 876 P2d 639, 51 St. Rep. 519 (1994).

Operation of Statute Clarified by Previous Supreme Court Opinion: McGuire was convicted on felony theft and burglary counts in Gallatin County and was sentenced in Gallatin County after being sentenced on other charges in Flathead County. The Gallatin County sentence contained no reference to the Flathead County sentence and did not expressly provide that it would run concurrently with the Flathead County sentence. The Supreme Court held that the Gallatin County District Court did not err in sentencing McGuire because any ambiguity in whether the two sentences were to run concurrently was clarified by the holding of the Supreme Court in St. v. McGuire, 260 M 386, 860 P2d 148, 50 St. Rep. 1122 (1993). In that case, the Supreme Court held that the Flathead County District Court had exceeded its authority by providing that McGuire's sentence was to run consecutively to one not yet imposed. The Supreme Court modified the sentence and judgment in that case by striking the portion providing for consecutive sentences. Therefore, when read together with the opinion in McGuire I, the effect of the Gallatin County District Court order in this case is that the sentence will run consecutively with the sentence imposed by the Flathead County District Court. St. v. McGuire, 260 M 389, 860 P2d 150, 50 St. Rep. 1132 (1993).

Order to Serve Probation After Sentence Discharged Unwarranted: Petitioner was sentenced to serve 15 years, with 10 years suspended, for selling drugs in Sheridan County. While on parole for the Sheridan County conviction, petitioner pleaded guilty to selling drugs in Gallatin County and received two concurrent 12-year sentences. When discharged from prison on the Gallatin County charges, petitioner was placed on 10 years probation for the 10-year suspended sentence in Sheridan County. The Supreme Court ordered that the petitioner be discharged from probation on the Sheridan County sentence, holding that the plain meaning of subsections (1)(b) and (5) of this section require that the "original" Sheridan County sentence be served before the

"new" Gallatin County sentence begins to run. Since the Gallatin County sentence has been discharged and the suspended portion of the Sheridan County sentence was merged in the Gallatin County sentence, the state has no authority to require petitioner to serve the suspended portion of the Sheridan County sentence consecutively with the end of the Gallatin County sentence. Robbins v. McCormick, 258 M 429, 853 P2d 1205, 50 St. Rep. 599 (1993).

Parolee's Shooting of Plaintiff Not Foreseeable: The Department of Institutions miscalculated the prisoner's parole eligibility date and paroled him before he was eligible to be released. The plaintiff was shot by the parolee and sued the Department for negligence. The Supreme Court affirmed the lower court's ruling that the Department was not liable because it could not have reasonably foreseen that the parolee would shoot someone. Kiger v. St., 245 M 457, 802 P2d 1248, 47 St. Rep. 2206 (1990).

Former Statute — Suspended Sentence Merged With New Sentence: The defendant, while serving two suspended sentences, was convicted of a new offense. At the close of the trial for the new offense, the judge sentenced the defendant without mentioning the prior sentences. In a subsequent hearing, the judge stated that the sentences were to run consecutively. The Supreme Court held that under the former version of the statute, the sentences merged unless the court specified otherwise and that the lower court had to make that determination at the close of the trial, not at the subsequent hearing. St. v. Thiel, 242 M 77, 788 P2d 337, 47 St. Rep. 565 (1990).

Merger of Sentences Imposed by Different Courts: Defendant was sentenced once by the Eleventh District Court and twice by the Fourth District Court for felony convictions and, upon incarceration, was informed that sentences from all three causes would run consecutively. Absent any court order to the contrary, the sentences were merged in accordance with this section to run concurrently. In re Petition of Arledge, 232 M 450, 756 P2d 1169, 45 St. Rep. 1188 (1988).

Instruction on Flight Proper When Based on Evidence: A jury instruction allowing consideration of testimony showing flight or concealment by the defendant as a circumstance tending to prove consciousness of guilt was proper in light of defendant's admission that he left the scene of the crime. St. v. Hurlbert, 232 M 115, 756 P2d 1110, 45 St. Rep. 923 (1988), citing St. v. Walker, 148 M 216, 419 P2d 300 (1966). Walker was followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996). Patton was followed in St. v. Johnson, 1998 MT 289, 291 M 501, 969 P2d 925, 55 St. Rep. 1186 (1998), in which it was held that even in the limited environment of prison, a defendant may fly to wherever the defendant thinks is safe to dispose of evidence, but that only some departure from a crime scene is necessary to support giving an instruction on flight. Patton was also followed in St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999). See also St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929, 56 St. Rep. 1190 (1999), in which the Supreme Court reconsidered the probative value of the flight instruction and directed that the better policy in future cases when evidence of flight has been properly admitted is to reserve comment on the significance of flight to counsel, rather than to the court through jury instructions. However, in Hall's case, no prejudice attached because the instruction included the qualification that evidence of flight was not, by itself, sufficient evidence of guilt, but rather only one circumstance to be considered by the jury. Hall was followed in St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939, 56 St. Rep. 1198 (1999).

Imposition of Consecutive Terms Within Court's Discretion: Defendant claimed that imposition of consecutive sentences in connection with a single episode of criminal behavior violated the intent of this section; however, on its face this statute clearly vests the District Court with discretion to impose consecutive terms regardless of whether the criminal acts arose out of a single occurrence of misconduct. St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988).

Modification of Sentence Not Authorized: This section limits the discretion of the sentencing judge to merger of sentence. In the absence of merger, there is no statutory authorization for modification of sentence. St. v. George, 224 M 495, 730 P2d 412, 43 St. Rep. 2363 (1986).

Good Time Earned While Serving One Sentence Not Applicable to Later Sentence: In 1970, petitioner was convicted of burglary and sentenced to 10 years in the Montana State Prison. He was released on parole in 1971. In 1976, he was returned to the Montana State Prison after being convicted on another burglary charge. Subsequently his parole was revoked. During the time petitioner was on parole, good time could be earned under 53-30-105 (now repealed) by a parolee. Under a 1981 amendment to that section, this is no longer possible. In 1982, petitioner filed a petition for a Writ of Habeas Corpus, claiming that the good time he earned while on parole should be applied to reduce the discharge date of his second sentence, as the second sentence had been merged (under 46-23-217, prior to amendment) with the first sentence. The Supreme Court ruled that the sentences ran concurrently but were not merged and that therefore any good time petitioner earned while on parole on his first sentence may be applied only to the first sentence.

Bagley v. Risley, 207 M 121, 672 P2d 1126, 40 St. Rep. 1937 (1983). See also St. v. Pendergrass, 281 M 129, 932 P2d 1056, 54 St. Rep. 94 (1997), holding that an escape sentence did not merge with other sentences. Pendergrass was reversed in Chandler v. Mahoney, 2000 MT 294, 302 M 309, 18 P3d 312, 57 St. Rep. 1247 (2000).

Concurrent Sentence Unless Specified: Under the former version of this section, if the District Court did not specify whether a sentence was to run concurrently or consecutively, it ran concurrently with any prior commitment. Petition of Parrett, 154 M 257, 459 P2d 268 (1969).

Sequence of Consecutive Sentences: When the petitioner was sentenced to serve consecutive sentences for escape and using an automobile without the consent of the owner and the warden executed the sentences in a sequence reverse to that indicated by the court, there was no infringement on his rights and his petition for a Writ of Habeas Corpus was denied. Petition of Cheadle, 143 M 327, 389 P2d 579 (1964).

Concurrent Felony and Misdemeanor Sentences: When the defendant is convicted of a felony under the first portion of a consolidated information and of a misdemeanor under the second portion, and the trial court decrees that the sentences can be served concurrently, the sentence for the felony should be served in the state prison, credit for the misdemeanor fine should be given at the same time, and any remaining time under the misdemeanor at the end of the state prison term should be served in the county jail. St. v. Bogue, 142 M 459, 384 P2d 749 (1963).

Attorney General's Opinions

Consecutive Suspended or Deferred Sentences — Probationary Period: When a sentencing court imposes a suspended or deferred sentence on more than one count and orders the periods of suspension or deferral to run consecutively, for purposes of probation revocation, the probationary period for the first count is considered to run before the period on the second and successive counts. 42 A.G. Op. 116 (1988).

Petition to Revoke Suspension or Deferral — May Apply to More Than One Sentence: Conditions of release are a part of the judgment in a case, and there is no prohibition against revoking the uncompleted sentences in a single proceeding where the terms of the judgment have been violated. Thus, if suspended or deferred sentences are to be served consecutively and time remains on more than one period of suspension or deferral, then more than one suspension or deferral may be revoked in the same proceeding. 42 A.G. Op. 116 (1988).

Consecutive Sentences: A prisoner sentenced pursuant to 46-18-401(5) must serve that term consecutively with the remainder of his original term. If the prisoner has not been designated a nondangerous offender (see 1995 repeal of 46-18-404), he is ineligible for parole until he has served at least one-half of his new sentence in addition to any minimum time he must serve with respect to his original sentence. 38 A.G. Op. 13 (1979).

Inconsistent Statutes: When two statutes are wholly inconsistent, incompatible, and incapable of being reconciled, the later statute impliedly repeals the earlier one if it does not expressly do so. 38 A.G. Op. 13 (1979).

Prisoner Receives New Sentence: If a prisoner who has received a new consecutive sentence under 46-18-401(5) is paroled, the remaining time of his new and original sentences thereafter run concurrently. 38 A.G. Op. 13 (1979).

Section 46-23-217 Impliedly Repealed: Section 46-23-217 was impliedly repealed by the enactment of 46-18-401(5). A sentence imposed regarding a crime committed after July 1, 1977, by a prisoner at the state prison or on parole or supervised release runs consecutively with the remainder of the prisoner's original sentence. Any crime committed on or before July 1, 1977, by a prisoner while on parole or conditional release runs concurrently with the prisoner's original sentence unless otherwise specified by the sentencing court. 38 A.G. Op. 13 (1979).

Collateral References

Criminal Law *key* 1216(1).

24 C.J.S. Criminal Law §§2096 through 2103.

21A Am. Jur. 2d Criminal Law §§833 through 840.

46-18-402. Credit for time served.

Commission Comments

Source: New—but see California Penal Code Section 2900.1 Statutes 1949; Minnesota Statutes Annotated Section 636.79 (1962); Model Penal Code Section 7.09 (proposed Official Draft, 1962).

In a recent Montana decision, State ex rel[.] Nelson v. Ellsworth, 141 Mont. 78, 375 P.2d 316 (1962) in interpreting R.C.M. 1947 Section 94-4717, a statute dealing with the time when a sentence commences, the Montana Supreme Court held it could give no credit for the time served on a prior reversed conviction because the sentence must commence when the person is delivered

to the penitentiary and could not have begun prior to that time. The court suggested that any possible injustice was a legislative problem. The intent of this section is to rectify this injustice. In absence of a statute, such as the above section, the position the Montana Court has taken will preclude it from giving credit.

Compiler's Comments

1995 Amendment: Chapter 372 in version effective January 31, 1997, deleted second sentence that read: "In calculating the time imprisoned, the person so convicted shall have the credit for all the time earned in diminution of sentence as provided under 53-30-105, unless the sentencing authority, in its discretion, may choose to deny such credit"; and made minor changes in style. Amendment effective January 31, 1997.

Case Notes

Rejection of Credit for Elapsed Time Served While on Probation: While serving a suspended sentence for a crime in Montana, Miller was convicted of a crime in Indiana and served a 2-year sentence there. Upon release on parole in Indiana, Miller returned to Montana and subsequently violated the terms of the Montana suspension. The suspension was revoked, and Miller was ordered to serve the remainder of the sentence at the state prison. Miller argued that he was entitled to credit for the time served in Indiana against the Montana commitment, but the District Court declined to allow credit for the Indiana time served, and Miller appealed. The Supreme Court affirmed. Montana law does not provide that a defendant is to receive credit on a suspended commitment in Montana for time spent in prison in another state on a separate conviction. The District Court did not order that the Montana and Indiana convictions be merged, so the Montana commitment continued to run while Miller was in prison in Indiana. It was only when Miller violated the terms of the suspended sentence after returning to Montana that the suspension was revoked, and upon revocation, the District Court had the discretion to allow or reject part or all of the time that had elapsed as a credit against the commitment. St. v. Miller, 2006 MT 159, 332 M 472, 139 P3d 839 (2006).

Probationer Not Entitled to Good Time Credit for Time Served on Original Sentence: Williams' suspended sentence for felony assault was revoked after Williams violated the terms of the suspension. Williams requested that he be credited for good time that he served on the suspended sentence. The District Court concluded that Williams was a probationer, not a parolee, and declined to grant good time credit. Williams appealed, but the Supreme Court affirmed. Williams' original sentence did not provide that Williams be treated as a parolee, so as a probationer, Williams was not entitled to credit for good time under McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001). St. v. Williams, 2003 MT 136, 316 M 140, 69 P3d 222 (2003).

No Credit Allowed for Time Served While on Probation: Gundrum was placed on probation but was later arrested on a probation violation. Gundrum contended that he should receive credit for the time that he was on probation under this section, even though he was not incarcerated. The Supreme Court disagreed. This section applies to credit for time served while incarcerated and thus does not apply to Gundrum. Further, under 46-18-203 and McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001), a judge has complete discretion to consider elapsed time that an offender is on probation and may expressly allow or reject the time as credit on the offender's sentence. Here, the District Court considered the nature of Gundrum's violations and the magnitude of his financial obligations before denying credit for time served on probation. Gundrum did not assert that the District Court failed to follow the mandates of 46-18-203, and the Supreme Court affirmed the denial of credit for time that Gundrum served on probation. Gundrum v. Mahoney, 2001 MT 246, 307 M 96, 36 P3d 890 (2001).

Effect on Eligibility for Parole: Section 46-18-402 allows the sentencing authority to deny credit for good time earned while serving a prior modified or invalid sentence but does not authorize the sentencing authority to provide that credit for time previously served should not be considered in determining eligibility for parole. St. v. Zachmeier, 153 M 64, 453 P2d 783 (1969).

Applicability: When habeas corpus was granted to a petitioner who had served a considerable portion of his sentence and whose commitment was set aside and the petitioner was permitted to withdraw his guilty plea, the court held that 46-18-402 should be observed upon any subsequent imposition of a new sentence. Morsette v. Ellsworth, 151 M 319, 443 P2d 28 (1968).

Law Review Articles

Credit for Jail Time Upon Revocation of Deferred Imposition of Sentence or Suspended Execution of Sentence, Kinnard, 38 Mont. L. Rev. 357 (1977).

Credit for Time Spent Incarcerated Prior to Revocation of an Order Deferring Imposition of Sentence, Little, 36 Mont. L. Rev. 345 (1975).

Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision, Agata, 25 Mont. L. Rev. 1 (1963).

46-18-403. Credit for incarceration prior to conviction.

Commission Comments

Source: New.

The intent of subsection [(1)] is to give credit for the time served prior to conviction. This includes time served up to judgment rendered after a plea of guilty or a trial or any time served while an appeal is pending.

Compiler's Comments

2005 Amendment: Chapter 13 in (2) in first sentence near middle after "offense" substituted "may" for "must"; and made minor changes in style. Amendment effective October 1, 2005.

1995 Amendment: Chapter 388 in (2), in first sentence after "credit", deleted "of $25" and inserted second and third sentences concerning the establishment and amount of the daily rate of credit for incarceration; and made minor changes in style. Amendment effective April 12, 1995.

1989 Amendment: In (2), near middle, increased rate at which fine is paid off by imprisonment to $25 from $10 per day; and made minor changes in phraseology.

Case Notes

Defendant Entitled to Credit for Jail Time: When incarceration was directly related to the offense for which the defendant is being sentenced, credit for time served must be given. St. v. Milligan, 2008 MT 375, 346 M 491, 197 P3d 956 (2008).

Credit Properly Given for Time Served While Incarcerated Prior to Revocation: In 2001, Damon was sentenced on a felony conviction to the Department of Corrections (DOC) for 10 years with 5 years suspended with conditions and on a misdemeanor conviction to the county detention center for 6 months, with the sentences to run concurrently. Damon began serving the suspended portion of the sentence on June 8, 2005, and several weeks later, he was arrested and charged under a separate cause number with several offenses. Damon pleaded guilty to one count of felony obstruction of justice and received a 10-year suspended sentence with credit for the time served in the detention center following the arrest. In November 2005, Damon was arrested for violating probation conditions in the original case, and the state petitioned to revoke the 5-year suspended sentence in the original case. The District Court revoked the 5-year suspended sentence based on the probation violations and sentenced Damon to 5 years with the DOC with credit for 98 days served in the detention center following arrest for the probation violations, but the court refused to credit Damon for street time served during the probation period following June 8, 2005, or for the time served following the second arrest. Damon challenged the time credited, but the Supreme Court affirmed. Had the District Court credited the 5-year revoked sentence with the time following the second arrest, Damon would have received double credit for those days. Nothing in 46-18-203(7)(b) entitles a defendant to additional credit against a revoked sentence for time served relating solely to a separate offense for which the defendant received a consecutive sentence credited with the same period of time served. Thus, the District Court did not err in crediting Damon's sentence with only a portion of the time served while incarcerated prior to the sentence revocation. St. v. Damon, 2007 MT 276, 339 M 413, 170 P3d 490 (2007), distinguishing St. v. Tracy, 2005 MT 128, 327 M 220, 113 P3d 297 (2005).

Suspension of Sentence Following Probation Violation Not Violative of Double Jeopardy — Credit for Time Served Properly Allowed: DeWitt was convicted of two counts of aggravated burglary, found to be a persistent felony offender, and sentenced to three consecutive 10-year sentences. DeWitt appealed, and the Supreme Court remanded with instructions to dismiss one count. While awaiting resentencing, DeWitt was incarcerated for 1,275 days. The District Court then resentenced DeWitt to one 10-year sentence for aggravated burglary and a consecutive 10-year sentence as a persistent felony offender, suspended all but 1,275 days of the 20-year sentence, and gave DeWitt credit for 1,275 days served. Without prison time to serve, DeWitt was immediately released on probation. DeWitt subsequently violated probation, the suspended sentence was revoked, and DeWitt was sentenced to 10 years with 5 years suspended, with credit for 160 days served while awaiting revocation proceedings. DeWitt appealed on grounds that the sentencing court failed to allow credit for the 1,275 days served when the suspended sentence was revoked and the new 10-year sentence was imposed and asserted that his double jeopardy rights were violated by reinstatement of the original sentence. The Supreme Court disagreed

with both arguments. When the sentencing court sentenced DeWitt following the probation violation, the court had a 16.5-year suspended sentence to work with, which was more than sufficient to account for the 10-year sentence with 5 years suspended that was imposed. Although a sentencing court must give credit for time served, revocation of a suspended sentence based on a probation violation and reinstatement of the original sentence does not constitute double jeopardy as long as the sentence is within the parameters of the sentence imposed in the initial suspended sentence and credit is allowed for time served. Further, a persistent felony offender designation is not a separate crime carrying a separate sentence, but rather is a statutorily required sentence enhancement that is part of the initial sentence, so the sentencing court could not have "dropped" the persistent felony offender count and sentenced DeWitt only under the aggravated burglary count, thereby limiting the available time on resentencing to 6.5 years. The sentence was not violative of double jeopardy, was within statutory parameters, and was affirmed. St. v. DeWitt, 2006 MT 302, 334 M 474, 149 P3d 549 (2006).

Criminal Fines Distinct From Other Court-Imposed Compensatory Financial Obligations — Fisher Overruled: The plain meaning of "fine" in this section does not encompass fees, costs, charges, or other court-imposed financial obligations. Criminal fines are punitive in nature and are distinct from other court-imposed financial obligations associated with a criminal proceeding that are compensatory in nature, such as an assessment of fees for probationary supervision or a charge to defray a local government's costs in administering the criminal justice system. Voerding v. St., 2006 MT 125, 332 M 262, 136 P3d 502 (2006), overruling St. v. Fisher, 2003 MT 33, 314 M 222, 65 P3d 223 (2003), to the extent that Fisher suggests that the term "fine" in subsection (2) of this section encompasses other types of court-imposed financial obligations, such as fees, charges, and costs. See also St. v. VanWinkle, 2008 MT 208, 344 M 175, 186 P3d 1258 (2008).

Failure to Give Defendant Credit for Pretrial Incarceration Time Served — Remand: In the sentencing court's oral sentence, Hoots was assessed fines on three separate counts, but in the written judgment, the sums were not set out as to each count, nor was Hoots given monetary credit against the fines for pretrial time served in incarceration. The Supreme Court remanded for resentencing to conform the written judgment to the oral sentence and to give Hoots credit for pretrial time served. St. v. Hoots, 2005 MT 346, 330 M 144, 127 P3d 369 (2005).

Remand to Determine Credit for Prejudgment Time Served — Failure to Object Not Fatal to Appeal: The District Court gave Erickson credit for time served on charges for two separate crimes. Erickson did not object to the credit at sentencing, but instead contested the credit on appeal. Following St. v. Eaton, 2004 MT 283, 323 M 287, 99 P3d 661 (2004), the Supreme Court applied the exception to the rule that failure to timely object to a sentence risks waiver of a sentencing issue on appeal because giving Erickson less credit than he was entitled to would violate statutory mandates. A defendant's sentence may be credited with incarceration time only if the incarceration was directly related to the offense for which the sentence was imposed. The record on appeal was unclear regarding whether Erickson's bond was revoked on one of the charges and whether Erickson received proper presentence credit, so the case was remanded to determine whether Erickson was given proper credit for time served for each offense. St. v. Erickson, 2005 MT 276, 329 M 192, 124 P3d 119 (2005), following St. v. Kime, 2002 MT 38, 308 M 341, 43 P3d 290 (2002), and followed in St. v. Henderson, 2008 MT 230, 344 M 371, 188 P3d 1011 (2008). Henderson was followed in St. v. Allison, 2008 MT 305, 346 M 6, 192 P3d 1135 (2008). On remand, the District Court determined that Erickson's bond was not formally revoked on the first charge and properly credited Erickson with 267 days served on the first charge and for 457 days served from arrest to the sentencing hearing on the second charge. St. v. Erickson, 2008 MT 50, 341 M 426, 177 P3d 1043 (2008).

Failure to Credit Defendant Against Fine for Time Incarcerated Prior to Conviction — Fine Vacated: Following Wiedrich's conviction for DUI, the District Court assessed a $1,000 fine but failed to give Wiedrich credit for the time that he was incarcerated prior to conviction. Because the credit far exceeded the amount of the fine, the Supreme Court vacated the fine. St. v. Wiedrich, 2005 MT 127, 327 M 214, 112 P3d 1054 (2005).

No Credit for Time Served on Informal House Arrest: The District Court conditioned Gulbranson's release on bond with informal house arrest. Gulbranson contended that the house arrest restricted his liberty in a manner sufficiently similar to incarceration, as provided in this section, to require that he be given credit for time served. However, Gulbranson did not cite any legal authority to support the contention, and the Supreme Court declined to consider the unsupported argument. Instead, the Supreme Court held that the informal house arrest in this case was not house arrest as provided for in Title 46, ch. 18, part 10, so 46-18-203 did not require that Gulbranson's sentences be credited with time served for that period. Gulbranson failed to

show that the District Court was statutorily required to credit him for time served while released on bond, so it was within the District Court's discretion whether to allow credit. Absent an abuse of discretion, the District Court was affirmed. St. v. Gulbranson, 2003 MT 139, 316 M 163, 69 P3d 1187 (2003), followed in St. v. Clark, 2008 MT 112, 342 M 461, 182 P3d 62 (2008), and St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009).

No Discretion in Giving Defendant Credit for Time Served and Fine Paid: Fisher was sentenced to 13 months plus 5 years of probation and fined $1,000 and $570 in costs for felony DUI. Fisher moved to amend, requesting $47 a day credit for 31 days of pretrial commitment, with the remaining 6 days applied to the sentence. The motion was denied, and Fisher appealed. The Supreme Court reversed. A sentencing court has no discretion in applying this section. The court must employ both subsections and give a defendant credit for each day of incarceration against both the sentence and any fine imposed. (In 2005, an amendment made the credit against a fine discretionary.) Once a valid sentence is pronounced, the court has no discretion to modify the sentence except to correct factual errors. Rather, an illegal sentence must be addressed in the manner provided by law for appeal and postconviction relief. St. v. Fisher, 2003 MT 33, 314 M 222, 65 P3d 223 (2003), following Billings v. Layzell, 242 M 145, 789 P2d 221 (1990), followed in St. v. Mingus, 2004 MT 24, 319 M 349, 84 P3d 658 (2004), and overruled in Voerding v. St., 2006 MT 125, 332 M 262, 136 P3d 502 (2006), to the extent that Fisher suggests that the term "fine" in subsection (2) of this section encompasses other types of court-imposed financial obligations, such as fees, charges, and costs.

Multiple Sentences Imposed Consecutively — Defendant Entitled to Credit for Presentence Incarceration Only Once Against Aggregate of All Terms Imposed: Price was convicted of fourth offense DUI and four misdemeanors in connection with a motor vehicle accident. The District Court sentenced Price to jail time for three charges. For the misdemeanors, Price was sentenced to 2 days in jail for driving with a revoked license and to 10 days for failure to provide proof of insurance. For the DUI conviction, Price was sentenced to 12 months with the Department of Corrections. The sentences were to run consecutively. To account for the time spent in jail awaiting trial, the court credited Price with 18 days served, first applying 12 days' credit to the misdemeanors and then applying the remaining 6 days' credit to the DUI sentence. Price appealed on grounds that the court was required to grant full credit for time served on each sentence imposed. The Supreme Court concluded that Price's interpretation was not warranted by the plain language of this section and would result in a fundamental unfairness in the administration of criminal sentencing among similarly situated defendants and would defeat the Legislature's purpose for permitting consecutive sentences. This section entitles defendants to credit for presentence incarceration only once against the aggregate of all terms imposed when multiple sentences are imposed consecutively. Price was entitled to receive credit for each day of incarceration, and the District Court properly awarded Price credit for each day served. St. v. Price, 2002 MT 150, 310 M 320, 50 P3d 530 (2002). See also St. v. Boettcher, 423 NW 2d 533 (Wis. 1988).

Concurrent Incarceration for Separate Offense — Defendant's Sentence Credited With Time Served in Incarceration Only if Incarceration Directly Related to Offense for Which Sentence Imposed: When arrested for felony theft, DUI, and driving with a suspended license, Kime was already in supervised release for a prior felony assault conviction. Bail was set at $25,000, but Kime did not post bail, remaining incarcerated. Shortly thereafter, Kime was removed from the supervised release program and transferred to the state prison to serve the remainder of the felony assault sentence. Kime ultimately pleaded guilty to the felony theft, DUI, and driving with a suspended license charges. At sentencing, Kime asked the District Court to credit his sentence with the time that he was incarcerated between the date of the arrest and the date of sentencing. However, the court credited the sentence only with the 20 days served between Kime's arrest and transfer to prison. Kime appealed, arguing that because the three new offenses were bailable offenses and the District Court imposed a sentence of imprisonment, the sentence should have been credited with the entire time of incarceration pursuant to this section. The Supreme Court disagreed. The general purpose of this section is to eliminate the disparity of treatment between indigent and nonindigent defendants, and that purpose is not served by crediting a defendant's sentence for time served when the defendant would not have been released on bail in any event as a result of being held on a sentence related to an earlier offense. Therefore, a defendant's sentence may be credited with time served in incarceration only if that incarceration was directly related to the offense for which the sentence was imposed. St. v. Kime, 2002 MT 38, 308 M 341, 43 P3d 290 (2002), distinguishing St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), and followed in St. v. Henderson, 2008 MT 230, 344 M 371, 188 P3d 1011 (2008). Henderson was followed in St. v. Allison, 2008 MT 305, 346 M 6, 192 P3d 1135 (2008).

Failure to Credit Inmate With Time Served Before Sentencing in Written Judgment After Allowing Credit in Oral Pronouncement of Sentence: At the sentencing hearing, Horton inquired as to whether he would get credit for time served between arrest and sentencing. The judge responded that credit would be granted automatically. However, in the written judgment entered 2 days later, the judge denied credit for time served because Horton was being held on a probation violation. Under this section, Horton was entitled to credit for each day of incarceration prior to or after sentencing, and pursuant to St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the court's oral pronouncement controlled over the written judgment. Thus, the Supreme Court directed that the provision in the written judgment denying Horton credit for time served be stricken. St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001).

Credit Not Due for Nonbailable Offense for Which Life Without Parole Is Sentence: In view of appellant's four consecutive life terms, plus 40 years for use of a weapon, without eligibility for parole, credit for time served before trial is immaterial. Because death was a possible punishment for appellant and a person is not entitled to bail when death is a possible punishment and because a person is entitled to credit for time served before trial only on a bailable offense, appellant was not entitled to credit. St. v. Race, 285 M 177, 946 P2d 641, 54 St. Rep. 1099 (1997).

Credit for Pretrial Detention: The defendant was held in jail for 30 days prior to his trial for two traffic violations. The lower court refused to give him credit for the time served toward payment of the fine. The Supreme Court reversed, holding that the language of the statute in effect at the time was mandatory in requiring credit for time served. Billings v. Layzell, 242 M 145, 789 P2d 221, 47 St. Rep. 558 (1990).

Prior Incarceration in Other States: This statute has application only to Montana offenses and sentences and has no application to time served in prisons or jails of other states. Petition of Woods, 166 M 537, 535 P2d 173 (1975).

Credit on Deferred Imposition of Sentence:

When the defendant was held in the county jail for 31 days in lieu of bail prior to trial and was sentenced to a term of probation, and less than 31 days before the expiration of his 3-year term of probation a petition for revocation of probation was filed and the defendant was sentenced to a long term of imprisonment, the defendant's contention that he was entitled to a credit of 31 days preconviction jail time on the probationary order and that the Montana state court had lost jurisdiction was without merit since probation is not "a judgment of imprisonment" and preconviction jail time credit is of legislative grace and not a constitutional guarantee. Gray v. Warden of Mont. St. Prison, 523 F2d 989 (9th Cir. 1975).

A period of confinement in the county jail was not credited to the period of deferred imposition of sentence since a deferred imposition of sentence is not a judgment of imprisonment. Petition of Gray, 163 M 321, 517 P2d 351 (1973).

Revocation of Deferral — Credit for Time Served: Prison time previously served as a condition of deferment of sentence must be credited against the prison term imposed upon revocation of the petitioner's deferred imposition of sentence. State ex rel. Bovee v. District Court, 162 M 98, 508 P2d 1056 (1973).

Retroactive Application: This section did not apply to a prisoner who was sentenced after the effective date of this section for a crime committed prior to such effective date. Petition of Wilson, 154 M 508, 463 P2d 469 (1970).

Law Review Articles

Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision, Agata, 25 Mont. L. Rev. 1 (1963).

Collateral References

Fines *key* 12.

36A C.J.S. Fines §§21, 22.

Part 5
Persistent Felony Offenders

Part Case Notes

Youth Tried, Convicted, and Sentenced Under Transfer Statute Correctly Sentenced as Persistent Felony Offender: In 1999, when Mainwaring was a juvenile, he pleaded guilty to mitigated deliberate homicide and was convicted pursuant to 41-5-206 and sentenced pursuant to 41-5-2503(1)(a). A part of that sentence was later suspended under 41-5-2510. Later, shortly after turning 21, Mainwaring assaulted a child. The state brought assault charges against Mainwaring and then sought to have the court designate Mainwaring as a persistent felony

offender (PFO). The District Court approved the designation as a PFO, based on Mainwaring's 1999 felony conviction, and Mainwaring was convicted and sentenced to 20 years in prison. The Supreme Court held that a conviction under 41-5-206(6) was equivalent to any adult felony conviction and that there is nothing in the Montana Youth Court Act or the Criminally Convicted Youth Act that precludes the application of the PFO statutes and designation to an individual previously convicted of a felony when the individual was a youth. Citing St. v. Damon, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005), the Supreme Court held that the District Court therefore had the authority to apply the PFO statutes and designation to Mainwaring. The Supreme Court also overruled Mainwaring's due process objections and affirmed his conviction. St. v. Mainwaring, 2007 MT 14, 335 M 322, 151 P3d 53 (2007).

Persistent Felony Offender Statute Not Violative of Double Jeopardy Protection: As set out in St. v. Maldonado, 176 M 322, 578 P2d 296 (1978), the persistent felony offender statute authorizing enhanced sentences for recidivists does not constitute double jeopardy. St. v. Farnsworth, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989).

Due Process and Equal Protection: Section 46-18-502 does not violate the equal protection and due process guarantees although only a minority of repeat felony offenders are prosecuted under it. St. v. Maldonado, 176 M 322, 578 P2d 296 (1978).

Ex Post Facto Laws: The persistent felony offender statute, as applied to the defendant, did not violate constitutional safeguards dealing with ex post facto laws because the law did not punish him for conduct prior to enactment of 46-18-502 but merely notified the defendant he was subject to increased punishment if he in the future committed an additional felony crime. St. v. Maldonado, 176 M 322, 578 P2d 296 (1978).

Restoration of Rights: Rather than involving any civil or political "right", increasing the sentence of a persistent felony offender is entirely consistent with the constitutional mandate that "Laws for the punishment of crime shall be founded on the principles of prevention and reformation." St. v. Maldonado, 176 M 322, 578 P2d 296 (1978).

Harmless Admission: When a defendant's prior conviction of a felony was not charged during the trial but was admitted by the defendant in his testimony, such admission was not prejudicial since the sentence he finally received was less than he would have received under the former second offense statute. Petition of Gallagher, 153 M 440, 456 P2d 306 (1969).

46-18-501. Definition of persistent felony offender.

Case Notes

Alternative Sentence for Drug Offense Not Precluded by Persistent Felony Offender Statutes, but Incarceration Not Error: Brendal pleaded guilty to fraudulently obtaining dangerous drugs and was sentenced to 25 years in prison with 15 years suspended. Based on prior convictions for the same offense, the sentencing court designated Brendal as a persistent felony offender and imposed a mandatory 10-year prison sentence. Brendal appealed the sentence on grounds that the sentencing court should have considered a sentence to a drug treatment program pursuant to the alternative sentencing authority in 45-9-202. However, the Supreme Court affirmed. The persistent felony offender statutes do not preclude a District Court from providing an alternative sentence under 45-9-202 for a person convicted of a drug-related offense, as long as the required criteria for imposing an alternative sentence are satisfied. Therefore, although the District Court could have provided an alternative sentence, it was not error to sentence Brendal to incarceration. St. v. Brendal, 2009 MT 236, 351 M 395, 213 P3d 448 (2009).

Assignment of Persistent Felony Offender Status for Commission of Second Felony Before Conviction of First Felony Consistent With Definition: The language in this section clearly defines a persistent felony offender as a person who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first. Under this language, the persistent felony offender statute can be used to enhance a sentence when the second felony was committed before conviction of the first felony. St. v. Anderson, 2009 MT 39, 349 M 245, 203 P3d 764 (2009), affirming St. v. Williamson, 218 M 242, 707 P2d 530 (1985), and St. v. Hamm, 250 M 123, 818 P2d 830 (1991).

Consideration of Sentencing Factors in Sentencing Persistent Felony Offender Not Violative of Right to Trial by Jury: Following conviction for an eighth DUI, Vaughn was sentenced as a persistent felony offender to a 50-year term in the state prison. Relying on the proposition in Blakely v. Wash., 542 US 296 (2004), that factual findings that serve to enhance a sentence beyond the statutory maximum must be determined by a jury beyond a reasonable doubt, Vaughn appealed the felony sentence, asserting that the 50-year sentence imposed under 46-18-502 served to enhance the sentence beyond the maximum 13-month commitment to the Department of Corrections followed by a suspended sentence of up to 5 years authorized for

felony DUI in 61-8-731 and that therefore the persistent felony offender sentence should have been determined by a jury on the facts. The Supreme Court first noted that the Blakely proposition applies to a fact other than the fact of a prior conviction and that it is the fact of a defendant's prior felony conviction that authorizes an enhanced sentence under 46-18-502 and this section. Here, Vaughn's enhanced felony DUI sentence was based on the sentencing court's finding that Vaughn had a prior felony DUI conviction. That factual determination may properly be made by the sentencing court rather than by a jury. The prior DUI was a sentencing factor that was an aggravating or mitigating circumstance supporting the imposition of a sentence within the range authorized for a persistent felony offender. Thus, Vaughn's right to a trial by jury was not violated by the sentencing court's findings of fact in support of a sentence as a persistent felony offender. The sentence was affirmed. St. v. Vaughn, 2007 MT 164, 338 M 97, 164 P3d 873 (2007). See also Apprendi v. N.J., 530 US 466 (2000).

Constitutionality of Persistent Felony Offender Statutes: Shults contended that the persistent felony offender (PFO) statutes were unconstitutional on their face in violation of double jeopardy, equal protection, and cruel and unusual punishment or as they applied to Shults's case. The Supreme Court disagreed. First, the PFO statutes do not constitute double jeopardy because a sentence as a habitual criminal is not viewed as a new jeopardy (see Gryger v. Burke, 334 US 728 (1948)). Second, Shults was not able to show that the PFO statutes classify two or more similarly situated groups in an unequal manner and thus failed to meet the first threshold of a meritorious equal protection claim. Last, a sentence that is within maximum statutory guidelines and that is not so disproportionate as to shock the conscience or outrage the moral sense of the community is not considered cruel and unusual punishment. Shults's sentence was within statutory parameters, and in light of Shults's 18-year criminal history and repeated failure to conform his behavior to societal norms despite having numerous opportunities to do so, the sentence could not be seen as so disproportionate as to shock the conscience or outrage the moral sense of the community and thus was not considered cruel and unusual punishment. St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

Failure to Raise Legality of Sentence on Direct Appeal — Postconviction Consideration Barred: Osborne was convicted of a fourth DUI in 1999, and when charged with felony DUI in 2003, the state sought to have Osborne declared a persistent felony offender. The District Court obliged, and Osborne was declared a persistent felony offender and sentenced to 10 years in prison with 5 years suspended. Osborne did not appeal the sentence directly, but filed a petition for postconviction relief, asserting that the sentence was not legal. The petition was denied, and Osborne appealed. The state argued that the Supreme Court was procedurally barred under 46-21-105 from considering the petition because the legal challenge to the sentence could have been raised on direct appeal. Osborne asserted that because the state did not raise the procedural bar issue in District Court, that argument was waived. Although the Supreme Court as a rule does not consider issues raised for the first time on appeal, this general rule does not preclude consideration of jurisdictional questions raised for the first time on appeal. The procedural bar is jurisdictional, so the court considered the state's argument, concluding that lack of subject matter jurisdiction may not be waived and that 46-21-105 represents a jurisdictional limit on courts' ability to entertain and decide petitions for postconviction relief and effectively prohibits courts from exercising jurisdiction over grounds for relief that could have been raised on direct appeal. Thus, Osborne's failure to challenge the legality of the sentence on direct appeal precluded consideration in a postconviction petition. St. v. Osborne, 2005 MT 264, 329 M 95, 124 P3d 1085 (2005).

Persistent Felony Offender Statute Not Violative of Double Jeopardy Protections: Wardell was convicted of felony sexual contact with a child in South Dakota and later was charged with numerous sexual crimes in Montana, including failure to register as a sex offender. The District Court sentenced Wardell to 5 years on the failure to register count and designated Wardell as a persistent felony offender, ultimately adding an additional 20-year consecutive sentence. Wardell appealed on grounds that the conviction for failure to register and the sentence for persistent felony offender constituted double jeopardy because each relied on the same underlying conviction. The Supreme Court disagreed. A sentence as a habitual criminal is not to be viewed as a new jeopardy. The sentence enhancement was related to the second crime—failure to register—and thus did not constitute double jeopardy. Under this section, the dual use of the prior South Dakota conviction for designating Wardell as a persistent felon was authorized. Further, it is not a crime to be a persistent felony offender, and being designated a persistent felony offender cannot constitute double jeopardy. St. v. Wardell, 2005 MT 252, 329 M 9, 122 P3d 443 (2005).

Use of Persistent Felony Offender Statute to Increase Sentence Not Considered Cruel and Unusual Punishment: Wardell was originally sentenced as a persistent felony offender to 45 years in prison with 30 years suspended. Wardell filed a petition for postconviction relief, and that sentence was vacated. Upon resentencing, Wardell's sentence was increased to 20 years suspended plus 5 years for failure to register as a sex offender. Wardell argued on appeal that the sentence constituted cruel and unusual punishment because it was excessive when compared to other sentences for failure to register. The Supreme Court noted that Wardell's sentence was within statutory maximum guidelines and was not so disproportionate to the crime as to shock the conscience or outrage the moral sense of the community or of justice. The sentence was affirmed. St. v. Wardell, 2005 MT 252, 329 M 9, 122 P3d 443 (2005), distinguishing St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003).

District Court Jurisdiction to Apply Persistent Felony Offender Designation to Felony DUI: Yorek pleaded guilty to and was sentenced on a felony DUI charge. The District Court determined that it had jurisdiction and imposed a persistent felony offender designation. Yorek sought postconviction relief on grounds that the District Court lacked subject matter jurisdiction to impose a persistent felony offender designation for felony DUI. The District Court denied the petition for postconviction relief, concluding that sentencing for felony DUI is not solely governed by 61-8-731 and 61-8-734, that nothing in the persistent felony offender statute excludes felony DUI offenders from its application, and that Yorek waived any jurisdiction claim by pleading guilty. The Supreme Court affirmed. Nothing in 46-18-502 distinguishes between or among the types of felonies to which it applies, or excludes DUI offenders. Rather, if the underlying charge meets the definition of a felony and if the state has provided proper notice of its intent to seek persistent felony offender status under 46-13-108, a District Court has the statutory authority to designate and sentence an offender as a persistent felony offender. Yorek's crime met the definition of a felony, and Yorek fell squarely within the persistent felony offender statute. The state met the notice provisions, and the District Court possessed subject matter jurisdiction to designate Yorek as a persistent felony offender. Because the jurisdiction question was dispositive, the Supreme Court did not reach the question of whether Yorek's guilty plea was a procedural bar against bringing the claim. St. v. Yorek, 2002 MT 74, 309 M 238, 45 P3d 872 (2002), followed in St. v. Pettijohn, 2002 MT 75, 309 M 244, 45 P3d 870 (2002), and St. v. Damon, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005).

Release From Commitment Triggering Commencement of Statutory Persistent Felony Offender Period: Montoya's initial suspended sentence for a 1984 felony burglary conviction was revoked, and he was resentenced to prison for 5 years in 1994, with 2 years of the sentence suspended with conditions. Montoya was then released from commitment in 1996. Under this section, the 5-year period began to run in 1996, and a subsequent 1998 felony conviction was well within the time limit of the statute, so the sentencing court did not err in designating Montoya a persistent felony offender. St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937, 56 St. Rep. 706 (1999), following St. v. Graves, 241 M 533, 788 P2d 311, 47 St. Rep. 483 (1990), clarifying St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988), and followed in St. v. Bales, 1999 MT 334, 297 M 402, 994 P2d 17, 56 St. Rep. 1334 (1999).

Unconstitutionality of Prior Conviction Not Proved: LaPier's attorney asked LaPier's parole officer, Riley, if anything in Riley's investigative report indicated that in a police court trial, LaPier had waived his right to a jury trial. Riley indicated that nothing in his report showed a waiver. LaPier argued on appeal that he could not be found a persistent felony offender because the police court conviction was constitutionally infirm. The Supreme Court upheld LaPier's conviction, stating that there is a presumption of the regularity of court proceedings and LaPier had offered no direct evidence that he had been denied his right to a jury trial. St. v. LaPier, 1998 MT 174, 289 M 392, 961 P2d 1274, 55 St. Rep. 707 (1998). See also St. v. Perry, 283 M 34, 938 P2d 1325 (1997).

Notice of Intent to Seek Increased Punishment Not Filed With Court Until After Trial — No Error in Persistent Felony Offender Designation: The state timely served defense counsel with notice of its intent to seek increased punishment for McQuiston as a persistent felony offender but did not file the notice with the court until after trial was concluded, 5 months before sentencing. McQuiston contended that timely filing of the notice was a jurisdictional prerequisite and that failure to so do constituted reversible error. However, the state's notice to defense counsel 5 months before trial and to the court 5 months before sentencing did not prejudice McQuiston, and the persistent felony offender designation was not made in error. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Definitional Requirements of Persistent Felony Offender Met — Enhanced Sentence Proper: Sentence enhancement was proper upon a showing that defendant was: (1) previously convicted

of mitigated deliberate homicide on February 19, 1980; (2) paroled on that offense on October 9, 1985; and (3) convicted of two counts of burglary, one count of theft, and one count of attempt on March 29, 1989. The definitional requirements of this section having been met, an additional 10-year consecutive sentence was proper. St. v. Graves, 241 M 533, 788 P2d 311, 47 St. Rep. 483 (1990), followed in St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937, 56 St. Rep. 706 (1999).

Proof of Constitutionality of Prior Conviction Not Required: While a constitutionally infirm conviction cannot be used to support a determination of persistent felony offender (see St. v. Lewis, supra), the state is not required to prove that a prior conviction offered for purposes of the persistent felony offender determination is constitutionally valid. St. v. Farnsworth, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989). See also St. v. Okland, 283 M 10, 941 P2d 431, 54 St. Rep. 467 (1997), and St. v. Ailport, 1998 MT 315, 292 M 172, 970 P2d 1044, 55 St. Rep. 1292 (1998).

Probation Not "Commitment" — Enhanced Sentence Reversed: The trial court relied on subsection (2)(b) of this section in enhancing defendant's sentence because the present offense occurred less than 5 years after defendant's probation from a prior suspended sentence. The state contended that probation constituted commitment for purposes of designating defendant a persistent felony offender. The Supreme Court disagreed and voided the enhanced sentence, finding that the plain meaning of "commitment" reveals that the period of commitment begins when a defendant is handed over to law enforcement personnel for confinement and ends when the defendant is released from custody. The statutory 5-year period starts when an offender is once again free to victimize society, not at the end of a period of probation. St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988), clarified in St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937, 56 St. Rep. 706 (1999).

Defendant Persistent Felony Offender: Defendant claimed that his prior felony conviction was invalid because the offense was committed on the Flathead Reservation, and that he was convicted in the District Court of the Fourth Judicial District, which lacked jurisdiction. The court observed that this is not the forum for determining whether the court that issued his prior conviction had jurisdiction. Defendant had a prior felony conviction for the offense of armed robbery that qualified him as a persistent felony offender. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

No Collateral Estoppel and Due Process Bars to Sentencing: Defendant argued that collateral estoppel and due process barred his status as both a persistent felony offender and dangerous offender (see 1995 repeal of 46-18-404) because the designations served to sentence him twice for the same offense. The court found no merit to the argument. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

Time of Multiple Offenses — No Window of Opportunity: Defendant was charged with two felonies occurring at about the same time and had previously been convicted of a felony 5 years prior to the later charges. Defendant's attorney erroneously advised him that the state could notice him as a persistent felony offender based on the former conviction. Defendant pleaded guilty to avoid increased punishment as a persistent felony offender and later sought to withdraw the plea on grounds of coercion and ineffective assistance of counsel. The District Court denied the motion, and the Supreme Court affirmed. The courts rejected defendant's contention that the statute should be construed to ban the use of the statute since the second offense was committed prior to the conviction on the first one. "On a different occasion" does not mean "in a different time frame". Separate crimes committed at about the same time can be used to increase punishment under this statute. A defendant may not commit any number of felonies between the time he commits his first felony and his conviction therefor and be immune from designation as a persistent felony offender. There is no "window of opportunity" under 46-18-501. St. v. Williamson, 218 M 242, 707 P2d 530, 42 St. Rep. 1551 (1985), followed in St. v. Hamm, 250 M 123, 818 P2d 830, 48 St. Rep. 830 (1991).

Deferred Imposition of Sentence Not Dismissed — "Conviction" for Purposes of Persistent Felony Offender Status: On appeal following conviction for criminal mischief and attempted burglary for which the defendant was sentenced as a persistent felony offender, the defendant argued that a prior conviction and deferred imposition of sentence should not have been considered a "conviction" under the persistent felony offender statutes because he successfully completed probation, even if the record of his prior conviction was not expunged or the sentence dismissed. The Supreme Court held, consistent with the rationale of St. v. Drew, 158 M 214, 490 P2d 230 (1971), that the case should be remanded to District Court to determine whether the prior unrevoked deferred sentence should be dismissed, and directed that if the sentence is dismissed then it should not be considered in determining whether the defendant is a persistent felony offender. St. v. Gladue, 209 M 235, 679 P2d 1256, 41 St. Rep. 669 (1984).

Timing of Sentencing Required to Bring Defendant Within Operation of Statute: Where the defendant was convicted of two counts of negligent homicide following a previous conviction for burglary within 5 years prior to the negligent homicide convictions, the District Court did not err in sentencing the defendant under the persistent felony offender statute. The defendant's contention that he is not "presently being sentenced for a second felony" until after the court has determined to sentence him to a term of imprisonment for more than 1 year is a hypertechnical construction of the statute intended to avoid the clear intention of the Legislature. The defendant's case is covered by the legislative mandate [deleted by a 1983 amendment] that the chapter be liberally construed to the end that dangerous offenders be correctively treated in custody for long terms as needed. St. v. Ballard, 202 M 81, 655 P2d 986, 39 St. Rep. 2342 (1982).

Void Conviction: Since the prior felony conviction was void because of a denial of due process during arraignment, it was improper to sentence the defendant under the former second offense statute. Lewis v. St., 153 M 460, 457 P2d 765 (1969), followed in St. v. Okland, 283 M 10, 941 P2d 431, 54 St. Rep. 467 (1997). Okland was followed, with a different result, in St. v. Ailport, 1998 MT 315, 292 M 172, 970 P2d 1044, 55 St. Rep. 1292 (1998).

Collateral References

Pardoned or expunged conviction as "prior offense" under state statute or regulation enhancing punishment for subsequent conviction. 97 ALR 5th 293.

Use of prior military conviction to establish repeat offender status. 11 ALR 5th 218.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 ALR 5th 263.

46-18-502. Sentencing of persistent felony offender.

Compiler's Comments

1999 Amendment: Chapter 52 at beginning of (2) inserted exception clause; in (2)(b)(ii) after "parole" deleted "or otherwise"; in (2)(c) at end deleted "the offender shall, except as provided in 46-18-219, be imprisoned in the state prison for a term of not less than 10 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both"; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

1995 Amendment: Chapter 482 in version effective July 1, 1997, in (1), near beginning, and in (2), near end, inserted reference to exception in 46-18-219; and made minor changes in style.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 46-18-502, enacted as sec. 16 of Senate Bill No. 66, are effective July 1, 1997.

1981 Amendments: Chapter 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Chapter 327 inserted "Except as provided in subsection (2)" at the beginning of (1); inserted (2) relating to an offender who was a persistent felony offender at the time of his previous felony conviction, except the language relating to the $50,000 fine, which was added pursuant to Ch. 198 (see above); inserted "or the first 10 years of a sentence imposed under subsection (2)" in (3);

and inserted (4) requiring that a sentence under subsection (2) runs consecutive to any other sentence.

Case Notes

Persistent Felony Offender Sentence Limited to 100 Years: Gaither received an 85-year sentence for felony attempted sexual abuse of children, 10 years for felony criminal endangerment, and an additional 50 years with 10 years suspended as a persistent felony offender, for a total of 135 years in prison. Gaither appealed the sentence on grounds that the maximum sentence that could be imposed as a persistent felony offender is 100 years. The state contended that the sentence available under 46-18-502 could be applied to specific crimes in order to augment the overall sentence available for a defendant being sentenced for more than one felony. The Supreme Court interpreted 46-18-502 as mandatory, so that once a District Court decides to sentence an offender as a persistent felony offender, the sentence must be from 10 to not more than 100 years. The statute does not give a District Court authority to mix and match a persistent felony offender sentence with another felony conviction occurring in the same proceeding and exceed the 100-year limit on imprisonment. Because Gaither's sentence exceeded the 100-year limitation, it was illegal, so the case was remanded for resentencing, and if the state sought to sentence Gaither as a persistent felony offender, the prison sentence could not exceed 100 years. St. v. Gaither, 2009 MT 391, 353 M 344, 220 P3d 640 (2009).

Alternative Sentence for Drug Offense Not Precluded by Persistent Felony Offender Statutes, but Incarceration Not Error: Brendal pleaded guilty to fraudulently obtaining dangerous drugs and was sentenced to 25 years in prison with 15 years suspended. Based on prior convictions for the same offense, the sentencing court designated Brendal as a persistent felony offender and imposed a mandatory 10-year prison sentence. Brendal appealed the sentence on grounds that the sentencing court should have considered a sentence to a drug treatment program pursuant to the alternative sentencing authority in 45-9-202. However, the Supreme Court affirmed. The persistent felony offender statutes do not preclude a District Court from providing an alternative sentence under 45-9-202 for a person convicted of a drug-related offense, as long as the required criteria for imposing an alternative sentence are satisfied. Therefore, although the District Court could have provided an alternative sentence, it was not error to sentence Brendal to incarceration. St. v. Brendal, 2009 MT 236, 351 M 395, 213 P3d 448 (2009).

Consideration of Sentencing Factors in Sentencing Persistent Felony Offender Not Violative of Right to Trial by Jury: Following conviction for an eighth DUI, Vaughn was sentenced as a persistent felony offender to a 50-year term in the state prison. Relying on the proposition in Blakely v. Wash., 542 US 296 (2004), that factual findings that serve to enhance a sentence beyond the statutory maximum must be determined by a jury beyond a reasonable doubt, Vaughn appealed the felony sentence, asserting that the 50-year sentence imposed under this section served to enhance the sentence beyond the maximum 13-month commitment to the Department of Corrections followed by a suspended sentence of up to 5 years authorized for felony DUI in 61-8-731 and that therefore the persistent felony offender sentence should have been determined by a jury on the facts. The Supreme Court first noted that the Blakely proposition applies to a fact other than the fact of a prior conviction and that it is the fact of a defendant's prior felony conviction that authorizes an enhanced sentence under 46-18-501 and this section. Here, Vaughn's enhanced felony DUI sentence was based on the sentencing court's finding that Vaughn had a prior felony DUI conviction. That factual determination may properly be made by the sentencing court rather than by a jury. The prior DUI was a sentencing factor that was an aggravating or mitigating circumstance supporting the imposition of a sentence within the range authorized for a persistent felony offender. Thus, Vaughn's right to a trial by jury was not violated by the sentencing court's findings of fact in support of a sentence as a persistent felony offender. The sentence was affirmed. St. v. Vaughn, 2007 MT 164, 338 M 97, 164 P3d 873 (2007). See also Apprendi v. N.J., 530 US 466 (2000).

Suspension of Sentence Following Probation Violation Not Violative of Double Jeopardy — Credit for Time Served Properly Allowed: DeWitt was convicted of two counts of aggravated burglary, found to be a persistent felony offender, and sentenced to three consecutive 10-year sentences. DeWitt appealed, and the Supreme Court remanded with instructions to dismiss one count. While awaiting resentencing, DeWitt was incarcerated for 1,275 days. The District Court then resentenced DeWitt to one 10-year sentence for aggravated burglary and a consecutive 10-year sentence as a persistent felony offender, suspended all but 1,275 days of the 20-year sentence, and gave DeWitt credit for 1,275 days served. Without prison time to serve, DeWitt was immediately released on probation. DeWitt subsequently violated probation, the suspended sentence was revoked, and DeWitt was sentenced to 10 years with 5 years suspended, with credit for 160 days served while awaiting revocation proceedings. DeWitt appealed on grounds that the

sentencing court failed to allow credit for the 1,275 days served when the suspended sentence was revoked and the new 10-year sentence was imposed and asserted that his double jeopardy rights were violated by reinstatement of the original sentence. The Supreme Court disagreed with both arguments. When the sentencing court sentenced DeWitt following the probation violation, the court had a 16.5-year suspended sentence to work with, which was more than sufficient to account for the 10-year sentence with 5 years suspended that was imposed. Although a sentencing court must give credit for time served, revocation of a suspended sentence based on a probation violation and reinstatement of the original sentence does not constitute double jeopardy as long as the sentence is within the parameters of the sentence imposed in the initial suspended sentence and credit is allowed for time served. Further, a persistent felony offender designation is not a separate crime carrying a separate sentence, but rather is a statutorily required sentence enhancement that is part of the initial sentence, so the sentencing court could not have "dropped" the persistent felony offender count and sentenced DeWitt only under the aggravated burglary count, thereby limiting the available time on resentencing to 6.5 years. The sentence was not violative of double jeopardy, was within statutory parameters, and was affirmed. St. v. DeWitt, 2006 MT 302, 334 M 474, 149 P3d 549 (2006).

Constitutionality of Persistent Felony Offender Statutes: Shults contended that the persistent felony offender (PFO) statutes were unconstitutional on their face in violation of double jeopardy, equal protection, and cruel and unusual punishment or as they applied to Shults's case. The Supreme Court disagreed. First, the PFO statutes do not constitute double jeopardy because a sentence as a habitual criminal is not viewed as a new jeopardy (see Gryger v. Burke, 334 US 728 (1948)). Second, Shults was not able to show that the PFO statutes classify two or more similarly situated groups in an unequal manner and thus failed to meet the first threshold of a meritorious equal protection claim. Last, a sentence that is within maximum statutory guidelines and that is not so disproportionate as to shock the conscience or outrage the moral sense of the community is not considered cruel and unusual punishment. Shults's sentence was within statutory parameters, and in light of Shults's 18-year criminal history and repeated failure to conform his behavior to societal norms despite having numerous opportunities to do so, the sentence could not be seen as so disproportionate as to shock the conscience or outrage the moral sense of the community and thus was not considered cruel and unusual punishment. St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

Failure to Raise Legality of Sentence on Direct Appeal — Postconviction Consideration Barred: Osborne was convicted of a fourth DUI in 1999, and when charged with felony DUI in 2003, the state sought to have Osborne declared a persistent felony offender. The District Court obliged, and Osborne was declared a persistent felony offender and sentenced to 10 years in prison with 5 years suspended. Osborne did not appeal the sentence directly, but filed a petition for postconviction relief, asserting that the sentence was not legal. The petition was denied, and Osborne appealed. The state argued that the Supreme Court was procedurally barred under 46-21-105 from considering the petition because the legal challenge to the sentence could have been raised on direct appeal. Osborne asserted that because the state did not raise the procedural bar issue in District Court, that argument was waived. Although the Supreme Court as a rule does not consider issues raised for the first time on appeal, this general rule does not preclude consideration of jurisdictional questions raised for the first time on appeal. The procedural bar is jurisdictional, so the court considered the state's argument, concluding that lack of subject matter jurisdiction may not be waived and that 46-21-105 represents a jurisdictional limit on courts' ability to entertain and decide petitions for postconviction relief and effectively prohibits courts from exercising jurisdiction over grounds for relief that could have been raised on direct appeal. Thus, Osborne's failure to challenge the legality of the sentence on direct appeal precluded consideration in a postconviction petition. St. v. Osborne, 2005 MT 264, 329 M 95, 124 P3d 1085 (2005).

District Court Jurisdiction to Apply Persistent Felony Offender Designation to Felony DUI: Yorek pleaded guilty to and was sentenced on a felony DUI charge. The District Court determined that it had jurisdiction and imposed a persistent felony offender designation. Yorek sought postconviction relief on grounds that the District Court lacked subject matter jurisdiction to impose a persistent felony offender designation for felony DUI. The District Court denied the petition for postconviction relief, concluding that sentencing for felony DUI is not solely governed by 61-8-731 and 61-8-734, that nothing in the persistent felony offender statute excludes felony DUI offenders from its application, and that Yorek waived any jurisdiction claim by pleading guilty. The Supreme Court affirmed. Nothing in this section distinguishes between or among the types of felonies to which it applies, or excludes DUI offenders. Rather, if the underlying charge meets the definition of a felony and if the state has provided proper notice of

its intent to seek persistent felony offender status under 46-13-108, a District Court has the statutory authority to designate and sentence an offender as a persistent felony offender. Yorek's crime met the definition of a felony, and Yorek fell squarely within the persistent felony offender statute. The state met the notice provisions, and the District Court possessed subject matter jurisdiction to designate Yorek as a persistent felony offender. Because the jurisdiction question was dispositive, the Supreme Court did not reach the question of whether Yorek's guilty plea was a procedural bar against bringing the claim. St. v. Yorek, 2002 MT 74, 309 M 238, 45 P3d 872 (2002), followed in St. v. Pettijohn, 2002 MT 75, 309 M 244, 45 P3d 870 (2002), and St. v. Damon, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005).

Failure to Adequately Inform Defendant of Maximum Possible Penalty — Reversible Error in Failing to Allow Withdrawal of Guilty Plea: After offering an Alford plea but prior to a change of plea hearing, Melone signed an acknowledgment of waiver of rights, stating that he understood the maximum possible penalty for felony assault and that his sentence could be enhanced for using a deadly weapon and because of his prior criminal record. At the change of plea hearing, the court informed Melone that the weapon enhancement penalty would not apply and that the maximum penalty for felony assault was "ten years in the Montana State Prison or a $50,000 fine". The court then allowed Melone to withdraw his guilty plea and enter the Alford plea. The court later sentenced Melone to 10 years in prison, plus 10 years to be served consecutively as a persistent offender. Melone moved for a hearing on the persistent offender enhancement and requested that he be allowed to withdraw his plea. The court rejected the motion to withdraw the plea, but vacated the sentence and granted a new sentencing hearing to allow Melone to present evidence regarding applicability of the persistent offender enhancement. Following the hearing, the court affirmed its original sentence. Melone appealed, contending that he was never informed that he could receive up to 100 years because of his potential status as a persistent offender and that, as a consequence, his plea was not knowing and voluntary. The Supreme Court agreed. Under 46-12-210 and 46-16-105, a defendant must be informed of the maximum penalty, including the effect of any penalty enhancement provision. The fact that the *prosecutor* informed Melone of a possible persistent offender penalty immediately prior to questioning did not satisfy the statutory requirement that the *court* inform the defendant of the maximum penalty. Melone's statements in the written acknowledgment were insufficient to satisfy the doubts of the Supreme Court that Melone was aware that his sentence could be enhanced by up to 100 years as a result of his plea. Rather, it appeared that Melone was under the mistaken belief that he risked sentence enhancement only if he proceeded to trial. Resolving their doubt that the plea was voluntary in favor of Melone, the Supreme Court reversed and remanded the case to District Court to allow Melone to withdraw the plea. St. v. Melone, 2000 MT 118, 299 M 442, 2 P3d 233, 57 St. Rep. 493 (2000).

Sentence of 100 Years Without Parole for Sexual Intercourse Without Consent Committed Upon Person of Same Gender Not Excessive — Persistent Felony Offender: Ford contended that his sentence of 100 years without parole eligibility for sexual intercourse without consent committed upon a person of the same gender was excessively harsh and disproportionate to the gravity of the crime. The Supreme Court found that the sentence was within legal parameters provided by statute and affirmed the sentence, noting that Ford: (1) was a persistent felony offender; (2) had a prior criminal history of sexually preying on young boys; (3) had undergone previous attempts by professional therapists and state officials to treat his problems but was apparently unwilling to accept the provided treatment; and (4) had a predatory nature. St. v. Ford, 278 M 353, 926 P2d 245, 53 St. Rep. 947 (1996).

Notice of Intent to Seek Increased Punishment Not Filed With Court Until After Trial — No Error in Persistent Felony Offender Designation: The state timely served defense counsel with notice of its intent to seek increased punishment for McQuiston as a persistent felony offender but did not file the notice with the court until after trial was concluded, 5 months before sentencing. McQuiston contended that timely filing of the notice was a jurisdictional prerequisite and that failure to so do constituted reversible error. However, the state's notice to defense counsel 5 months before trial and to the court 5 months before sentencing did not prejudice McQuiston, and the persistent felony offender designation was not made in error. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Persistent Felony Offender Statute Determinative of Sentence Rather Than Statute Governing Underlying Offense: On March 13, 1995, the District Court sentenced McQuiston in open court to 15 years in the state prison, with 5 years suspended, for sexual intercourse without consent and 15 years in the state prison, with 5 years suspended, for incest. On March 14, the court entered written judgment sentencing McQuiston to two consecutive terms of 30 years in the state prison, with the last 5 years suspended, for each offense and further designated McQuiston

a persistent felony offender and a dangerous offender. On March 31, the court, after review of the transcript of the sentencing hearing, amended the sentence to 22 ½ years in prison, with 5 years suspended, for each offense and ordered the sentences to be served consecutively for a total of 45 years in prison, with 10 years suspended. McQuiston alleged error in sentencing, arguing that the sentence constituted an ex post facto violation because it was based on the incest penalty in effect at the time of sentencing rather than the penalty in effect at the time that the offense occurred. However, when a defendant has been designated a persistent felony offender, it is this section that determines the maximum sentence, not the statute governing the underlying offense. The 22 ½-year sentence was well within the maximum allowed under this section, was not applied ex post facto, and was thus affirmed. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Maximum Statutory Sentence for Persistent Felony Offender — Not Additional Sentence: After finding Fitzpatrick to be a persistent felony offender, the District Court sentenced him to 10 years for escape and 5 years for burglary, plus an additional 100 years on each count as a persistent felony offender. The sentence imposed by this section is a maximum sentence, replacing the maximum sentence for the offense, and is not a sentence in addition to the sentence for the offense. Therefore, the Supreme Court vacated the sentences as being in excess of statutory maximums and remanded for resentencing consistent with this section. The sentences may not exceed 100 years on each count and must run consecutively. St. v. Fitzpatrick, 247 M 206, 805 P2d 584, 48 St. Rep. 164 (1991), replacing a prior opinion at 48 St. Rep. 5 (1991), followed in St. v. DeSalvo, 273 M 343, 903 P2d 202, 52 St. Rep. 1019 (1995), and distinguished in St. v. Gunderson, 282 M 183, 936 P2d 804, 54 St. Rep. 283 (1997), and St. v. Robinson, 2008 MT 34, 341 M 300, 177 P3d 488 (2008), in which persistent felony offender sentences imposed in addition to sentences for the original offenses were not considered illegal because the total sentences imposed were below the maximum provided for by subsection (2) of this section and were thus within statutory parameters.

Second Felony Arising as Result of First Felony — Persistent Offender Designation Proper — Crimes Sufficiently Disparate: Defendant was arrested on a felony drug charge and later assaulted an officer while attempting to escape. Defendant asserted that the District Court erred in designating him a persistent felony offender because both underlying convictions arose from a single transaction. However, the fact that both crimes arose out of the same transaction does not in itself bar application of the persistent felony offender designation. In general, when different crimes, even though unrelated in nature, are committed at the same place, on the same victim or group of victims, and at the same time or as part of a continuous series of criminal acts, they should be considered as having been committed on the same occasion for sentence enhancement purposes. In this case, the crimes were sufficiently disparate in time, place, and victim that they could not be said to have occurred on the same occasion, so sentence enhancement was appropriate. St. v. Hawkins, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989).

Defendant Not Designated Persistent Felony Offender in Previous Conviction — Discretion of Judge Within Statutory Limits: Defendant argued that because he was not designated a persistent felony offender in his previous conviction, he should have received only 5 years under 46-18-502(1) rather than 50 years with 40 years suspended under 46-18-502(2). However, the sentence was within the range authorized by this section, and the judge did not abuse his discretion in imposing the sentence when the defendant could have been designated a persistent felony offender at the time of his previous conviction, based on his record at that time. St. v. Tracy, 233 M 529, 761 P2d 398, 45 St. Rep. 1705 (1988).

Rules of Evidence Inapplicable to Sentencing: Defendant contended that the court erred in adding 10 years to his sentence for being a persistent felony offender because the court relied on evidence improperly before it. The Supreme Court affirmed the sentence because the rules of evidence do not apply to sentencing and because the evidence was competent. St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988).

Three Hundred-Year Prison Sentence of Mentally Ill Defendant Upheld: Sentencing defendant, who was found mentally ill but criminally culpable, to the Montana State Prison for a term of 300 years without the possibility of parole or furlough was not cruel and unusual punishment. The District Court had stated, among other things, that defendant was very dangerous and there was no treatment program that would alter his behavior. St. v. Watson, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984).

Defendant Under Duty to Contest Presentence Report in Lower Court: After conviction of theft and robbery, defendant was designated as a persistent felony offender and his sentence was enhanced. Defendant contended that there was no evidence that he was the same person whose prior record was introduced at the sentencing hearing. The Supreme Court, relying on St. v.

Radi, 185 M 38, 604 P2d 318 (1979), held that the defendant has an affirmative duty to contest matters contained in a presentence report. He chose not to and is precluded from doing so on appeal. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983), distinguished in St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999).

Finding of No Mitigating Factors Supported in Record — Alcohol and Sexual Problems: Where the trial court considered defendant's drinking and sexual problems but concluded that those conditions did not excuse defendant from accountability for his acts, and the evidence presented at the hearing and in the presentence investigation report supported the trial court's conclusion, there was no abuse of discretion in sentencing defendant as a persistent felony offender. St. v. Metz, 184 M 533, 604 P2d 102 (1979).

Sentence Under Persistent Offender Statute Not Cruel and Unusual — Fairness Questions for Sentence Review Board: A sentence of 100 years is within the maximum allowable by the persistent felony offender statute, and as such does not violate the eighth amendment to the United States Constitution. Challenges to the equitability of a sentence as opposed to its legality are properly directed to the Sentence Review Division. St. v. Metz, 184 M 533, 604 P2d 102 (1979).

Specific Objection to Evidence Required in Persistent Felony Offender Hearing: By failing to make a specific objection, the defendant waived his right to assert that the State's certificate of prior conviction was not competent evidence without proof that he was the person named in the certificate. The defendant was informed well in advance of the time he entered his guilty plea that he would be tried as a persistent felony offender. At the hearing to determine whether the defendant was a persistent felony offender, he had an opportunity to object to the State's lack of identification but failed to do so. St. v. Metz, 184 M 533, 604 P2d 102 (1979). See also St. v. Brown, 228 M 209, 741 P2d 428, 44 St. Rep. 1462 (1987).

Presumption of Constitutionality: Following a conviction for attempted deliberate homicide, the defendant was sentenced as a persistent felony offender to 30 years in prison without parole. While the defendant claims the sentence to be unconstitutional, it was held in St. v. Karathanos, 158 M 461, 493 P2d 326 (1972), that a sentence within statutory limits is presumed to be constitutional. The defendant has the burden of overcoming the presumption and has not done so. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Persistent Felony Offender Versus Law-Abiding Citizen: Article II, sec. 28, Mont. Const., grants an offender who has served his sentence a fair opportunity to enjoy the rights that law-abiding citizens enjoy. It does not grant him immunity from being treated as a persistent felony offender. St. v. Radi, 176 M 451, 578 P2d 1169 (1978). See St. v. Gafford, 172 M 380, 563 P2d 1129 (1977).

Presentence Investigation: Although the State proved the defendant's status as a persistent felony offender by means of a prior felony conviction pending appeal, the need for a presentence investigation report was not thereby eliminated. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

Statutes Construed Together: The Supreme Court saw no problem in construing 46-18-502 and 46-18-503 (renumbered 46-13-108) together to provide both the procedural requirements and substantive basis for implementing persistent felony offender sanctions since that is precisely what the Legislature intended. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

Misuse of Plea Bargaining Process and Habitual Criminal Statute: Without declaring the plea bargaining process constitutionally infirm or the habitual criminal statute unconstitutional on its face, the Supreme Court held that the defendant was denied due process under federal and state provisions when he realistically was sentenced to 10 years for attempted burglary and 40 years for refusing to plead guilty and insisting upon a jury trial. St. v. Sather, 172 M 428, 564 P2d 1306 (1977).

Sentence for Prior Conviction: A judgment under former law that the defendant "be imprisoned in the state prison for the term of ten years, five years upon the conviction for assault in the second degree, and five years for the prior conviction of a felony as by the statute made and provided" was not void as to the 5 years for the former conviction. St. v. Connors, 27 M 227, 70 P 715 (1902).

Part 6
Procedure After Sentencing

46-18-601. Judgment in writing — lien.

Commission Comments

Source: [R.C.M. 1947, section] 94-7819.

No change.

Collateral References

Fines *key* 3.

36A C.J.S. Fines §19.

46-18-603. Disposition of fines and forfeitures.

Compiler's Comments

2001 Amendment: Chapter 585 in second sentence substituted "must be forwarded to the state treasurer for deposit in the state general fund" for "must be paid to the county treasurer of the county in which the court is held and by him credited as provided by law. If the fine or forfeiture is paid to the county treasurer, at the time of such payment there shall be filed with the county treasurer a complete statement showing the total of the fine or forfeiture received or incurred with an itemized statement of the costs incurred by the county in such action. The statement shall give the title of the cause and be subscribed by the person or officer making such payment"; and made minor changes in style. Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in version effective July 1, 2002, the code commissioner changed "state treasurer" to "department of revenue".

1987 Amendment: In second sentence, after "if not", inserted "paid to a justice's court or".

Case Notes

Order That Fine Be Paid to Charitable Organization — Reversible Error: The District Court fined defendant his vacation pay and sick leave pay and ordered that those funds be paid to the Great Falls United Way. Because the order did not comply with the statutory payment requirements of this section, the Supreme Court reversed and remanded the judgment for further proceedings. St. v. Sullivan, 266 M 313, 880 P2d 829, 51 St. Rep. 827 (1994).

Attorney General's Opinions

Allocation of Justice's Court Fines and Costs: Money which has been collected as fines and costs in Justice's Court and paid to the County Treasurer by the Justice of the Peace and which remains after the specific allocations made in this section should be credited to the county general fund pursuant to 46-18-235. 41 A.G. Op. 39 (1985).

Restitution Not to Be Made From Forfeited Appearance Bond: A judge is without the authority to order restitution to be made from a forfeited appearance bond. Restitution is not a "cost" of the case that may be defrayed. Section 46-18-603 refers specifically to costs incurred by the county, not by the victim. The money from the forfeited bond is to be paid to the County Treasurer. 38 A.G. Op. 96 (1980).

Part 7
Jail Work Release Program

Part Case Notes

Child Support as Restitution and Condition of Probation: Child support violations were noted in the presentence investigation. Defendant should have known that they might be considered by the court, so there was no due process violation. The District Court properly ordered payment of child support as a form of restitution and rehabilitation and as a legitimate condition of parole. St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Condition of Probation: Under former law, provisions in a probation order permitting the petitioner to have employment outside the county jail, absolving the Sheriff from liability in permitting the petitioner to be absent from his custody without bail, and requiring that the petitioner pay his own board at the jail from his earnings, while similar to some former provisions relating to convicted misdemeanants serving county jail sentences, did not convert a condition of probation into a term of imprisonment. In re Williams' Petition, 145 M 45, 399 P2d 732 (1965).

Part Law Review Articles

Ramifications of Jail-Based Probation Upon Suspended Imposition of Sentence, Petersen, 27 Mont. L. Rev. 98 (1965).

46-18-701. Limited release during employment hours.

Commission Comments

Commission Comment Not Divided: This section is a recodification of part of section 95-2216, R.C.M. 1947. Sections 46-18-702 through 46-18-705 are also derived from section 95-2216. The commission comments to section 95-2216 are printed in their entirety under 46-18-701.

Source: [R.C.M. 1947, sections] 94-7835 through 94-7840.

No change.

Compiler's Comments

1997 Amendment: Chapter 189 in (1), near end after "confinement with", substituted "limited release" for "parole"; in (2), near beginning of first sentence after "order", inserted "for limited release"; and made minor changes in style.

Case Notes

Alcoholics — Refraining as Valid Condition of Parole: One who, because of addiction or character disorder, is unable to control his excessive drinking of alcoholic beverages has no constitutional or statutory right to release free from limitations on his use of alcohol, either on parole or pursuant to a suspended sentence. There was no merit to appellant's contention that it was vindictive and unreasonable or illegal to require him, an acknowledged alcoholic, to refrain from drinking as a condition of his probation or parole. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982), followed, with regard to the requirement for nexus between the sentencing limitation or condition and the underlying offense, in St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620, 56 St. Rep. 70 (1999).

Parole Conditions — Application to Suspended Portion of Sentence: Parole conditions set by Board of Pardons (now Board of Pardons and Parole) also applied to period of suspended sentence where court passing sentence did not set conditions upon suspended portion of sentence, particularly where that court expressly directed that when defendant was not in prison he was to be under the supervision of the Board and court could revoke the suspended sentence for violation of those conditions. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Restrictions During Deferral — Abuse of Discretion: When the court deferred imposition of sentence but required the defendants to serve 1 year in the county jail with release for working hours, it abused its discretion to impose reasonable restrictions or conditions during the period of the deferred imposition. St. v. Openshaw, 172 M 511, 565 P2d 319 (1977).

Collateral References

Computation of incarceration time under work-release or "hardship" sentences. 28 ALR 4th 1265.

46-18-702. Disposition of prisoner's earnings.

Commission Comments

Source: See commission comments to 46-18-701.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-18-703. Transfer to another county.

Commission Comments

Source: See commission comments to 46-18-701.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-18-704. Reduction of sentence.

Commission Comments

Source: See commission comments to 46-18-701.

46-18-705. Effect of violation of conditions.

Commission Comments

Source: See commission comments to 46-18-701.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 8
Effect of Conviction

46-18-801. Effect of conviction — civil disabilities.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), in second sentence, substituted "board of pardons and parole" for "board of pardons". Amendment effective March 12, 1997.

1995 Amendment: Chapter 555 in (1), in first sentence, inserted "as provided in the Montana constitution or" and inserted second sentence regarding rules specifying conditions of probation; deleted former (2) that read: "(2) No person shall suffer any civil or constitutional disability not specifically included by the sentencing judge in his order of sentence"; in (2) inserted "Except as provided in the Montana constitution"; and made minor changes in style.

Code Commissioner Change: Pursuant to sec. 5, Ch. 546, L. 1995, the Code Commissioner substituted Department of Corrections for Department of Corrections and Human Services.

Severability: Section 5, Ch. 555, L. 1995, was a severability clause.

Applicability: Section 6, Ch. 555, L. 1995, provided: "(1) [Section 2(1)] [45-8-313(1)] does not apply to a person convicted of an offense referred to in [section 2(1)] [45-8-313(1)] before [the effective date of this act] [effective October 1, 1995].

(2) [Section 3] [45-8-314] applies only to sentences imposed after [the effective date of this act] [effective October 1, 1995].

(3) [Section 1] [46-18-801] applies retroactively, within the meaning of 1-2-109."

Case Notes

No General or Inherent Authority of Sentencing Court to Generally Impose Parole Conditions — Parole Condition Related to Sexual Offense Authorized: There is no general or inherent authority for a sentencing court to impose parole conditions. A sentencing court may impose conditions on parole that are authorized by statute only. In this case, all conditions on Burch's suspended sentence for sexual offenses were proper, but only one parole condition, prohibiting Burch from possessing pornography or accessing the Internet, was authorized under 46-18-255. Burch's admission that he used the Internet at work to access pornography while on parole established that Burch violated a condition of his suspended sentence by a preponderance of the evidence. Thus, the sentencing court did not err in revoking Burch's suspended sentence. St. v. Burch, 2008 MT 118, 342 M 499, 182 P3d 66 (2008), followed in St. v. Dennison, 2008 MT 344, 346 M 295, 194 P3d 704, (2008), and St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009), regarding authority of sentencing court.

Sex Offender Registration and Disclosure Requirements Not Violative of Privacy or Right of Convicted to Restoration of Rights: Mount was convicted of sexual intercourse without consent and served his sentence. Nine days after final discharge from prison in 1996, Mount registered as a sexual offender, but he was convicted in 2000 of failing to update the registration as required in 46-23-507. On appeal, Mount asserted that the ongoing registration and disclosure requirements of the Sexual or Violent Offender Registration Act violated the right to privacy under Art. II, sec. 10, Mont. Const., and constitutional and statutory provisions for reinstatement of the rights of a citizen under Art. II, sec. 28, Mont. Const., and this section. The Supreme Court disagreed. As a fundamental right, the right to individual privacy may be infringed only by a compelling state interest; however, protection of the public from the recidivism of sex offenders, prevention of the victimization of vulnerable children, and assistance in keeping track of sex offenders constitute the requisite compelling interest. Further, Art. II, sec. 28, Mont. Const., and this section apply only to the restoration of civil and political rights, and a conviction for sexual intercourse without consent does not fall under this category of protected rights. Thus, Mount was not deprived of any rights by the registration and disclosure requirements of the Sexual or Violent Offender Registration Act. St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), followed in Wagner v. St., 2004 MT 31, 319 M 413, 85 P3d 750 (2004).

Addition of Written Sentencing Conditions Not Enunciated Orally at Hearing — Johnson Applied: Drube failed to complete a sex offender program, so the District Court revoked his suspended sentence and sentenced him to a 9-year term, with commitment to the Department of Corrections for the first 5 years and the remainder to be served at the state prison. The court specified that the prison portion of the sentence be suspended as long as Drube met sentencing conditions, including completion of a long-term aftercare program. Drube appealed the sentence on grounds that the court imposed a condition on the sentence that was impossible to fulfill and because the written revocation and sentencing order differed from the oral sentence enunciated at the sentencing hearing. Reviewing the sentence for legality, the Supreme Court affirmed. Drube presented nothing establishing that it would be impossible to complete the sex offender program within the reinstated 5-year commitment to the Department. Arguing that eight written conditions added to the suspended sentence by written order should be stricken, Drube cited St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), for the proposition that when written and oral sentences differ, the oral order prevails. The Supreme Court agreed with the general rule in Lane, but noted that the rule is not absolute. Under St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480 (2000), when deciding whether a subsequent written sentencing order is unlawful because it contains conditions not enunciated orally, the court first determines

whether a defendant was afforded the opportunity to respond to the inclusion upon sufficient notice at hearing and second whether the portion of the written sentence substantively increases the defendant's loss of liberty and sacrifice of property. Here, all the conditions in the 2002 written revocation and sentencing order were contained either in Drube's original sentence or in a 2001 revocation and sentencing order and thus were not new or unknown to Drube, who had the opportunity to respond to the conditions placed on the sentence, nor did Drube present any argument that the eight conditions substantively increased the loss of liberty or sacrifice of property. Thus, the 2002 sentencing order was not rendered unlawful by the addition of conditions not imposed orally at the sentencing hearing. St. v. Drube, 2003 MT 138, 316 M 156, 69 P3d 1182 (2003).

Conditions Imposed in Written Judgment and Sentence Different From Those Imposed in Oral Sentence — Lane, Waters, and Simpson Reviewed — Test to Determine Which New Conditions Lawful or Unlawful — Payment of Restitution and Costs: Johnson was sentenced orally for writing bad checks and later contended that four of the conditions imposed in the written judgment and sentence by the District Court were unlawful under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), because they were not announced orally when she was sentenced in open court. The Supreme Court reviewed its decisions in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142 (1999), and St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361 (1999), and reasoned that a written sentence would be held unlawful only if it substantively increased the defendant's loss of liberty or the defendant's sacrifice of property. Under this test, the Supreme Court held that two of the four penalties not mentioned by the District Court in its oral pronouncement of Johnson's sentence were unlawful, those being the restitution ordered to the Missoula County jail of money expended for Johnson's medical care and the requirement that Johnson pay for the costs of her prosecution in District Court. The Supreme Court held that the other two parts of the written sentence, the requirement that Johnson make restitution from money earned in prison and the imposition of certain "civil" restrictions as conditions of Johnson's suspended sentence, such as the requirement that Johnson stay out of gambling casinos, were lawfully imposed because they did not increase the amount of money that Johnson was ordered to pay or increase Johnson's deprivation of liberty in addition to those penalties imposed orally. The requirement for payment from prison earnings only specified where the money was to come from, and the "civil" restrictions were largely mentioned by the District Court at Johnson's sentencing hearing. St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

No Departmental Authority to Modify Sentence During Term of Sentence Through Special Probationary Conditions: Field was sentenced to 16 years in prison with 8 years suspended for felony deviate sexual conduct. After serving a portion of the sentence, Field was placed on probation. The sentencing judge attempted to incorporate conditions that might be imposed on probation by providing that any agent of the Montana Probation and Parole Bureau (now Department of Corrections) was authorized to arrange and establish rules necessary for Field's probation and to modify, increase, or reduce the requirements of the rules. Based on that authority, 4 years after the sentence, a Department probation officer added a handwritten special parole condition that Field not be alone with minor children. When Field violated the special condition, the probationary sentence was revoked. As amended in 1995, this section allows a sentencing judge to incorporate by reference conditions of parole established by the Department at the time that the sentence is imposed, but does not authorize a judge to grant to the Department the power to modify a sentence by imposing subsequent constitutional infringements, such as a restriction on the freedom of association, after the judgment and sentence have been signed. Here, no evidence was offered that the special condition imposed on Field was a standard Department rule at the time of sentencing, and nothing in the sentence allowed for the special condition that Field not be alone with a minor; therefore, Field's incarceration for parole violation was premised on a violation of a special condition that was never imposed by a court. Reversing, the Supreme Court held that sentencing of a defendant to an abridgment of a constitutionally protected interest must be performed by the District Court and articulated at the time of sentencing, not modified by a probation officer 4 years after a sentence is imposed. St. v. Field, 2000 MT 268, 302 M 62, 11 P3d 1203, 57 St. Rep. 1123 (2000).

Right to Possess Firearms — Not Specifically Prohibited by Judge but Prohibited by State Agency Administering Probation: As a condition of probation, defendant was placed by the judge under the jurisdiction of the Department of Corrections and ordered to comply with the terms and conditions established by the Department. The Department had an administrative rule making nonpossession of firearms a standard condition for probationers. Because the sentencing court did not, as required by this section, specifically enumerate and specifically include in the

sentence order a prohibition against possessing a firearm, the Department of Corrections could not, and the rule did not, deprive defendant of the right to possess firearms. (However, see the 1995 amendment to subsection (1) of this section, which reversed this holding.) U.S. v. Brooks, 270 M 136, 890 P2d 759, 52 St. Rep. 113 (1995).

Restoration of Civil Rights Determined by Law of State Where Original Conviction Obtained: When defendant was convicted of felony in North Dakota and moved to Montana during the probationary period, the question of restoration of civil rights is determined by North Dakota law. Conviction would be considered still in existence for purposes of the statute criminalizing a transaction in firearms by a convicted felon, even though under Montana law, civil rights would have been considered restored prior to commission of the gun transaction. U.S. v. Eaton, 31 F3d 789 (1994).

Detention of Prisoner After Expiration of Sentence Not Allowed: The plaintiffs, whose child had been killed by a released prisoner, sued the state in tort on the basis that the state could have initiated civil commitment proceedings against the prisoner, rather than releasing him. The Supreme Court held that the state has no authority to hold a prisoner beyond the expiration of his sentence and no duty to initiate civil proceedings. VanLuchene v. St., 244 M 397, 797 P2d 932, 47 St. Rep. 1609 (1990).

Restriction Not Included in Sentence — Prisoner Suffrage: The constitutional restrictions on the petitioner's suffrage rights while he is in prison are effective regardless of whether the court, under this section, added or omitted such restrictions in the sentence imposed. Emery v. St., 177 M 73, 580 P2d 445 (1978).

Attorney General's Opinions

Prisoner Voting Rights: No person may vote in the state of Montana while serving a sentence in a penal institution resulting from conviction of a felony. 37 A.G. Op. 125 (1978).

Collateral References

Public office: pardon as restoring public office or license or eligibility therefor. 58 ALR 3d 1191.

Effect of conviction under federal law, or law of another state or country, on right to vote or hold public office. 39 ALR 3d 303.

Part 9
Appellate Review of Legal Sentences

Part Compiler's Comments

Section Not Codified: Section 95-2504, R.C.M. 1947, a temporary provision, was not codified in the MCA. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 196, L. 1967.

Part Case Notes

Robbery With Gun Apparently Under Coat — Sentence of Thirty Years Permissible: Defendant claimed that his 30-year sentence for robbery of a convenience store was disproportionate to the facts (which included a finding that he had his hand under his coat and the store clerk believed he had a gun). The sentence was within the permissible statutory range, there was no clear abuse of discretion, and the sentence was properly reviewable in the Sentence Review Division, not the Supreme Court. St. v. Lewis, 220 M 418, 715 P2d 1064, 43 St. Rep. 492 (1986), following St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

Allegations of Improper Conduct of Counsel — No Disqualification of Judge: In statements made to a presentence investigator and ultimately to the District Judge, Gleed alleged improper conduct by his trial counsel. On appeal, he argued that the seriousness of the charges could have caused the judge to take a negative view in sentencing him and that therefore the judge should have disqualified himself. The proper procedure for disqualifying a judge is outlined in 3-1-802; however, none of the circumstances for disqualification were present in this case. Gleed did not follow the statutory procedure for disqualification, nor did he attempt to have his sentence reviewed by the sentence review division under Title 46, ch. 18, part 9. Instead, he raised the issue on appeal, alleging in a conclusory fashion that the judge was biased against him. The Supreme Court held that there was no merit to Gleed's argument that the judge was biased and should have disqualified himself. Sentence was affirmed. St. v. Gleed, 220 M 56, 713 P2d 543, 43 St. Rep. 169 (1986).

Equitableness of Sentence Considered: Defendant was convicted of negligent homicide and sentenced to 10 years and to an additional consecutive 5 years for the knowing use of a gun while committing the offense. At the time of sentencing, the court had discretion to make the 5 years run either consecutively or concurrently. Section 46-18-221, under which the 5 years was

imposed, was later amended to require that a sentence under the section run consecutively. Defendant's contention on appeal that it was error to require the 5 years to run consecutively went to the equity of the requirement and not to its legality and should be directed to the Sentence Review Board rather than to the Supreme Court on appeal from the sentence. St. v. Hubbard, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982), followed in St. v. Warnick, 202 M 120, 656 P2d 190, 39 St. Rep. 2369 (1982).

Proportionality Review Sufficient: The function of the Sentence Review Division is to consider the appropriateness of a sentence with respect to an individual offender and as to the particular offense involved. In considering an application for postconviction review, the court held that a proportionality review is sufficient if the Sentence Review Division considers the records of appealed cases. McKenzie v. Osborne, 195 M 26, 640 P2d 368, 38 St. Rep. 1745 (1981).

Fairness of Sentence Under Persistent Offender Statute — Question for Board: A sentence of 100 years is within the maximum allowable by the persistent felony offender statute, and as such does not violate the eighth amendment to the United States Constitution. Challenges to the equitability of a sentence as opposed to its legality are properly directed to the Sentence Review Division. St. v. Metz, 184 M 533, 604 P2d 102 (1979).

Jurisdiction Over Revocation Proceedings: For violation of parole conditions imposed by the Board of Pardons (now Board of Pardons and Parole), the original sentencing court has the implied power and jurisdiction to revoke a suspension of sentence granted by the Sentence Review Division without violating the double jeopardy protection. In fact, the Sentence Review Division lacks jurisdiction over a revocation proceeding initiated by the State. In re Ratzlaff, 172 M 439, 564 P2d 1312 (1977).

Part Law Review Articles

Montana's Sentence Review Division: A Twenty Year Overview, Jordan, 49 Mont. L. Rev. 369 (1988).

46-18-901. Review division of supreme court — review of sentences.

Commission Comments

Commission Comment Not Divided: This section is a recodification of part of section 95-2501, R.C.M. 1947. Section 46-18-902 is also derived from section 95-2501. The commission comments to section 95-2501 are printed in their entirety under 46-18-901.

Source: General Statutes of Connecticut, section 51-194.

This provision establishes a review division of the Supreme Court and sets forth the composition of this review division, the qualification and manner of selection of the members of the review division, and how often it will meet.

Compiler's Comments

2003 Amendment: Chapter 69 at end of (2) substituted "locations as determined by the review division" for "Deer Lodge"; at end of (4) deleted "and such clerical help as it deems adequate and fix their compensation"; and made minor changes in style. Amendment effective July 1, 2003.

SUPREME COURT ORDERS

Order of May 14, 1998: On May 6, 1998, this Court received a letter from the Honorable William Nels Swandal, Chair of the Sentence Review Division of the Supreme Court of Montana. Judge Swandal pointed out that as a result of this Court's recent opinion in Ranta v. State of Montana, 1998 MT 95, the Sentence Review Division must, in future cases, inform a criminal defendant of his or her right to have representation by counsel in both deciding whether to file an application for sentence review and in appearing and presenting a case to the Sentence Review Division. Judge Swandal's letter went on to state, "It is my understanding that there is no mechanism in place at this time to appoint counsel for defendants at sentence review, or to determine if they qualify for counsel." Judge Swandal suggested discussions to determine an appropriate way to implement the Ranta decision.

The Court having now reviewed and considered Judge Swandal's letter, and his understanding being correct that there is not presently a mechanism in place for the appointment of counsel for defendants at sentence review,

IT IS HEREBY ORDERED that whenever a criminal defendant is represented by appointed counsel in proceedings before a Montana district court, counsel's representation of that defendant shall continue throughout any sentence review proceedings under Title 46, Chapter 18, part 9, MCA. Upon a district court's sentencing of such a criminal defendant, the clerk of the district court shall provide notice of such continuing representation to the defendant, his counsel, and counsel for the State.

The Clerk is directed to provide copies of this Order to the members of the Sentence Review Division: The Honorable William Nels Swandal, the Honorable Richard G. Phillips, and the Honorable Jeffrey H. Langton; to all other judges of the district courts of the State of Montana; to all clerks of the district courts of the State of Montana; to Barbara Fairhurst, secretary for the Sentence Review Division; and to the State Bar of Montana with the request that it be published in the next possible issue of the Montana Lawyer.

Order of June 16, 1998: On May 14, 1998, this Court issued an order setting forth the appropriate procedure for the appointment of counsel at sentence review proceedings. We ordered that "whenever a criminal defendant is represented by appointed counsel in proceedings before a Montana district court, counsel's representation of that defendant shall continue throughout any sentence review proceedings under Title 46, Chapter 18, part 9, MCA."

By way of a letter dated June 4, 1998, the Sentence Review Board has asked that we issue a supplemental order in answer to certain questions which have arisen with respect to the appointment and reimbursement of counsel for sentence review proceedings.

In answer to the questions posed by the Sentence Review Board,

IT IS HEREBY ORDERED that, whether appointed or retained, counsel for a criminal defendant shall represent that defendant throughout any sentence review proceedings under Title 46, Chapter 18, part 9, MCA. As with any other case, a criminal defendant represented by retained counsel must pay the cost of that representation. If, however, a defendant is found indigent by the court and represented by appointed counsel, the county from which the conviction arose will pay for that representation.

IT IS FURTHER ORDERED that, as in other cases, the amount appointed counsel will be reimbursed for representing a criminal defendant on sentence review is to be determined either by the court, or in accordance with the public defender contract.

IT IS FURTHER ORDERED that the correct reimbursement procedure is that employed on all other appeals.

The Clerk of Court is directed to provide copies of this Order to the members of the Sentence Review Division: the Honorable William Nels Swandal, the Honorable Richard G. Phillips, and the Honorable Jeffery H. Langton; to all other judges of the district courts of the State of Montana; to all clerks of the district courts of the State of Montana; to Barbara Fairhurst, secretary for the Sentence Review Division; and to the State Bar of Montana with the request that it be published in the next possible issue of the Montana Lawyer.

Rules of Sentence Review Division:

In order to provide for the more effective administration of the review of sentences imposed on convicted felons in the State of Montana, in accordance with Title 46, Chapter 18, of the Montana Code Annotated, 1985, the Sentence Review Division of the Supreme Court by this order hereby adopted the following rules, thereby superseding all previous such rules.

RULE 1. After notice and within sixty (60) days after a defendant is sentenced to a term of one year or more in the State Prison, the defendant may apply to have his sentence reviewed by the Sentence Review Division of the Supreme Court of Montana. It is the duty of trial counsel to protect the defendants interest in this respect and the duty of the trial court to ensure that the defendant understands he has a right to review of the sentence imposed. If such review is requested, the sentence may be increased, decreased, affirmed as entered by the trial court, or otherwise altered by the Sentence Review Division. The filing of application for review of sentence does not stay execution of the sentence.

RULE 2. The Clerks of the District Courts of the State of Montana shall serve upon persons sentenced to more than one (1) year in the State Prison a completed Montana Sentence Review Form No. 1, together with three (3) blank copies of Montana Sentence Review Form No. 2. The clerk shall further serve upon the defendant a copy of the courts Sentence and Judgment. Service shall also be made when a deferred or suspended sentence if revoked and the defendant is sentenced to more than one (1) year in the State Prison.

RULE 3. The defendants Application for Sentence Review (Montana Sentence Review Form No. 2) must be filed with the Clerk of the District Court for the county from which the defendant was sentenced. In the event the defendant has been sentenced and is serving time upon two sentences from separate counties, separate applications must be submitted to each Clerk of Court for the county from which the defendant was sentenced, if the defendant wants each sentence reviewed.

RULE 4. The Clerk of the District Court will file the original copy of said application for Review of Sentence (Montana Sentence Review Form No. 2) in the court file of the defendant. The Clerk will then complete Clerks Certificate and Statement (Montana Sentence Review Form

No. 3) and forward it, together with the original court file and other documents required by Form No. 3 to:

Sentence Review Division
Room 315, Justice Building
215 North Sanders
Helena, MT 59620

RULE 5. The Clerk of the District Court shall forward said Clerks Certificate and Statement, together with all documents required, to the secretary of the Sentence Review Division within ten (10) working days after receipt of the Application for Review of Sentence.

RULE 6. The Clerk of the District Court shall forward a copy of the Application for Review of Sentence (Montana Sentence Review Form No. 2) to the Judge who imposed the sentence and a copy to the County Attorney for the County from which the defendant was sentenced within five (5) working days of receipt of same from the defendant.

RULE 7. In the event the Application for Review of Sentence is filed more than 60 days after the sentence is imposed, the Clerk shall proceed as if it were filed on time. However, the secretary of the Sentence Review Division shall thereafter promptly notify the defendant that the application is untimely and request the defendant file within thirty (30) days a statement of reasons why the Sentence Review Division should hear the matter. The Sentence Review Division will rule upon such matters after said thirty (30) days has elapsed and may refuse to hear such application if the reasons for the late filing are insufficient. The Sentence Review Division will hear late applications which have been caused by the taking of an appeal to the Montana Supreme Court.

When there is a pending appeal or request for post-conviction relief, the application for Sentence Review should not be filed until such time as the petition for post-conviction relief or the appeal has been determined, at which time the defendant shall be given sixty (60) days in which to file for review of the sentence.

RULE 8. The secretary of the Sentence Review Division shall not accept an Application for Review of Sentence directly; all such applications must be filed in compliance with MCA 46-18-903, which requires they be filed with the Clerk of the District Court.

RULE 9. The secretary of the Sentence Review Division shall keep a minute book in which shall be recorded the date and time the completed application for review was received by the Clerk of the District Court. The Sentence Review Division shall hear applications in the order they are received by the respective Clerks of Court unless circumstances make such order impractical or the Sentence Review Division orders otherwise.

RULE 10. The Sentence Review Division records are public records and open to public inspection except for decisions which are pending and which have not been released or finally approved by the judges.

RULE 11. After the Application for Review is filed as herein provided, the secretary of the Sentence Review Division shall accept for filing briefs concerning the review of sentence, and any material considered by the sentencing judge at the time of the imposition of sentence. The Sentence Review Division will not consider any new material, letters, petitions, or matters which were not presented to the sentencing judge.

RULE 12. The Sentence Review Division shall meet at the Montana State Prison, Deer Lodge, Montana, at the Womens Correctional Center in Billings, Montana, or at some other convenient place, at such times as shall be approved by the Division. The secretary shall notify each member of the place and dates of such meetings.

RULE 13. The secretary of the Sentence Review Division shall send notices of the time and place of such hearing at least twenty (20) days prior to such hearing to each of the following:

A. The judge who imposed the sentence,
B. The County Attorney for the county from which the defendant was sentenced,
C. The defendant,
D. The defendants attorney, if known,
E. The Montana Defender Project, if involved,
F. Any other person who has requested such notice.

RULE 14. The Sentence Review Divisions hearings shall be public. Admittance shall be subject to the rules of admission into the Montana State Prison generally. Proceedings shall be as informal as possible to allow full expression by all parties and their attorneys. The Rules of Evidence will serve as a guide but are not binding in the proceeding. The defendant shall have the right to appear and to be represented by counsel. For purposes of this rule, the appearance of the defendant may be accomplished by a video conference so that all participants can see each other. The defendant is not entitled to counsel at the expense of the State of Montana. The

defendant will be responsible for retaining an attorney if he or she so chooses. The Montana Defender Project may represent a defendant, but such representation is not required. The State may be represented by the County Attorney and/or Attorney General. By requesting a review of his or her sentence by the Sentence Review Division, and proceeding without an attorney, the defendant waives the right to be represented by an attorney, and his or her sentence may be increased, decreased, or left unchanged by the Division.

RULE 15. The record from which the Sentence Review Division shall conduct its review shall consist of the following:

A. Copy of the information and affidavit in support of the motion for leave to file,
B. Copy of plea agreement or transcript setting forth the same,
C. Pre-sentence report,
D. Sentence and judgment and reasons for same, or transcript containing said reasons,
E. Other documents relied on by the sentencing judge,
F. Transcript of sentencing hearing.

Failure to include any of the foregoing items may be cause for the Sentence Review Division to decline to conduct the sentence review and the Sentence Review Division may remand the same to the Clerk of the District Court for compilation of the necessary documents. If the sentencing judge did not set forth his reasons for sentence, or did not consider a pre-sentence report, or if there are critical matters which should have been presented at the sentencing hearing, the Sentence Review Division may vacate the sentence and remand it for re-sentencing based upon proper documentation. In the event the sentence and judgment contains clerical errors, the Sentence Review Division may vacate the sentence and remand for re-sentencing.

RULE 16. The primary objective of the Sentence Review Division is to provide for uniformity in sentencing when appropriate and to ensure that the interest of the public and the defendant are adequately addressed by the sentence. In reviewing the sentences the Sentence Review Division shall consider the correctional policy of the State of Montana as set forth in the Section 46-18-101 to protect society by preventing crime through punishment and rehabilitation of the convicted. The Sentence Review Division will hold an individual responsible and accountable for his/her actions and shall ensure that persons convicted of crime are dealt with in accordance with their individual characteristics, circumstances, needs and potentialities. The review shall be undertaken to assure that the sentence imposed is based on the following:

A. The crime committed;
B. The prospects of rehabilitation of the offenders;
C. The circumstances under which the crime was committed;
D. The criminal history of the offender.

The Sentence Review Division shall further review the sentences, with a view to removing dangerous and habitual offenders from society and providing corrective treatment for such long terms as needed. In other cases, the Sentence Review Division shall consider whether the offender could have been dealt with adequately by probation, suspended sentence or fine where such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual.

RULE 17. The sentence imposed by the District Court is presumed correct, and the sentence will not be reduced or increased unless it is deemed clearly inadequate or excessive.

RULE 18. The Sentence Review Division will not consider any matter or development subsequent to the imposition of the sentence in the District Court. Matters not to be considered include:

A. Institutional adjustment,
B. New social information,
C. Institutional disciplinary actions pending or had against the defendant,
D. Work report, or
E. Inmate release plans.

RULE 19. If the Sentence Review Division orders a different sentence than the one originally imposed, the District Court in a convenient county shall re-sentence the defendant as ordered by the Sentence Review Division.

A. The time served on any sentence reviewed shall be deemed to have been served on the sentence as revised by the Sentence Review Division.

B. The decision of the Sentence Review Division will be final. The decision and reasons for such decision will be stated in a written opinion reported and published in the Montana Reports.

C. Copies of the decisions of the Sentence Review Division shall be furnished to the following:

1. The Clerk of the District Court from which the defendant was originally sentenced,

2. The judge who imposed the sentence reviewed,
3. The County Attorney for the County from which the defendant was originally sentenced,
4. The defendant,
5. The principal officer of the institution where the defendant is confined,
6. The attorney for the defendant or the Montana Defender Project.

RULE 20. Once the defendants application is set for hearing, no continuance will be granted without a written motion and good cause.

RULE 21. The defendants attorney is entitled to inspect and copy any document filed with the Sentence Review Division.

RULE 22. Rehearing may be ordered by the Sentence Review Division upon application in writing directed to the Sentence Review Division within thirty (30) days of notice of the Sentence Review Divisions decision on the original application. Rehearing shall not stay any order or judgment previously made unless the Sentence Review Division specifically stays such previous order or judgment. Only one petition for rehearing shall be permitted by any applicant for sentence review, and the grounds therefor shall be clearly stated in said petition in accordance with rules governing rehearings in the Supreme Court of Montana.

RULE 23. A record, by court reporter or by tape recording, shall be made of all proceedings before the Sentence Review Division, and preserved for five (5) years.

RULE 24. A hearing shall be held on each application for sentence review within 180 days of the date of filing. The division will consider for dismissal any application which has not been heard within such time period. Continuances may be granted only for sufficient cause shown. Ordinarily, failure to have an attorney shall not constitute sufficient cause to grant a continuance.

These rules are effective the 18th day of September, 1997.

FORMS

MONTANA SENTENCE REVIEW FORM NO. 1_____

IN THE DISTRICT COURT OF THE ..... JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF .....

_____

STATE OF MONTANA,
Plaintiff,
vs.

NOTICE OF RIGHT TO APPLY FOR SENTENCE REVIEW

..... ,
Defendant

_____

TO THE ABOVE NAMED DEFENDANT:

TAKE NOTICE

You are hereby notified that you may, within 60 days from this date, apply to the Sentence Review Division of the Supreme Court of Montana for a review of the sentence just imposed upon you in the above-entitled case.

You are advised that if you do apply for such review your sentence may be increased, decreased or affirmed without change.

You are herewith furnished three copies of Application for Review of Sentence, Montana Sentence Review Form No. 2. If you decide to file such Review Application, you will mail the original to the undersigned Clerk of Court and retain two copies for your use.

DATED this ..... day of ....., 19....

.....
Clerk

.....
By Deputy

The undersigned does hereby certify that a true copy of the above Notice was personally served upon the above-named defendant, together with three forms of application for Review as above recited on this date, together with a copy of the Judgment in this cause.

.....
Clerk

.....
By Deputy

Name and address of Clerk to whom completed application for Review of Sentence (Montana Sentence Review Form No. 2) must be mailed:.....

Clerk of the District Court

.....

.....

MONTANA SENTENCE REVIEW FORM NO. 2

IN THE DISTRICT COURT OF THE ..... JUDICIAL DISTRICT
COUNTY OF .....

STATE OF MONTANA,
Plaintiff,
vs.

APPLICATION FOR
REVIEW OF SENTENCE

.....,
Defendant

TO: The Clerk of the above-captioned court:

The above-named defendant states:

(1) That on the ..... day of ....., 19..., I was sentenced in the above-entitled action to serve ..... years in the State Prison of Montana.

(2) That I request that the Sentence Review Division of the Supreme Court of Montana review my sentence.

(3) That I consent and agree that by making this application for review, my sentence may be increased, decreased or affirmed without change, and that there is no appeal from the decision herein to be made.

DATED this ..... day of ....., 19....

.....
Petitioner

Instructions to the Defendant:

If you decide to file this application you will mail the original to the Clerk of the District Court for the county from which you were sentenced. The Clerk's address appears on Form No. 1.

MONTANA SENTENCE REVIEW FORM NO. 3

IN THE DISTRICT COURT OF THE ..... JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF .....

STATE OF MONTANA,
Plaintiff,
vs.

CLERK'S CERTIFICATE
AND STATEMENT

.....,
Defendant

TO: THE SENTENCE REVIEW DIVISION OF THE SUPREME COURT OF MONTANA,

The Undersigned Clerk of the District Court does hereby certify and state:

(1) That the enclosed file in Cause No. ..... is the entire case file in such matter, with the exception of exhibits offered during the trial, which are not forwarded.

(a) A pre-sentence investigation was conducted and a report prepared. Yes __ No __.

(b) A copy of the pre-sentence report is in the court file. Yes __ No __.

(c) The sentence involved a plea bargain agreement. Yes __ No __.

(d) The plea bargain agreement was in written form and the original of same is in the court file. Yes __ No __.

(e) A transcript was made of the sentencing hearing where the plea bargain agreement (whether written or oral) was discussed. Yes __ No __.

(f) A copy of the transcript is in the court file. Yes __ No __.

If any document referred to is not in the court file, it is forwarded with the file if it is available.

(2) That any and all exhibits offered in this cause at the sentencing hearing, including medical and psychiatric reports, are included with the file.

(3) That copies of Montana Sentence Review Form No. 2, Application for Review of Sentence, have been served upon the Judge who sentenced the defendant and upon the County Attorney for the county from which defendant was sentenced.

DATED: .....

.....
Clerk

.....
By Deputy

The District Court Clerk shall mail this form, together with the complete court file to:

Court Administrator's Office
Sentence Review Division
Montana Supreme Court
Room 315 Justice Building
215 N. Sanders
Helena, MT 59620

Within five (5) days of receipt of Application for Review of Sentence.

Case Notes

Application for Extraordinary Relief from Montana Supreme Court Only Recourse for Defendant Who Wishes to Challenge Decision of the Sentence Review Division: The District Court lacked jurisdiction to review decisions of the Sentence Review Division because it is a division of the Montana Supreme Court. Jordan v. St., 2008 MT 334, 346 M 193, 194 P3d 657, (2008).

Hybrid Standard of Supreme Court Review of Sentencing When Offender Ineligible for Review by Sentence Review Division: In St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937 (1999), the Supreme Court held that it will review a criminal sentence only for legality, discarding the previous two-tiered approach of reviewing sentences for both legality and abuse of discretion, which was considered a carryover from the days before the creation of the Sentence Review Division when the court reviewed all sentencing challenges. However, Montoya created a "no review" window once the Sentence Review Division came into being, which left offenders with unreasonable sentencing conditions, but no term of incarceration and thus no eligibility for Sentence Review Division consideration, without a remedy. Therefore, the court fashioned a hybrid standard of review to close the "no review" window. If an offender is sentenced to 1 year or more of actual incarceration and is eligible for review by the Sentence Review Division, the court will apply the Montoya standard and review the sentence for legality only, but if the offender is ineligible for review by the Sentence Review Division, the court will review a sentence for both legality and abuse of discretion, applying the two-tiered approach used prior to creation of the Sentence Review Division. St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004), followed in St. v. Ruiz, 2005 MT 117, 327 M 109, 112 P3d 1001 (2005).

Challenge to Equity of Sentence Properly With Sentence Review Division, Not Supreme Court: A challenge to the equity of a sentence, as opposed to the legality of a sentence, properly lies with the Sentence Review Division, not the Supreme Court, which does not review a sentence on appeal for mere inequity or disparity. In this case, defendant cloaked an equity challenge in the vestiges of a constitutional argument in seeking Supreme Court review, but the court declined to address it, leaving the matter to the Sentence Review Division. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004), following St. v. DeSalvo, 273 M 343, 903 P2d 202 (1995), and followed in St. v. Baker, 2008 MT 396, 347 M 159, 197 P3d 1001 (2008).

No Due Process Right to Sentence Review — Actual Incarceration Required Before Sentence Subject to Review — Suspended Sentences Precluded From Review: Holt pleaded guilty to sexual assault, received a 10-year suspended sentence, and subsequently applied for sentence review. The Sentence Review Division denied the application on grounds that Holt did not qualify for sentence review because his sentence was suspended in its entirety and involved no actual

incarceration. Holt appealed, alleging violation of his due process rights. After granting Holt's writ of supervisory control pursuant to Art. VII, sec. 2(2), Mont. Const., and former Rule 17(a), M.R.App.P. (now superseded), the Supreme Court held that sentence review is not a constitutional right, but rather a system that the Legislature voluntarily created. Thus, the discretion to determine the circumstances and conditions under which sentence review will be allowed lies with the Legislature, and the state's discretion is not subject to due process concerns unless it offends some principle of justice so deeply rooted in the traditions and conscience of the people as to be ranked fundamental (see Mont. v. Egelhoff, 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (1996)). The Sentence Review Division's interpretation of 46-18-903(1), excluding a person who is not incarcerated from sentence review, comports with the rules of statutory construction, is consistent with the sentence review statutes as a whole, reflects the intent of the Legislature, avoids absurd or unduly harsh results, and is entitled to deference because the Division is charged with administration of the sentence review statutes. Because sentence review is a statutory right of relatively recent origin, the due process clauses of the U.S. and Montana Constitutions do not demand that sentence review be available at all, nor do they limit the Legislature's restriction of sentence review to defendants who are actually incarcerated. State ex rel. Holt v. District Court, 2000 MT 142, 300 M 35, 3 P3d 608, 57 St. Rep. 560 (2000).

Standard of Review of Criminal Sentence Clarified — Supreme Court Review of Legality of Sentence Only: In an effort to clear up a prevalent inconsistency in Montana case law regarding the appropriate standard of review of criminal sentences, the Supreme Court held that it will review a criminal sentence only for legality, i.e., whether the sentence is within the parameters provided by statute, which in turn implies de novo review—a sentence is either legal or it is not. The court overruled St. v. Davison, 188 M 432, 614 P2d 489 (1980), St. v. White, 200 M 123, 650 P2d 765, 39 St. Rep. 1619 (1982), St. v. Graveley, 275 M 519, 915 P2d 184 (1996), St. v. Gunderson, 282 M 183, 936 P2d 804, 54 St. Rep. 283 (1997), and any other Montana decision that suggests that the Supreme Court will also review criminal sentences for an abuse of discretion. St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937, 56 St. Rep. 706 (1999), followed in St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002). However, see St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004), wherein the Supreme Court fashioned a hybrid standard of review for offenders with unreasonable sentencing conditions but no term of incarceration who are ineligible for review by the Sentence Review Division. In reviewing those sentences, the court will review a sentence for both legality and abuse of discretion, applying the two-tiered approach used prior to creation of the Sentence Review Division.

Authority to Amend Written Judgment to List Reasons for Parole Restriction: Defendant contended that the District Court erred in failing to state its reasons for restricting parole eligibility in the court's original written judgment and that further error occurred when the court amended the written judgment, following remand from the Sentence Review Division, to list the reasons parole was restricted. Under 46-18-117 (now repealed), the District Court may correct an erroneous sentence at any time to correct clerical errors and to make the record reflect what was actually decided, as long as the correction does not set aside the judgment or change what was originally intended. Here, the amended judgment was consistent with the oral pronouncement of judgment and merely set forth the reasons for imposing the parole restriction. Further, 46-18-117 (now repealed) allows correction of a sentence following remand from an appellate court. The Sentence Review Division functions as part of the appellate process. Thus, when the Division remanded the matter to the District Court for clarification, the court had the express statutory authority to issue an order amending the written judgment to list its reasons for imposing the parole eligibility restriction. St. v. Christianson, 1999 MT 156, 295 M 100, 983 P2d 909, 56 St. Rep. 613 (1999).

Failure to Appoint Counsel for Defendant During Sentence Review Process — Sentence Review as Critical Stage of Proceedings: To the extent that the Sentence Review Division has the power to impose any sentence that could be imposed by the District Court, including increasing a sentence, sentence review is a critical stage of the proceedings against a defendant because of the potential for substantial prejudice from possible further loss of liberty. Therefore, assistance of counsel is necessary to aid a defendant in presenting the defendant's case during all stages of the review process. Defendant's mere appearance before the Sentence Review Division does not constitute a valid waiver of the right to counsel. Thus, it is the duty of the Sentence Review Division to inform a defendant of the right to counsel representation both when deciding whether to file an application for review and when appearing and presenting a case to the Division. The Sentence Review Division rule holding to the contrary was held to be unconstitutional. Ranta v. St., 1998 MT 95, 288 M 391, 958 P2d 670, 55 St. Rep. 378 (1998), following Consiglio v. Warden, St. Prison, 220 A2d 269 (Conn. 1966).

Suspended Sentence Properly Revoked — No Supreme Court Review of Disparate Sentences: Baisch's sentence was suspended on condition that, among other things, he remain law-abiding, undergo a psychological examination, and complete his graduate equivalency diploma within 1 year. When Baisch's probation officer called Baisch in to inquire as to why he was not meeting appointments in fulfilling his diploma requirements, Baisch became belligerent and was arrested for assault and criminal mischief. The charges were dismissed because of a defect in language, but the state petitioned to revoke the suspended sentence anyway. The state met its burden of showing by a preponderance of the evidence that Baisch violated the terms of probation, and the District Court did not err in reinstating Baisch's 7-year prison term. Baisch's argument that the sentence was too harsh was not appropriate for consideration by the Supreme Court because arguments of that nature are reserved for consideration by the Sentence Review Division. St. v. Baisch, 1998 MT 12, 287 M 191, 953 P2d 1070, 55 St. Rep. 41 (1998), followed in St. v. Senn, 2003 MT 52, 314 M 348, 66 P3d 288 (2003).

46-18-902. Interested judge not to act.

Commission Comments

Source: See commission comments to 46-18-901.

Compiler's Comments

2003 Amendment: Chapter 69 near middle of second sentence after "division" inserted "or if any member is unavailable to serve"; and made minor changes in style. Amendment effective July 1, 2003.

46-18-903. Application for review.

Commission Comments

Source: General Statutes of Connecticut, section 51-195; Annotated Laws of Massachusetts, Chapter 278, section 28B.

This section empowers the review division to review sentences of incarceration for one year or more in the State Prison. Upon imposition of sentence, the clerk of the sentencing Court must give the defendant written notice of this right of appeal to the review division and notice of the possibility that his sentence may be increased on appeal. The trial Judge may submit a statement of his reasons for a particular sentence to the review division and the review division may require the submission of such a statement.

Compiler's Comments

2003 Amendment: Chapter 69 in (1) near beginning of first sentence after "prison" inserted "or to the custody of the department of corrections" and near middle of second sentence after "sentenced" inserted "and to the person's counsel"; in (2) at end of first sentence inserted "and the person's counsel of record"; in (3) after "grant" inserted "or deny"; and made minor changes in style. Amendment effective July 1, 2003.

Case Notes

Hybrid Standard of Supreme Court Review of Sentencing When Offender Ineligible for Review by Sentence Review Division: In St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937 (1999), the Supreme Court held that it will review a criminal sentence only for legality, discarding the previous two-tiered approach of reviewing sentences for both legality and abuse of discretion, which was considered a carryover from the days before the creation of the Sentence Review Division when the court reviewed all sentencing challenges. However, Montoya created a "no review" window once the Sentence Review Division came into being, which left offenders with unreasonable sentencing conditions, but no term of incarceration and thus no eligibility for Sentence Review Division consideration, without a remedy. Therefore, the court fashioned a hybrid standard of review to close the "no review" window. If an offender is sentenced to 1 year or more of actual incarceration and is eligible for review by the Sentence Review Division, the court will apply the Montoya standard and review the sentence for legality only, but if the offender is ineligible for review by the Sentence Review Division, the court will review a sentence for both legality and abuse of discretion, applying the two-tiered approach used prior to creation of the Sentence Review Division. St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004), followed in St. v. Ruiz, 2005 MT 117, 327 M 109, 112 P3d 1001 (2005).

No Due Process Right to Sentence Review — Actual Incarceration Required Before Sentence Subject to Review — Suspended Sentences Precluded From Review: Holt pleaded guilty to sexual assault, received a 10-year suspended sentence, and subsequently applied for sentence review. The Sentence Review Division denied the application on grounds that Holt did not qualify for sentence review because his sentence was suspended in its entirety and involved no actual incarceration. Holt appealed, alleging violation of his due process rights. After granting Holt's

writ of supervisory control pursuant to Art. VII, sec. 2(2), Mont. Const., and former Rule 17(a), M.R.App.P. (now superseded), the Supreme Court held that sentence review is not a constitutional right, but rather a system that the Legislature voluntarily created. Thus, the discretion to determine the circumstances and conditions under which sentence review will be allowed lies with the Legislature, and the state's discretion is not subject to due process concerns unless it offends some principle of justice so deeply rooted in the traditions and conscience of the people as to be ranked fundamental (see Mont. v. Egelhoff, 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (1996)). The Sentence Review Division's interpretation of subsection (1) of this section, excluding a person who is not incarcerated from sentence review, comports with the rules of statutory construction, is consistent with the sentence review statutes as a whole, reflects the intent of the Legislature, avoids absurd or unduly harsh results, and is entitled to deference because the Division is charged with administration of the sentence review statutes. Because sentence review is a statutory right of relatively recent origin, the due process clauses of the U.S. and Montana Constitutions do not demand that sentence review be available at all, nor do they limit the Legislature's restriction of sentence review to defendants who are actually incarcerated. State ex rel. Holt v. District Court, 2000 MT 142, 300 M 35, 3 P3d 608, 57 St. Rep. 560 (2000).

Lack of Sentence Review Process for Misdemeanants Not Violative of Equal Protection: The plain language of this section applies the sentence review process only to felons facing incarceration in the state prison, not to misdemeanants. Because felons and misdemeanants are not similarly situated classes, the lack of a sentence review process for misdemeanants does not violate equal protection guarantees. St. v. Renee, 1999 MT 135, 294 M 527, 983 P2d 893, 56 St. Rep. 545 (1999).

Application for Sentence Review Not Considered Direct Appeal — Plain Error Doctrine Inapplicable: Postconviction relief provides a defendant with a procedure to address claims that would have been raised by means of a petition for writ of habeas corpus or a writ of error coram nobis, while the Sentence Review Division reviews the equity of a sentence. The plain language of 46-21-105 makes it clear that an application for review of a sentence, as contained in this section, is not a direct appeal within the context of 46-21-105. Further, the common-law rule of plain error does not extend to cases in which a defendant had the opportunity to challenge a dangerous offender designation on direct appeal but chose not to. St. v. Moorman, 279 M 330, 928 P2d 145, 53 St. Rep. 1173 (1996).

46-18-904. Procedure upon review.

Commission Comments

Commission Comment Not Divided: This section is a recodification of part of section 95-2503, R.C.M. 1947. Section 46-18-905 is also derived from section 95-2503. The commission comments to section 95-2503 are printed in their entirety under 46-18-904.

Source: General Statutes of Connecticut, section 51-196.

This section gives the review division the authority to substitute any sentence the trial judge could have imposed, including an increased term. It is intended that the statute be construed so as to prevent the consideration of the evidence which was not before the trial judge, such as post-sentence rehabilitation, and cooperation, but allows the division to require the production of pre-sentence reports, transcript of sentencing day proceedings, and other documents such as psychiatric reports that were before the primary sentencing authority, and any other relevant material that could have or should have been obtained at the time of sentencing.

Compiler's Comments

2003 Amendment: Chapter 69 in (1)(a)(i) after "imposed" deleted "either increasing or decreasing the penalty"; at end of (1)(a)(ii) inserted "including a decrease or increase in the penalty"; in (2) at beginning of second sentence substituted "The person requesting the review may appear and has the right to be represented by counsel" for "The appellant may appear and be represented by counsel"; in (3) near end of second sentence substituted "person" for "defendant"; and made minor changes in style. Amendment effective July 1, 2003.

1985 Amendment: In (2) inserted last sentence allowing other interested persons to attend and participate in the review; and in (3) inserted first sentence creating a presumption that the District Court sentence is correct.

Case Notes

Failure to Appoint Counsel for Defendant During Sentence Review Process — Sentence Review as Critical Stage of Proceedings: To the extent that the Sentence Review Division has the power to impose any sentence that could be imposed by the District Court, including increasing a sentence, sentence review is a critical stage of the proceedings against a defendant because of the

potential for substantial prejudice from possible further loss of liberty. Therefore, assistance of counsel is necessary to aid a defendant in presenting the defendant's case during all stages of the review process. Defendant's mere appearance before the Sentence Review Division does not constitute a valid waiver of the right to counsel. Thus, it is the duty of the Sentence Review Division to inform a defendant of the right to counsel representation both when deciding whether to file an application for review and when appearing and presenting a case to the Division. The Sentence Review Division rule holding to the contrary was held to be unconstitutional. Ranta v. St., 1998 MT 95, 288 M 391, 958 P2d 670, 55 St. Rep. 378 (1998), following Consiglio v. Warden, St. Prison, 220 A2d 269 (Conn. 1966).

Stiffening of Sentence by Sentence Review Division That Found Original Sentence Not Inadequate: Offender pleaded guilty to aggravated assault and was sentenced to 20 years in the state prison. The Sentence Review Division found that the sentence was not inadequate or excessive, but modified the sentence to provide for no parole until 7 years had been served and to require completion of the prison's anger management program and other counseling considered appropriate by the staff. The Division stated that the modification was made because during the sentence review hearing, offender showed no remorse or concern for the victim, showed disdain for the victim, and accepted no responsibility for his actions. On petition for postconviction relief, the court held that having found that the original sentence was not inadequate, the Sentence Review Division lacked jurisdiction to alter the sentence. The court struck the modification from the sentence. St. v. Torres, 277 M 514, 922 P2d 1180, 53 St. Rep. 826 (1996).

Review of Sentence for Inequity: Review of a sentence for mere inequity or disparity is for the Sentence Review Division, not the Supreme Court, which will review only for legality of the sentence, under the abuse of discretion standard. St. v. Lloyd, 208 M 195, 676 P2d 229, 41 St. Rep. 263 (1984), followed in St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991). See also St. v. Moorman, 279 M 330, 928 P2d 145, 53 St. Rep. 1173 (1996).

Implications of Decision to Let Sentence Stand: Given the function of the Sentence Review Division, its decision to leave as originally imposed a 40-year sentence for robbery amounts to an implicit finding that the sentence was not so greatly disproportionate to the crime so as to constitute cruel and unusual punishment. In re Jones, 176 M 412, 578 P2d 1150 (1978).

Sentence Increase: An increase of a sentence under this section did not constitute double jeopardy or denial of due process or equal protection of the laws. St. v. Henrich, 162 M 114, 509 P2d 288 (1973).

Questions Reviewable: The Review Division established by this chapter provides appellate review of "legal" sentences and therefore could not review the contention of the defendant that his sentence under 45-9-102 was "illegal" because he was denied the statutory presumption in favor of deferred imposition. St. v. Simtob, 154 M 286, 462 P2d 873 (1969).

46-18-905. Decision — finality, report of.

Commission Comments

Source: See commission comments to 46-18-904.

Compiler's Comments

2003 Amendment: Chapter 69 in (1) near end of second sentence after "person sentenced" inserted "the defense counsel, the county attorney"; and made minor changes in style. Amendment effective July 1, 2003.

Case Notes

Application for Extraordinary Relief From Montana Supreme Court Only Recourse for Defendant Who Wishes to Challenge Decision of the Sentence Review Division: The District Court lacked jurisdiction to review decisions of the Sentence Review Division because it is a division of the Montana Supreme Court. Jordan v. St., 2008 MT 334, 346 M 193, 194 P3d 657, (2008).

Review of Decision of Sentence Review Division: A petition for postconviction relief or other extraordinary writ is appropriate for the purpose of challenging a decision of the Sentence Review Division. St. v. Torres, 277 M 514, 922 P2d 1180, 53 St. Rep. 826 (1996).

Finality of Review by Sentence Review Division: The Supreme Court held that the petitioner's challenges to her sentences had previously been reviewed by the Sentence Review Division and that with respect to review of sentences for mere inequity or disparity, the Division's decision is final. In re Petition of Slice, 271 M 337, 896 P2d 1125, 52 St. Rep. 472 (1995).

Part 10
Home Arrest

Part Compiler's Comments

Severability: Section 14, Ch. 105, L. 1991, was a severability clause.

46-18-1001. Definitions.

Compiler's Comments

1997 Amendment: Chapter 322 at end of definition of home arrest inserted "and home arrest procedures and conditions imposed under this part. It does not include intensive supervision by the department of corrections"; in definition of monitoring device, in first sentence substituted "capable of" for "that is limited in capability to", in second sentence substituted "may include an apparatus for testing the offender's breath for the presence of alcohol" for "must be minimally intrusive", and inserted third sentence stating that "A telephone alone is not a monitoring device"; and made minor changes in style.

1995 Amendment: Chapter 546 in (4), in two places, substituted "department of corrections" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Name Change: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Applicability: Section 15, Ch. 105, L. 1991, provided: "[This act] applies to sentences imposed after [the effective date of this act] [effective October 1, 1991]."

Case Notes

No Credit for Time Served on Informal House Arrest: The District Court conditioned Gulbranson's release on bond with informal house arrest. Gulbranson contended that the house arrest restricted his liberty in a manner sufficiently similar to incarceration, as provided in 46-18-403, to require that he be given credit for time served. However, Gulbranson did not cite any legal authority to support the contention, and the Supreme Court declined to consider the unsupported argument. Instead, the Supreme Court held that the informal house arrest in this case was not house arrest as provided for in this part, so 46-18-203 did not require that Gulbranson's sentences be credited with time served for that period. Gulbranson failed to show that the District Court was statutorily required to credit him for time served while released on bond, so it was within the District Court's discretion whether to allow credit. Absent an abuse of discretion, the District Court was affirmed. St. v. Gulbranson, 2003 MT 139, 316 M 163, 69 P3d 1187 (2003), followed in St. v. Clark, 2008 MT 112, 342 M 461, 182 P3d 62 (2008), and in St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009).

46-18-1002. Home arrest — petition — agreement.

Compiler's Comments

1997 Amendment: Chapter 322 in (1), in first sentence after "imprisonment", deleted "in the county jail or state prison" and inserted second sentence stating that "The term of home arrest may not exceed 6 months"; inserted (2) stating what the petition must include; and rewrote (3), (4), and (5) to clarify matters, slightly change procedures, delete a provision that home arrest time be credited against the maximum term of imprisonment imposed, and insert a requirement that each adult residing with the offender shall consent to the home arrest (see 1997 Session Law for former text).

Applicability: Section 15, Ch. 105, L. 1991, provided: "[This act] applies to sentences imposed after [the effective date of this act] [effective October 1, 1991]."

Case Notes

No Credit for Time Served on Informal House Arrest: The District Court conditioned Gulbranson's release on bond with informal house arrest. Gulbranson contended that the house arrest restricted his liberty in a manner sufficiently similar to incarceration, as provided in 46-18-403, to require that he be given credit for time served. However, Gulbranson did not cite any legal authority to support the contention, and the Supreme Court declined to consider the unsupported argument. Instead, the Supreme Court held that the informal house arrest in this case was not house arrest as provided for in this part, so 46-18-203 did not require that Gulbranson's sentences be credited with time served for that period. Gulbranson failed to show that the District Court was statutorily required to credit him for time served while released on bond, so it was within the District Court's discretion whether to allow credit. Absent an abuse of

discretion, the District Court was affirmed. St. v. Gulbranson, 2003 MT 139, 316 M 163, 69 P3d 1187 (2003), followed in St. v. Clark, 2008 MT 112, 342 M 461, 182 P3d 62 (2008), and in St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009).

46-18-1003. Home arrest — conditions — fees.

Compiler's Comments

1997 Amendment: Chapter 322 in (1)(a)(iv) substituted "educational institution or program approved by the supervising authority" for "approved educational institution or program"; deleted former (1)(b) providing that a home arrestee may not commit another offense during the period of home arrest; in (1)(c) substituted "maintain a telephone in the home and the ordered monitoring device on the arrestee's person" for "maintain a telephone or other approved monitoring device in the home or on the arrestee's person"; in (1)(d)(ii) inserted reference to 46-23-1031; substituted (2) providing for an arrest warrant if it is believed there was a violation of home arrest, notice and a report to the court on arrest, a court hearing, revocation of home arrest and a sentence to serve all or part of the original sentence and, if imposition of sentence was suspended in the original proceeding, imposition of any sentence that could have been originally imposed, and a credit for home arrest time against any sentence to be served for former language that read: "A written and notarized consent agreement must be filed with the court by every adult who will share the offender's home during the term of home arrest"; deleted (3) subjecting a home arrestee violating a condition of home arrest to prosecution under 45-7-306; and made minor changes in style.

Applicability: Section 15, Ch. 105, L. 1991, provided: "[This act] applies to sentences imposed after [the effective date of this act] [effective October 1, 1991]."

46-18-1004. Home arrest — ineligibility.

Compiler's Comments

1995 Amendment: Chapter 546 substituted "department of corrections" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Name Change: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Applicability: Section 15, Ch. 105, L. 1991, provided: "[This act] applies to sentences imposed after [the effective date of this act] [effective October 1, 1991]."

46-18-1005. Home arrest — responsibility for own living expenses — government benefits.

Compiler's Comments

Applicability: Section 15, Ch. 105, L. 1991, provided: "[This act] applies to sentences imposed after [the effective date of this act] [effective October 1, 1991]."

46-18-1006. Home arrest — list of offenders.

Compiler's Comments

Applicability: Section 15, Ch. 105, L. 1991, provided: "[This act] applies to sentences imposed after [the effective date of this act] [effective October 1, 1991]."

CHAPTER 19
EXECUTION OF JUDGMENT

Chapter Collateral References

Corrections Policy and Facility Needs, Mont. Legislative Council, 1980.

Part 1
Method of Execution

Part Case Notes

Concurrent Felony and Misdemeanor Sentences: When the defendant is convicted of a felony under the first portion of a consolidated information and of a misdemeanor under the second portion, and the trial court decrees that the sentences can be served concurrently, the sentence for the felony should be served in the state prison, credit for the misdemeanor fine should be given at the same time, and any remaining time under the misdemeanor at the end of the state prison term should be served in the county jail. St. v. Bogue, 142 M 459, 384 P2d 749 (1963).

Punishment for Contempt: An attorney found guilty of contempt was properly subject to punishment by fine and imprisonment until the fine was paid. State ex rel. Coleman v. District Court, 51 M 195, 149 P 973 (1915).

46-19-101. Commitment of defendant — transfer of information in possession of sheriff.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, section 119-1.

This basically constitutes no change in the present law but attempts to set out more concisely the steps to effectuate the judgment of imprisonment or death.

Compiler's Comments

2009 Amendment: Chapter 53 inserted (2) requiring the sheriff to deliver information regarding the defendant's physical and mental health when delivering the defendant to the place of confinement, commitment, or execution; and made minor changes in style. Amendment effective October 1, 2009.

2003 Amendment: Chapter 141 substituted text relating to commitment of a defendant and delivery of the defendant by the sheriff to the place of confinement, together with an order signed by the sentencing judge constituting authority for holding the defendant, for former text that read: "Upon rendition of judgment after pronouncement of a sentence imposing punishment of imprisonment or death, the court shall commit the defendant to the custody of the sheriff, who shall deliver the defendant to the place of his confinement or execution." Amendment effective October 1, 2003.

Case Notes

Prison's Custody Classification as Alleged Violation of Plea Bargaining Agreement — Withdrawal of Plea Denied: Under a plea bargain agreement, defendant was sentenced to 10 years as a nondangerous offender (see 1995 repeal of 46-18-404) without parole. Upon entering prison, he was held in close custody for 24 months under prison rules calling for dangerous offenders and those sentenced without parole to serve 24 months in close custody prior to being considered for transfer to lower, more amenable custody levels. The prosecution, defense counsel, defendant, and judge were all unaware of those rules. Defendant was not entitled to withdraw his plea on the ground he was kept in close custody for 24 months in violation of his plea agreement. There was no violation of the agreement, nor was he entitled to the additional good time credits he would have received had he not been held so long in close custody. Prison officials take many factors into account in making custody reclassifications, and there was no guarantee he would have been held in close custody only for the time he claimed he should have been upon entry to the prison. St. v. Mesler, 210 M 92, 682 P2d 714, 41 St. Rep. 939 (1984).

Alteration of Judgment: The warden of the state prison has no authority to change or alter a judgment of conviction in any particular. State ex rel. Nelson v. Ellsworth, 141 M 78, 375 P2d 316 (1962).

Authority to Detain:

Proceedings in contempt are in their nature criminal, and the order adjudging one in contempt is in its nature a final judgment, but the Sheriff cannot execute a judgment in a criminal matter or proceeding without "competent authority", as provided in 7-32-2205. Hence, when one has been committed for contempt and the Sheriff does not hold a certified copy of the order of commitment, he is not authorized to detain the person so committed. In re Mettler, 50 M 299, 146 P 747 (1915).

The certified copy of the judgment is the evidence of the warden's authority for detaining the prisoner. Stephens v. Conley, 48 M 352, 138 P 189 (1914).

Collateral References

Criminal Law *key* 999(1).

Effect of delay in taking defendant into custody after conviction and sentence. 76 ALR 5th 485.

Power of court to increase severity of unlawful sentence—modern status. 28 ALR 4th 147.

Power of state court, during same term, to increase severity of lawful sentence—modern status. 26 ALR 4th 905.

Loss of jurisdiction by delay in imposing sentence. 98 ALR 3d 605.

46-19-102. Execution of judgment.

Commission Comments

Source: R.C.M. 1947, [sections] 94-8002 and 94-8003.

This section makes no substantial change.

Compiler's Comments

2009 Amendment: Chapter 327 throughout section before "judgment" inserted reference to fine portion of judgment; in (1) near beginning after "alone" inserted "or for a fine and imprisonment"; and made minor changes in style. Amendment effective October 1, 2009.

2003 Amendment: Chapter 510 in (1) near middle inserted "any unpaid interest accrued on the judgment, and costs and fees incurred in collecting the judgment"; inserted (3) authorizing court to contract with private person or entity to collect judgment, authorizing assigned private person or entity to institute suit or lawful collection procedures and postjudgment remedies in person's or entity's own name, authorizing court to pay reasonable fee, after deducting required charges, to private person or entity for judgment collection, and requiring fee incurred by court to be added to judgment amount; and made minor changes in style. Amendment effective October 1, 2003.

1995 Amendment: Chapter 388 in (2), after "detained", substituted "and allowed a credit for each day of incarceration as provided in 46-18-403" for "until the judgment is complied with. The imprisonment must not exceed 1 day for every $25 of the fine"; and made minor changes in style. Amendment effective April 12, 1995.

1989 Amendment: In (2), in second sentence, increased rate at which fine is paid off by imprisonment to $25 from $10 per day; and made minor changes in phraseology.

Case Notes

Fine or Imprisonment:

A judgment under former law requiring a defendant who was convicted on three counts of an information charging violations of the liquor law to pay a fine of $200 and to serve 60 days in the county jail on each count and, if the fines were not paid, to serve them out at the rate of 1 day for each $2 of the fines was held not uncertain or ambiguous. It meant that he would be imprisoned for a total of 180 days and would serve 1 day for each $2 of the fines aggregating $600. In re Pyle, 72 M 494, 234 P 254 (1925).

The District Court had the power under a former statute to impose a sentence of imprisonment in the county jail for a certain number of days, the defendant in addition to pay a fine in a stated amount and, in default of payment, to stand committed 1 day for every $2 of the fine after expiration of the term of imprisonment until the fine was paid. In re Londos, 54 M 418, 170 P 1045 (1918).

A judgment under former law in a case of misdemeanor, imposing a fine of $500 and providing that in default of payment the defendant be imprisoned "for the term of one day for each $2 of said fine", was sufficiently definite and certain. State ex rel. Poindexter v. District Court, 51 M 186, 149 P 958 (1915).

Attorney General's Opinions

Imprisonment in County Jail Upon Failure to Pay Traffic Fine: Both 61-8-711 and 46-19-102 concern imprisonment upon failure to pay fines for traffic offenses. Because a particular statute governs when a general statute and a particular statute on the same subject are inconsistent, 61-8-711 governs. However, if the failure to pay is based on indigency, constitutional issues arise. The courts have recognized the infirmity of imposing a fine as a sentence and then converting it into a jail term simply because the defendant is indigent and cannot forthwith pay the fine in full. 38 A.G. Op. 61 (1980).

Collateral References

Fines *key* 6.

36A C.J.S. Fines §6.

46-19-103. Execution of death sentence.

Commission Comments

Source: [R.C.M. 1947, sections 94-8007, 94-8016 through 94-8018.]

This section does not change the law in any way but merely combines into one provision separate statutes dealing with execution of the death sentence. It should be noted that the commission has not considered the propriety of capital punishment, but has redrafted a law in conformity with what appears to be the present public policy of this state.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 387 in (3) near end before "pronounces" substituted "coroner or deputy coroner" for "licensed physician" and at end after "dead" deleted "according to accepted standards of medical practice"; in (6)(b) substituted present language designating the makeup of witnesses for an execution for former language that read: "The warden shall allow the execution to be observed by 12 witnesses, 3 of whom may be designated by

the person to be executed"; inserted (6)(c) providing grounds for rejection of a witness by the department of corrections; inserted (8) providing that rejection of a witness is not grounds for staying an execution; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 491 in (2) substituted "the Montana state prison or the Montana women's prison" for "a state prison". Amendment effective April 27, 1999.

1997 Amendment: Chapter 92 in (3), after "inflicted by", deleted "hanging the defendant by the neck until he is dead or, at the election of the defendant, by" and deleted second sentence that read: "A defendant who wishes to choose execution by lethal injection shall do so at the hearing at which an execution date is set, and if he does not, the option to choose death by lethal injection is waived"; in (4), in second sentence, substituted "director of the department of corrections" for "warden of the state prison" and in third sentence substituted "director" for "warden" and after "judgment" deleted "method of execution"; in first sentence in (6), after "execution", deleted "carried out by lethal injection"; in (7), after "time", deleted "mode, and manner in which"; and made minor changes in style. Amendment effective March 19, 1997.

Applicability: Section 4, Ch. 92, L. 1997, provided: "[This act] [46-19-103 and 46-23-301] applies to death warrants issued by a court on or after [the effective date of this act]." Effective March 19, 1997.

1989 Amendment: In second sentence of (1) substituted "20" for "5"; inserted last sentence of (3) relating to time for choosing execution by lethal injection; inserted (4) relating to preparation, delivery, and contents of death warrant; in (5) substituted reference to subsection (6) for reference to subsection (5) and inserted last two sentences relating to anonymity of executioner and confidentiality of facts pertaining to his selection and training; and at beginning of (7) inserted "Within 20 days" and after "the warden shall" substituted "return the death warrant to the clerk of the court from which it was issued, noting on the warrant the time, mode, and manner" for "make a return upon the death warrant showing time, mode, and manner". Amendment effective April 15, 1989.

1987 Amendment: In (4), in second sentence, changed "subsection (4)" to "subsection (5)".

1983 Amendments — Applicability: Chapter 292 inserted (2) authorizing the Sheriff to deliver defendant to the State Prison and placing confinement costs on the state.

Chapter 411, in (3), after "by the neck until he is dead" inserted optional provision for death by lethal injection; in (4), substituted language requiring the prison warden to provide a suitable room for executions and all implements necessary, to select the person to perform the execution, and to supervise the execution for "A sentence of death must be executed within the walls or yard of a jail or some convenient private place in the county where the trial took place."; in (5), substituted language concerning an execution carried out by lethal injection and requiring witnesses for "The sheriff of the county must be present and shall supervise such execution which shall be conducted in the presence of a physician, the county attorney of the county, and at least 12 reputable citizens to be selected by the sheriff. The sheriff shall, at the request of the defendant, permit such priests or ministers, not exceeding two, as the defendant may name and only persons, relatives, or friends, not to exceed five, to be present at the execution together with such peace officers as he may think expedient to witness the execution. No other persons than those mentioned in this subsection can be present at the execution, nor can any person under age be allowed to witness the same."; and in (6), changed "sheriff" to "warden".

Section 7, Ch. 411, L. 1983, provided: "This act applies to death sentences whether first pronounced before or after its effective date. The legislature intends this act to apply retroactively under 1-2-109." Effective on passage and approval, April 7, 1983.

1981 Amendment: Added the last sentence of (1) relating to setting the execution date after a stay.

Case Notes

Abolition of Hanging — No Denial of Right to Attack Hanging as Unconstitutional: Execution by hanging does not violate the eighth amendment. Even if it did, the petitioner's execution would not thus be prevented because the alternative method, lethal injection, could be used, and he is not attacking that method. When the 1997 Montana Legislature abolished hanging, the eighth amendment claim became moot. Petitioner has no constitutionally protected interest in a choice of death penalty punishment. His claim that hanging, which he had selected, violated the eighth amendment and that the Legislature's abolishment of hanging denies him a vested right in that claim, a claim he asserts would have prevailed, resulting in the fact that he could not be executed by lethal injection, is denied. Abolition of hanging was not a bill of attainder intended to render the petitioner's claim moot. Langford v. Day, 134 F3d 1381 (9th Cir. 1998).

Criteria Met for Supreme Court Jurisdiction of Death Row Petition for Injunctive Relief: Pursuant to the version of this section that was in effect at the time that Langford was sentenced

for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended this section by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford then filed an original proceeding with the Montana Supreme Court, asserting that the state impermissibly truncated his ability to fully appeal his death sentence by removing hanging as a means of execution and that the state should be permanently enjoined from executing him under the current version of this section. After examining the applicable statutory criteria, the Supreme Court accepted jurisdiction of the petition for writ of injunction because: (1) the state was clearly a party to the action; (2) the public had an interest in establishing and maintaining the validity of state actions in a proceeding that attempted to curtail the state's ability to enact, amend, and enforce state legislation; and (3) Langford's imminent execution constituted sufficient emergency circumstances to render due consideration in the trial court and appeal to the Supreme Court an inadequate remedy. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Deletion of Hanging as Form of Capital Punishment Not Bill of Attainder: Pursuant to the version of this section that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended this section by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to this section constituted a bill of attainder in violation of Art. II, sec. 30, Mont. Const., inflicting punishment without a judicial trial. However, this section does not inflict punishment, but simply delineates the procedure by which a previously imposed sentence is carried out. Thus, the amendment to this section was not a bill of attainder. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Deletion of Hanging as Form of Capital Punishment Not Denial of Ability to Present Argument Regarding Cruel and Unusual Punishment: Pursuant to the version of this section that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended this section by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to this section violated numerous constitutional provisions by denying him the ability to present the cruel and unusual punishment argument to the federal courts. The Supreme Court found no merit in Langford's argument that the state Attorney General advised the Legislature to amend this section in order to deny Langford the grounds for appeal, because the Attorney General supported but did not initiate the legislation. Further, the court did not agree with Langford's assertion that the amendment rendered the time that Langford spent in pursuing the cruel and unusual punishment argument retroactively useless and chargeable to the state as a form of cruel and unusual punishment in itself, because the eighth amendment argument was not the only claim that Langford pursued. Therefore, the entire time could not be charged to the state as being related to the amendment to this section. Having concluded that Langford failed to establish any constitutional violations, his petition for writ of injunction staying his execution was denied. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Deletion of Hanging as Form of Capital Punishment Not Ex Post Facto Application: Pursuant to the version of this section that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging

was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended this section by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to this section constituted an ex post facto law in violation of Art. II, sec. 31, Mont. Const., because it effectively removed his defense of arguing that hanging was cruel and unusual punishment. However, Langford was not asserting a defense to a crime with which he was charged; he had already pleaded guilty and been sentenced, and the validity of the convictions was not at issue. The Supreme Court found no ex post facto violation because Langford's purely conjectural assertions that he potentially would have a due process-type right to avoid execution under the earlier version of the statute did not create a current substantive right that would be infringed by an amendment altering only the procedure by which his sentence would be carried out. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997). See also McKenzie v. Day, 57 F3d 1461 (9th Cir. 1995).

State Not Required to Wait Five Years to Execute Convict: Upon the dissolution of Gollehon's stay of execution, the District Court set a new execution date within 90 days of the hearing dissolving the stay, as required by this section. Gollehon argued that the state could not execute him prior to the expiration of the 5-year period provided in 46-21-102 for petitioning for postconviction relief. The Supreme Court held that the provisions concerning postconviction relief do not override the statutory language requiring the setting of a new execution date upon the dissolution of a stay of execution. Gollehon v. District Court, 271 M 363, 897 P2d 1058, 52 St. Rep. 447 (1995), followed in State ex rel. Turner v. District Court, 271 M 392, 897 P2d 1060, 52 St. Rep. 498 (1995).

Authority of Replacement Judge to Reset Execution Date: McKenzie argued that the judge presiding over the resetting of McKenzie's execution date had no jurisdiction to do so because the original presiding judge or that judge's successor did not enter an order conferring jurisdiction. However, this section rather than 3-1-804 controls in this situation. This section reposes the act of setting the execution date and signing the death warrant in the court in which the defendant was sentenced. Because both judges preside in the same district, resetting of the execution by the subsequent judge was proper and the requirement in 3-1-804, which relates to the substitution of District Court Judges, did not apply. St. v. McKenzie, 271 M 32, 894 P2d 289, 52 St. Rep. 312 (1995).

No Discharge of Prisoner Sentenced to Die Based on Failure to Execute Death Warrant on Date Fixed: McKenzie contended that under the law in effect at the time that he was sentenced to death in 1975 (section 95-2303(b), R.C.M. 1947, a predecessor to this section), the execution had to be conducted within 60 days of sentencing and the sentencing court had no jurisdiction to reset the execution date if the 60 days elapsed. However, the section was amended in 1981 to require the court to set a new execution date upon dissolution of a stay of execution. Because the order resetting the execution date was merely a procedural, ministerial act that did not affect McKenzie's substantial rights, the controlling law was the law in effect at the time of the court's resetting the execution date. The Supreme Court also cited several out-of-state court precedents for the proposition that failure to execute a death warrant on the date fixed does not result in immunity to or discharge of a person sentenced to die but requires the fixing of a new execution date. Thus, the resentencing court did not err in resetting the execution date according to this section. St. v. McKenzie, 271 M 32, 894 P2d 289, 52 St. Rep. 312 (1995).

No Violation of Ex Post Facto Prohibitions: This section, imposing an obligation to set a date of execution at the time that sentence is pronounced, does not confer upon a state trial court any authority to reconsider a death sentence once it has been pronounced and therefore does not violate ex post facto prohibitions. McKenzie v. Day, 57 F3d 1461 (1995).

Failure to Choose Method of Execution as Waiver of Right to Election of Methods: Defendant chose not to speak in answer to the sentencing court's question concerning method of execution. Defendant's silence constituted a waiver of the right to election of methods, rendering moot any later arguments regarding whether execution by hanging can be considered cruel and unusual punishment. (See 1997 amendment.) St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993). See also St. v. Langford, 254 M 44, 833 P2d 1127 (1992).

Election of Hanging as Precluding Contention That Hanging a Cruel and Unusual Punishment: Langford sought a declaration that punishment by hanging was a cruel and unusual punishment in violation of the eighth amendment to the U.S. Constitution (similar to Art. II, sec. 22, Mont. Const.). However, he had been afforded an ample opportunity under this

section to elect lethal injection over hanging as the form of execution but chose not to do so. Accordingly, he rendered moot any claim concerning the constitutionality of hanging as a method of execution. (See 1997 amendment.) St. v. Langford, 254 M 44, 833 P2d 1127, 49 St. Rep. 615 (1992).

1983 Amendments Not Bill of Attainder: Chapter 411, L. 1983, amended 46-19-103 to allow the defendant to choose death by lethal injection as an alternative to hanging. Section 7 makes the act applicable to death sentences whether first pronounced before or after its effective date, making the act specifically retroactive. The act is not a bill of attainder as argued by the defendant who was convicted before the effective date of the act and sentenced to death after its effective date. (See 1997 amendment.) St. v. Fitzpatrick, 211 M 341, 684 P2d 1112, 41 St. Rep. 1400 (1984).

Hanging Not Cruel and Unusual Punishment: There is no evidence that shows that death from hanging, when properly carried out, is anything other than swift and immediate or that hanging results in any more suffering than that associated with other modes of execution. The Supreme Court has no power to change the legislatively settled provisions of the sentence in the absence of constitutional violation. (See 1997 amendment.) St. v. Coleman, 185 M 299, 605 P2d 1000 (1979).

Collateral References

Criminal Law *key* 1219.

24 C.J.S. Criminal Law §§2110, 2191 through 2194, 2219.

Validity of rules and regulations concerning viewing of execution of death penalty. 107 ALR 5th 291.

Part 2
Suspension of Execution of Death

46-19-201. When and how mental fitness of defendant determined.

Commission Comments

Source: New.

This provision will replace R.C.M. 1947, sections 94-8009 and 94-8010 which set forth a special procedure for determining the sanity of the defendant. This special procedure is no longer necessary because the chapter dealing with competency of the accused provides for this determination.

Collateral References

Criminal Law *key* 981(2).

24 C.J.S. Criminal Law §§2039, 2040, 2194.

46-19-202. Proceedings following determination regarding fitness.

Commission Comments

Source: [R.C.M. 1947, section] 94-8012.

This section makes no substantial change.

Compiler's Comments

2005 Amendment: Chapter 130 in (2) near end after "appropriate" substituted "facility" for "institution". Amendment effective October 1, 2005.

1995 Amendment: Chapter 546 in (2) substituted "department of public health and human services" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

1983 Amendments — Applicability: Chapter 361, in (2) and (3), substituted "Montana state hospital" for "Warm Springs state hospital".

Chapter 411, in (1) and (3), substituted reference to state prison warden for reference to sheriff.

Section 7, Ch. 411, L. 1983, provided: "This act applies to death sentences whether first pronounced before or after its effective date. The legislature intends this act to apply retroactively under 1-2-109." Effective on passage and approval, April 7, 1983.

Collateral References

Criminal Law *key* 98(2).

24 C.J.S. Criminal Law §§2123, 2142, 2194, 2213 through 2219.
Propriety of carrying out death sentences against mentally ill individuals. 111 ALR 5th 491.

46-19-203. Procedure for determining if woman is pregnant.

Commission Comments

Source: R.C.M. 1947, [section] 94-8013.
This section makes no substantial change.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-19-204. Proceedings following determination regarding pregnancy.

Commission Comments

Source: R.C.M. 1947, section 94-8014.
No change.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: In third sentence, before "warrant", substituted "a death" for "his"; and inserted last sentence relating to items that must be recited on the warrant.

1983 Amendment — Applicability: Substituted reference to state prison warden for reference to sheriff in two places.

Section 7, Ch. 411, L. 1983, provided: "This act applies to death sentences whether first pronounced before or after its effective date. The legislature intends this act to apply retroactively under 1-2-109." Effective on passage and approval, April 7, 1983.

Part 3
Commitment to Prison in Another State

Part Case Notes

Habeas Corpus — Exhaustion of State Remedies: A petition for a Writ of Habeas Corpus was denied a prisoner convicted in Montana but imprisoned in Nevada because his state remedies had not been exhausted. Evans v. Wolff, 427 F. Supp. 400 (D.C. Mont. 1977).

46-19-301. Western Interstate Corrections Compact — contents.

Commission Comments

Source: [R.C.M. 1947, section] 94-8019.
No change.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Attorney General's Opinions

Contracts for Custody and Care of Prisoners: The Department of Institutions (now Department of Corrections) has authority to contract with an Indian tribe which is a member of the Western Interstate Corrections Compact for the custody, care, and maintenance of adult Indian prisoners. 37 A.G. Op. 92 (1977).

46-19-302. Effectuation of purposes of compact.

Commission Comments

Source: [R.C.M. 1947, section] 94-8021.
No change.

Attorney General's Opinions

Contracts for Custody and Care of Prisoners: The Department of Institutions (now Department of Corrections) has authority to contract with an Indian tribe which is a member of the Western Interstate Corrections Compact for the custody, care, and maintenance of adult Indian prisoners. 37 A.G. Op. 92 (1977).

46-19-303. Power of governor to enter into contracts.

Commission Comments

Source: [R.C.M. 1947, section] 94-8023.
No change.

Compiler's Comments

1995 Amendment: Chapter 546 substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Attorney General's Opinions

Contracts for Custody and Care of Prisoners: The Department of Institutions (now Department of Corrections) has authority to contract with an Indian tribe which is a member of the Western Interstate Corrections Compact for the custody, care, and maintenance of adult Indian prisoners. 37 A.G. Op. 92 (1977).

46-19-304. Commitment or transfer of inmate to institution outside of state.

Commission Comments

Source: [R.C.M. 1947, section] 94-8021.

No change.

Attorney General's Opinions

Contracts for Custody and Care of Prisoners: The Department of Institutions (now Department of Corrections) has authority to contract with an Indian tribe which is a member of the Western Interstate Corrections Compact for the custody, care, and maintenance of adult Indian prisoners. 37 A.G. Op. 92 (1977).

46-19-305. Hearings requested by other states.

Commission Comments

Source: [R.C.M. 1947, section] 94-8022.

No change.

Compiler's Comments

1995 Amendment: Chapter 546 substituted "board of pardons and parole" for "board of pardons" and substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Part 4
Interstate Corrections Compact

46-19-401. Compact adopted — text.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

46-19-402. Effectuation of purposes of compact.

Compiler's Comments

1995 Amendment: Chapter 546 substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

CHAPTER 20
APPEALS

Chapter Compiler's Comments

Supreme Court Rules Governing Criminal Appellate Procedure — Certain Title 46, Ch. 20, Sections Superseded: A June 16, 1986, order of the Montana Supreme Court, which became effective on January 19, 1987, amended the Rules of Appellate Civil Procedure by deleting "Civil" from the title and extensively amending the rules to make them applicable to both civil and criminal appellate civil procedure. The court's order stated that certain Title 46, ch. 20, sections were superseded. The superseded sections are: 46-20-102, 46-20-201, 46-20-202, 46-20-203, 46-20-301, 46-20-302, 46-20-303, 46-20-304, 46-20-305, 46-20-306, 46-20-311, 46-20-312, 46-20-313, 46-20-314, 46-20-315, 46-20-316, 46-20-317, 46-20-318, 46-20-319, 46-20-401, 46-20-402, 46-20-403, 46-20-404, 46-20-405, 46-20-406, 46-20-407, 46-20-408, 46-20-409, 46-20-410, 46-20-501, 46-20-502, 46-20-503, 46-20-504, 46-20-511, 46-20-512, 46-20-513, 46-20-601, 46-20-602, 46-20-603, 46-20-604, 46-20-704, 46-20-705.

The advisory commission note preceding the rules as amended reads: "The procedure covering appeals in criminal cases to the supreme court of Montana from Montana district courts has heretofore been found in various statutes. It was decided that for convenience the rules governing procedure for appellate practice should be equally applicable to civil and criminal cases, the same as found in the Federal Rules of Appellate Procedure. Many of the proposed amendments are minor, designed to make them applicable to criminal cases as well as civil. In such cases, no further advisory commission notes appear necessary."

Interim Study of Delays: SJR 30 (1981) requested an interim study of delays in the administration of appeals of criminal cases in the criminal justice system of Montana and means by which the institutional causes of these delays could be lawfully eliminated and required a report of the findings of the study to the Legislature. The Legislative Council designated the Joint Subcommittee on Judiciary to conduct the study.

Chapter Case Notes

DECISIONS UNDER CHAPTER 20

Petition for Postconviction Relief Filed With Supreme Court — No District Court Jurisdiction to Amend Pleadings on Remand: Boucher filed with the Supreme Court for postconviction relief. The Supreme Court remanded to District Court for an evidentiary hearing on whether Boucher was denied effective assistance of counsel because of counsel's failure to investigate and formulate a defense based on the victim's history of making false accusations of sexual assault. On remand, Boucher sought to offer additional evidence of ineffective counsel unrelated to the issue remanded. Although a District Court has the discretion to grant or deny a motion to amend a postconviction petition when the petition is filed with that court, in cases like this when the petition is originally filed with the Supreme Court and remanded, the District Court does not have authority to grant leave to amend the pleadings to include allegations not included in the original petition. St. v. Boucher, 1999 MT 102, 294 M 296, 980 P2d 1058, 56 St. Rep. 431 (1999), distinguishing Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997), and Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997).

Denial of Appeal Allowed When Right to Postconviction Relief Exercised — No Due Process Violation Found: Finney argued on appeal that he had been denied his right to effective assistance of counsel. Citing Evitts v. Lucey, 469 US 387 (1985), the Supreme Court held that when, as in this case, a criminal defendant was afforded a remedy in postconviction proceedings that have already been reviewed under a different part of the Supreme Court's opinion, there is no violation of the defendant's due process rights in denial of appeal. St. v. Finney, 281 M 58, 931 P2d 1300, 54 St. Rep. 58 (1997), distinguished in Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Trial Judge's Role: Trial judge has a duty to conduct the trial in a speedy and fair manner and is allowed wide latitude in doing so. St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982).

Failure to Request More Specific Instructions at Trial Level: On appeal, the defendant argued that more specific instructions were necessary. The defendant, however, did not request more specific instructions at trial. The defendant cannot on appeal hold the state or the trial court responsible for her failure to request more specific instructions. St. v. Goltz, 197 M 361, 642 P2d 1079, 39 St. Rep. 613 (1982).

Deliberate Homicide — Sufficiency of Evidence to Support Guilty Verdict: In determining on appeal whether a criminal conviction is supported by substantial evidence, the evidence is viewed in the light most favorable to the State. The defendant's confession was found to have been voluntary, other evidence placed the defendant near the scene at the probable time of the murder, the defendant was unable to explain his whereabouts at the probable time of the murder, and the defendant was unable to explain his wet shoes while every witness who had been with him in the hours before the murder by drowning said the defendant had not walked near any water. This and other evidence, all viewed in the light most favorable to the State, was held sufficient to support conviction for deliberate homicide. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979); certiorari granted, Blakney v. Mont., 451 US 1013, 69 L Ed 2d 384, 101 S Ct 2999 (1981), and judgment vacated on, apparently, another ground and case remanded for further consideration in light of Edwards v. Ariz., 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880 (1981); affirmed on remand in St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Standing to Raise Issue on Appeal: In a prosecution for attempted deliberate homicide in which the defendant was convicted of the lesser included offense of aggravated assault, the trial court denied defendant the opportunity to question prospective jurors on the death penalty. As defendant was not convicted of a crime for which he could be sentenced to death, under St. v. Johnson, 75 M 240, 243 P 1073 (1926), he had no standing to raise this issue on appeal. The trial court therefore did not abuse its discretion in refusing defendant's request. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

DECISIONS UNDER FORMER PART 3
RELATING TO RECORD ON APPEAL

Consequence of Failure to Order Transcript: Where defendant did not order the entire transcript, as required under subsection (2) of 46-20-302 (now superseded) if insufficiency of the evidence is to be argued on appeal, the defendant is precluded from asserting there was a failure of proof as to one element of the offense charged. St. v. Harvey, 219 M 402, 713 P2d 517, 43 St. Rep. 46 (1986).

Motion to Suppress Results of Breathalyzer Test Denied — Affirmed on Appeal — No Transcript Forwarded: Charged with driving under the influence of alcohol, defendant moved to suppress results of Breathalyzer test. The Justice of the Peace denied the motion. In a bench trial the Justice Court found defendant guilty. On appeal to the District Court, defendant renewed his suppression motion on a set of stipulated facts. Motion was denied and defendant was convicted by a jury of violating 61-8-406, but was acquitted of charges under 61-8-401. On appeal to the Supreme Court, defendant stated that no trial transcript was being forwarded since the appeal of the denial of the suppression motion could be reviewed upon the face of the stipulated facts. The state included excerpts of the trial transcript that buttressed the lower court's decision on the suppression motion. The Supreme Court approved the state's approach since the suppression motion denial was not final and could be reversed at any time. St. v. Sharp, 217 M 40, 702 P2d 959, 42 St. Rep. 1009 (1985).

Lost Trial Notes — New Trial Granted — No Double Jeopardy: The defendant did not oppose an order granting him a new trial because the court reporter lost his trial notes but alleged double jeopardy when he failed to get acquitted at the second trial. No valid double jeopardy claim existed because the defendant was not forced to accept retrial. He had available to him procedures under 46-20-304 (now superseded), albeit not totally sufficient, to appeal without benefit of an actual verbatim transcript. Allegations of violation of the right to a speedy trial were unfounded since the initial trial was timely. St. v. Hodgson, 184 M 394, 603 P2d 246 (1979).

Final Judgment Controlling Over Minute Entry: Absent special circumstances indicating otherwise, the final formal judgment as entered by the trial court controls over an inconsistent minute entry. St. v. Owens, 182 M 338, 597 P2d 72 (1979).

Record Not to Be Supplemented by Affidavits: Review is limited to the existing record, which cannot be supplemented or supplanted by affidavits filed for the first time on appeal. St. v. Tiedemann, 178 M 394, 584 P2d 1284, 35 St. Rep. 1705 (1978).

Motion for Partial Transcript: The denial of a motion for a partial transcript is proper when the movant fails to set forth the issues to be appealed. In any event, the motion is within the discretion of the court. (A 1983 amendment required a transcript of the entire proceedings.) St. v. Anderson, 171 M 188, 557 P2d 795 (1976).

Furnishing Transcript — Duty of Court Reporter: When a nonindigent defendant petitioned the court to order the official court reporter to supply him with one original copy of the transcript of his trial and to allow the defendant to supply additional copies required for appeal, the court held that the court reporter must furnish all copies because the court reporter is required to

certify the correctness of each copy of the transcript. St. v. Merseal, 167 M 409, 538 P2d 1364 (1974).

Insufficient Financial Need: It would have been unconscionable to permit a proceeding in forma pauperis by a petitioner whose income for the previous year was $13,000 and who had a house, vehicles, and furniture worth over $11,000, even though the petitioner had only a small bank balance and owed over $800 in taxes. Petition of Allen, 156 M 163, 476 P2d 510 (1970).

Duty of Defense Counsel on Appeal: When the court-appointed counsel failed to advise the clerk's office as to what would be required for the record on appeal from a conviction of burglary and there was no record before the Supreme Court, the defendant had been denied his right to effective representation by counsel on his appeal and the cause was remanded to the District Court with directions to revoke appointment of the present counsel and appoint a competent and effective counsel to properly prosecute the appeal. St. v. Bubnash, 139 M 517, 366 P2d 155 (1961).

Copy of Order Constituting Judgment: An appeal by the State in a criminal prosecution from an order made at the close of the State's case in chief, directing the jury to return a verdict in favor of the defendant, was not subject to dismissal on the ground that the record on appeal did not contain a copy of the order which had all the attributes of a judgment and constituted the judgment. St. v. Thierfelder, 114 M 104, 132 P2d 1035 (1943), overruled on other grounds in St. v. Labbitt, 117 M 26, 156 P2d 163 (1945).

Record on Appeal Sufficient: On an appeal under former law from an order sustaining a demurrer to the information, the record, consisting of the information, the demurrer and the ruling thereon, the notice of appeal, a copy of the minute entries, and the certificate of the Clerk of Court, was held sufficient; no bill of exceptions was necessary since no exception was required to the ruling on the demurrer. St. v. Safeway Stores, Inc., 106 M 182, 76 P2d 81 (1938).

Insufficient Record:

The merits of an appeal in a criminal case will not be considered when the papers constituting the record are included in a bill of exceptions and not certified as the record or identified in any way by the certificate of the Clerk of the District Court or the trial judge. St. v. Farriss, 34 M 424, 87 P 177 (1906).

When the record on appeal does not contain the judgment, the appeal is subject to dismissal on motion. St. v. Mott, 29 M 292, 74 P 728 (1903).

The Supreme Court was without jurisdiction to consider an appeal when the record did not contain a copy of the notice of appeal. Butte v. Call, 23 M 94, 57 P 726 (1899).

Chapter Law Review Articles

Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision, Agata, 25 Mont. L. Rev. 1 (1963).

Chapter Collateral References

Mootness: when criminal case becomes moot so as to preclude review of or attack on conviction or sentence. 9 ALR 3d 462.

Part 1
General Provisions

Part Case Notes

Hybrid Standard of Supreme Court Review of Sentencing When Offender Ineligible for Review by Sentence Review Division: In St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937 (1999), the Supreme Court held that it will review a criminal sentence only for legality, discarding the previous two-tiered approach of reviewing sentences for both legality and abuse of discretion, which was considered a carryover from the days before the creation of the Sentence Review Division when the court reviewed all sentencing challenges. However, Montoya created a "no review" window once the Sentence Review Division came into being, which left offenders with unreasonable sentencing conditions, but no term of incarceration and thus no eligibility for Sentence Review Division consideration, without a remedy. Therefore, the court fashioned a hybrid standard of review to close the "no review" window. If an offender is sentenced to 1 year or more of actual incarceration and is eligible for review by the Sentence Review Division, the court will apply the Montoya standard and review the sentence for legality only, but if the offender is ineligible for review by the Sentence Review Division, the court will review a sentence for both legality and abuse of discretion, applying the two-tiered approach used prior to creation of the Sentence Review Division. St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004), followed in St. v. Ruiz, 2005 MT 117, 327 M 109, 112 P3d 1001 (2005).

Standard of Review of Criminal Sentence Clarified — Supreme Court Review of Legality of Sentence Only: In an effort to clear up a prevalent inconsistency in Montana case law regarding the appropriate standard of review of criminal sentences, the Supreme Court held that it will review a criminal sentence only for legality, i.e., whether the sentence is within the parameters provided by statute, which in turn implies de novo review—a sentence is either legal or it is not. The court overruled St. v. Davison, 188 M 432, 614 P2d 489 (1980), St. v. White, 200 M 123, 650 P2d 765, 39 St. Rep. 1619 (1982), St. v. Graveley, 275 M 519, 915 P2d 184 (1996), St. v. Gunderson, 282 M 183, 936 P2d 804, 54 St. Rep. 283 (1997), and any other Montana decision that suggests that the Supreme Court will also review criminal sentences for an abuse of discretion. St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937, 56 St. Rep. 706 (1999), followed in St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002). However, see St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004), wherein the Supreme Court fashioned a hybrid standard of review for offenders with unreasonable sentencing conditions but no term of incarceration who are ineligible for review by the Sentence Review Division. In reviewing those sentences, the court will review a sentence for both legality and abuse of discretion, applying the two-tiered approach used prior to creation of the Sentence Review Division.

Pro Se Case Appeal Filed Without Briefs — General Review of Transcript on Court's Motion: Where the defendant made the defense of his deliberate homicide case difficult by failing to cooperate with his several attorneys, and after conviction was granted several extensions by the Supreme Court for filing a transcript and his first brief, but nevertheless failed to file a brief and specifications of error, the Supreme Court on its own motion reviewed the District Court transcript for typical kinds of errors and found: (1) that the evidence was sufficient to support the defendant's conviction as the defendant was convicted on the basis of his own testimony; (2) that there were no errors in the jury instructions given on the evidence and the elements of the crime; (3) that assistance of counsel was adequate and that the failure of defendant's counsel to subpoena evidence or witnesses was not relevant to the crime charged; and (4) that the statutory penalties for deliberate homicide with a dangerous weapon did not constitute cruel and unusual punishment. St. v. Graham, 206 M 49, 669 P2d 691, 40 St. Rep. 1499 (1983).

Suppression Question — Psychological Evaluation — Standard of Review: Where two expert witnesses present conflicting evidence during a suppression hearing as to results of psychological evaluations they performed of the defendant and the District Court finds one expert's testimony to be more credible than the other's, such determination will be disturbed on appeal only if it is not supported by substantial credible evidence. In re R.P.S., 188 M 317, 613 P2d 999 (1980), following St. v. Grimestad, 183 M 29, 598 P2d 198 (1979).

Objection of Defendant to Mistrial: The remedy of a criminal defendant lies in an appeal following his conviction or in a post-conviction proceeding except when the Writ of Habeas Corpus is applicable, and the Supreme Court will not suspend the rules to consider the validity of the granting of a motion for a mistrial, but the defendant must proceed in accordance with the rules to secure a prompt and fair trial. State ex rel. LaFlesch v. District Court, 165 M 302, 529 P2d 1403 (1974), overruled in Keating v. Sherlock, 278 M 218, 924 P2d 1297, 53 St. Rep. 855 (1996).

Delay Charged to Defendant: When the appellant filed his transcript and subsequently received seven separate orders for extensions of time to file his brief, the court refused his application to vacate the hearing of the appeal. St. v. Cockrell, 130 M 552, 305 P2d 337 (1957).

Jurisdiction Over Appeals From Justices' Courts: The Supreme Court does not have appellate jurisdiction to review the judgments or orders of the Justices' Courts. State ex rel. Estes v. Justice Court, 129 M 136, 284 P2d 249 (1955).

46-20-101. Single method of review in criminal cases.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, [sections] 121-1, and 121-2.

This chapter provides a complete, simplified and speedy method of review in all criminal cases. Subsection [(2)] establishes Notice of Appeal as the sole method of review in criminal cases. However, it is not designed to limit or affect any types of review incidental to the extraordinary writs or post-conviction writs or post-conviction relief provided in Chapter [21] of this code.

Case Notes

Failure of Counsel to Preserve Defendant's Request for Appeal Prejudicial Per Se — Out-of-Time Appeal Appropriate Remedy: Despite a request to do so, Tweed's counsel failed to file a timely appeal of Tweed's sexual abuse conviction. Counsel did not intentionally abandon the appeal; rather, the failure was unintentional and resulted from a filing oversight and

miscommunication. Nevertheless, the error was prejudicial per se and constituted ineffective assistance of counsel in violation of Tweed's constitutional rights. The failure to timely appeal was excusable, and because postconviction proceedings were considered an inadequate remedy, the Supreme Court decided that an out-of-time appeal was the appropriate remedy and, being in possession of a sufficient record, proceeded to consider the merits of the appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002), following St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Out-of-Time Appeal in Criminal Matters — Exclusive Jurisdiction With Supreme Court: Under this section, the only method for review in criminal cases is by notice of appeal. Time limits for filing an appeal are mandatory and jurisdictional. If a defendant takes no action to perfect an appeal within 90 days of judgment, the District Court loses its jurisdiction and the appeal is out-of-time. However, an out-of-time appeal is a remedy that may be available to a criminal defendant who, through no fault of the defendant, misses a deadline for filing an appeal. Although former Rule 21(b), M.R.App.P. (now superseded), precluded an out-of-time appeal in a civil case, the Supreme Court is not precluded from addressing a motion for an out-of-time appeal in a criminal case. Further, a District Court lacks jurisdiction to grant an out-of-time appeal. The Supreme Court has exclusive jurisdiction to grant a motion for an out-of-time appeal, and the motion is considered an original proceeding subject to the provisions of former Rule 17, M.R.App.P. (now superseded). Upon a showing that the failure to timely notice a criminal appeal was excusable under the circumstances, the Supreme Court may conclude that an out-of-time appeal is the appropriate remedy pursuant to former Rule 21(b), M.R.App.P. (now superseded). In that event, the matter will be remanded to the District Court with instructions to vacate and reenter judgment to afford the defendant a second opportunity to act within the statutory timeframes for filing notice of appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

Petition for Writ to Dismiss: The remedy of an original petition for a writ to dismiss a criminal action was not available on the grounds of double jeopardy after a motion for a mistrial had been granted over the objection of the defendant and the case had been set for a new trial, since the only review in criminal cases is by notice of appeal. State ex rel. LaFlesch v. District Court, 165 M 302, 529 P2d 1403 (1974), overruled in Keating v. Sherlock, 278 M 218, 924 P2d 1297, 53 St. Rep. 855 (1996).

46-20-103. Scope of appeal by state.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, [section] 120-1.

The present Montana Code provides for limited areas of appeal by the state in criminal cases. Subsections [(2)(a) through (c)] merely incorporate into the new code, section 94-8104 (1), (2) and (3). Subsections [(2)(d) through (g)] expand the right of appeal by the state. The dismissing of a warrant, suppressing evidence or suppressing an admission or confession, as well as changing the venue of the trial, may result in the destruction of the state's case and should be made the basis of an appeal by the state.

Subsection 4 and (5) of 94-8104 were omitted. Subsection 94-8104(4) is adequately covered by subsection 1(b) (2) and (3). Subsection 94-8104(5) providing for an appeal from an order directing the jury to find for the defendant seems unnecessary. The present code does not give the judge power to direct a verdict nor does the new code intend to give the judge this power.

Section 94-7227 gives the court the power to advise the jury to acquit. This, in effect gives the judge the power to direct a verdict and avoid an appeal since the state cannot appeal from a judgment of acquittal. It seems preferable to omit this section from the code and require the judge to grant a new trial or dismiss the case if he desires to control the outcome of the case.

Compiler's Comments

1989 Amendment: Inserted (2)(h) allowing appeal from order or judgment imposing sentence contrary to law. Amendment effective April 8, 1989.

Applicability: Section 3, Ch. 478, L. 1989, provided: "[This act] applies to all sentencing proceedings begun after [the effective date of this act]." Effective April 8, 1989.

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GENERAL

Improper Denial of State's Right to Appeal Justice's Court Suppression Motion: A Justice's Court granted Willis's motion to suppress that precluded the state from presenting statements made by Willis on the day of an accident on grounds that the state had unlawfully obtained the statements in violation of constitutional guarantees against self-incrimination. The state appealed the Justice's Court's ruling to the District Court, and the District Court granted Willis's motion to dismiss on grounds that the District Court lacked jurisdiction. On appeal, the Supreme Court reversed. Regardless of whether the Justice's Court order suppressed evidence or a confession or admission, the state had a statutory right under 46-20-103 to appeal the Justice's Court's ruling. Trial de novo in District Court was the proper proceeding for the state's appeal pursuant to St. v. Yarns, 252 M 45, 826 P2d 543, 49 St. Rep. 132 (1992), and St. v. Kesler, 228 M 242, 741 P2d 791, 44 St. Rep. 1490 (1987). St. v. Willis, 2008 MT 293, 345 M 402, 192 P3d 691 (2008). See also St. v. Strizich, 286 M 1, 952 P2d 1365, 54 St. Rep. 1241 (1997).

Objection to Dismissal Not Prerequisite to State's Right to Appeal Dismissal: The state did not have to object in Justice's Court to the defendant's motion to dismiss in order to preserve the state's right to appeal the grant of the motion to the District Court. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996).

Trial De Novo Not Prohibited: This section merely lists those general instances in which the state may undertake an appeal from a lower court to a higher court. Nothing in the statute may be construed to prohibit trial de novo in a court of competent jurisdiction. St. v. Kesler, 228 M 242, 741 P2d 791, 44 St. Rep. 1490 (1987).

Trial De Novo of Criminal Case on Appeal From Justice's Court to District Court — No District Court Jurisdiction to Review Justice's Court Order Suppressing Evidence: A criminal case on appeal from Justice's Court to District Court must be tried anew in the District Court pursuant to 46-17-311, regardless of which party appeals. Accordingly, a District Court does not have appellate jurisdiction to review a Justice's Court order suppressing evidence. St. v. Kesler, 228 M 242, 741 P2d 791, 44 St. Rep. 1490 (1987), followed in St. v. Yarns, 252 M 45, 826 P2d 543, 49 St. Rep. 132 (1992).

Application for Writ of Supervisory Control: An application for a Writ of Supervisory Control is an original proceeding and not an appeal. State ex rel. Nelson v. District Court, 173 M 221, 566 P2d 1282 (1977).

Nature of Right to Appeal — Construction:

The right of appeal in a criminal case, unknown to the common law, exists only by virtue of constitutional or statutory enactment. Statutes granting the right of appeal to the State in criminal actions must be strictly construed, and the right limited to the instances mentioned. If the right is not clearly and unequivocally conferred, an appeal does not lie, nor can the right, if conferred, be enlarged by construction of the statute. St. v. Peck, 83 M 327, 271 P 707 (1928).

The right of appeal by the State should be strictly construed and limited to those instances mentioned in the statute. St. v. Northrup, 13 M 522, 35 P 228 (1893); Territory v. Laun, 8 M 322, 20 P 652 (1889).

JUDGMENT OF ACQUITTAL

Acquittal for Mental Disease or Defect:

A judgment of acquittal on the ground of mental disease or defect excluding responsibility could not be directly appealed by the State. St. v. Nelson, 178 M 280, 583 P2d 435, 35 St. Rep. 1496 (1978).

The State had no right of direct appeal of an acquittal by reason of mental defect excluding responsibility because the defendant was not free of control by the court as in the case of a dismissal. St. v. Hagerud, 174 M 361, 570 P2d 1131 (1977).

NONAPPEALABLE DISMISSAL

Dismissal for Insufficient Evidence Not Appealable: Where the defendants were charged with the theft of calves belonging to another and the charges were dismissed for insufficient evidence because the State did not prove the defendants' failure to give notice under 81-4-217, the dismissal of the charges could not be appealed by the State. Under the rationale of St. v. Cool, 174 M 99, 568 P2d 567 (1977) (citing U.S. v. Ball, 163 US 662 (1896), and Fong Foo v. U.S., 369 US 141, 7 L Ed 2d 629, 82 S Ct 671 (1962)), a dismissal for insufficient evidence under the circumstances of this case operates as an acquittal and an appeal constitutes a violation of the defendants' rights against double jeopardy. St. v. Greenwalt, 204 M 196, 663 P2d 1178, 40 St. Rep. 767 (1983).

State Not to Appeal Justice's Court Dismissal:

When a criminal cause in Justice's Court was dismissed because a witness subpoenaed by both parties testified for the prosecution and failed to appear for the defendant, the State had no right to appeal because 46-20-103 applies only to appeals from District Court and 46-17-311 allows appeals from Justice's Court only for the defendant. St. v. Sanchez, 187 M 434, 610 P2d 162 (1980).

At the close of all the evidence, the judge granted a defense motion for a directed verdict of acquittal grounded in alleged failure of the State to present evidence sufficient as a matter of law to give the case to the jury. The judge then dismissed the case. The State had no right to appeal under this section. The court's "dismissal" was an acquittal, whatever its label. Review of an acquittal, on error or otherwise, constitutes double jeopardy. St. v. Cool, 174 M 99, 568 P2d 567 (1977).

Dismissal of Appeal After Appeal to District Court From Justice's Court:

A District Court's order of dismissal of the complaint following an appeal from a conviction in a Justice's Court did not fall within the provisions of the former section and therefore was not an appealable order. St. v. Becko, 125 M 76, 230 P2d 768 (1951).

When the defendant was convicted in a Justice's Court and appealed to the District Court, in which court the action was dismissed on the defendant's motion, the State had no right of appeal under the former section. St. v. McCluskey, 125 M 20, 229 P2d 169 (1951).

The defendant was convicted in a Justice's Court of engaging in the business of plumbing without obtaining a license. He appealed to the District Court where, after trial, the trial court entered judgment that the statute in question was unconstitutional and discharged the defendant. The State appealed. The Supreme Court held that the judgment did not fall within any of the provisions of the former section granting the State the right of appeal in a criminal case, and the appeal was dismissed. St. v. Wright, 91 M 427, 8 P2d 646 (1932).

APPEALABLE ORDERS

District Court Retention of Criminal Jurisdiction — State's Appeal of Order Granting Driving Privileges Not Timely: A condition of Jivelekas's sentence for felony DUI and misdemeanor driving with a revoked or suspended license provided that Jivelekas could not drive unless approval was granted by the sentencing court or Jivelekas's supervising officer. Nearly 2 years after Jivelekas completed all terms of his sentence, he asked the District Court for approval to operate a motor vehicle in order to maintain full-time employment. The state contended that because 61-8-731 required that Jivelekas's probation officer authorize motor vehicle operation, the District Court did not have jurisdiction to consider Jivelekas's motion. The Supreme Court disagreed. Even if the District Court exceeded its statutory authority in imposing the sentence condition, the court still retained jurisdiction to entertain Jivelekas's motion. Additionally, the Supreme Court was precluded from addressing the merits of the state's argument because the state failed to file a timely appeal pursuant to former Rule 5(b), M.R.App.P. (now superseded), so the appeal was time-barred. St. v. Jivelekas, 2005 MT 277, 329 M 204, 122 P3d 1248 (2005), following Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004).

Order From Which Appeal Taken Not Required to Be Written: The District Court judge orally dismissed a criminal proceeding after he had ordered a legal intern from the courtroom because the judge considered the intern to be inappropriately attired and when the judge could not locate the appropriate criminal charge in the court file. This section authorizes the state to appeal any order or judgment that has the substantive effect of dismissing the case, whether or not the order is in writing. St. v. Schwictenberg, 237 M 213, 772 P2d 853, 46 St. Rep. 746 (1989).

Pretrial Order Allowing Use of Evidence of Other Crimes: A pretrial order denying a motion in limine to preclude the state from using evidence of other crimes pursuant to Rule 404(b), Montana Rules of Evidence (see Title 26, ch. 10), is appealable within the scope of 46-20-103. St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986). See also St. v. Yarns, 252 M 45, 826 P2d 543, 49 St. Rep. 132 (1992). T.W. and Yarns were overruled in St. v. Strizich, 286 M 1, 952 P2d 1365, 54 St. Rep. 1241 (1997), to the extent that a pretrial order excluding evidence based on the rules of evidence, such as relevancy, probative value, or statutory inadmissibility, does not constitute an order suppressing evidence sufficient to form a statutory basis for appeal pursuant to this section.

Voir Dire Not Always Required: The State contended it was error to grant a change of venue prior to voir dire of prospective jurors to determine if an impartial jury could be selected. In this case, defense counsel's affidavit stating facts supporting a finding of alleged prejudice, copies of newspaper accounts of previous Justice's Court trial, and written report of a criminologist regarding a survey of registered voters were sufficient reasonable grounds to support a finding of

widespread prejudice. It was not necessary to voir dire prospective jurors prior to granting a change of venue. St. v. Paisley, 204 M 191, 663 P2d 322, 40 St. Rep. 763 (1983).

Right of State to Appeal Denial for a Change of Venue Not Enjoyed by Defendant — No Violation of Equal Protection: Armstrong argued that it is a violation of the equal protection of the law to allow the State to appeal the denial of a request for a change of venue but to refuse that same right to a defendant. The Supreme Court said that the State has no right to appeal following a conviction or acquittal. Therefore, the allowance to the State of an interlocutory appeal for review of orders respecting place of trial, prior to conviction or acquittal, serves a purpose, that the public interest be protected in the handling of criminal cases. There is a rational basis for these appeal provisions in the statute. St. v. Armstrong, 189 M 407, 616 P2d 341 (1980).

Interlocutory Orders: The State may appeal from an interlocutory order, and such appeals are governed by this chapter. St. v. Bergum, 164 M 155, 520 P2d 653 (1974).

Order Sustaining Demurrer to Information: Under former law, an order sustaining a demurrer to an information constituted a judgment. The former statute authorized an appeal by the State from an adverse judgment on a demurrer to the indictment or information. St. v. Safeway Stores, Inc., 106 M 182, 76 P2d 81 (1938).

Order Arresting Judgment: Regarding the substance of things, an order arresting judgment is in its nature and results a judgment for the defendant. It is a denying of a judgment to the State and a discharge and acquittal of the defendant from any possible consequences that threatened to flow from the information. St. v. Northrup, 13 M 522, 35 P 228 (1893).

NONAPPEALABLE ORDERS

Admissibility of Preliminary Alcohol Screening Test Results for Probable Cause Purposes Only — Clarification and Effect of Orders Suppressing Evidence — Grant of Motion to Exclude Inadmissible Evidence Not Considered Order Suppressing Evidence: The state sought to have the results of a preliminary alcohol screening test admitted into evidence in a DUI case. The City Court denied the motion, and the state immediately appealed to District Court, contending that in denying the motion, the City Court had suppressed evidence and that the statutory 6-month limit on trial of misdemeanors in 46-13-401 was thus exhausted. The Supreme Court noted that the results of a preliminary alcohol screening test pursuant to 61-8-409 are not substantive evidence of the amount of alcohol present in a person's body but instead are an estimate of alcohol concentration only for the purpose of establishing probable cause to believe that a person is under the influence of alcohol prior to making an arrest. An order that suppresses evidence is an order that excludes evidence on the grounds that the evidence was illegally obtained and does not include a pretrial order that excludes evidence based on rules of evidence, such as relevancy, probative value, or statutory inadmissibility. Thus, the City Court order excluding preliminary alcohol screening test results was not an order suppressing evidence but rather an order determining that the results were not substantive evidence at all; therefore, there was no statutory basis under subsection (2)(e) of this section for appeal to District Court. Because City Court jurisdiction was not exhausted by some action authorizing appeal to the District Court, 46-13-401(2) was not satisfied and defendant, who made no move to postpone, was entitled to dismissal of the DUI charge with prejudice pursuant to 46-13-401(2) on grounds that he had not received a timely trial. St. v. Strizich, 286 M 1, 952 P2d 1365, 54 St. Rep. 1241 (1997), following St. v. Carney, 219 M 412, 714 P2d 532 (1986), and St. v. Bullock, 272 M 361, 901 P2d 61 (1995), overruling inconsistent holdings in St. v. T.W., 220 M 280, 715 P2d 428 (1986), and St. v. Yarns, 252 M 45, 826 P2d 543 (1992), and followed, with regard to limited admissibility of preliminary breath test evidence, in St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003). See also St. v. Crawford, 2003 MT 118, 315 M 480, 68 P3d 848 (2003), and St. v. Snell, 2004 MT 334, 324 M 173, 103 P3d 503 (2004).

Admission of Evidence Under Rape Shield Law — Proper Use of Supervisory Control: The Attorney General petitioned the Supreme Court for a writ of supervisory control in a case in which the District Court had ruled that certain evidence of prior sexual conduct by the victim was admissible in a case charging sexual intercourse without consent. The Supreme Court accepted original jurisdiction of the case, holding that it was a proper case for supervisory control because: (1) once the testimony on prior sexual conduct is given in open court, the injury that the rape shield law was intended to prevent has already occurred; and (2) under 46-20-103, evidentiary rulings under the rape shield law may not be appealed. State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996).

Refusal by Trial Court to Rule on Admissibility of Suppressed Evidence for Impeachment Purposes — No Error: The state asked the District Court to rule that defendant's statements

that had been suppressed from the case in chief could nevertheless be used for impeachment because impeachment is a collateral use to which the exclusionary rule does not apply. When the District Court took the matter under advisement, the state sought to compel the Supreme Court to rule on the issue prior to trial. However, nothing in this section expressly guarantees the state the right to have a lower court suppression ruling in time to perfect an appeal. The power to grant or deny pretrial motions is within the sound discretion of the District Court. Absent a District Court ruling, the impeachment issue was not properly before the Supreme Court. St. v. Moore, 250 M 254, 818 P2d 835, 48 St. Rep. 913 (1991), distinguishing St. v. Carney, 219 M 412, 714 P2d 532 (1986).

Adverse Evidentiary Ruling Not Suppression of Evidence: A District Court order, sustaining objection to the admission of blood sample analyses in a DUI negligent homicide case because the state could not show a proper chain of custody of the samples, does not constitute a suppression of evidence under subsection (2)(e) of this section and therefore is not an appealable order. St. v. Carney, 219 M 412, 714 P2d 532, 43 St. Rep. 54 (1986), distinguished in St. v. Yarns, 252 M 45, 826 P2d 543, 49 St. Rep. 132 (1992).

Order Setting Aside Information: Under former law, an appeal could not be taken by the State from an order setting aside an information. St. v. O'Brien, 20 M 191, 50 P 412 (1897).

Order Made After Judgment: Under former law, the State could not appeal from an order of the District Court sustaining a defendant's plea of former acquittal and jeopardy after the reversal of a conviction for manslaughter under an indictment charging murder in the first degree. St. v. O'Brien, 19 M 6, 47 P 103 (1896).

Law Review Articles

Double Jeopardy: Appeal by the State as Subjecting Defendant to Double Jeopardy, Replogle, 7 Mont. L. Rev. 56 (1946).

The Relationship of Double Jeopardy to Prosecution Appeals, Strazzella, 73 Notre Dame L. Rev. 1 (1997).

Collateral References

Criminal Law *key* 1024(1) through (4), (7).

24 C.J.S. Criminal Law §§2342 through 2347.

4 Am. Jur. 2d Appellate Review §§213 through 217.

Appealability of order suspending imposition or execution of sentence. 51 ALR 4th 939.

Right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance—modern status. 11 ALR 4th 399.

46-20-104. Scope of appeal by defendant.

Commission Comments

Source: M.R.App.P.—[former] Rule 2 [now superseded].

Subsection [(7)] avoids an appeal that might not be necessary because the ultimate decision might be favorable to the defendant (e.g., an appeal from an order to suppress evidence).

[Subsection (2)] also broadens the scope of appeal in one respect. Under the present code it is necessary to make a motion for a new trial and then appeal from an adverse ruling if the grounds of appeal are also the grounds for a motion for a new trial. No such requirement is intended to be imposed by this code. All questions heretofore raised on such an appeal may be raised on appeal from the judgment regardless of whether a motion for a new trial has been made in the trial court. Also, in regard to the limitations on appeal imposed by this section it must be kept in mind that other post-conviction proceedings have been provided for in Chapter [21] Post Conviction Hearing. Both this Chapter and Chapter [21], Post Conviction Hearing, provide the defendant with the necessary machinery to obtain relief from an illegal conviction. It is the purpose of Subsection [(2)] to provide one complete, full and adequate review by enlarging the power of the reviewing court. This is accomplished by allowing the court to decide all questions raised by the entire proceeding, below, including an appeal from a motion for a new trial.

It is intended that this section be supplemented by the extensive post conviction remedy.

Compiler's Comments

1983 Amendment: In (2), substituted "alleged error" for "order or decision"; and inserted last sentence making failure to timely object at trial a waiver of the objection.

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GENERALLY

Date Defendant Sentenced In Absentia Considered Date of Legally Effective Sentence for Appeal Purposes: Clark was charged with a misdemeanor traffic violation but failed to appear for trial and was tried, convicted, and sentenced by the Municipal Court in absentia pursuant to 46-16-123 on June 12, 2006. A warrant was issued for failure to appear, and Clark appeared before a different Municipal Court on July 14, 2006, and was informed of the June sentence. Clark sought to appeal to District Court, but the District Court dismissed the appeal on grounds that it was untimely. On appeal to the Supreme Court, Clark argued that dismissal of the appeal by the District Court was in error because the period for filing a Municipal Court appeal should have begun on July 14 when he was informed of the June sentence, rather than June 12 when the sentence was actually imposed. The Supreme Court disagreed. A valid sentence was imposed on June 12 and was not subject to postponement or modification until Clark appeared on the bench warrant. By Municipal Court Rule, Clark had until June 26 to file an appeal, but the appeal was not filed until July 28 and was therefore untimely and was properly dismissed by the District Court. St. v. Clark, 2008 MT 317, 346 M 80, 193 P3d 934 (2008). See also St. v. Bonamarte, 2006 MT 291, 334 M 376, 147 P3d 220 (2006).

Failure to Preserve Issue for Appeal by Failure to Object at Trial — Plain Error Review Inappropriate Absent Implication of Defendant's Fundamental Rights: At Price's trial for assault with a weapon, a stun gun, the trial court allowed evidence of Price's prior conviction for intimidation. Following conviction, Price appealed on grounds that the evidence was improperly introduced because the state failed to give notice of the intent to introduce other crimes evidence in violation of Price's due process rights. The state contended that Price waived the right to appeal the issue by failing to object to introduction of the evidence and by actively participating in its introduction. The Supreme Court declined to review the issue because Price failed to object to the evidence at trial and thus did not preserve the issue for appeal. Further, plain error review was inappropriate because Price's fundamental constitutional rights were not implicated by introduction of the evidence. St. v. Price, 2007 MT 269, 339 M 399, 171 P3d 293 (2007), followed in St. v. Stearns, 2008 MT 356, 346 M 348, 195 P3d 794 (2008).

Remand or Order to Lift Stay Unnecessary Upon Affirmation by Appellate Court — Supreme Court Jurisdiction of Municipal Court Appeal Affirmed but Remanded by District Court: A Municipal Court sentenced Costa for misdemeanor traffic offenses, then stayed imposition of sentence pending Costa's appeal to District Court. The District Court affirmed judgment and remanded to the Municipal Court for imposition of sentence. The question then arose as to whether the Supreme Court had jurisdiction to address the District Court's decision. The Supreme Court noted that the definition of remand is to send something back for further action; however, the Legislature did not intend to require an appellate court to formally remand in cases involving affirmed criminal judgments. In addition, it is unnecessary for an appellate court to direct that a stay pending appeal be lifted once a defendant has exhausted the right to appeal and the underlying judgment and sentence have been affirmed. Therefore, the District Court's remand was premature, unnecessary, and of no immediate consequence and had no effect on the Municipal Court's final judgment and sentence. The Municipal Court stayed Costa's sentence pending appeal, which presumably encompassed an appeal to the Supreme Court, so because the District Court's remand was unnecessary, the Supreme Court had jurisdiction over Costa's appeal. Billings v. Costa, 2006 MT 181, 333 M 84, 140 P3d 1070 (2006).

No Supreme Court Jurisdiction to Hear Appeal Absent Final Judgment: Reeder was convicted of DUI in Municipal Court. Reeder appealed to District Court, raising 22 issues. The District Court found that Reeder's due process rights were not violated, but held that the Municipal Court erroneously admitted the results of an Intoxilyzer test without proper foundation and remanded for a new trial. Reeder appealed the District Court's decision and raised other issues not addressed by the District Court. The Supreme Court held that because Reeder did not currently stand convicted of a criminal offense and because no final judgment of conviction had been entered, the Supreme Court lacked jurisdiction to hear the case, so the appeal was dismissed. St. v. Reeder, 2004 MT 244, 323 M 15, 97 P3d 1104 (2004).

Record-Based Claims of Ineffective Counsel for Failure to Object Considered on Direct Appeal and Denied: Daniels claimed on direct appeal that he was denied effective assistance of counsel because defense counsel failed to investigate and interview certain witnesses in order to present a case in chief and failed to object to certain trial testimony. The state responded that Daniels could not demonstrate that counsel's actions were not objectively reasonable or that there was a reasonable possibility that counsel's errors caused a prejudicial result. The Supreme Court noted that Daniels' claims concerning failure to investigate were not record-based and thus not subject to review on direct appeal, pursuant to Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), and St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001). Regarding the record-based claims of failure to object, the court agreed with the state. The evidence in question was admissible, so counsel was not required to object and could not be considered ineffective for failing to do so. Absent a showing of counsel's deficient performance, Daniels' conviction was affirmed. St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003).

District Court Review of Denial of Right to Speedy Trial in Justice's Court — Exception to Trial De Novo: As a general rule, the District Court must try all appeals from Justice's Court de novo and may not sit as a court of review. To ensure a defendant's adequate remedy at law, there is an exception to the general rule if the error complained of is lack of a speedy trial in Justice's Court because that error cannot be cured by trial de novo. Thus, the District Court may rule on a Justice's Court's denial of a motion to dismiss for lack of a speedy trial in the event that the defendant timely appeals the Justice's Court conviction and sentence to the District Court and raises the speedy trial issue as part of the appeal. State ex rel. Wilson v. District Court, 270 M 449, 893 P2d 318, 52 St. Rep. 264 (1995).

Judgment and Sentence Prerequisite to Appeal to District Court — Misdemeanors: Except for misdemeanors listed in 3-5-302(2), a District Court is limited to appellate jurisdiction of misdemeanor cases. Imposition of sentence and entry of a final judgment by a Justice's Court or City Court are prerequisites to appeal to a District Court, and a party may not consent to subject matter jurisdiction or waive the want of jurisdiction. St. v. Hegeman, 248 M 49, 808 P2d 509, 48 St. Rep. 318 (1991), followed in St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996), and St. v. Diesen, 1998 MT 163, 290 M 55, 964 P2d 712, 55 St. Rep. 655 (1998).

Right of State to Appeal Denial for a Change of Venue Not Enjoyed by Defendant — No Violation of Equal Protection: Armstrong argued that it is a violation of the equal protection of the law to allow the State to appeal the denial of a request for a change of venue but to refuse that same right to a defendant. The Supreme Court said that the State has no right to appeal following a conviction or acquittal. Therefore, the allowance to the State of an interlocutory appeal for review of orders respecting place of trial, prior to conviction or acquittal, serves a purpose, that the public interest be protected in the handling of criminal cases. There is a rational basis for these appeal provisions in the statute. St. v. Armstrong, 189 M 407, 616 P2d 341 (1980).

Deliberate Homicide — Sufficiency of Evidence to Support Guilty Verdict: In determining on appeal whether a criminal conviction is supported by substantial evidence, the evidence is viewed in the light most favorable to the State. The defendant's confession was found to have been voluntary, other evidence placed the defendant near the scene at the probable time of the murder, the defendant was unable to explain his whereabouts at the probable time of the murder, and the defendant was unable to explain his wet shoes while every witness who had been with him in the hours before the murder by drowning said the defendant had not walked near any water. This and other evidence, all viewed in the light most favorable to the State, was held sufficient to support conviction for deliberate homicide. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979); certiorari granted, Blakney v. Mont., 451 US 1013, 69 L Ed 2d 384, 101 S Ct 2999 (1981), and judgment vacated on, apparently, another ground and case remanded for further consideration in light of Edwards v. Ariz., 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880 (1981); affirmed on remand in St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Guilty Plea: The issue of suppression of evidence is a matter of defense at trial and may become an issue upon appeal; but when a guilty plea has been entered, the defendant is convicted upon his plea of guilty and not upon the evidence. St. v. Turcotte, 164 M 426, 524 P2d 787 (1974).

Denial of Petition for Writ of Error Coram Nobis: Leave to file an appeal from a denial of a petition for a Writ of Error Coram Nobis by the District Court was denied by the Supreme Court since no leave to file an appeal is required under the law and if an appeal was available from the District Court order, the time therefor had not expired. Brown v. St., 140 M 289, 371 P2d 262 (1962).

Perfecting Appeal While New Trial Motion Pending: The act of the defendant in a criminal prosecution in perfecting an appeal from the judgment of conviction while his motion for a new

trial was pending did not deprive the trial court of jurisdiction thereafter to pass upon the motion, or the Supreme Court of jurisdiction to consider the subsequent appeal from the order denying the new trial. St. v. Harkins, 85 M 585, 281 P 551 (1929).

STANDARD OF REVIEW

Hybrid Standard of Supreme Court Review of Sentencing When Offender Ineligible for Review by Sentence Review Division: In St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937 (1999), the Supreme Court held that it will review a criminal sentence only for legality, discarding the previous two-tiered approach of reviewing sentences for both legality and abuse of discretion, which was considered a carryover from the days before the creation of the Sentence Review Division when the court reviewed all sentencing challenges. However, Montoya created a "no review" window once the Sentence Review Division came into being, which left offenders with unreasonable sentencing conditions, but no term of incarceration and thus no eligibility for Sentence Review Division consideration, without a remedy. Therefore, the court fashioned a hybrid standard of review to close the "no review" window. If an offender is sentenced to 1 year or more of actual incarceration and is eligible for review by the Sentence Review Division, the court will apply the Montoya standard and review the sentence for legality only, but if the offender is ineligible for review by the Sentence Review Division, the court will review a sentence for both legality and abuse of discretion, applying the two-tiered approach used prior to creation of the Sentence Review Division. St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004), followed in St. v. Ruiz, 2005 MT 117, 327 M 109, 112 P3d 1001 (2005).

Standard of Review of Criminal Sentence Clarified — Supreme Court Review of Legality of Sentence Only: In an effort to clear up a prevalent inconsistency in Montana case law regarding the appropriate standard of review of criminal sentences, the Supreme Court held that it will review a criminal sentence only for legality, i.e., whether the sentence is within the parameters provided by statute, which in turn implies de novo review—a sentence is either legal or it is not. The court overruled St. v. Davison, 188 M 432, 614 P2d 489 (1980), St. v. White, 200 M 123, 650 P2d 765, 39 St. Rep. 1619 (1982), St. v. Graveley, 275 M 519, 915 P2d 184 (1996), St. v. Gunderson, 282 M 183, 936 P2d 804, 54 St. Rep. 283 (1997), and any other Montana decision that suggests that the Supreme Court will also review criminal sentences for an abuse of discretion. St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937, 56 St. Rep. 706 (1999), followed in St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002). However, see St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004), wherein the Supreme Court fashioned a hybrid standard of review for offenders with unreasonable sentencing conditions but no term of incarceration who are ineligible for review by the Sentence Review Division. In reviewing those sentences, the court will review a sentence for both legality and abuse of discretion, applying the two-tiered approach used prior to creation of the Sentence Review Division.

NONAPPEALABLE ISSUES

Sentence Pending — Appeal Premature: Defendant was convicted in Municipal Court of partner or family member assault and sentenced to 1 year with all but 30 days suspended. The sentence also included restitution, conditioned upon the state requesting it or the expiration of a 60-day period. Before either condition occurred, defendant appealed, and the record was transferred to the District Court. Defendant argued in District Court that the restitution order should be stricken, but the judgment and sentence were affirmed. However, the restitution portion was remanded to the Municipal Court. Defendant appealed to the Supreme Court. The Supreme Court held that because neither sentencing condition had occurred when defendant appealed to the District Court, defendant's sentence was not yet final, so the appeal to the District Court was premature and the District Court had no jurisdiction to hear the appeal. Moreover, defendant could not cure the jurisdictional defect by ignoring the restitution issue on appeal to the Supreme Court. Because the restitution issue was still pending, defendant's judgment was not final, and the Supreme Court had no jurisdiction to consider the appeal. The Supreme Court noted that defendant's notice of appeal should be considered timely and that defendant's right to appeal should not be prejudiced because of the District Court's error in taking premature jurisdiction over the case and deciding it in piecemeal fashion. St. v. Bonamarte, 2006 MT 291, 334 M 376, 147 P3d 220 (2006).

Generalized Motion In Limine Insufficient to Preserve Appeal of Issue of Admissibility of Specific Prior Bad Conduct Absent Objection: Vukasin's generalized motion in limine to exclude evidence of prior crimes and bad acts was granted. Vukasin later contended that the prosecution introduced improper witness testimony of prior violent conduct that was prejudicial and prevented a fair trial. The Supreme Court noted that while a motion in limine may preserve a specification of error for appeal, the mere act of filing the motion does not negate the obligation to

object and to make the basis and grounds for the objection clear to the trial court and that a trial court will not be put in error when that court does not have the opportunity to rule on the admissibility of the evidence and to correct itself. Here, Vukasin made no objection when the evidence was introduced, nor was the broad motion in limine specific enough in itself as to the basis for an objection. The motion did not identify either the specific witness or testimony to which Vukasin later objected on appeal, so the trial court was not alerted by the motion that Vukasin was objecting to the testimony given. Thus, the motion was a generalized objection that did not preserve the evidentiary issue, so appeal of the issue was waived. St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003), followed in St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005), and St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006). See also St. v. Stuit, 277 M 227, 921 P2d 866 (1996).

No Authority to Appeal Justice's Court Order Denying Motion to Withdraw Guilty Plea: The Feights got into a fight with a highway patrol officer at a high school basketball game and were charged with misdemeanor assault. They were informed of their rights in Justice's Court, waived their right to counsel, and pleaded guilty. More than a month later, they moved through counsel to withdraw their guilty pleas, claiming good cause under 46-16-105. The Justice's Court denied the motion, holding that the Feights had been given due process and had voluntarily, knowingly, and willingly entered guilty pleas. The Feights appealed the denial of their motion to withdraw their guilty pleas to District Court. The state moved to dismiss the appeal, contending that the District Court lacked jurisdiction to review denial of the motion to withdraw a plea. The District Court dismissed the appeal but remanded to Justice's Court with a recommendation that the Feights be allowed to withdraw their pleas. Instead, the Justice's Court reinstated judgment, and the Feights appealed to the Supreme Court. The Supreme Court affirmed. The statutes that provide for and determine the jurisdiction of a District Court to entertain an appeal from a Justice's Court include 3-5-303, 46-12-204, 46-17-203, and 46-17-311. However, none of these statutes provide authority for appeal to the District Court from the denial of a motion to withdraw a guilty plea. Further, the specific language of these sections prevails over the general language in this section defining the scope of appeal by a criminal defendant. The Legislature has not created a statutory right of appeal from a Justice's Court denial of a motion to withdraw a guilty plea, and the Supreme Court refrained from creating one. St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), distinguishing St. v. Rogers, 267 M 190, 883 P2d 115 (1994), and followed in St. v. Fox, 2001 MT 209, 306 M 353, 34 P3d 484 (2001).

Denial of Bond Pending Appeal — Method of Supreme Court Review — Jurisdiction: After conviction for negligent homicide and on related charges, Ingraham moved the District Court to continue bond pending appeal. The District Court denied the motion, finding that Ingraham was a danger to the community and therefore did not meet the requirements of 46-9-107. Ingraham then moved the Supreme Court, pursuant to former Rule 22, M.R.App.P. (now superseded), to continue bond pending appeal or, in the alternative, to accept appeal of the District Court's order denying bond, pursuant to former Rule 1, M.R.App.P. (now superseded), and this section. The Attorney General moved to dismiss, contending that there was no provision in law for appeal from a District Court order denying bond pending appeal and that Ingraham should have brought an original habeas corpus proceeding. The Supreme Court agreed with the Attorney General and dismissed Ingraham's motion or appeal, holding that Ingraham should have brought a petition for a writ of habeas corpus pursuant to 46-22-103. Ingraham then filed a petition for a writ of habeas corpus, which was filed with Justice Trieweiler pursuant to 3-2-212. Justice Trieweiler granted the petition to the extent necessary for the District Court to hold an evidentiary hearing as provided by statute, under the theory that the District Court was the more appropriate court for the hearing than was the Supreme Court. The Attorney General opposed the order by applying to the full Supreme Court for a writ of supervisory control, arguing, contrary to the state's previous position, that 46-22-103 does not really apply to persons convicted in a criminal case and that the more appropriate procedure was an original proceeding "in the nature of habeas corpus" before the full Supreme Court. The application for a writ of supervisory control was denied, was treated by the Supreme Court as a late-filed response to Ingraham's petition for a writ of habeas corpus, and was referred to Justice Trieweiler. Justice Trieweiler determined that it was inappropriate for him alone to determine the form of review of the District Court's denial of bond. Justice Trieweiler also determined that: (1) Ingraham had no constitutional right to bond pending appeal; (2) Ingraham did have a right to the proper exercise of the District Court's discretion in the application of 46-9-107; and (3) that right was a substantial right for the purposes of this section. For these reasons, Justice Trieweiler vacated his previous order granting Ingraham's petition for a writ of habeas corpus and referred the

matter to the full Supreme Court for review of the District Court's order denying bond pending appeal. St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

No Appeal, Based on Constitutionality of Offense Charged, From Judgment of Not Guilty by Reason of Mental Disease or Defect: Kaplan was charged with seven counts of stalking under 45-5-220, arising from her repeated contact with her former martial arts instructor. Kaplan moved to dismiss the charges on grounds that 45-5-220 is unconstitutional. Following a briefing, the motion was denied. By stipulation, Kaplan was subsequently found not guilty by reason of mental disease or defect. Because Kaplan was not convicted, there was no judgment of conviction from which to appeal. Therefore, the denial of her motion to dismiss, absent a judgment of conviction, was not itself an appealable order. The proper method of challenging a finding of mental disease or defect is found in 46-14-301 through 46-14-303. Appealing the constitutionality of the statute under which the person was charged is not an option. St. v. Kaplan, 275 M 108, 910 P2d 240, 53 St. Rep. 60 (1996), followed in St. v. Violette, 2009 MT 19, 349 M 81, 201 P3d 804 (2009).

Judgment as Including Sentence — Sentence Not Strictly Premised on Punishment: A defendant had 60 days under former Rule 5(b), M.R.App.P. (now superseded), to appeal a final judgment. Although prior to the 1991 enactment of 46-1-202, "sentence" was interpreted as being the same as "punishment", 46-1-202 now defines a sentence as any judicial disposition of a criminal proceeding upon a plea, verdict, or finding of guilt. The judicial disposition is itself a sentence regardless of whether actual punishment is deferred or imposed immediately. This broader definition applies to deferment cases, but in double jeopardy cases, the narrower meaning premised on the punishment factor still applies. Therefore, a judgment that includes a deferred sentence is final for purposes of appeal, and an appeal filed more that 60 days after sentencing was dismissed as untimely. St. v. Rice, 275 M 81, 910 P2d 245, 53 St. Rep. 48 (1996), followed in Davis v. St., 2004 MT 112, 321 M 118, 88 P3d 1285 (2004).

Resetting Execution Date Not Considered Appealable Judgment — Setting Execution Date as Ministerial Rather Than Judicial Act: McKenzie was sentenced for deliberate homicide and aggravated kidnapping, and the death penalty was imposed in 1975. Despite the subsequent process of appeals spanning nearly 20 years, the 1975 sentence was never vacated by any court. The District Court held a hearing in 1995 to reset the execution date after the appeals proceedings, none of which were ultimately successful for McKenzie, had run their course. McKenzie claimed that the hearing constituted a resentence that reimposed the death sentence, which was beyond the jurisdiction of the District Court. The Supreme Court noted that setting the execution date was a ministerial function rather than a judicial act. Because McKenzie's substantial rights could not be implicated by that ministerial act, the District Court's order resetting the execution date could not be defined as a new judgment from which an appeal could lie. The District Court merely executed the judgment before it. Further, under St. v. Hanners, 254 M 524, 839 P2d 1267 (1992), once the valid judgment and sentence had been signed, the District Court had no jurisdiction to vacate the original judgment except as provided by law. Montana has no law allowing amendment of an original judgment at a hearing resetting an execution date. St. v. McKenzie, 271 M 32, 894 P2d 289, 52 St. Rep. 312 (1995).

Order Denying Application for Writ of Certiorari Proper Absent Final Judgment: Wilson appealed to the District Court regarding denial of her application for a writ of certiorari for review of a Justice's Court's ruling denying her motion to dismiss for lack of a speedy trial in connection with a DUI prosecution that was not completed. However, Wilson was entitled to an appeal only from a final judgment of conviction and from orders after a judgment that affected her substantial rights. Because she was never sentenced, there was no final judgment from which she could appeal. The District Court correctly determined that the speedy trial issue could be raised in connection with Wilson's appeal from Justice's Court to District Court and that denial of the application for a writ of certiorari was proper. State ex rel. Wilson v. District Court, 270 M 449, 893 P2d 318, 52 St. Rep. 264 (1995).

Defense Strategy Not Proper Basis for Appeal: A defendant's decisions in defense strategy do not form a proper basis for an appeal. St. v. Larson, 266 M 28, 878 P2d 886, 51 St. Rep. 638 (1994).

Alleged Error in Instruction Given at Defendant's Request: The Supreme Court would not consider an alleged error in an instruction that was given at defendant's request. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992).

Order Denying Petition for Writ of Prohibition: An order of the District Court denying the petition of the defendant for a Writ of Prohibition to restrain a Justice's Court from further proceedings in a criminal action was not a judgment and could not be appealed. State ex rel. Aho v. Justice Court, 131 M 585, 313 P2d 542 (1957).

ISSUES PRESERVED FOR APPEAL

Only Record-Based Ineffective Assistance of Counsel Claim on Appeal: Frasure claimed on appeal that her attorney provided ineffective assistance at trial by failing to object to the introduction of certain evidence. However, the Supreme Court will determine that there was ineffective assistance of counsel only if that conclusion can be based on the record on appeal or if there is no plausible justification for counsel's actions or inactions. Frasure failed to establish that her ineffective assistance claim was record-based, so the claim was dismissed without prejudice to the filing of a petition for postconviction relief. St. v. Frasure, 2004 MT 305, 323 M 479, 100 P3d 1013 (2004). See also St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003).

Failure of Defense Counsel to Question Defendant's Mental Condition During Sentencing — Alleged Errors in Attorney Performance Properly Resolved in Postconviction Relief Proceeding: Watson petitioned for postconviction relief and claimed that defense counsel provided inadequate assistance at sentencing by not questioning whether Watson suffered from a mental disease or defect. The District Court denied the petition, determining that the ineffective assistance claim was record-based and should have been raised on direct appeal. In St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001), the Supreme Court outlined a two-step process for determining whether ineffective assistance claims should have been raised on appeal or in a postconviction hearing. First, the trial record must adequately document a challenged act or omission of defense counsel for a defendant to raise an ineffective assistance claim on direct appeal. Second, the record on appeal must afford sufficient understanding of the reasons for counsel's act or omission to answer the threshold question of whether the alleged error expressed a trial strategy or tactical decision, and if the record does not supply the reason for counsel's act or omission, the claim must be raised by petition for postconviction relief. Here, the record was devoid of any evidence as to why counsel did not question Watson's mental condition, so Watson could not have properly raised an ineffective assistance claim on direct appeal. Therefore, the Supreme Court reversed and remanded for an evidentiary postconviction hearing to determine whether counsel's act or omission was a trial strategy or tactical decision. Watson v. St., 2002 MT 329, 313 M 209, 61 P3d 759 (2002), following Strickland v. Wash., 466 US 668 (1984). See also Soraich v. St., 2002 MT 187, 311 M 90, 53 P3d 878 (2002).

Motion In Limine Sufficient to Preserve Objection for Appeal: Defendant's motion in limine to exclude testimony regarding certain chemicals in his blood and bottles of prescription medication found in his car was sufficient to preserve the objection for appeal. The propriety of the admission of the evidence is a proper issue for the Supreme Court on appeal. St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

Alford Plea in Sexual Assault Case — Revocation of Suspended Sentence: In a sexual assault case, the defendant sufficiently raised the issue of the fifth amendment right against self-incrimination to warrant review on appeal. The defendant entered an Alford plea, and sexual offender evaluation and treatment were conditions of the suspended sentence. The District Court did not abuse its discretion when it revoked the defendant's suspended sentence for violations of the conditions of the suspended sentence, including sexual offender evaluation and treatment. St. v. Butler, 272 M 286, 900 P2d 908, 52 St. Rep. 745 (1995).

Denial of Motion for Mistrial: The part of the defendant's appeal claiming that the trial court erred in denying a motion of the defendant for a mistrial was properly before the Supreme Court when it was taken within the time allowed by statute. St. v. Tiedemann, 139 M 237, 362 P2d 529 (1961).

ISSUES NOT RAISED IN LOWER COURT

Failure to Object to Prosecutor's Comment During Closing Argument — Waiver of Issue on Appeal: Misner moved for a new trial on grounds that his counsel was ineffective by failing to object to the prosecutor's comments during closing arguments. The trial court determined that the comments were appropriate references to and reasonable inferences from the evidence, and the motion was denied. On appeal, the Supreme Court affirmed. An attorney may argue and draw reasonable inferences from evidence if facts support the statements, and the prosecutor's inferences that Misner staged the crime scene were reasonable given the blood spatter evidence. There was no reasonable possibility that had Misner's counsel objected to the prosecutor's remarks in closing arguments, the result of the proceeding would have been different, so Misner was not prejudiced, and the ineffective assistance claim was without merit. St. v. Misner, 2007 MT 235, 339 M 176, 168 P3d 679 (2007), following St. v. Grace, 2001 MT 22, 304 M 144, 18 P3d 1008 (2001).

Failure to Raise Legal Theory Regarding Juror Misconduct at Trial: After being convicted of two counts of incest, Rennaker raised for the first time on appeal a new legal theory regarding

juror misconduct. The Supreme Court, citing St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002), held that even though Rennaker had raised the issue of juror misconduct in the trial court and submitted several affidavits from other jurors regarding that misconduct, his raising of the new theory, that the misconduct affected the jurors' impartiality or contaminated the jury pool, for the first time on appeal would not be considered by the court. St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

Effect of Alford Plea on Subsequent Appeals — Request to Withdraw Alford Plea to Be Made in District Court: Hoots entered an Alford plea to DUI charges and later sought to withdraw the plea on appeal, contending that the plea was made only because Hoots was forced to plead guilty after the trial court denied a request for new counsel. However, Hoots did not request to withdraw the plea at any time during the District Court proceedings. Because a motion to withdraw an Alford plea must be made in District Court, the Supreme Court declined to address the issue on appeal. St. v. Hoots, 2005 MT 346, 330 M 144, 127 P3d 369 (2005), following St. v. Butler, 272 M 286, 900 P2d 908 (1995).

Ineffective Counsel Claims Insufficient to Invoke Plain Error Doctrine on Direct Appeal: On direct appeal, Novak contended that his counsel's failure to object to certain prejudicial, inadmissible evidence compromised his right to a fair trial and asserted that the Supreme Court should apply the plain error doctrine to review counsel's failure. The Supreme Court held that all of the alleged errors were encompassed in Novak's effective assistance of counsel claim, which could be raised in postconviction proceedings, but were insufficient to invoke the plain error doctrine on direct appeal. St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005).

Review of Legality of Imposing Restitution — Failure to Raise Issue Below: If a defendant appeals a sentence in a criminal case on the grounds that it is illegal or exceeds statutory mandates, the issue may be reviewed even if no objection was made at the time of sentencing. Therefore, defendant's claim that an order to pay restitution as a condition to a suspended sentence was illegal was not waived by his failure to raise the issue below and would be reviewed on appeal. St. v. Eaton, 2004 MT 283, 323 M 287, 99 P3d 661 (2004).

Failure to Provide Proof of Entitlement to Postconviction Relief — Petition Properly Denied: Ellenburg raised several issues on appeal, some of which were raised in District Court and some of which were not. The Supreme Court declined to address all issues that were not preserved for appeal. Several other issues were procedurally barred because Ellenburg either raised them on direct appeal or reasonably could have raised them on direct appeal. Postconviction relief was denied on the remaining issues because Ellenburg waived the right to appeal those issues by failing to provide any evidentiary support for the allegations. The petition for postconviction relief was properly denied. Ellenburg v. Chase, 2004 MT 66, 320 M 315, 87 P3d 473 (2004), following St. v. Schmalz, 1998 MT 210, 290 M 420, 964 P2d 763 (1998), St. v. Niederklopfer, 2000 MT 187, 300 M 397, 6 P3d 448 (2000), and St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001), and followed in Herman v. St., 2006 MT 7, 330 M 267, 127 P3d 422 (2006).

Failure of Trial Court to Hold Hearing Regarding Juror's Acquaintance With Witness — Waiver Absent Timely Objection — Plain Error Doctrine Inapplicable: During voir dire at Davis's trial, several jurors indicated that they were acquainted with two witnesses but stated that their acquaintance would not affect their ability to sit as jurors. Immediately after the first witness was called, a juror stated to the court that he knew the witness. Without objection from Davis, the court noted the statement and the witness proceeded to testify. Following conviction, Davis appealed on grounds that the court should have held a hearing to determine whether the juror was biased and that failure to do so violated Davis's right to an impartial jury. The Supreme Court disagreed. Davis's failure to object at trial constituted a waiver of appellate review of the issue. Further, Davis did not meet the narrow criteria in St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), to warrant plain error review. Judgment was affirmed. St. v. Davis, 2003 MT 341, 318 M 459, 81 P3d 484 (2003), followed in St. v. Taylor, 2009 MT 161, 350 M 447, 208 P3d 422 (2009).

Failure to Raise Issue of Court Bias at Trial — Consideration of Issue Precluded on Appeal — Plain Error Doctrine Inapplicable: Following conviction for felony stalking, defendant contended on appeal that there was bias against him at trial because the victim worked for the County Attorney's office where the District Court was located, so both the office and the District Court Judge should have recused themselves. However, the plain error doctrine did not apply under the limited exceptions in St. v. Finley, 276 M 126, 915 P2d 208 (1996), and because the issue was not raised at trial, the Supreme Court declined to address it for the first time on appeal. St. v. Adgerson, 2003 MT 284, 318 M 22, 78 P3d 850 (2003).

Admissibility of Jail Medication Sign-Out Sheet to Show Inmate Drug Availability — Jail Drug Sale Conviction Affirmed: Defendant was convicted of sale of dangerous drugs after a jail

inmate testified that he observed defendant and another inmate taking drugs that could have come only from defendant's prescription in the jail medication box. Defendant contended that admission of the jail medication sign-out sheet was improper because the prosecution failed to qualify the officer as custodian of or knowledgeable of the record. The Supreme Court noted that after the District Court overruled defense counsel's nonspecific objection to the officer's direct testimony, counsel then failed to assert any new objection on the basis of inadequate foundation, hearsay, or other grounds. By remaining silent, defendant waived any objection to admission of the medication sign-out sheet and failed to preserve the issue for appeal. The medication sign-out sheet was properly admitted absent a timely objection. St. v. Vandersloot, 2003 MT 179, 316 M 405, 73 P3d 174 (2003).

Failure to Object at Trial Constituting Waiver of Right to Claim Prosecutorial Misconduct on Appeal: Azure argued on appeal that the state committed prosecutorial misconduct by introducing allegedly false evidence during Azure's homicide trial regarding threats that Azure allegedly made toward the victim's brother on the night of the shooting. However, Azure made no contemporaneous objection to the testimony during trial, which constituted a waiver of Azure's right to appellate review of the claim. St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002). See also St. v. Courchene, 256 M 381, 847 P2d 271 (1992), and St. v. Stuit, 268 M 176, 885 P2d 1290 (1994).

No Review on Direct Appeal of Allegation of Improper Jury Impanelment Absent Objection at Trial: Azure appealed a conviction for deliberate homicide on grounds that the jury was unlawfully impaneled, citing St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000). Azure noted that he was tried 2 months after Lamere, in the same judicial district, and that it was probable that the same improper jury impanelment used in Lamere was used in Azure's case, making Azure's trial illegal as well. Azure asked the Supreme Court to remand for factfinding on the issue, because no record was made as to how the jury was impaneled. The Supreme Court declined to remand. Remanding for a hearing is not a proper remedy for an appeal on direct review, because an evidentiary hearing can be accomplished only in a postconviction hearing. It could not be determined from the record what procedure was used to summon the jury, so the issue could not be reviewed. Further, review pursuant to the plain error doctrine was not available, because there was no record for the Supreme Court to review to determine whether an error occurred, let alone if the error met the criteria of plain error under the common law or 46-20-701. St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002).

Plenary Review of Criminal Sentence by Supreme Court Even Though No Objection Made at Sentencing: Brister was sentenced to 20 years for felony sexual assault with 10 years suspended, served the 10-year prison sentence, and then was released and began the 10-year suspended sentence. About 6 years into the suspended sentence, Brister was arrested for felony theft and for violating various parole conditions. The District Court then revoked the suspended sentence and reimposed another 10-year suspended sentence to run consecutively with a 5-year felony theft sentence. The new suspended sentence included 26 additional conditions. Brister did not object to any of the conditions when they were imposed, but filed a motion objecting to the sentence 2 months later, claiming that the conditions were not and could not have been included in the original suspended sentence, and thus violated double jeopardy and ex post facto laws. The state maintained that Brister waived any objections to the conditions by failing to contemporaneously object when the sentence was pronounced, and that the appeal from the sentence was not timely filed. The Supreme Court disagreed and reversed. Under St. v. Lenihan, 184 M 338, 602 P2d 997 (1979), the court will review a sentence imposed in a criminal case if it is alleged that the sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing. Further, Brister provided the District Court with an opportunity to correct any sentencing errors by filing an objection under 46-18-117 (now repealed), which allowed 120 days for correction of an illegal sentence, so Brister retained the right to appeal the purportedly illegal sentence. St. v. Brister, 2002 MT 13, 308 M 154, 41 P3d 314 (2002), overruling St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019 (2000), St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001), and St. v. Smith, 2001 MT 111, 305 M 298, 27 P3d 39 (2001), to the extent that those cases held that failure to raise a contemporaneous objection to an illegal sentence at the time of hearing resulted in waiver of defendant's objection, and followed in St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002). See also St. v. Southwick, 2007 MT 257, 339 M 281, 169 P3d 698 (2007).

Failure to Object at Trial to Refusal to Allow Testimony of Additional Witnesses After Trial Commenced — No Interference With Constitutional Right to Present Defense: LaDue contended that failure to allow the testimony of two additional witnesses after the start of his trial on charges of attempted deliberate homicide interfered with his constitutional right to present a defense. However, LaDue did not raise the constitutional question at trial, thus failing to

preserve the issue for appeal. Failure to raise the issue at trial constituted waiver of the right to appeal it. St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

Propriety of Prosecutor Vouching for Credibility of Witness Not Open for Appellate Review: Grace argued that the prosecutor had improperly vouched for the credibility of one of the state's witnesses during closing arguments and that he should have been granted a new trial by the lower court. The Supreme Court held that Grace had not objected to the prosecutor's statements during the trial and therefore the issue could not be raised for the first time on appeal. St. v. Grace, 2001 MT 22, 304 M 144, 18 P3d 1008 (2001).

Failure of Defense Counsel to Object to Comments by Judge — Potential Reaction by Jury Held Not to Relieve Necessity for Objection — Plain Error Doctrine Not Applied: During Scarborough's trial for deliberate homicide, the District Court Judge made two statements that Scarborough later interpreted as improper comments on the evidence. However, Scarborough did not object to either comment during the trial. Later, on appeal, Scarborough argued that he decided not to object to the District Court's comments during the trial because he was afraid of alienating the jury. The Supreme Court held that the risk of alienating the jury does not excuse the defense from objecting to what the defense believes is improper comments from the District Court Judge. The Supreme Court held that because the comments were not objected to during the trial, the objection was waived. The Supreme Court also refused to apply the common-law plain error doctrine because, taking the totality of the circumstances into consideration, the Supreme Court did not believe that the conditions requiring the application of that doctrine were presented in the case. St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Offer of Proof Necessary to Enable Supreme Court Review of Ruling on Admissibility of Evidence: At Raugust's trial, he attempted to question witnesses regarding his prearrest statements, but the prosecution objected on grounds of hearsay and the trial court sustained the objections. On appeal, Raugust argued that the statements were offered to prove his state of mind rather than for the truth of the matter asserted and that he was thus denied the opportunity to present a defense because of the exclusion of evidence reflecting a reasonable doubt as to his guilt. However, when an objection to evidence is sustained and the answer of a witness is not apparent, an offer of proof is necessary to enable the Supreme Court to review the ruling. Raugust made no offer of proof or argument at trial with respect to why he felt the objection should be overruled and therefore waived his argument on appeal by failing to make an offer of proof once the objections were sustained. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Jennings, 96 M 80, 28 P2d 448 (1934).

Failure to Object to Conduct of Psychological Evaluation or to Continuation of Sentencing Hearing — Waiver of Right to Consideration on Appeal: Osterloth was convicted of felony sexual assault and was required to undergo a sexual offender evaluation by a therapist of his choice at county expense. His scheduled sentencing was continued to allow the evaluation. On appeal, Osterloth contended that the District Court erred by sentencing him without an evaluation prepared by a qualified therapist, pursuant to 46-18-111, and by continuing sentencing instead of conducting a sentencing hearing without delay, as required in 46-18-115. The Supreme Court noted that under this section, it is precluded from considering an alleged error unless a timely objection was made or the criteria of 46-20-701 are met. Osterloth did not object to the evaluation being conducted by his own evaluator or to the sentencing continuation, nor did he assert that he could satisfy any of the requirements of 46-20-701. Thus, Osterloth waived the right to have the Supreme Court consider these alleged errors on appeal. St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000).

District Court Exceeding Scope of Appellate Review — Abuse of Discretion in Applying Particularized Suspicion of DUI to Traffic Stop Triggered by Report of Vandalism: Robertson was stopped after a vehicle of the description that he was driving was reported leaving the scene of a vandalism. He was subsequently convicted of DUI in City Court and appealed to District Court on grounds that his right to confront witnesses was denied and that the city had not sustained the necessary burden of proof to support the conviction. The District Court remanded to the City Court for dismissal on grounds that the arresting officer did not have a sufficient particularized suspicion to justify the investigative stop for DUI. However, the issue of a sufficient particularized suspicion was never raised or ruled on in City Court by either Robertson or the city. When a District Court exercises its power of appellate review, it must refrain from deciding issues not properly raised or objected to in the court below; thus, the District Court abused its discretion by exceeding the scope of its appellate review in addressing the issue of particularized suspicion, so the Supreme Court reversed the order of the District Court dismissing the City Court judgment against Robertson. Missoula v. Robertson, 2000 MT 52, 298

M 419, 998 P2d 144, 57 St. Rep. 250 (2000). See also Missoula v. Asbury, 265 M 14, 873 P2d 936, 51 St. Rep. 383 (1994), and St. v. Herrera, 1998 MT 173, 289 M 499, 962 P2d 1180 (1998).

Failure to Object to Closing Comments — Waiver of Right to Consideration on Appeal: Schmalz claimed that in closing arguments, the prosecutor argued a theory to the jury that was not supported by testimony, constituting prosecutorial misconduct, but Schmalz did not object to the comments during closing arguments. Failure to object resulted in failure to properly preserve the claim for appeal and resulted in the waiver of Schmalz's right to have the Supreme Court consider the claims regarding the prosecutor's closing argument. St. v. Schmalz, 1998 MT 210, 290 M 420, 964 P2d 763, 55 St. Rep. 889 (1998).

Evidence of Habit Disallowed — No Denial of Due Process and Right to Defense — Unspecific Objection — No Impairment of Substantial Rights by Comment of District Court on Merits of Defense: Huerta was tried on charges of felony assault (now assault with a weapon) of a juvenile and attempted to present evidence that it was the habit of the juvenile's mother to punish him severely. The District Court prevented the evidence from going to the jury. Huerta claimed that the District Court had prevented Huerta from presenting his only defense and thereby prevented him from obtaining a fair trial, in violation of his right to due process under the fifth amendment to the U.S. Constitution and his right to a defense under the sixth amendment. The Supreme Court noted that the claim of denial of a constitutional right was made for the first time on appeal and, citing St. v. Weeks, 270 M 63, 891 P2d 477 (1995), and St. v. Loh, 275 M 460, 914 P2d 592 (1996), held that Huerta had not made a specific enough objection when he objected at trial to a "miscarriage of justice". The Supreme Court also held that the District Court erred when it commented before the jury that "Brenda . . . is not on trial here". However, the Supreme Court held, as it noted that it had in St. v. Cassill, 71 M 274, 229 P 716 (1924), that under the circumstances, Huerta had received a fair trial and that his substantial rights were not prejudiced by the remark of the District Court. St. v. Huerta, 285 M 245, 947 P2d 283, 54 St. Rep. 1133 (1997).

Defendant Must Argue Insufficiency of Evidence Prior to Appeal: Walsh argued that the evidence presented in his trial was insufficient to support his conviction on the charges of aggravated assault. The Supreme Court held that it would not consider Walsh's argument because he had failed to raise the issue of insufficient evidence at any time prior to filing his brief on appeal. St. v. Walsh, 281 M 70, 931 P2d 42, 54 St. Rep. 64 (1997), overruled in St. v. Granby, 283 M 193, 939 P2d 1006, 54 St. Rep. 558 (1997). Granby was followed in St. v. Hagen, 283 M 156, 939 P2d 994, 54 St. Rep. 542 (1997).

In Camera Inspection of Note From Jury — Failure to Object as Precluding Appeal: Swan contended that he was deprived of his right to be present at all stages of trial because he was not present at an in camera hearing at which the trial court considered and answered a note from the jury inquiring whether an assault instruction applied to a felony aggravated assault charge as well as a felony assault (now assault with a weapon) charge. Both counsel were present for the discussion of the note, and neither objected to the court's answer. Swan's failure to object at the time that the note was discussed and to raise the objection in his motion for a new trial constituted the waiver of the objection when raised for the first time on appeal. St. v. Swan, 279 M 483, 928 P2d 933, 53 St. Rep. 1246 (1996).

Failure to Object and Failure to Invoke Exception — Waiver of Objection: Martin was charged with several counts of sexual assault, sexual intercourse without consent, and deviate sexual conduct. Martin sought to have the counts severed in such a manner that five separate trials would have been required, but the District Court refused to sever. Martin argued before the Supreme Court that he was prejudiced by action of the prosecutor. The Supreme Court held that because Martin had made no objection at trial to any of the alleged instances of misconduct and because he did not argue that he was entitled to raise the arguments pursuant to 46-20-701(2), the Supreme Court would not address the arguments of misconduct. St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996).

Claim First Made on Appeal That Judge Should Not Have Questioned Witness or Curtailed Line of Prosecution Questioning: In a prosecution for aggravated kidnapping and assault, the judge's questions to a witness who sold defendant bullets and curtailing of a line of questioning pursued by the prosecution would not be considered on appeal because they were not raised below. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Sexual Abuse — Failure of District Court to Consider Sentencing Alternatives — No Objection — Sentence Not Illegal or Violation of Due Process: Swoboda pleaded guilty to sexual abuse of children, was classified as a nondangerous offender, and was sentenced to 15 years with the Department of Corrections. On appeal, she claimed as error the District Court's failure to consider alternatives to incarceration. The Supreme Court noted that she had not objected at

sentencing to the District Court's failure and declined to review the judgment. The Supreme Court noted that in the past, it had made an exception and reviewed such a failure of the District Court when the state conceded the failure of the District Court or when the sentence was illegal. Here, however, the Supreme Court noted that the sentence was not beyond the District Court's jurisdiction. Citing St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep 310 (1996), the Supreme Court also held that the failure of the District Court was not a manifest miscarriage of justice and would not leave unsettled the question of the fundamental fairness of the trial or the proceedings. St. v. Swoboda, 276 M 479, 918 P2d 296, 53 St. Rep. 478 (1996).

Failure to Object Bars Issues on Appeal — Designation as Dangerous Offender — Order for Alcohol Treatment — Failure to Advise Maximum Penalty: Hofman pleaded guilty to a felony and, at the conclusion of the sentencing hearing, was designated a dangerous offender (see 1995 repeal of 46-18-404) and was ordered to undergo alcohol treatment. Hofman appealed the designation and the order and, in addition, alleged that the District Court failed to advise him of the maximum penalties for his offense. The Supreme Court held that Hofman's failure to raise these issues in the District Court precluded the issues from being raised on appeal. St. v. Hofman, 275 M 455, 913 P2d 1256, 53 St. Rep. 223 (1996).

DNA Evidence — General Objection in Motion In Limine Insufficient to Preserve Objection for Purposes of Appeal: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence that was combined with standard serological evidence to provide a combined statistical estimate of the probability that Weeks was the father of a child of his stepdaughter. Weeks objected to the combined evidence but not on a foundation basis. The state argued that Weeks waived any objection that he had to the combined evidence, but Weeks contended that his motion in limine preserved an objection to the evidence. The Supreme Court held that Weeks's motion in limine, which did not specify any reasons or authorities why the evidence should be excluded, did not contain an objection to the combined statistical evidence but simply concluded that the DNA evidence was prejudicial. The Supreme Court held that this objection was insufficient to preserve the issue for appeal. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995), followed in St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996).

Trial Court's Improper Questioning of Witness in Front of Jury Not Reversible Error: Kelly, convicted of kidnapping and unlawful sexual intercourse, argued that the trial court erred in questioning the minor victim as to competency in front of the jury. The Supreme Court held that no objection had been made during the trial and that the objection was therefore waived. The Supreme Court also held that although the trial court erred in questioning the child in front of the jury because a witness is presumed competent, there was other direct and corroborative evidence of Kelly's guilt. St. v. Kelly, 265 M 298, 876 P2d 641, 51 St. Rep. 522 (1994).

Claim of Error Not Within Exception — Waiver of Appellate Review: Defendant contended that the prosecutor's false comments precluded a fair trial. Unless claims of error fit within an exception to 46-20-701(2), appeal is improper. Appellate review was waived in this case because: (1) the right to object existed at the time of trial; (2) evidence was not suppressed; and (3) material and controlling facts upon which the claim was predicated were known to defendant and his attorney. St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994), followed in St. v. Riley, 270 M 436, 893 P2d 310, 52 St. Rep. 258 (1995), and St. v. Nelson, 274 M 11, 906 P2d 663, 52 St. Rep. 1069 (1995). St. v. Nelson was followed in St. v. Hofman, 275 M 455, 913 P2d 1256, 53 St. Rep. 223 (1996).

Failure to Object to Closing Argument Regarding Defendant's State of Mind — Waiver of Right to Appeal: Although the prosecution inappropriately used evidence in closing arguments to suggest defendant's state of mind, failure of defendant to contemporaneously object to the alleged error at trial precluded the Supreme Court from reviewing the issue on appeal. The trial court must first be allowed the opportunity, through objection by the parties, to correct the error at trial. St. v. Losson, 262 M 342, 865 P2d 255, 50 St. Rep. 1588 (1993), followed in St. v. Wild, 266 M 331, 880 P2d 840, 51 St. Rep. 872 (1994), and St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996).

Failure to Offer Voluntariness Instruction or Object to Lack of Voluntariness Instruction: Defendant who did not offer an instruction on voluntariness as an element of every crime or object to failure to give such an instruction was not entitled to review of the issue on appeal. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992), followed, with regard to failure to offer instruction on a lesser included offense, in St. v. Swan, 279 M 483, 928 P2d 933, 53 St. Rep. 1246 (1996).

Refusal to Consider, in Absence of Objection, Discussion of Other Bad Acts Before Jury: The Supreme Court would not consider the issue on appeal in absence of objection at trial to

discussion before the jury regarding whether evidence of other bad acts, which the court barred, should be admitted. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992).

Failure to Raise Double Jeopardy Argument at Trial — Insufficient Record: The Supreme Court refused to consider a double jeopardy argument that was not raised in a timely fashion at trial, given that the record presented for review was insufficient to establish a double jeopardy defense. St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992).

Failure to Object to Admissibility of Testimony — Issue Not Considered on Appeal: The Supreme Court declined to consider on appeal the issues of evidence and confrontation raised on testimony when no objection was raised to the testimony at trial. St. v. McCord, 251 M 317, 825 P2d 194, 49 St. Rep. 53 (1992), followed in St. v. Stuit, 277 M 227, 921 P2d 866, 53 St. Rep. 607 (1996).

Failure to Object to Tape Recorder in Jury Room — Appeal Right Waived: After the case was submitted to the jury, the jury requested a tape recorder to play the recording of a drug transaction. Defendant was consulted and had no objection. Failure to object to the action at trial precluded defendant's right to raise the issue on appeal. St. v. Moreno, 248 M 91, 809 P2d 574, 48 St. Rep. 339 (1991).

Not Taking Stand Due to Judge's Comments: The defendant appealed his conviction on the basis that he had not taken the stand because he had relied on certain comments of the trial court with respect to corroborative testimony. The Supreme Court held that the issue was not before it because the defendant had failed to object at the close of his trial. St. v. Kaczmarek, 243 M 456, 795 P2d 439, 47 St. Rep. 1319 (1990), followed in St. v. Johnson, 257 M 157, 848 P2d 496, 50 St. Rep. 209 (1993).

No Prejudice Through Order in Companion Case: In a companion case involving defendant's brother, the trial court, over the brother's objection, ordered the production of statements made by individuals whom the brother intended to call as witnesses, pursuant to 46-15-323. Pursuant to an order in his own case, defendant was required to produce the same information. Defendant did not object to the order in his own case and was precluded from raising the issue on appeal. Further, defendant lacked standing to assert the privilege that was alleged by his brother; the defendant did not demonstrate any prejudice to him as a result of the order in the companion case. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Raising Issue in Postconviction Relief That Could Have Been Preserved for Appeal — Abuse of Process: Defendant sought to challenge jury instructions in a petition for postconviction relief after failing to object to the disputed instructions at trial. He offered no excuse for failing to object and did not argue that he could not have reasonably complied with the procedural requirements of 46-16-401 and this section. Because objections to the instructions could have been raised at trial, those grounds for relief could have reasonably been available for direct appeal. To allow defendant to raise an issue in postconviction relief that he could reasonably have preserved for direct appeal would constitute an abuse of process. St. v. Gorder, 243 M 333, 792 P2d 370, 47 St. Rep. 958 (1990), followed in St. v. Baker, 272 M 273, 901 P2d 54, 52 St. Rep. 735 (1995). Baker was followed in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999).

Closing Argument — Prosecutor's Comments on Defendant Not Taking Stand: On appeal, defense counsel argued that the prosecutor's closing comments were directed at the defendant's failure to testify. The Supreme Court stated that it was incumbent on counsel to make his objection at the time of trial and that, as a general rule, the court does not entertain issues on appeal that were not raised at trial. St. v. Wiman, 236 M 180, 769 P2d 1200, 46 St. Rep. 279 (1989).

Untimeliness of Motion Waived by Failure to Object: A motion to suppress was filed the first day of trial, contrary to the 10-day notice requirement in 46-13-301. By failing to object to the timeliness of the motion at trial, any objection on appeal was waived under this section. In re J.W.K., 223 M 1, 724 P2d 164, 43 St. Rep. 1483 (1986).

Constitutionality Not Considered: Defendant alleged for the first time on appeal that 45-5-201 is unconstitutional because it fails to provide a parent, who may use reasonable and necessary force to restrain or correct his child under 45-3-107, with any guidance in determining what is or is not reasonable or necessary force. The Supreme Court refused to consider the allegation on appeal, since none of the exceptions of 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987) were found to apply. St. v. Probert, 221 M 476, 719 P2d 783, 43 St. Rep. 988 (1986).

Alleged Constitutional Violation: Concerning an alleged constitutional violation (failure to allow defendant to confront witnesses by allowing hearsay evidence) when the error was not objected to at trial, a party must show prejudicial error and must satisfy one of the three

requirements listed in 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987) before the claim will be noticed on appeal. St. v. Cain, 220 M 509, 717 P2d 15, 43 St. Rep. 568 (1986), followed in St. v. Enright, 2000 MT 372, 303 M 457, 16 P3d 366, 57 St. Rep. 1590 (2000). See also Forsyth v. Allison, 274 M 246, 908 P2d 205, 52 St. Rep. 1212 (1995).

Failure to Object to In-Court Identification of Defendant — Issue Waived on Appeal: Where, in a prosecution for deliberate homicide in which a prosecution witness identified the defendant in court and the defendant failed to object to the identification, the failure of the defendant to object at trial precludes him on appeal from predicating error on the admission of the identification. [But see 1983 amendment allowing consideration on appeal under circumstances set out in 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987).] St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Failure to Object to Jury Instructions — Issue Precluded on Appeal: Where the defendant was convicted of felony murder, aggravated kidnapping, and robbery and either failed to object at trial to certain instructions to the jury or concurred in those instructions, the Supreme Court found the defendant was precluded from raising alleged errors in those instructions for the first time on appeal. [But see 1983 amendment allowing consideration on appeal under circumstances set out in 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987).] The Supreme Court also found that the objections had no merit as the instructions objected to, or instructions substantially similar to them, had been approved in St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 1134 (1979). St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981). See also St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Independent Knowledge of Juror — Failure to Object: The fact that a juror had acted as a special prosecutor in a disbarment action against an attorney under a workers' compensation indictment and had used the defendant's disbarment, which dealt at length with the facts involved in the defendant's criminal case, as a model in drafting his pleadings did not require a reversal of the defendant's conviction when, at the conclusion of the trial, the juror met with the judge and counsel and told them what he knew and the defendant made no objection. The defense failed to meet its responsibility by its failure to properly object and thereby give the court an opportunity to remedy any alleged defects. [But see 1983 amendment allowing consideration on appeal under circumstances set out in 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987).] St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

WAIVER OF ISSUE BY PARTY'S ACTION

Objectionable Testimony Elicited by Defendant's Own Actions — Right to Allege Error on Appeal Waived: Smith was charged with stealing his mother's credit card and using the card to withdraw money from her bank account and charge items for his personal use. Pretrial, Smith moved in limine to preclude witnesses at trial from testifying regarding Smith's prior criminal convictions, and the motion was granted. When his mother testified, Smith's counsel asked what efforts she made to locate Smith after discovering that her credit card was gone, and the mother responded that she had checked with Smith's parole officer to see if the officer knew where Smith was. Smith immediately moved for a mistrial, asserting that the comment violated the motion in limine, but the motion was denied. On appeal, the Supreme Court affirmed. Because the objectionable testimony was elicited by Smith's own actions, he waived the right to allege error on appeal because he actively participated in creating the error. St. v. Smith, 2005 MT 18, 325 M 374, 106 P3d 553 (2005), following St. v. Gafford, 172 M 380, 563 P2d 1129 (1977).

Failure to Object to Jury Instruction — Ineffective Assistance of Counsel Claim Unfounded — Plain Error Doctrine Inapplicable: The trial court instructed the jury that Gray could be convicted of assault on a peace officer if the state proved that Gray caused a reasonable apprehension of bodily harm in any of three police officers. Gray contended that the instruction erroneously allowed the jury to convict for assault of one or more of the officers without agreeing to one specific set of facts, in violation of the unanimity requirement that the jury must be in agreement as to the principal factual elements underlying the offense. Even though Gray's counsel acquiesced to the instruction, Gray contended that the fundamental right to a unanimous jury verdict is inviolate, so plain error review was appropriate. However, Gray not only failed to contemporaneously object to the instruction, but specifically asked the trial court to add the language that he argued on appeal was insufficient. The Supreme Court declined to apply the doctrine, refusing to put the trial court in error for an action in which Gray acquiesced and actively participated. Additionally, Gray's claim of ineffective assistance of counsel based on his attorney's acquiescence and participation in the jury instruction for strategic purposes also failed. In light of the overwhelming evidence of guilt, Gray could not show that the trial outcome was prejudiced because of the lack of a specific unanimity instruction or that the result would

have been different if the attorney had not engaged in the legal strategy. The conviction was affirmed. St. v. Gray, 2004 MT 347, 324 M 334, 102 P3d 1255 (2004), followed in St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

No Appellate Review of Trial Court's Refusal to Allow Expert Testimony Absent Contemporaneous Objection: During Olsen's arson trial, Olsen sought to introduce testimony from a chemical engineer who had concluded that a faulty junction box was the cause of the fire. After voir dire to determine the engineer's qualifications to testify, the District Court granted the state's motion to exclude the engineer's testimony on grounds that he lacked the necessary expertise to testify on the subject of forensic electrical engineering. Olsen made no offer of proof regarding the witness's qualifications to testify or the substance of the testimony, nor did Olsen object to the refusal to allow the testimony. Nevertheless, on appeal, Olsen contended that the trial court erred in disallowing the testimony. The Supreme Court held that Olsen's failure to make a contemporaneous objection at trial constituted waiver of the objection, so the issue was not subject to appellate review. St. v. Olsen, 2004 MT 158, 322 M 1, 92 P3d 1204 (2004).

Record Devoid of Reasons for Counsel's Conduct During Voir Dire — Ineffective Assistance Claim Improperly Raised on Direct Appeal: Defendant's claims of ineffective assistance of counsel during voir dire could not be addressed without considering matters outside the record and were therefore inappropriate for direct appeal. The claims were thus dismissed without prejudice to defendant's pursuit of the claims in postconviction proceedings. St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003), following St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003).

Counsel Decision to Forego Certain Defense Considered Trial Strategy — Insufficient Record to Determine Effective Assistance of Counsel on Direct Appeal: On direct appeal, Hendricks contended that he was provided ineffective assistance of counsel in his assault trial because his attorney failed to raise the affirmative defense of justifiable use of force. However, in a disclosure statement filed prior to the omnibus hearing, Hendricks's counsel specifically noted that the defense of justifiable use of force would not be asserted. On the morning of trial, counsel stated that no jury instructions on the defense of justifiable use of force would be offered. Thus, the decision not to raise the defense was made consciously and was not the result of ignorance or neglect and was presumed to be sound trial strategy falling within the realm of reasonable professional conduct absent evidence to the contrary. Absent a sufficient record to address the issue of ineffective assistance, the direct appeal was dismissed, requiring Hendricks to raise the issue by a postconviction relief proceeding, if at all. The Supreme Court clarified that it will no longer use the approach in St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001), to determine effective assistance of counsel, but rather the procedure set out in St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003). St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003), followed in St. v. Webster, 2005 MT 38, 326 M 112, 107 P3d 500 (2005).

No Pretrial Determination Regarding Whether Statement Admissible for Impeachment Purposes — Waiver of Right to Object to Admissibility: At the time of arrest, Harris admitted an act of sexual intercourse with his adopted daughter. Prior to trial, Harris moved to suppress the statement on grounds that it was involuntary and obtained in violation of his fifth amendment rights under the United States Constitution. The District Court agreed that the statement could not be used, but expressly stated that its limited suppression order did not address whether it could be used by the state for impeachment purposes in the event that Harris testified, essentially reserving its ruling for a later time, as authorized in 46-13-104. Harris's testimony about the statement during direct examination brought the statement into evidence by his own volition, constituting waiver of the right to appeal the admissibility of the statement for use as impeachment. St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), distinguishing St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996), and St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Withdrawal of Proposed Instruction on Accountability — Waiver on Appeal: Sittner proposed a jury instruction stating that a defendant's knowledge that a crime is being committed, in conjunction with the defendant's presence during the crime, is insufficient to support a finding of guilt by accountability. The state's proposed instruction was that one may become an accomplice by being present and joining in the criminal act. Sittner withdrew his proposed instruction during settling of instructions, and the state's instruction was used. In the absence of a timely objection, Sittner's withdrawal of his proposed instruction constituted a waiver of the objection and precluded the raising of the issue on appeal, considering that none of the exceptions to the requirement for timely objection in 46-20-701 applied. St. v. Sittner, 1999 MT 103, 294 M 302, 980 P2d 1053, 56 St. Rep. 434 (1999).

REVIEW UNDER PLAIN ERROR DOCTRINE

Failure to Object to Prosecutor's Closing Arguments — Waiver of Objection: Defendant contended that he was denied a fair trial because of comments made by the prosecutor during closing arguments regarding defendant's credibility. However, defendant failed to object and preserve the issue for appeal, so the objection was waived. Nevertheless, defendant urged the Supreme Court to employ discretionary plain error review and reverse, but the court was not persuaded that the comments resulted in a manifest miscarriage of justice, undermined the fundamental fairness of the trial, or compromised the integrity of the judicial process, so plain error review was denied. St. v. Rose, 2009 MT 4, 348 M 291, 202 P3d 749 (2009).

Trial Court's Comment on Defense Objection at Trial Not Compromising of Judicial Integrity — Plain Error Review Inappropriate: When the trial court sustained the state's objection to a prior hearsay statement of a witness, defense counsel objected and asked to put the objection on the record. The court replied, "Fine. So noted. You've asked the question, I've overruled it. You don't have to say anything more. The Supremes can read it." On appeal, defendant sought plain error review because the comment compromised the trial court's impartiality in front of the jury by assuming defendant's guilt and eventual conviction. The Supreme Court noted that trial courts should refrain from such comments in front of jurors but held that in this case, in context the comment was simply an explanation that no additional objection was necessary to preserve the objection for potential appellate review and did not compromise the integrity of the judicial process, so plain error review was not invoked. St. v. Skinner, 2007 MT 175, 338 M 197, 163 P3d 399 (2007).

No Clear Comment on or Infringement of Defendant's Right to Remain Silent — Plain Error Doctrine Not Invoked: Upshaw claimed that the testimony of a detective at trial regarding Upshaw's decision to exercise the right to remain silent violated the right to due process and the privilege against self-incrimination and that pursuant to Doyle v. Ohio, 426 US 610 (1976), the Supreme Court should invoke the plain error doctrine and reverse the conviction. The state asserted that the prosecutor did not commit a Doyle error by eliciting testimony of Upshaw's post-Miranda silence, but rather that the evidence came from a nonresponsive answer by the detective and that the prosecution did not deliberately seek to put the evidence before the jury or use the evidence to impeach Upshaw. The Supreme Court examined the record and determined that the brief comment on Upshaw's silence was confined to a minor portion of the detective's testimony and that the prosecutor did not pursue the issue, use the testimony to impeach Upshaw, or refer to the testimony in cross-examination or closing. To be plain, an error should firmly convince a person that the prosecutor's comments created an inference for the jury that, by remaining silent, Upshaw must be guilty. However, in this case, there was no such firm conviction. Thus, the court declined to invoke the plain error doctrine because there was no clear comment on or infringement of Upshaw's right to remain silent. St. v. Upshaw, 2006 MT 341, 335 M 162, 153 P3d 579 (2006), following St. v. Godfrey, 2004 MT 197, 322 M 254, 95 P3d 166 (2004).

Theory of Erroneous Jury Instruction Raised for First Time on Appeal — No Plain Error: At trial, the District Court instructed the jury to view with distrust the testimony of a witness who was legally accountable for the same crime as Daniels. Daniels objected to the instruction on grounds that the witness's testimony had changed and was no longer inculpatory, so the instruction was unnecessary. On appeal, Daniels argued that the instruction violated his right to a fair trial because it could have been construed to instruct the jury to distrust his exculpatory statements given to police immediately after his arrest, having implicated the witness in those statements. The Supreme Court found no prejudicial effect in the jury instruction, and Daniels could not argue on appeal a theory of error that was changed from the theory raised in trial court. St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), followed in St. v. Rinkenbach, 2003 MT 348, 318 M 499, 82 P3d 8 (2003).

Prosecutorial Comments During Closing Not Violative of Defendant's Right to Fair Trial: Raugust argued on appeal that the prosecutor's comments during closing arguments deprived Raugust of a fair trial, notwithstanding the failure of Raugust's attorney to object, which Raugust characterized as ineffective assistance of counsel. Under this section, review is barred of any alleged errors not objected to at trial, unless the error falls within the exceptions in 46-20-701(2), but Raugust nevertheless urged review under the plain error doctrine. The Supreme Court held that this case did not present the requisite exceptional case to invoke the plain error doctrine because the alleged errors were either misstatements of fact, taken out of context of the prosecutor's argument, constituted the state's analysis of the evidence, or were later cured by the jury instructions. Raugust's claim of ineffective assistance of counsel also failed because Raugust did not meet the first prong of the Strickland test by showing that his counsel's performance was deficient. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St.

Rep. 570 (2000). See also St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827 (1999), St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), and St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008).

Claim First Made on Appeal That Judge Who Decided Issue of Flight in Bail Hearing Should Not Have Tried Case Because Flight Was an Issue: Defendant claimed that the lower court judge should not have tried his case because whether he had fled the jurisdiction was a seriously disputed question at trial. The judge had previously decided during a bail hearing that defendant was a flight risk. Defendant's contention that the judge was not truly impartial was precluded by statute from being decided on appeal because it was not raised below. The common-law plain error doctrine is an exception to the statute, but it is a doctrine that will be invoked only in exceptional cases in which failure to review the claimed error might result in manifest miscarriage of justice, leave unsettled the question of fundamental fairness at trial, or compromise the integrity of the judicial process. It was determined inapplicable in this case. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Common-Law Plain Error — Case-by-Case Review: Despite the passage of 46-20-701, Montana's plain error statute restricting the review of errors not objected to at trial, the doctrine of common-law plain error review by the Montana Supreme Court continues to exist to allow correction of errors not objected to at trial but that affect the fairness, integrity, and public reputation of judicial proceedings. The Supreme Court retains the inherent power and obligation to interpret the constitution, protect individual rights, prevent manifest injustice, and correspondingly review lower court decisions and actions for error. The power of such review is inherent in the appellate process itself. Thus, while acknowledging the constraints of 46-20-701, the Supreme Court will discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights even if no contemporaneous objection is made and notwithstanding the statutory criteria, in the class of cases when failure to conduct the review may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of trial proceedings, or compromise the integrity of the judicial process. The doctrine will be applied sparingly and on a case-by-case basis. Nevertheless, the necessity for contemporaneous objection to claimed error remains because 46-20-701 will be applied, except in the class of cases mentioned above. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), followed in St. v. Monaco, 277 M 221, 921 P2d 863, 53 St. Rep. 604 (1996), St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996), St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), St. v. Pizzichiello, 1999 MT 123, 294 M 436, 983 P2d 888, 56 St. Rep. 499 (1999), St. v. Hanson, 1999 MT 226, 296 M 82, 988 P2d 299, 56 St. Rep. 891 (1999), Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001), St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), and St. v. Auld, 2006 MT 189, 333 M 125, 142 P3d 753 (2006). See also Halldorson v. Halldorson, 175 M 170, 573 P2d 169 (1977), St. v. Wilkins, 229 M 78, 746 P2d 588 (1987), Seyferth v. St., 277 M 377, 922 P2d 494, 53 St. Rep. 698 (1996), St. v. Gray, 2004 MT 347, 324 M 334, 102 P3d 1255 (2004), and St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

Prosecution Comment on Sexual Abuse in Opening Statement — Door Not Opened — Testimony Properly Excluded Under Rape Shield Law: Stuit was charged with sexual abuse of S.M., a minor. At trial, the District Court cautioned both the defense and prosecution that testimony concerning prior acts of abuse of S.M. would not be admitted. However, in an opening statement, the prosecution made reference to past sexual abuse of S.M. No objection was made by the defense at the time. Later, in a conference in chambers, the District Court noted that the statement came close to opening the door on the issue of past abuse, but ultimately ruled that the door had not been opened on the issue. The Supreme Court held that failure of defense counsel to make a contemporaneous objection waived the issue and that the doctrine of plain error did not apply under the statute. The Supreme Court also held that any evidence of prior abuse was inadmissible under the rape shield law. St. v. Stuit, 268 M 176, 885 P2d 1290, 51 St. Rep. 1238 (1994).

Alleged Court Error and Prosecutor Misconduct Not Objected to During Trial: Thompson argued that his conviction should be overturned because of errors by the District Court in instructing the jury and because of misconduct by the prosecutor during closing remarks. The Supreme Court held that the defendant had not objected during the trial and that the court would not implement the plain error doctrine because the defendant had made no showing that his rights had been substantially prejudiced. St. v. Thompson, 259 M 62, 853 P2d 1188, 50 St. Rep. 682 (1993). See also In re Petition of Slice, 271 M 337, 896 P2d 1125, 52 St. Rep. 472 (1995).

Failure to Object — No Plain Error in Admitting Mug Shot in Evidence: Absent proof that his substantial rights were prejudiced, appellant who did not object during the trial was not entitled

to review of introduction into evidence of his mug shot, which he claimed indicated to the jury that he had a past criminal record. Even under the plain error doctrine, which provides a remedy to prevent manifest injustice when objection was not made below, reversal was not warranted. A mug shot is generally admissible, at the discretion of the judge, if disguised, as it was here, to remove law enforcement information. Appellant could not prove prejudice because eyewitnesses to the theft could not absolutely identify defendant from the mug shot, his own testimony showed that he in fact had a past criminal record, and his defense was that he was not the person who committed the theft. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992).

Failure to Object to Judge Qualifying Ten-Year-Old Sexual Crime Victim as Witness in View of Jury — Not "Plain Error" — Mass of Damaging Evidence Precluding Any Prejudice: In the presence of the jury, the District Court Judge questioned the 10-year-old victim of a sexual crime and an aggravated assault about whether she was aware of the consequences of taking an oath and testifying. Defense counsel did not object. Although it would have been better to have conducted the questioning away from the jury and the questions should have been framed differently, any mistake did not warrant the application of the "plain error" rule of 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987) because the defendant was not prejudiced by the manner of qualifying the victim in light of all of the independent and highly damaging evidence against him. St. v. Smith, 208 M 66, 676 P2d 185, 41 St. Rep. 176 (1984).

Effective Assistance of Counsel — No Objection Raised to Improper Argument by Prosecution — Appealability: Although objection to the prosecutor's argument may not be raised on appeal if it has not been raised at trial, if it forms a basis for an effective assistance of counsel issue, it will be considered on appeal. [Under the 1983 amendment of this section, it will be considered only under circumstances set out under 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987).] If a prejudicial prosecutorial argument is alleged, it will not be presumed. Rather, it must be established from the record that a substantial right has been denied. St. v. Dupre, 200 M 165, 650 P2d 1381, 39 St. Rep. 1660 (1982).

Violations Not Charged — Elimination From Probation Revocation Hearing Consideration: The District Court, sitting without a jury in probation revocation hearing, is presumed to be able to properly evaluate evidence and determine the credibility of witnesses without regard to incompetent evidence, and that ability was demonstrated where the judge eliminated from consideration all alleged probation violations not charged by petition and affidavit for revocation and therefore erroneously admitted at hearing. St. v. Steffans, 195 M 395, 636 P2d 836, 38 St. Rep. 1976 (1981). See also St. v. Nelson, 225 M 215, 731 P2d 1299, 44 St. Rep. 181 (1987).

Review of Jury Instruction Later Declared Unconstitutional in Other Case — Plain Error Rule: The giving of a jury instruction, without objection by the defendant, that was subsequently declared unconstitutional in another case did not justify the use of the plain error rule when the instruction did not go to the essence of the case and was harmless beyond a reasonable doubt. St. v. Hardy, 185 M 130, 604 P2d 792 (1980).

INADEQUATELY SUPPORTED CLAIMS

No Record as to Why Counsel Took Particular Actions in Providing Defense — Effective Assistance Claim Not Appropriate for Direct Appeal: Hamilton claimed that he received ineffective assistance of counsel at a trial on incest charges, asserting that counsel: (1) failed to deliver on the promise that Hamilton would testify; (2) allowed a detective to testify regarding the veracity of Hamilton and the alleged victim; and (3) demeaned Hamilton and defense counsel in closing statements. The Supreme Court examined each claim but was unable to determine from the record why counsel took that particular strategy. Because the claims were not record-based, the effective assistance issue was not appropriate for direct appeal, and Hamilton's claim was dismissed without prejudice to raising the claim in postconviction relief proceedings. St. v. Hamilton, 2007 MT 223, 339 M 92, 167 P3d 906 (2007), following St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001).

Record-Based or Nonrecord-Based Information Determinative of Appropriateness of Direct Appeal or Petition for Postconviction Relief — Direct Appeal Dismissed When Record Insufficient to Substantiate Effectiveness of Counsel: In 1999, White moved for an evidentiary hearing to allow the development of facts that were not part of the record but that were necessary to sustain a claim of ineffective assistance of counsel. The Supreme Court declared by order that a petition for postconviction relief would be the proper avenue for White's nonrecord-based ineffective assistance of counsel claim. Nevertheless, in late 2000, White appealed, contending that the claim of prejudicial error resulting from her trial counsel's various failures to provide representation, such as the failure to call witnesses, make an opening statement, or offer a theory of the case at any stage of the proceedings, was supported by the record and proper for

direct appeal. The general rule set out in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), is that when ineffective assistance claims are based on facts of record, they must be raised on direct appeal, while claims based on allegations not documented in the record must be raised by petition for postconviction relief. The underlying principle of the rule is that a silent record cannot rebut the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The two distinct classifications of on-record and off-record actions tend to overlap at times, and though not easily distilled into a formula, the definitive question that decides whether actions are on-record or off-record is whether the record fully explains why counsel took the particular course of action. Generally, an alleged failure to object to the introduction of evidence, to the testimony of a witness, or to prosecutorial misconduct at trial is considered record-based and appropriate for direct appeal. Likewise, counsel's own conduct in presenting the case, such as improperly eliciting damaging testimony from a witness or rendering an improper opening statement or closing argument, may be pointed to as record-based. Decisions regarding the timing and number of objections and whether to offer no opening statement at all lie within counsel's tactical discretion, indicating that nonrecord-based information explaining the tactic may be involved. Similarly, counsel's failure to adequately investigate, to prepare a defense, to become familiar with critical areas of the applicable law, to offer a particular jury instruction, to object to the trial court's failure to consider sentencing alternatives, to object to the admission of evidence that is evidenced by the record, or to fully inform defendant of the consequences of various options and rights, even though the prejudicial results of the ineffectiveness appear on the record, may constitute a nonrecord-based claim. In White's case, the record supplied some indicia of why a certain objection was raised at a particular time, but was still insufficient to determine to what extent counsel's actions were purely tactical or resulted from deficient representation. Thus, the information was considered nonrecord-based and should have been raised by petition for postconviction relief, so White's direct appeal was dismissed without prejudice. St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001), followed in St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), St. v. Notti, 2003 MT 296, 318 M 146, 79 P3d 289 (2003), St. v. Rinkenbach, 2003 MT 348, 318 M 499, 82 P3d 8 (2003), St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005), Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006), St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006), St. v. Upshaw, 2006 MT 341, 335 M 162, 153 P3d 579 (2006), St. v. Fender, 2007 MT 268, 339 M 395, 170 P3d 971 (2007), and St. v. Herman, 2008 MT 187, 343 M 494, 188 P3d 978 (2008). See also St. v. Adgerson, 2003 MT 284, 318 M 22, 78 P3d 850 (2003), for a similar application of the Hagen rule and St. v. Davis, 2003 MT 341, 318 M 459, 81 P3d 484 (2003). See also St. v. St. Germain, 2007 MT 28, 336 M 17, 153 P3d 591 (2007), in which the Supreme Court declined to address a direct appeal of defense counsel's nonrecord-based reasons for making a double jeopardy argument and for failing to call a witness to testify in an incest case because the issues were appropriate for postconviction proceedings. See also St. v. Green, 2009 MT 114, 350 M 141, 205 P3d 798 (2009), in which an ineffective counsel appeal based on counsel's failure to request an accomplice instruction in a homicide trial was dismissed in favor of postconviction relief proceedings because plausible justifications existed for counsel's conduct that could not be addressed on appeal since the record did not resolve the factual questions surrounding counsel's actions.

Objection to Qualifications of Pathologist to Testify Regarding Gunshot Wound: At Clausell's deliberate homicide trial, objection was made to the testimony of a Board-certified clinical pathologist who offered opinions regarding a gunshot wound, on grounds that the pathologist was not a Board-certified forensic pathologist and therefore was not qualified to testify. However, the doctor had performed over 400 autopsies, including about 40 that involved gunshot wounds. Clausell did not offer any applicable legal theory that a clinical pathologist with such experience who is not a forensic pathologist is not qualified to testify in a homicide case, and the Supreme Court declined to adopt a rule to that effect. Further, Clausell failed to preserve any other objection at trial to the pathologist's testimony and was precluded from raising other issues regarding the testimony on appeal. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001), distinguishing In re K.H. & K.L.E., 1999 MT 128, 294 M 466, 981 P2d 1190 (1999).

PARTICULAR MATTERS NOT CONSTITUTING ERROR

Element of Crime Revealed Through Stipulation Entered for Strategic Reasons — No Ineffective Assistance of Counsel: At Auld's trial for witness tampering, defense counsel entered a stipulation revealing that Auld's parole officer, who was designated as a government employee, had or was about to engage in an investigation to determine if Auld had violated a rule by consuming alcohol. Auld asserted that counsel provided ineffective assistance by entering the

stipulation and conceding an element of the offense of witness tampering. The Supreme Court found Auld's argument unavailing. Counsel entered the stipulation for strategic reasons so that the jury would not hear that Auld was on parole at the time that the offense took place, and Auld could not use trial tactics and strategic decisions as a basis for an ineffective assistance of counsel claim. St. v. Auld, 2006 MT 189, 333 M 125, 142 P3d 753 (2006). See also St. v. Grixti, 2005 MT 296, 329 M 330, 124 P3d 177 (2005), and St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006).

Counsel's Failure to Interview and Call Witnesses Within Range of Reasonable and Sound Professional Decisions — Failure to Prove Ineffective Assistance of Counsel: Weaver contended that his defense counsel was ineffective in failing to interview and call certain witnesses and in not introducing an entomologist's report that might have created a reasonable doubt as to Weaver's role in a homicide. Under the first prong of the Strickland test, Weaver needed to overcome the strong presumption that counsel's defense strategies and trial tactics fell within a wide range of reasonable and sound professional decisions. The Supreme Court examined each of Weaver's contentions and determined that: (1) counsel's decision not to investigate potential witnesses did not fall below an objective standard of reasonableness; (2) Weaver failed to meet the burden of showing that counsel's failure to interview potential witnesses constituted ineffective assistance to the extent that it resulted in prejudice raising a reasonable probability that the trial outcome would have been different; (3) counsel's decision not to call every witness that Weaver identified actually carried fewer risks and promoted Weaver's best interest at trial; and (4) failure to introduce the entomologist's report was tactical and the result of a conscientious, weighed decision made after consultation with Weaver and thus was not erroneous. Weaver's ineffective assistance claim failed. Weaver v. St., 2005 MT 158, 327 M 441, 114 P3d 1039 (2005), following Clausell v. St., 2005 MT 33, 326 M 63, 106 P3d 1175 (2005).

Prosecutor's Comments Not Affecting Outcome of Trial — Failure to Prove Prosecutorial Misconduct: Clausell's defense in a deliberate homicide trial was that the victim's death was a "tragic accident". Because of Clausell's defense, his counsel failed to object to numerous comments by the prosecutor that focused on rebutting the "tragic accident" theory. On appeal, Clausell contended that the prosecutor's statements constituted prosecutorial misconduct and that his attorney's failure to object to the comments or to move to suppress evidence of the search of Clausell's apartment amounted to ineffective assistance of counsel. The Supreme Court disagreed on both issues. Given that the state presented sufficient evidence of deliberate homicide and that the jury was admonished to consider only the evidence, Clausell failed to show that the prosecutor's comments affected the trial's outcome. Because no prosecutorial misconduct occurred, defense counsel's failure to object to the comments could not be considered ineffective assistance, and defense counsel's trial tactics, including failure to seek to suppress evidence that was in plain view, fell within the wide range of reasonable and sound professional decisions. Clausell failed to establish that his attorney's lack of objections fell below the objective reasonableness standard or that he was prejudiced to the point that a reasonable probability existed that the result of the trial would have been different had counsel not performed ineffectively. The deliberate homicide conviction was affirmed. Clausell v. St., 2005 MT 33, 326 M 63, 106 P3d 1175 (2005), followed in St. v. Misner, 2007 MT 235, 339 M 176, 168 P3d 679 (2007). See also St. v. Gray, 207 M 261, 673 P2d 1262 (1983).

Evidence of Other Crimes as Proof of Continuing Course of Conduct — Adequacy of Jury Instruction — Failure to Make Specific Objection: Defendant Howell contended that the District Court's instruction to the jury that it could consider evidence of other crimes as proof of a continuous pattern of conduct violated the Just notice and jury instructions. Although the phrase "continuing course of conduct" has never been specifically approved for use in a jury instruction, it has been used interchangeably with several of the Just requirements. Use of the phrase in this case was found to be surplusage that was improperly included in the instruction; however, its use was not prejudicial and constituted harmless error. Further, Howell's failure to object to the adequacy of the Just notice requirements waived any deficiency in the notice. St. v. Howell, 254 M 438, 839 P2d 7, 49 St. Rep. 759 (1992).

Sua Sponte Instruction on Lesser Included Offense Not Required by Law or Due Process: Defendant contended that the District Court erred in not giving an instruction of its own accord on the lesser offense of misdemeanor sexual assault following his trial for felony sexual intercourse without consent when a request for the instruction was never made by the defense. Although a defendant has a right to a lesser included offense jury instruction if requested, mandatory instruction on lesser offenses on the judge's own accord is inconsistent with Montana law and the public policy of allowing trial counsel to conduct the case according to strategy and could result in unfair surprise to both the defense and the prosecution. Moreover, a District

Court's failure to instruct the jury sua sponte on a lesser included offense does not constitute deprivation of a defendant's right to due process. St. v. Sheppard, 253 M 118, 832 P2d 370, 49 St. Rep. 382 (1992), followed in St. v. Howell, 254 M 438, 839 P2d 87, 49 St. Rep. 759 (1992), and St. v. Leyba, 276 M 45, 915 P2d 794, 53 St. Rep. 7 (1996).

Screening of Child Witnesses at Trial — Conformity With Federal Constitution — Test — Failure to Raise State Constitutional Issue in Lower Court: Defendant argued that placement of a 6 ½-foot high by 10-foot wide opaque screen between himself and two child witnesses at his trial for sexual assault violated his constitutional rights to confront the witnesses against him. Defendant's failure to argue or object in the trial court on the basis of the Montana Constitution precluded consideration of the state issue on appeal. However, the Supreme Court cited Md. v. Craig, 497 US 836, 111 L Ed 2d 666, 110 S Ct 3157 (1990), and Coy v. Iowa, 487 US 1012, 101 L Ed 2d 857, 108 S Ct 2798 (1988), in finding that defendant's lack of opportunity for personal observation of the witnesses was not dispositive. Confrontation rights are not absolute but may give way to other competing interests so as to permit the use of certain procedural devices necessary to shield a child witness from the trauma of courtroom testimony. The test for determining necessity is: (1) the trial court must hear evidence and determine whether use of a procedure other than face-to-face confrontation is necessary to protect the welfare of the child witness; (2) the court must also find that the child would be traumatized, not by the courtroom generally but by the presence of the defendant; and (3) there must be a finding that the emotional distress suffered by the child in the presence of the defendant is more than mere nervousness, excitement, or some reluctance to testify. Federal standards having been met in this case, use of the opaque screen was not violative of the U.S. Constitution. St. v. Davis, 253 M 50, 830 P2d 1309, 49 St. Rep. 342 (1992).

Sufficient Evidence for Jury to Return Guilty Verdict: The defendant argued that there was insufficient evidence to support a guilty verdict for witness tampering. The Supreme Court held that the evidence that the defendant knew he was charged with two counts of domestic abuse (now partner or family member assault) and that he threatened his girlfriend that he or his friends would get her if she testified was sufficient to support the jury's findings. St. v. Matt, 245 M 208, 799 P2d 1085, 47 St. Rep. 1988 (1990). See also St. v. Hembd, 254 M 407, 838 P2d 412, 49 St. Rep. 788 (1992).

Comment on Defendant's Failure to Testify: The defendant appealed his conviction, alleging that the jury instruction provided by the prosecution commented on his refusal to testify and prejudiced his case. The Supreme Court held that even though the appeal was not timely, the court would hear it in order to preserve the substantial rights of the defendant. The court stated that the instruction would not have been prejudicial if requested by the defendant and that the third paragraph of the instruction relating to evaluating a testifying defendant's credibility should not have been given but was harmless error. St. v. Amsk, 243 M 39, 792 P2d 1109, 47 St. Rep. 1075 (1990).

Pro Se Case Appeal Filed Without Briefs — General Review of Transcript on Court's Motion: Where the defendant made the defense of his deliberate homicide case difficult by failing to cooperate with his several attorneys, and after conviction was granted several extensions by the Supreme Court for filing a transcript and his first brief, but nevertheless failed to file a brief and specifications of error, the Supreme Court on its own motion reviewed the District Court transcript for typical kinds of errors and found: (1) that the evidence was sufficient to support the defendant's conviction as the defendant was convicted on the basis of his own testimony; (2) that there were no errors in the jury instructions given on the evidence and the elements of the crime; (3) that assistance of counsel was adequate and that the failure of defendant's counsel to subpoena evidence or witnesses was not relevant to the crime charged; and (4) that the statutory penalties for deliberate homicide with a dangerous weapon did not constitute cruel and unusual punishment. St. v. Graham, 206 M 49, 669 P2d 691, 40 St. Rep. 1499 (1983).

Actions of Prosecutor Based on Provocation by Defense Counsel — No Error Found: Where, in a prosecution for deliberate homicide, the prosecuting attorney responded to certain evidentiary tactics of defense counsel by questioning him about his drinking habits, the court did not err in failing to caution the jury with respect to the alleged prejudicial comments of the prosecuting attorney. It has generally been held that an appellant may not predicate error upon the prosecuting attorney's actions where such were induced or provoked by the appellant's counsel. The defendant also failed to offer an appropriate cautionary instruction. Any irregularity did not affect the defendant's substantial rights. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

RETROACTIVITY ISSUES

What Constitutes Similarly Situated Case for Purposes of Retroactive Application of New Rule — Issue Required to Be Raised in Trial Court: As a general principle, in order for a case to be similarly situated for purposes of retroactive application of a newly announced rule, the issue addressed by the new rule should be raised by the movant at the trial court level and properly preserved for appeal. The only exception would be a challenge under the common-law plain error doctrine or if unique circumstances apply, such as those in St. v. Carter, 2005 MT 87, 326 M 427, 114 P3d 1001 (2005). Here, Foster-DeBerry contended that the new rule regarding suppression of telephone and transmission recordings announced in St. v. Goetz & St. v. Hamper, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), should retroactively apply to Foster-DeBerry's case, which was pending when the Goetz-Hamper rule was announced. However, Foster-DeBerry never filed a motion to suppress or raised the legal issues addressed in Goetz-Hamper in trial court, and thus did not preserve the issue for appeal, so Foster-DeBerry was not entitled to retroactive application of the Goetz-Hamper rule. Further, Foster-DeBerry did not argue for application of the plain error doctrine, so the Supreme Court declined to apply it. St. v. Foster-DeBerry, 2008 MT 397, 347 M 164, 197 P3d 1004 (2008), following Griffith v. Kentucky, 479 US 314 (1987), and St. v. Zivcic, 598 NW2d 565 (Wis. Ct. App. 1999).

Conviction of Felony Nonsupport Prior to Legislative Creation of Felony Offense Considered Improper Ex Post Facto Application Warranting Reversal — Common-Law Plain Error Doctrine Applied: Price was convicted of felony nonsupport for failure to make payments from 1988 through 1996 and was given the maximum 2-year sentence; however, the felony nonsupport statute was not enacted until 1993. On appeal, Price contended that the manner in which the felony nonsupport statute was applied violated the fundamental constitutional right to be free from ex post facto laws. The state argued that because Price failed to object at trial, the issue could not be raised on appeal. The issue of whether Price was convicted of felony nonsupport that occurred before the statute was enacted brought into question the fundamental fairness of Price's trial. The Supreme Court held that because a fundamental right was at issue, the common-law plain error doctrine applied despite Price's failure to preserve the issue at trial. A jury instruction allowed the jury to find Price guilty based on acts committed from 1988 through 1996 and thus subjected Price to increased punishment for conduct that occurred prior to enactment of the felony statute. This was an unconstitutional ex post facto application of the felony nonsupport law, constituting reversible error. St. v. Price, 2002 MT 284, 312 M 458, 59 P3d 1122 (2002).

Retroactive Applicability of Judicial Rule Regarding Oral Pronouncement of Sentence: Retroactivity is a threshold matter that compels the evenhanded application of a new rule for the conduct of criminal prosecutions to all similarly situated cases that are pending on direct appeal or not yet final. Therefore, all defendants whose cases meet those criteria are entitled to the retroactive application of a new judicial rule of criminal procedure. This standard applies irrespective of whether the new judicial rule constitutes a clear break from existing precedent and without regard to whether the rule was available to the District Court at the time that it ruled. Thus in the present case, the rule in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), that oral pronouncement of sentence controls over the written sentence for purposes of finality applied retroactively to Waters' appeal, even though the District Court did not have the Lane rule at the time of sentencing. St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999), following St. v. Egelhoff, 272 M 114, 900 P2d 260 (1995), and St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999), overruling St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), Peterson v. Mont. Bank of Bozeman, N.A., 212 M 37, 687 P2d 673 (1984), and their progeny, and followed in St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361, 56 St. Rep. 1032 (1999). See also Teague v. Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989).

Exceptions to General Rule of Retroactivity — Guillaume Inapplicable to Case Finalized Before Adoption of New Constitutional Rule: Although Nichols' conviction, resulting in an enhanced penalty for use of a weapon, was finalized more than 5 years prior to the Supreme Court's decision in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999), which created a new constitutional rule barring enhanced weapon sentences when the underlying offense requires proof of use of a weapon, Nichols nevertheless argued that the portion of his sentence precluded by Guillaume should be stricken from his sentence. The Supreme Court applied the retroactivity criteria in Teague v. Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989), noting that two exceptions apply to the general rule of retroactivity. The first exception applies when the constitutional rule puts primary, private individual conduct beyond the power of the criminal law to proscribe; the second exception applies when the

procedures used to convict the defendant are so implicit in the concept of ordered liberty as to constitute watershed rules of criminal procedure. Finding that Guillaume was not dictated by prior precedent and did not set out a watershed rule, the court held that the new rule did not require retroactive application to cases not pending on direct appeal or to cases that were final when the Guillaume opinion was issued. Not only was Nichols' claim time-barred under the pre-1997 version of 46-21-102, his argument that the sentence should be reduced to prevent a miscarriage of justice also failed because miscarriage of justice refers to actual, not legal, innocence. St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999), followed in St. v. Baker, 1999 MT 251, 296 M 253, 989 P2d 335, 56 St. Rep. 987 (1999), and overruled in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002). See also St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Substantial Change in Applicable Law — Teague Criteria: Byers filed for postconviction relief based on allegations that the Montana Supreme Court had reversed its position on the constitutionality of two sets of jury instructions regarding the mental element of the offense of deliberate homicide and voluntary intoxication subsequent to Byers' previous appeal. The U.S. Supreme Court's decision in Teague v. Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989), analyzing the retroactive application of judicial decisions to cases on collateral review, stated that a new rule will not be applied to cases coming before the court on collateral review after the date of the decision. A new rule was defined as a rule in which the result was not dictated by precedent at the time that the defendant's conviction became final. The Montana Supreme Court found that Byers' objection to jury instructions in his previous appeal had been overruled in St. v. Rothacher, 272 M 303, 901 P2d 82 (1995), amounting to a substantial change in applicable law that was not barred by Teague, but that the instructional error in Byers' trial was harmless beyond a reasonable doubt. The court declined to apply the new rule regarding instructions on voluntary intoxication set out in St. v. Egelhoff, 272 M 114, 900 P2d 260 (1995), because that decision specifically precluded retroactive application and because it had been subsequently overruled by the U.S. Supreme Court, resulting in no substantial change in the applicable law. Byers v. Mahoney, 279 M 28, 929 P2d 202, 53 St. Rep. 624 (1996). The Teague criteria were applied in St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999). The Teague criteria were also applied in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999).

Law Review Articles

Criminal Jurisdiction Over Indians and Post-Conviction Remedies: This note discusses, in part, the use of Writs of Error Coram Nobis and Habeas Corpus as post-conviction remedies for Indians. 22 Mont. L. Rev. 172 (1961).

Motion for Mistrial—Exclusive Character of Criminal Code: This discusses, among other things, the use of a Writ of Error Coram Nobis. Ryan, 21 Mont. L. Rev. 224 (1960).

"Coram Nobis"—Is It Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings?, Briggs, 17 Mont. L. Rev. 160 (1956).

Collateral References

Criminal Law *key* 1004, 1023(2), (12), (13).

24 C.J.S. Criminal Law §§2324, 2348 through 2350.

4 Am. Jur. 2d Appellate Review §§201 through 203.

Validity, construction, and application of concurrent-sentence doctrine—state cases. 56 ALR 5th 385.

Gestures, facial expressions, or other nonverbal communication of trial judge in criminal case as ground for relief. 45 ALR 5th 531.

Appealability of order suspending imposition or execution of sentence. 51 ALR 4th 939.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions. 23 ALR 4th 955.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators. 19 ALR 4th 192.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that judge believes defendant guilty. 90 ALR 3d 822.

Prejudicial effect of statement of prosecutor that if jury makes mistake in convicting it can be corrected by other authorities. 5 ALR 3d 974; 3 ALR 3d 1338.

46-20-105. Appeal by one codefendant.

Commission Comments

Source: [R.C.M. 1947, section] 94-8114.

No change.

Collateral References

Criminal Law *key* 1027.

24 C.J.S. Criminal Law §§2324, 2348.

Part 2
Initiation of Appeal

Part Case Notes

Timely Appeal Necessary: The Supreme Court was without jurisdiction to hear an appeal when a criminal defendant filed a notice of appeal more than 60 days after the rendition of judgment. State ex rel. Graveley v. District Court, 178 M 1, 582 P2d 775 (1978).

Copy of Transcript — Indigent:

When an indigent prison inmate's 60 days for appeal had expired, he could not get a copy of the trial and court record transcript. Ketcham v. St., 167 M 535, 541 P2d 68 (1975).

When a person convicted in the District Court petitioned the Supreme Court for a Writ of Mandate to compel the District Court to furnish a "copy of trial and court record transcript" for the purpose of appeal in forma pauperis, the Writ was denied when no timely application had been filed. State ex rel. Treat v. District Court, 124 M 234, 221 P2d 436 (1950).

Dismissal of Appeal: The motion of the Attorney General to dismiss appeals was well taken when the appeals were not taken within the time allowed by statute, no notice of appeal was filed or served, no proper record on appeal was filed, and no papers on the appeals were served upon either the County Attorney or the Attorney General. St. v. Martin, 147 M 548, 416 P2d 22 (1966).

Denial of Motion for Mistrial: The part of the defendant's appeal claiming that the trial court erred in denying a motion of the defendant for a mistrial was properly before the Supreme Court when it was taken within the time allowed by statute. St. v. Tiedemann, 139 M 237, 362 P2d 529 (1961).

Denial of Motion for New Trial: The motion of the State to strike the defendant's third specification of error, contending that there was no substantial evidence to support the verdict or judgment of conviction, was granted when the appeal was not taken within 60 days after the order denying the motion for a new trial. St. v. Tiedemann, 139 M 237, 362 P2d 529 (1961).

Excuse for Failure to Take Timely Appeal: When the District Court appointed counsel for the defendant and ordered preparation of the record for an appeal to the Supreme Court, all at public expense, the defendant having had no voice in the choice, in the interest of justice it was incumbent upon the Supreme Court to consider the contended errors although the court-appointed counsel failed to timely file the notice of appeal. St. v. Frodsham, 139 M 222, 362 P2d 413 (1961).

Insufficient Excuse for Failure to Take Appeal: Under a former statute allowing 6 months to appeal from a judgment, the death of defense counsel nearly a year after the trial and order of commitment was not a sufficient showing to justify an original Writ of Habeas Corpus in the Supreme Court. Dryman v. St., 139 M 141, 361 P2d 959 (1961).

Oral Request for Appeal Ineffective: A request stating an intention to appeal made orally in open court is wholly ineffectual to give the Supreme Court jurisdiction. State ex rel. Treat v. District Court, 124 M 234, 221 P2d 436 (1950).

Part Collateral References

Criminal Law *key* 1069, 1070, 1087, 1106(2).

5 Am. Jur. 2d Appellate Review §§292, 393, 394.

46-20-204. Stay of execution and relief pending appeal.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, [section] 121-6.

Subsection [(1)] is in harmony with our present code. However, in subsection[s (2), (3), and (4)] the necessity of obtaining a certificate of a judge stating that there is probable cause for appeal, as required by the present code, as a prerequisite for staying execution of judgment has been omitted. This appears to be an unnecessary and time consuming procedural step.

Subsection [(4)] permits review even though defendant is admitted to probation. If defendant is admitted to probation the order so admitting him shall remain in effect or he must post bail.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Convicted Felon Allowed Preconviction Bail Not Automatically Entitled to Bail Pending Appeal: Prior to his conviction for deliberate homicide, Moore was allowed bail, and following

conviction, he was designated a nondangerous offender (see 1995 repeal of 46-18-404) for purposes of parole eligibility. After conviction, Moore was denied bail pending appeal. Moore petitioned for a writ of habeas corpus, claiming that he is entitled to bail pending appeal as a matter of law pursuant to 46-9-107 and this section. The Supreme Court found that under 46-9-107, the District Court was required to order the detention of Moore unless it found that he was "not likely to flee". Since the District Court made the opposite finding based on evidence presented at the hearing, the Supreme Court found no abuse of discretion in the District Court's order denying bail pending appeal. The Supreme Court also held that the phrase "[i]f an appeal is taken and the defendant is admitted to bail" contained in subsection (2) of this section referred to bail pending appeal and requires that the District Court stay the execution of its sentence if the defendant is admitted to bail pending appeal. Because Moore was not admitted to bail pending appeal, his sentence should not be stayed. Moore v. McCormick, 260 M 305, 858 P2d 1254, 50 St. Rep. 1054 (1993).

Probation Violator Subject to Provisions Regarding Release on Bail: A person who has been convicted, sentenced, and placed on probation and who has violated probation is subject to the provisions regarding release on bail. The provisions of 46-20-204, providing for a stay of execution and relief pending appeal of original conviction, do not apply. St. v. Pease, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

Collateral References

5 Am. Jur. 2d Appellate Review §§393, 394, 434 through 440.

46-20-205. Effect of an appeal by the state.

Commission Comments

Source: [R.C.M. 1947, section] 94-8108.

This section is the same as the present code except for the addition of the words, "or order." It is intended that this section be consistent with and be implemented by Chapter [9] on Bail.

Case Notes

Right to a Speedy Trial: An appeal by the State of an order for a change in venue must be charged against the State in determining whether the defendant's right to a speedy trial has been violated. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Collateral References

Criminal Law *key* 1084.

Part 7
Action by Court

Part Case Notes

Failure to Request More Specific Instructions at Trial Level: On appeal, the defendant argued that more specific instructions were necessary. The defendant, however, did not request more specific instructions at trial. The defendant cannot on appeal hold the state or the trial court responsible for her failure to request more specific instructions. St. v. Goltz, 197 M 361, 642 P2d 1079, 39 St. Rep. 613 (1982).

Adequacy of Jury Instructions — Definition of Statutory Term — Case-by-Case Determination: Defendant in a deliberate homicide case urged that a proposed jury instruction defining "forcible felony" was refused incorrectly. As in an earlier case, the Montana Supreme Court held that a definition of every term in an applicable statute need not be given but rather, by necessity, each case must be considered on its own facts as to the adequacy of instructions on every theory having support in the evidence presented. Here, the definition of "forcible felony" added nothing to the term being defined and the lack of the instruction could not prevent the defendant from fully presenting his case to the jury. Therefore, there was no error in refusing the proposed instruction. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Admission of Evidence of Prior Relationship Between the Defendant and the Victim's Girlfriend and Threats by Defendant Against Her: The defendant in a deliberate homicide case claimed on appeal that the trial court erred in admitting into evidence acts and statements of the defendant which occurred prior to the shooting. The evidence concerned the former romantic relationship of the victim's girlfriend with the accused, the ill feelings of the defendant toward the victim that developed after the defendant's relationship with the woman was replaced with the victim's relationship with her, and the ensuing threats made by the defendant toward the woman. Because the State had to prove that the defendant purposely or knowingly caused the victim's death, the evidence of the defendant's intent was relevant in general and specifically because the defendant here alleged that he shot the victim in self-defense. Although threats

against a person other than the victim are not admissible generally, when the circumstances are such that the threat tends to show hostility toward the deceased, they are relevant. Although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, it may be admissible for other purposes such as proof of motive or intent or where such evidence forms a part of a single chain of facts is so intimately connected that the whole must be considered in order to interpret its several parts. Further, the challenged testimony was crucial to prove defendant's mental state at the time of the shooting, and as a result, the probative value outweighed its prejudicial effect. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Change of Venue — Grounds for Denial — Trial Court's Discretion: The defendant in a deliberate homicide case had moved for a change of venue based on allegedly inflammatory pretrial publicity and general bias against him in the county where the victim was killed. The Supreme Court held that a motion for a change of venue is addressed to the discretion of the trial court, and a denial is not reversible error in the absence of an abuse of discretion by the trial court. The Supreme Court also looked at the indicia of a denial of a fair trial resulting from prejudicial publicity (i.e., arousal of feelings of the community, threat to personal safety of the defendant, established opinion of members of the community as to the guilt of the accused, news articles beyond the objectivity of news printing and dissemination, and difficulty or failure in securing a fair and impartial jury from the community in which the news articles appeared). Having applied these indicators to the defendant's case and having considered the allegedly inflammatory news articles and broadcasts and the voir dire examination of prospective jurors, the Supreme Court found no abuse of discretion in the denial of the motion for a change of venue. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Defendant's Challenge of Jurors — Discretion of Judge in Ruling on Challenges: The defendant in a deliberate homicide case appealed his conviction in part on the basis that the trial court erred in denying his challenge to the jury panel as a whole and to one juror in particular. While noting that the right to a trial by an impartial jury is an unqualified one, the Supreme Court said that the pertinent inquiry was whether or not the jury empaneled was able to render an impartial judgment based solely upon the evidence presented at trial. Considering that each juror gave an assurance of impartiality and that the trial judge made cautionary remarks to the jury that they had a duty to lay aside their opinions and impressions, the Supreme Court held that under the circumstances the trial judge did not abuse his discretion by denying the defendant's challenge to the jury panel. With respect to the individual juror, the court noted that the judge had questioned the juror and that she had made it clear that she could put her emotions aside and judge the defendant fairly and solely upon the evidence presented at trial. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Jury Instruction on "Aggressor" — Self-Defense: An instruction defining "aggressor" and stating the unavailability of the defense of self-defense to an aggressor was appealed because there allegedly was no evidence presented in support of the instruction and, as given, allegedly was an incorrect statement of the law. The Supreme Court said that the trial judge must instruct the jury on every essential question presented by the evidence. Testimony that the defendant and a friend had made efforts to attract the victim's attention as he came out of the bar just before the shooting, coupled with the testimony of the defendant's prior acts of hostility towards the victim and his girlfriend, was sufficient to justify the aggressor instruction. Defendant's allegation that the jury instruction incorrectly stated the law also was rejected on appeal. The exceptions to the lack of availability of the defense of self-defense to an aggressor were inapplicable to the facts. Furthermore, the State had offered an instruction incorporating statutory language of 45-3-105, but the defendant rejected that proposed jury instruction. The reviewing court held that having objected to the very instruction he now asserts should have been included, defendant may not then predicate error on the absence of the qualifying instruction. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Jury Instruction on "Occupied Structure" — Coverage of Vehicles: On appeal from a conviction for deliberate homicide, the defendant claimed his proposed jury instruction on "occupied structure" was correct because the statutory definition includes "vehicle". However, the Chevrolet Blazer in which the defendant was sitting when he shot the victim was not covered by the definition, since the structure must be suitable for human occupancy or night lodging of persons or for carrying on business and the Blazer was not so suitable. A defendant is entitled to an instruction having support in the evidence presented but not if there is no such support. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Jury Instructions on Lesser Included Offenses — No Error When Omitted Instruction Not Offered by Appellant: On appeal, the defendant in a deliberate homicide case alleged error in the

failure to give jury instructions on mitigated deliberate homicide and negligent homicide. The general rule is that an instruction is required where there is some evidence to support the lesser included offense. Both negligent homicide and mitigated deliberate homicide are to be considered lesser included offenses of deliberate homicide. Here, a lesser included offense instruction was offered by the State and objected to by the defense. The Montana Supreme Court reiterated its position that error may not be predicated upon the failure to give an instruction when the party alleging the error failed to offer the instruction. Failure to offer an instruction removes the cause of error, particularly when the defense counsel has objected to the instruction upon the ground that the defendant was either guilty of deliberate homicide or not guilty. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Jury Instructions on "Serious Bodily Harm" and "Serious Bodily Injury" — Applicability — Requirements: Defendant in a deliberate homicide case contended on appeal that the trial court failed to instruct the jury fully and fairly on the law of self-defense. The disagreement centered on the differences between "serious bodily harm" and "serious bodily injury", and the proper uses of instructions on the two terms. The Montana Supreme Court said that the test is whether the instructions given on justifiable force gave the defendant ample opportunity to expound to the jury in argument his theory with respect to the use of force as self-defense against an unlawful act. The court found the test had been passed in this case. Further, the court agreed that "harm" and "injury" are not necessarily synonymous and that there is no indication that the Legislature intended to integrate the definition of "serious bodily injury" into the self-defense statute. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Polygraph Test Results — Admissibility — Expert Testimony of Polygraphists: The defendant in a deliberate homicide case appealed the trial court's granting of a motion in limine to prevent the introduction of expert testimony regarding polygraph test results of a friend of the defendant who had accompanied the defendant as a passenger in the defendant's car on the night of the shooting. The defendant alleged three grounds for this part of his appeal: (1) the trial court erred in refusing to hear defendant's offer of proof on the polygraph; (2) that the trial court erred in ruling that the proposed testimony was inadmissible as a matter of law; and (3) the trial court erred in refusing admission of the particular polygraph-related testimony offered by the defendant. The Supreme Court said that if the trial judge's ruling that as a matter of law the testimony of the polygraph examiner was inadmissible was a correct ruling, it was not error for the District Court to refuse to consider the defendant's offer of proof or for it to refuse to admit into evidence this particular area of testimony and evidence. The Montana rule is that the results of polygraph examinations are not admissible as evidence in a criminal trial. The polygraph test results in this case do not fall into the same category as other scientific evidence that is admissible to assist the trier of fact to understand the evidence or to determine a fact in issue. Here only the friend's understanding of the defendant's motives could be established by the test, and that was not an issue in the case. For these reasons it was not error for the trial court to rule that as a matter of law the evidence was inadmissible. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Suppression Question — Psychological Evaluation — Standard of Review: Where two expert witnesses present conflicting evidence during a suppression hearing as to results of psychological evaluations they performed of the defendant and the District Court finds one expert's testimony to be more credible than the other's, such determination will be disturbed on appeal only if it is not supported by substantial credible evidence. In re R.P.S., 188 M 317, 613 P2d 999 (1980), following St. v. Grimestad, 183 M 29, 598 P2d 198 (1979).

Sandstrom Instruction — Plain Error Rule: The Sandstrom instruction was given to the jury in an action charging Martinez with theft. The instruction was not objected to at trial but was raised on appeal. The Supreme Court invoked the "plain error" rule because of the use of a constitutionally defective jury instruction and reversed the conviction. St. v. Martinez, 188 M 271, 613 P2d 974 (1980).

Improper Sentencings — Excess of Maximum — Failure to Prove Essential Element: Where the District Court sentenced defendant to 20 years for burglary and the maximum possible sentence was 10 years, the Supreme Court reduced the sentence to 10 years. The Supreme Court also reversed the 10-year sentence the defendant received upon his conviction for felony theft, as the State failed to prove the essential element that the value of the property taken exceeded $150. All other sentences received by the defendant, as well as the provision of the sentence for no parole or work furlough, were within the maximum allowed by law and as such were within the discretion of the sentencing judge and were not overturned. St. v. Sunday, 187 M 292, 609 P2d 1188 (1980).

Increased Sentence: The District Court may increase the sentence or punishment imposed by a Justice of the Peace after a trial de novo on a misdemeanor charge. St. v. Fissette, 159 M 501, 498 P2d 1208 (1972), following Colten v. Ky., 405 US 913, 32 L Ed 2d 584, 92 S Ct 1953 (1971).

46-20-701. Elements of record court considers on review — errors noticed.

Commission Comments

Source of Subsection (1): M.R.App.P., [former] Rule 14 [now superseded]. The language of the last sentence of [former] Rule 14 was changed to make it more consistent with the language presently used.

Source of Subsection (2): Illinois Code of Criminal Procedure, [Chapter] 38, [section] 121-9. This provision is consistent with present Montana law. Its purpose is to prevent a failure of justice where there are defects in the appeal but the substantial rights of the parties have not been affected. If error exists which affects the substantial rights of the accused, then the decision should be reversed even though not brought to the attention of the trial court. This is the present law. The object of this section is to get the problem settled in the state court rather than in a federal court.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), in first sentence, substituted "convicted person" for "respondent" and deleted the bracketed phrase "[convicted person]" inserted by the Code Commissioner and substituted "the convicted person" for "such respondent" and in second sentence substituted "convicted person" for "appellant" and deleted the bracketed phrase "[convicted person]" inserted by the Code Commissioner; in (2), (2)(b), and (2)(c) substituted "convicted person" for "defendant" and deleted the bracketed phrase "[convicted person]" inserted by the Code Commissioner; and made minor changes in style. Amendment effective March 12, 1997.

Code Commissioner Clarification: Throughout the section, the Code Commissioner has inserted the bracketed references to the convicted person for purposes of clarity.

1983 Amendment: Substituted last sentence and (1), (2), and (3) relating to what defendant must establish before a claim alleging an error affecting jurisdictional or constitutional rights may be noticed on appeal for former sentence that read: "Defects affecting jurisdictional or constitutional rights may be noticed although they were not brought to the attention of the trial court."

Case Notes

General 1094
Failure of Proof on Appeal 1106
Sufficiency of Evidence 1108
Substantial Rights Affected 1112
Substantial Rights Not Affected 1118
Plain Error 1123
No Error Found 1130
Harmless Error 1136

GENERAL

Prosecutor's Closing Comments Not Improper or Prejudicial — No Prosecutorial Misconduct in Referencing Defendant's Evidence: Dewitz contended that the prosecutor committed misconduct in closing arguments by referencing a plea agreement entered by an alleged accomplice. However, the plea agreement was entered into evidence by defense counsel in an effort to show that the alleged accomplice was not credible, so Dewitz could not complain of the prosecutor's reference to evidence that Dewitz introduced. Nor did Dewitz demonstrate how the comments could be considered improper or prejudicial. The prosecutor's comments were not so egregious as to deprive Dewitz of a fair trial, so no misconduct occurred. St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009).

Incarceration of Mentally Ill Defendant — No Plain Error Review for Alleged Due Process Violation: Following Rovin's parole violations, the District Court revoked Rovin's suspended sentence and imposed a sentence in the state prison, despite the fact that Rovin suffered from mental illness. Rovin argued for the first time on appeal that incarceration would fail to achieve rehabilitation and thus violated due process, that the Supreme Court should invoke plain error review to address the constitutional violation, and that failure to do so would be a manifest miscarriage of justice. The Supreme Court declined. Rovin failed to demonstrate that the due process claim met the elements for plain error review. The District Court considered sentencing alternatives but rejected community-based treatment over concerns for the safety of Rovin and

the public. Rovin was represented at every stage of the proceedings, knowingly and voluntarily admitted the parole violations, and waived the right to appeal by failing to object at trial. Further, a mere assertion that failure to review a claimed error might result in a manifest miscarriage of justice is not sufficient to implicate plain error review. St. v. Rovin, 2009 MT 16, 349 M 57, 201 P3d 780 (2009), following St. v. Mackrill, 2008 MT 297, 345 M 469, 191 P3d 451 (2008).

Failure to Develop Legal Analysis Regarding Warrantless Recorded Telephone Conversation — Issue Not Considered on Appeal: Jones moved the District Court to suppress a tape-recorded telephone conversation that was conducted as part of a drug investigation, but the court denied the motion. On appeal, Jones asserted that the Supreme Court should apply its decision from two cases that were pending at the time of Jones's trial. However, Jones failed to present any legal analysis of the factors applicable to the issue of whether an unlawful search occurred or to discuss other precedents that might apply. The Supreme Court declined to conduct Jones's research or to develop legal analysis supporting Jones's position. Jones failed to establish District Court error, and denial of the motion to suppress was affirmed. St. v. Jones, 2008 MT 440, 347 M 512, 199 P3d 216 (2008), following St. v. Hicks, 2006 MT 71, 331 M 471, 133 P3d 206 (2006).

What Constitutes Similarly Situated Case for Purposes of Retroactive Application of New Rule — Issue Required to Be Raised in Trial Court: As a general principle, in order for a case to be similarly situated for purposes of retroactive application of a newly announced rule, the issue addressed by the new rule should be raised by the movant at the trial court level and properly preserved for appeal. The only exception would be a challenge under the common-law plain error doctrine or if unique circumstances apply, such as those in St. v. Carter, 2005 MT 87, 326 M 427, 114 P3d 1001 (2005). Here, Foster-DeBerry contended that the new rule regarding suppression of telephone and transmission recordings announced in St. v. Goetz & St. v. Hamper, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), should retroactively apply to Foster-DeBerry's case, which was pending when the Goetz-Hamper rule was announced. However, Foster-DeBerry never filed a motion to suppress or raised the legal issues addressed in Goetz-Hamper in trial court, and thus did not preserve the issue for appeal, so Foster-DeBerry was not entitled to retroactive application of the Goetz-Hamper rule. Further, Foster-DeBerry did not argue for application of the plain error doctrine, so the Supreme Court declined to apply it. St. v. Foster-DeBerry, 2008 MT 397, 347 M 164, 197 P3d 1004 (2008), following Griffith v. Kentucky, 479 US 314 (1987), and St. v. Zivcic, 598 NW2d 565 (Wis. Ct. App. 1999).

Length of Speedy Trial Interval When Dismissal Granted: The date that a court grants a speedy trial dismissal motion becomes the date of the case's disposition and the end date of the speedy trial interval for purposes of appeal. St. v. Billman, 2008 MT 326, 346 M 118, 194 P3d 58 (2008).

No Record as to Why Counsel Took Particular Actions in Providing Defense — Effective Assistance Claim Not Appropriate for Direct Appeal: Hamilton claimed that he received ineffective assistance of counsel at a trial on incest charges, asserting that counsel: (1) failed to deliver on the promise that Hamilton would testify; (2) allowed a detective to testify regarding the veracity of Hamilton and the alleged victim; and (3) demeaned Hamilton and defense counsel in closing statements. The Supreme Court examined each claim but was unable to determine from the record why counsel took that particular strategy. Because the claims were not record-based, the effective assistance issue was not appropriate for direct appeal, and Hamilton's claim was dismissed without prejudice to raising the claim in postconviction relief proceedings. St. v. Hamilton, 2007 MT 223, 339 M 92, 167 P3d 906 (2007), following St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001).

Element of Crime Revealed Through Stipulation Entered for Strategic Reasons — No Ineffective Assistance of Counsel: At Auld's trial for witness tampering, defense counsel entered a stipulation revealing that Auld's parole officer, who was designated as a government employee, had or was about to engage in an investigation to determine if Auld had violated a rule by consuming alcohol. Auld asserted that counsel provided ineffective assistance by entering the stipulation and conceding an element of the offense of witness tampering. The Supreme Court found Auld's argument unavailing. Counsel entered the stipulation for strategic reasons so that the jury would not hear that Auld was on parole at the time that the offense took place, and Auld could not use trial tactics and strategic decisions as a basis for an ineffective assistance of counsel claim. St. v. Auld, 2006 MT 189, 333 M 125, 142 P3d 753 (2006). See also St. v. Grixti, 2005 MT 296, 329 M 330, 124 P3d 177 (2005), and St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006).

Motion to Correct Sentence Not Considered Motion to Withdraw Guilty Plea — Plain Error Review of Nolo Contendere Plea Inappropriate: Attorney Holt pleaded not guilty to five counts of felony theft of clients' funds. Pursuant to a subsequent plea agreement, Holt pleaded nolo contendere to the contested counts, but reserved the right to withdraw the plea if the agreed sentences were not imposed. Following conviction, Holt asked the Supreme Court to exercise plain error review, find that the plea agreement was violated, and allow Holt to withdraw the nolo contendere guilty plea. The court declined. Holt made no motion in trial court to review the guilty plea, so that issue was not properly before the Supreme Court. Holt's speculation that he would not have entered the plea agreement had he considered the possibility of good time did not implicate Holt's fundamental constitutional rights, and failure to apply plain error review did not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. The Supreme Court refused to consider Holt's District Court motion to correct the sentence as a motion to withdraw the guilty plea and thus declined to consider Holt's argument that he be allowed to withdraw the nolo contendere plea based on plain error review. St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006), distinguishing St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

No Appellate Review of Trial Court's Refusal to Allow Expert Testimony Absent Contemporaneous Objection: During Olsen's arson trial, Olsen sought to introduce testimony from a chemical engineer who had concluded that a faulty junction box was the cause of the fire. After voir dire to determine the engineer's qualifications to testify, the District Court granted the state's motion to exclude the engineer's testimony on grounds that he lacked the necessary expertise to testify on the subject of forensic electrical engineering. Olsen made no offer of proof regarding the witness's qualifications to testify or the substance of the testimony, nor did Olsen object to the refusal to allow the testimony. Nevertheless, on appeal, Olsen contended that the trial court erred in disallowing the testimony. The Supreme Court held that Olsen's failure to make a contemporaneous objection at trial constituted waiver of the objection, so the issue was not subject to appellate review. St. v. Olsen, 2004 MT 158, 322 M 1, 92 P3d 1204 (2004).

Hybrid Standard of Supreme Court Review of Sentencing When Offender Ineligible for Review by Sentence Review Division: In St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937 (1999), the Supreme Court held that it will review a criminal sentence only for legality, discarding the previous two-tiered approach of reviewing sentences for both legality and abuse of discretion, which was considered a carryover from the days before the creation of the Sentence Review Division when the court reviewed all sentencing challenges. However, Montoya created a "no review" window once the Sentence Review Division came into being, which left offenders with unreasonable sentencing conditions, but no term of incarceration and thus no eligibility for Sentence Review Division consideration, without a remedy. Therefore, the court fashioned a hybrid standard of review to close the "no review" window. If an offender is sentenced to 1 year or more of actual incarceration and is eligible for review by the Sentence Review Division, the court will apply the Montoya standard and review the sentence for legality only, but if the offender is ineligible for review by the Sentence Review Division, the court will review a sentence for both legality and abuse of discretion, applying the two-tiered approach used prior to creation of the Sentence Review Division. St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004), followed in St. v. Ruiz, 2005 MT 117, 327 M 109, 112 P3d 1001 (2005).

Failure of Trial Court to Hold Hearing Regarding Juror's Acquaintance With Witness — Waiver Absent Timely Objection — Plain Error Doctrine Inapplicable: During voir dire at Davis's trial, several jurors indicated that they were acquainted with two witnesses but stated that their acquaintance would not affect their ability to sit as jurors. Immediately after the first witness was called, a juror stated to the court that he knew the witness. Without objection from Davis, the court noted the statement and the witness proceeded to testify. Following conviction, Davis appealed on grounds that the court should have held a hearing to determine whether the juror was biased and that failure to do so violated Davis's right to an impartial jury. The Supreme Court disagreed. Davis's failure to object at trial constituted a waiver of appellate review of the issue. Further, Davis did not meet the narrow criteria in St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), to warrant plain error review. Judgment was affirmed. St. v. Davis, 2003 MT 341, 318 M 459, 81 P3d 484 (2003), followed in St. v. Taylor, 2009 MT 161, 350 M 447, 208 P3d 422 (2009).

Right to Appeal Without Objection at Trial Applicable Only When Right Determined to Be Retroactive — Hall Decision on Flight Instruction Prospective Only: In St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929 (1999), the Supreme Court ruled that a jury instruction on the significance of flight should no longer be given because it could be an unnecessary comment on

the evidence by the trial court. Although he did not raise a "Hall-type" objection to a flight instruction at trial, Nolan asserted that he was entitled to consideration of a Hall-related claim on appeal pursuant to this section because his constitutional right to a fair trial was violated by the giving of the flight instruction, constituting prejudicial error. The Supreme Court disagreed. One condition for application of this section is that the right asserted in the claim did not exist at the time of trial and has been determined to be retroactive in application. The ruling in Hall was prospective, not retroactive, and Nolan's trial occurred prior to the Hall decision; thus, Nolan did not meet the requirements of this section for raising a claimed constitutional error on appeal to which an objection was not made at trial. St. v. Nolan, 2003 MT 13, 314 M 47, 62 P3d 1118 (2003).

No Presumption of Prejudice:

Prejudice in a criminal case will not be presumed, but rather must appear from the denial or invasion of a substantial right from which the law imputes prejudice. St. v. Nelson, 2002 MT 122, 310 M 71, 48 P3d 739 (2002); St. v. Stuit, 277 M 227, 921 P2d 866, 53 St. Rep. 607 (1996); St. v. Stuit, 268 M 176, 885 P2d 1290, 51 St. Rep. 1238 (1994); St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994); St. v. Staat, 248 M 291, 811 P2d 1261, 48 St. Rep. 1041 (1991); St. v. Newman, 242 M 315, 790 P2d 971, 47 St. Rep. 711 (1990); St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988); St. v. Brush, 228 M 247, 741 P2d 1333, 44 St. Rep. 1495 (1987); St. v. Steffans, 195 M 395, 636 P2d 836, 38 St. Rep. 1976 (1981); St. v. Bubnash, 142 M 377, 382 P2d 830 (1963); St. v. Straight, 136 M 255, 347 P2d 482 (1959); St. v. Hall, 55 M 182, 175 P 267 (1918). Stuit was followed in St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827, 56 St. Rep. 1 (1999).

Where the trial court mistakenly granted challenges for cause to the prosecution but denied a similar challenge by defendant, the court held that prejudice will not be presumed where the record shows that the trial court's error affected neither constitutional nor jurisdictional rights of the defendant, and defendant on appeal has failed to demonstrate prejudice to his substantial rights resulting from the error. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982).

It ought no longer to be the rule in criminal cases in this state that, error being shown, prejudice will be presumed, as was held prior to 1895 when the codes were adopted. The former practice resulted in altogether too many reversals of criminal cases for technical errors which did not affect the substantial rights of the defendant. St. v. Byrd, 41 M 585, 111 P 407 (1910); St. v. Gordon, 35 M 458, 90 P 173 (1907).

Failure to Object at Trial Constituting Waiver of Right to Claim Prosecutorial Misconduct on Appeal: Azure argued on appeal that the state committed prosecutorial misconduct by introducing allegedly false evidence during Azure's homicide trial regarding threats that Azure allegedly made toward the victim's brother on the night of the shooting. However, Azure made no contemporaneous objection to the testimony during trial, which constituted a waiver of Azure's right to appellate review of the claim. St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002). See also St. v. Courchene, 256 M 381, 847 P2d 271 (1992), and St. v. Stuit, 268 M 176, 885 P2d 1290 (1994).

No Review on Direct Appeal of Allegation of Improper Jury Impanelment Absent Objection at Trial: Azure appealed a conviction for deliberate homicide on grounds that the jury was unlawfully impaneled, citing St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000). Azure noted that he was tried 2 months after Lamere, in the same judicial district, and that it was probable that the same improper jury impanelment used in Lamere was used in Azure's case, making Azure's trial illegal as well. Azure asked the Supreme Court to remand for factfinding on the issue, because no record was made as to how the jury was impaneled. The Supreme Court declined to remand. Remanding for a hearing is not a proper remedy for an appeal on direct review, because an evidentiary hearing can be accomplished only in a postconviction hearing. It could not be determined from the record what procedure was used to summon the jury, so the issue could not be reviewed. Further, review pursuant to the plain error doctrine was not available, because there was no record for the Supreme Court to review to determine whether an error occurred, let alone if the error met the criteria of plain error under the common law or this section. St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002).

Record-Based or Nonrecord-Based Information Determinative of Appropriateness of Direct Appeal or Petition for Postconviction Relief — Direct Appeal Dismissed When Record Insufficient to Substantiate Effectiveness of Counsel: In 1999, White moved for an evidentiary hearing to allow the development of facts that were not part of the record but that were necessary to sustain a claim of ineffective assistance of counsel. The Supreme Court declared by order that a petition for postconviction relief would be the proper avenue for White's nonrecord-based ineffective assistance of counsel claim. Nevertheless, in late 2000, White appealed, contending that the claim of prejudicial error resulting from her trial counsel's various failures to provide representation, such as the failure to call witnesses, make an opening statement, or offer a

theory of the case at any stage of the proceedings, was supported by the record and proper for direct appeal. The general rule set out in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), is that when ineffective assistance claims are based on facts of record, they must be raised on direct appeal, while claims based on allegations not documented in the record must be raised by petition for postconviction relief. The underlying principle of the rule is that a silent record cannot rebut the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The two distinct classifications of on-record and off-record actions tend to overlap at times, and though not easily distilled into a formula, the definitive question that decides whether actions are on-record or off-record is whether the record fully explains why counsel took the particular course of action. Generally, an alleged failure to object to the introduction of evidence, to the testimony of a witness, or to prosecutorial misconduct at trial is considered record-based and appropriate for direct appeal. Likewise, counsel's own conduct in presenting the case, such as improperly eliciting damaging testimony from a witness or rendering an improper opening statement or closing argument, may be pointed to as record-based. Decisions regarding the timing and number of objections and whether to offer no opening statement at all lie within counsel's tactical discretion, indicating that nonrecord-based information explaining the tactic may be involved. Similarly, counsel's failure to adequately investigate, to prepare a defense, to become familiar with critical areas of the applicable law, to offer a particular jury instruction, to object to the trial court's failure to consider sentencing alternatives, to object to the admission of evidence that is evidenced by the record, or to fully inform defendant of the consequences of various options and rights, even though the prejudicial results of the ineffectiveness appear on the record, may constitute a nonrecord-based claim. In White's case, the record supplied some indicia of why a certain objection was raised at a particular time, but was still insufficient to determine to what extent counsel's actions were purely tactical or resulted from deficient representation. Thus, the information was considered nonrecord-based and should have been raised by petition for postconviction relief, so White's direct appeal was dismissed without prejudice. St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001), followed in St. v. Earl, 2003 MT 158, 316 M 263, 71 P3d 1201 (2003), St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), St. v. Notti, 2003 MT 296, 318 M 146, 79 P3d 289 (2003), St. v. Rinkenbach, 2003 MT 348, 318 M 499, 82 P3d 8 (2003), St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005), Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006), St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006), St. v. Upshaw, 2006 MT 341, 335 M 162, 153 P3d 579 (2006), St. v. Fender, 2007 MT 268, 339 M 395, 170 P3d 971 (2007), and St. v. Herman, 2008 MT 187, 343 M 494, 188 P3d 978 (2008). See also St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003), and St. v. Davis, 2003 MT 341, 318 M 459, 81 P3d 484 (2003). See also St. v. Adgerson, 2003 MT 284, 318 M 22, 78 P3d 850 (2003), for a similar application of the Hagen rule. See also St. v. St. Germain, 2007 MT 28, 336 M 17, 153 P3d 591 (2007), in which the Supreme Court declined to address a direct appeal of defense counsel's nonrecord-based reasons for making a double jeopardy argument and for failing to call a witness to testify in an incest case because the issues were appropriate for postconviction proceedings. See also St. v. Green, 2009 MT 114, 350 M 141, 205 P3d 798 (2009), in which an ineffective counsel appeal based on counsel's failure to request an accomplice instruction in a homicide trial was dismissed in favor of postconviction relief proceedings because plausible justifications existed for counsel's conduct that could not be addressed on appeal since the record did not resolve the factual questions surrounding counsel's actions.

Objection to Qualifications of Pathologist to Testify Regarding Gunshot Wound: At Clausell's deliberate homicide trial, objection was made to the testimony of a Board-certified clinical pathologist who offered opinions regarding a gunshot wound, on grounds that the pathologist was not a Board-certified forensic pathologist and therefore was not qualified to testify. However, the doctor had performed over 400 autopsies, including about 40 that involved gunshot wounds. Clausell did not offer any applicable legal theory that a clinical pathologist with such experience who is not a forensic pathologist is not qualified to testify in a homicide case, and the Supreme Court declined to adopt a rule to that effect. Further, Clausell failed to preserve any other objection at trial to the pathologist's testimony and was precluded from raising other issues regarding the testimony on appeal. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001), distinguishing In re K.H. & K.L.E., 1999 MT 128, 294 M 466, 981 P2d 1190 (1999).

Failure to Object at Trial to Refusal to Allow Testimony of Additional Witnesses After Trial Commenced — No Interference With Constitutional Right to Present Defense: LaDue contended that failure to allow the testimony of two additional witnesses after the start of his trial on charges of attempted deliberate homicide interfered with his constitutional right to present a defense. However, LaDue did not raise the constitutional question at trial, thus failing to

preserve the issue for appeal. Failure to raise the issue at trial constituted waiver of the right to appeal it. St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

Common-Law Plain Error — Defendant Must Demonstrate With Specifics That a Fundamental Constitutional Right Was Violated at Trial: Whipple claimed that the trial court erred in allowing five witnesses to testify as to the credibility of the testimony of two minors who testified that Whipple had sexually abused them. The Supreme Court stated that because claims of plain error are almost always raised for the first time on appeal, a defendant must do more than simply make a generalized claim that the defendant's rights were violated by the alleged error. See St. v. Finley, 276 M 126, 915 P2d 208 (1996). The Supreme Court stated that it would not exercise its power of common-law plain error review of alleged errors not objected to at trial because Whipple had not met his burden of demonstrating specifically how a constitutional right of his had been violated by an error of the trial court. St. v. Whipple, 2001 MT 16, 304 M 118, 19 P3d 228 (2001).

Stipulation to Not Mention Suspended Driver's License at DUI Trial — Mention of Expired Driver's License Cured by Jury Admonition: Brady was charged with DUI, fourth or subsequent offense, arising from circumstances surrounding a single-vehicle accident in which Brady swerved off the highway, hit a rock wall, and rolled the vehicle. The information also charged Brady with three misdemeanors: driving while his license was suspended or revoked, failure to provide proof of insurance, and failure to give notice of an accident by the quickest means. Shortly before voir dire, Brady stated that he would plead guilty to the misdemeanors and moved that the state's witnesses not mention any of the offenses to which Brady would plead guilty. The state did not object to the motion. The third witness for the state, a deputy who was at the wreck scene, testified that he found a wallet near the vehicle that contained an expired driver's license. Brady moved for mistrial on grounds that the state violated the judge's order not to mention an expired license. The state countered that the stipulation was that the state would not mention that the license was suspended, but that mention of an expired license was not covered. The District Court found that there was a difference between the jury knowing that Brady's license was suspended, which suggested criminal activity, and knowing that the license was expired, which is not in itself criminal. The court then admonished the jury to disregard the testimony regarding the expired license as irrelevant to the case. Brady was convicted of DUI and appealed on grounds that denial of his motion for a mistrial was reversible error because the state's witness deliberately violated an order in limine to which the state previously stipulated. Granting a mistrial is appropriate when a reasonable possibility exists that inadmissible evidence might have contributed to the conviction. The strength of the evidence against the defendant, together with the prejudicial influence of the inadmissible evidence and whether a cautionary jury instruction could cure any prejudice, must be considered in determining whether a prohibited statement contributed to the conviction. A mistrial should be denied for technical errors of defects that do not affect the defendant's substantial rights and when the record is sufficient to establish guilt. The Supreme Court agreed that there is a difference between an expired license and a suspended license with regard to implications of guilt. Here, any potential prejudice that might have resulted from testimony about the expired license was sufficiently cured by the admonition to the jury, and the District Court did not abuse its discretion in denying the motion for mistrial. St. v. Brady, 2000 MT 282, 302 M 174, 13 P3d 941, 57 St. Rep. 1178 (2000), distinguishing St. v. Partin, 287 M 12, 951 P2d 1002 (1997). Brady was followed in St. v. White, 2008 MT 129, 343 M 66, 184 P3d 1008 (2008), with regard to denial of a mistrial when technical errors or defects do not affect a defendant's substantial rights and when the record is sufficient to establish guilt.

Failure to Raise Sentencing Objections Before District Court — Issue Not Preserved for Appeal: Tucker pleaded guilty to attempted aggravated assault with a weapon. At the sentencing hearing, Tucker argued that one of the sentencing exceptions applied to him because his mental capacity was impaired because of his transsexualism combined with the stress of his fiance's custody battles. The District Court disagreed and added the minimum 2-year weapon enhancement to his sentence. At no time did Tucker complain to the court that its findings were inadequate under 46-18-223 or allege that the sentence was illegal, excessive, or improper. Instead, Tucker argued on appeal that the sentencing court erred as a matter of law in failing to state the reasons why the sentencing exception did not apply. The Supreme Court refused to remand for resentencing because Tucker failed to bring the allegations of sentencing error to the attention of the District Court in a timely manner. The purpose of the contemporaneous objection requirement is to give the District Court the first opportunity to correct any error. Failure to do so constitutes a waiver of the right to appeal the issue. St. v. Tucker, 2000 MT 255, 301 M 466, 10 P3d 832, 57 St. Rep. 1046 (2000).

Failure to Object to Conduct of Psychological Evaluation or to Continuation of Sentencing Hearing — Waiver of Right to Consideration on Appeal: Osterloth was convicted of felony sexual assault and was required to undergo a sexual offender evaluation by a therapist of his choice at county expense. His scheduled sentencing was continued to allow the evaluation. On appeal, Osterloth contended that the District Court erred by sentencing him without an evaluation prepared by a qualified therapist, pursuant to 46-18-111, and by continuing sentencing instead of conducting a sentencing hearing without delay, as required in 46-18-115. The Supreme Court noted that under 46-20-104, it is precluded from considering an alleged error unless a timely objection was made or the criteria of this section are met. Osterloth did not object to the evaluation being conducted by his own evaluator or to the sentencing continuation, nor did he assert that he could satisfy any of the requirements of this section. Thus, Osterloth waived the right to have the Supreme Court consider these alleged errors on appeal. St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000).

Standard of Review of Criminal Sentence Clarified — Supreme Court Review of Legality of Sentence Only: In an effort to clear up a prevalent inconsistency in Montana case law regarding the appropriate standard of review of criminal sentences, the Supreme Court held that it will review a criminal sentence only for legality, i.e., whether the sentence is within the parameters provided by statute, which in turn implies de novo review—a sentence is either legal or it is not. The court overruled St. v. Davison, 188 M 432, 614 P2d 489 (1980), St. v. White, 200 M 123, 650 P2d 765, 39 St. Rep. 1619 (1982), St. v. Graveley, 275 M 519, 915 P2d 184 (1996), St. v. Gunderson, 282 M 183, 936 P2d 804, 54 St. Rep. 283 (1997), and any other Montana decision that suggests that the Supreme Court will also review criminal sentences for an abuse of discretion. St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937, 56 St. Rep. 706 (1999), followed in St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002). However, see St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004), wherein the Supreme Court fashioned a hybrid standard of review for offenders with unreasonable sentencing conditions but no term of incarceration who are ineligible for review by the Sentence Review Division. In reviewing those sentences, the court will review a sentence for both legality and abuse of discretion, applying the two-tiered approach used prior to creation of the Sentence Review Division.

Withdrawal of Proposed Instruction on Accountability — Waiver on Appeal: Sittner proposed a jury instruction stating that a defendant's knowledge that a crime is being committed, in conjunction with the defendant's presence during the crime, is insufficient to support a finding of guilt by accountability. The state's proposed instruction was that one may become an accomplice by being present and joining in the criminal act. Sittner withdrew his proposed instruction during settling of instructions, and the state's instruction was used. In the absence of a timely objection, Sittner's withdrawal of his proposed instruction constituted a waiver of the objection and precluded the raising of the issue on appeal, considering that none of the exceptions to the requirement for timely objection in this section applied. St. v. Sittner, 1999 MT 103, 294 M 302, 980 P2d 1053, 56 St. Rep. 434 (1999).

Motion In Limine Sufficient to Preserve Objection for Appeal: Defendant's motion in limine to exclude testimony regarding certain chemicals in his blood and bottles of prescription medication found in his car was sufficient to preserve the objection for appeal. The propriety of the admission of the evidence is a proper issue for the Supreme Court on appeal. St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

Mistrial Determinations — Trial Court and Supreme Court Standards: The Supreme Court recently clarified the standard to be applied by a trial court considering the grant of a mistrial by stating that a mistrial should be granted either when there is a demonstration of a manifest necessity or when a party has been denied a fair and impartial trial. The Supreme Court now adopts the rule that the manifest necessity part of the standard should be applied only if the trial court considers the grant of a mistrial when the allegedly injured party does not request or consent to a mistrial and that the denial of a fair and impartial trial part of the standard applies when the allegedly injured party does request or consent to a mistrial. As to the Supreme Court's standard of review of the District Court's ruling, the Supreme Court will no longer apply the standard of clear and convincing evidence that the trial court's ruling is erroneous. The standard to be applied is whether the trial court abused its discretion, clarifying St. v. Ford, 278 M 353, 926 P2d 245 (1996), St. v. Romero, 279 M 58, 926 P2d 717 (1996), and St. v. Walker, 280 M 346, 930 P2d 60 (1996). St. v. Partin, 287 M 12, 951 P2d 1002, 54 St. Rep. 1474 (1997), followed in St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998), St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999), and St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003). See also St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000), in which it was held that the District Court did not err when it denied defendant's motion for

mistrial based on trial testimony that the court had previously excluded in its order in limine because the objectionable testimony was not prejudicial, St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005), St. v. Dubois, 2006 MT 89, 332 M 44, 134 P3d 82 (2006), and St. v. White, 2008 MT 129, 343 M 66, 184 P3d 1008 (2008). Partin was distinguished, as to comments by the judge, in St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Evidence of Habit Disallowed — No Denial of Due Process and Right to Defense — Unspecific Objection — No Impairment of Substantial Rights by Comment of District Court on Merits of Defense: Huerta was tried on charges of felony assault (now assault with a weapon) of a juvenile and attempted to present evidence that it was the habit of the juvenile's mother to punish him severely. The District Court prevented the evidence from going to the jury. Huerta claimed that the District Court had prevented Huerta from presenting his only defense and thereby prevented him from obtaining a fair trial, in violation of his right to due process under the fifth amendment to the U.S. Constitution and his right to a defense under the sixth amendment. The Supreme Court noted that the claim of denial of a constitutional right was made for the first time on appeal and, citing St. v. Weeks, 270 M 63, 891 P2d 477 (1995), and St. v. Loh, 275 M 460, 914 P2d 592 (1996), held that Huerta had not made a specific enough objection when he objected at trial to a "miscarriage of justice". The Supreme Court also held that the District Court erred when it commented before the jury that "Brenda . . . is not on trial here". However, the Supreme Court held, as it noted that it had in St. v. Cassill, 71 M 274, 229 P 716 (1924), that under the circumstances, Huerta had received a fair trial and that his substantial rights were not prejudiced by the remark of the District Court. St. v. Huerta, 285 M 245, 947 P2d 283, 54 St. Rep. 1133 (1997).

Issue of Untested Breath Test Solution Raised for First Time on Appeal: Appellant, convicted of DUI, raised for the first time on appeal a claim that a newspaper reported that untested ethyl alcohol, used to calibrate Intoxilyzers, was distributed to the Sheriff's office that tested him and that his conviction should be reversed because the solution used to calibrate the Intoxilyzer used on him was not approved as required by rule. He did not show that the untested solution was actually in use at the time that his breath sample was taken. He assumed that the solution was in use based on the news article. The statute providing for review of material and controlling facts that were not known to a defendant and that could not have been ascertained by the exercise of reasonable diligence was not applicable. Review of the issue would require the appellate court to conduct a hearing and act as a finder of fact, and the District Court had not decided the question of whether the untested solution was used for appellant's breath test. St. v. Hagen, 283 M 156, 939 P2d 994, 54 St. Rep. 542 (1997).

Failure to Object and Failure to Invoke Exception — Waiver of Objection: Martin was charged with several counts of sexual assault, sexual intercourse without consent, and deviate sexual conduct. Martin sought to have the counts severed in such a manner that five separate trials would have been required, but the District Court refused to sever. Martin argued before the Supreme Court that he was prejudiced by action of the prosecutor. The Supreme Court held that because Martin had made no objection at trial to any of the alleged instances of misconduct and because he did not argue that he was entitled to raise the arguments pursuant to subsection (2) of this section, the Supreme Court would not address the arguments of misconduct. St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996).

Clarification of Manifest Necessity Doctrine: Recognizing that the manifest necessity doctrine had not been consistently applied since being invoked in St. v. Close, 191 M 229, 623 P2d 940 (1981), the Supreme Court clarified the standard by which to review the denial of a motion for mistrial, holding that a mistrial motion will be granted only when there is *either* a demonstration of manifest necessity *or* when the defendant has been denied a fair and impartial trial. St. v. Ford, 278 M 353, 926 P2d 245, 53 St. Rep. 947 (1996).

Evidence of Flight as Showing Guilt: Evidence of defendant's flight after an offense occurs may be admitted as a circumstance tending to show consciousness of guilt. Having found that the charged crimes occurred, the trial judge properly considered evidence of defendant's flight in reaching the conclusion that defendant was the one who committed the crimes. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Claim First Made on Appeal That Judge Should Not Have Questioned Witness or Curtailed Line of Prosecution Questioning: In a prosecution for aggravated kidnapping and assault, the judge's questions to a witness who sold defendant bullets and curtailing of a line of questioning pursued by the prosecution would not be considered on appeal because they were not raised below. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Claim First Made on Appeal That Judge Who Decided Issue of Flight in Bail Hearing Should Not Have Tried Case Because Flight Was an Issue: Defendant claimed that the lower court judge should not have tried his case because whether he had fled the jurisdiction was a seriously disputed question at trial. The judge had previously decided during a bail hearing that defendant was a flight risk. Defendant's contention that the judge was not truly impartial was precluded by statute from being decided on appeal because it was not raised below. The common-law plain error doctrine is an exception to the statute, but it is a doctrine that will be invoked only in exceptional cases in which failure to review the claimed error might result in manifest miscarriage of justice, leave unsettled the question of fundamental fairness at trial, or compromise the integrity of the judicial process. It was determined inapplicable in this case. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Issues Not Raised on Appeal Barred by Statute — Scope of Bar: Brown was convicted of felony assault (now assault with a weapon), and the conviction was affirmed on appeal. Brown then filed a petition for postconviction relief, claiming ineffective assistance of his appellate counsel and that the introduction of certain evidence at trial violated his fourth and fifth amendment rights. In his petition for postconviction relief, Brown acknowledged that the constitutional issues were not raised on appeal but argued that the statutory bar should not apply because he tried to raise the issues, but neither his trial nor appellate counsels did so. Citing St. v. Baker, 272 M 273, 901 P2d 54 (1995), the Supreme Court held that because Brown's appellate counsel properly applied that law (concluding that issues not raised at trial could not be raised on appeal) and because the statutory language barring issues that "could reasonably have been raised on direct appeal" included issues not properly preserved at trial, Brown was precluded from raising those issues in a petition for postconviction relief. Brown v. St., 277 M 430, 922 P2d 1146, 53 St. Rep. 692 (1996). See also St. v. Beckman, 284 M 459, 944 P2d 756, 54 St. Rep. 977 (1997), and Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999).

General Objection to Judicial Notice Insufficient to Preserve Issue on Appeal: Loh was charged with criminal possession of a controlled substance and sought to have her confession suppressed. The District Court denied the motion to suppress, and Loh was tried on the charge. At the trial, the prosecution requested the District Court to take judicial notice of the testimony of several firefighters given at the suppression hearing. The District Court agreed, over Loh's objection, saying that judicial notice of that former testimony was the very purpose contemplated by Rule 201, M.R.Ev. (Title 26, ch. 10). The Supreme Court held that the general objection made by Loh's counsel at the suppression hearing was an insufficient objection. The Supreme Court also noted that if there was error, it was harmless error and that Loh failed to make a further objection as to the sufficiency of any evidence offered at trial. St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Failure to Object Bars Issues on Appeal — Designation as Dangerous Offender — Order for Alcohol Treatment — Failure to Advise Maximum Penalty: Hofman pleaded guilty to a felony and, at the conclusion of the sentencing hearing, was designated a dangerous offender (see 1995 repeal of 46-18-404) and was ordered to undergo alcohol treatment. Hofman appealed the designation and the order and, in addition, alleged that the District Court failed to advise him of the maximum penalties for his offense. The Supreme Court held that Hofman's failure to raise these issues in the District Court precluded the issues from being raised on appeal. St. v. Hofman, 275 M 455, 913 P2d 1256, 53 St. Rep. 223 (1996).

DNA Evidence — General Objection in Motion In Limine Insufficient to Preserve Objection for Purposes of Appeal: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence that was combined with standard serological evidence to provide a combined statistical estimate of the probability that Weeks was the father of a child of his stepdaughter. Weeks objected to the combined evidence but not on a foundation basis. The state argued that Weeks waived any objection that he had to the combined evidence, but Weeks contended that his motion in limine preserved an objection to the evidence. The Supreme Court held that Weeks's motion in limine, which did not specify any reasons or authorities why the evidence should be excluded, did not contain an objection to the combined statistical evidence but simply concluded that the DNA evidence was prejudicial. The Supreme Court held that this objection was insufficient to preserve the issue for appeal. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995), followed in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996), and St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996).

Lack of Omnibus Hearing Not Prejudicial — Adequate Notice and Presentation of Case: Defendant claimed error because no omnibus hearing was held in his criminal case, which prejudiced his opportunities for preparation of a timely defense and led to surprise when the

state attempted to introduce certain physical evidence at trial. One of the purposes of the omnibus hearing is to discuss the use of evidence regarding other bad acts. In this case, the acts were other sexual assaults defendant had purportedly committed. Twenty days before trial, the state gave notice to defendant, pursuant to St. v. Just, 184 M 262, 602 P2d 957 (1979), of its intent to use the evidence of other bad acts, which constituted ample notice and opportunity for defendant to prepare for that evidence. Defendant's claim of lack of ability to confront the witness failed because the Van Pelt exception to the rape shield law did not apply in this case because the defendant did not contend that the victim made accusations that had been adjudicated as false prior to trial. Defendant's argument of surprise also failed because even though he was not made aware at an omnibus hearing of the state's intent to introduce the rape victim's clothing as evidence, his objection to introduction of the evidence at trial was sustained and the evidence excluded. Defendant was not prejudiced by the lack of an omnibus hearing. St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994).

Evidence of Defense Witness's Prior Criminal History Not Admissible — Conviction Overturned: In a prosecution for accountability for aggravated kidnapping, the District Court allowed the state to cross-examine the defendant's witness as to the witness's prior criminal history. The Supreme Court found this to be reversible error on the grounds that there is a reasonable possibility that the inherently prejudicial and inadmissible evidence of the witness's criminal history might have contributed to the defendant's conviction. St. v. Bristow, 267 M 170, 882 P2d 1041, 51 St. Rep. 1010 (1994).

Refusal to Consider Validity of Complaint for Cruelty to Animals Raised for First Time on Appeal: Walter shot a dog on March 7, 1993, and was subsequently convicted of misdemeanor cruelty to animals under 45-8-211. Walter defended on the basis that his actions were the result of actions of the dog's owner and that the complaint was invalid because the owner was guilty of unclean hands. The Supreme Court noted that the validity of the complaint was not raised at the District Court level and that the Supreme Court would not consider the defense for the first time on appeal because none of the exceptions to this section applied to the case. St. v. Walter, 266 M 429, 880 P2d 1346, 51 St. Rep. 903 (1994).

Claim of Error Not Within Exception — Waiver of Appellate Review: Defendant contended that the prosecutor's false comments precluded a fair trial. Unless claims of error fit within an exception to subsection (2) of this section, appeal is improper. Appellate review was waived in this case because: (1) the right to object existed at the time of trial; (2) evidence was not suppressed; and (3) material and controlling facts upon which the claim was predicated were known to defendant and his attorney. St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994), followed in St. v. Stuit, 268 M 176, 885 P2d 1290, 51 St. Rep. 1238 (1994).

Allegations of Ineffective Assistance of Counsel Made on Direct Appeal — Review Confined to Record: Supreme Court review of a defendant's allegations of ineffective assistance of counsel in the context of a direct appeal is confined to the record. Claims requiring consideration of factual matters outside the record are therefore inappropriate on direct appeal. St. v. Bradley, 262 M 194, 864 P2d 787, 50 St. Rep. 1511 (1993); In re Petition of Evans, 250 M 172, 819 P2d 156, 48 St. Rep. 702 (1991); St. v. Schoffner, 248 M 260, 811 P2d 548, 48 St. Rep. 424 (1991), citing St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990). See also Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999).

Alleged Court Error and Prosecutor Misconduct Not Objected to During Trial: Thompson argued that his conviction should be overturned because of errors by the District Court in instructing the jury and because of misconduct by the prosecutor during closing remarks. The Supreme Court held that the defendant had not objected during the trial and that the court would not implement the plain error doctrine because the defendant had made no showing that his rights had been substantially prejudiced. St. v. Thompson, 259 M 62, 853 P2d 1188, 50 St. Rep. 682 (1993).

Alleged Error in Instruction Given at Defendant's Request: The Supreme Court would not consider an alleged error in an instruction that was given at defendant's request. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992).

Failure to Offer Voluntariness Instruction or Object to Lack of Voluntariness Instruction: Defendant who did not offer an instruction on voluntariness as an element of every crime or object to failure to give such an instruction was not entitled to review of the issue on appeal. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992).

Refusal to Consider, in Absence of Objection, Discussion of Other Bad Acts Before Jury: The Supreme Court would not consider the issue on appeal in absence of objection at trial to discussion before the jury regarding whether evidence of other bad acts, which the court barred, should be admitted. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992).

Reserving for Postconviction Relief — Ineffective Assistance Claim That May Be Made on Appeal: On appeal, a claim of ineffective assistance of counsel with respect to any matters in the record may not be reserved and later made in a petition for postconviction relief. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992).

Failure to State Specific Grounds for Objection to Instruction on Lesser Included Offense as Waiver of Appeal: At the settlement conference for jury instructions, the state proposed a series of instructions that sought to include sexual assault as a lesser included offense of sexual intercourse without consent. Defense counsel objected to the giving of the instruction but did not state specific reasons for the objection. The absence of a proper objection constituted waiver of the objection for appeal purposes, and thus the lesser included offense issue was not preserved for appeal. St. v. Ogle, 255 M 246, 841 P2d 1133, 49 St. Rep. 932 (1992).

Review of Criminal Appeal Limited to Record: The Supreme Court's review of allegations on direct appeal is limited to what is contained in the record, and the court will limit its inquiry only to those matters contained in the record. St. v. Mason, 253 M 419, 833 P2d 1058, 49 St. Rep. 506 (1992).

Failure to Object to Late Admission of Swab Test Results — No Prejudice: Defendant contended that the delay in processing powder residue swab tests, resulting in the lack of availability of the test results until the fourth day of trial, constituted negligent suppression of exculpatory evidence and violated due process. However, defendant neglected to object to the evidence during trial or to move for a stay in proceedings until the results could be analyzed by defense experts. Absent a demonstration of prejudice or evidence that the conduct prevented defense claims from being raised, dismissal of the case was not warranted. St. v. McCord, 251 M 317, 825 P2d 194, 49 St. Rep. 53 (1992).

Not Taking Stand Due to Judge's Comments: The defendant appealed his conviction on the basis that he had not taken the stand because he had relied on certain comments of the trial court with respect to corroborative testimony. The Supreme Court held that the issue was not before it because the defendant had failed to object at the close of his trial. St. v. Kaczmarek, 243 M 456, 795 P2d 439, 47 St. Rep. 1319 (1990).

No Prejudice Through Order in Companion Case: In a companion case involving defendant's brother, the trial court, over the brother's objection, ordered the production of statements made by individuals whom the brother intended to call as witnesses, pursuant to 46-15-323. Pursuant to an order in his own case, defendant was required to produce the same information. Defendant did not object to the order in his own case and was precluded from raising the issue on appeal. Further, defendant lacked standing to assert the privilege that was alleged by his brother; the defendant did not demonstrate any prejudice to him as a result of the order in the companion case. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

What Questions Constitute Prosecutorial Misconduct: Defendant contended that statements asked of a witness by the County Attorney on cross-examination constituted prosecutorial misconduct and resulted in prejudice. In determining that the questions did not comprise misconduct, the Supreme Court cited sec. 3-5.7(d) of the ABA Standards for Criminal Justice (1986), which states that "[i]t is unprofessional conduct for a prosecutor to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking". St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Defense of Statute of Limitations — Cannot Be Raised for First Time on Appeal: The defendant was charged with felony theft, but the trial court reduced the charge to misdemeanor theft during the trial in light of evidence as to the value of the stolen property. On appeal, the defendant argued that the 1-year statute of limitations for trying him on the misdemeanor charge had run. The Supreme Court ruled that the defense of the statute of limitations was jurisdictional, had to be asserted at the trial, and was waived if not asserted before appeal. St. v. Larson, 240 M 203, 783 P2d 416, 46 St. Rep. 2055 (1989).

Constitutionality Not Considered: Defendant alleged for the first time on appeal that 45-5-201 is unconstitutional because it fails to provide a parent, who may use reasonable and necessary force to restrain or correct his child under 45-3-107, with any guidance in determining what is or is not reasonable or necessary force. The Supreme Court refused to consider the allegation on appeal, since none of the exceptions of 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987) were found to apply. St. v. Probert, 221 M 476, 719 P2d 783, 43 St. Rep. 988 (1986).

Alleged Constitutional Violation — Prerequisites: Concerning an alleged constitutional violation (failure to allow defendant to confront witnesses by allowing hearsay evidence) when the error was not objected to at trial, a party must show prejudicial error and must satisfy one of the three requirements listed in 46-20-702 (renumbered 46-20-701(2) by Code Commissioner,

1987) before the claim will be noticed on appeal. St. v. Cain, 220 M 509, 717 P2d 15, 43 St. Rep. 568 (1986), followed in St. v. Rodgers, 257 M 413, 849 P2d 1028, 50 St. Rep. 335 (1993), and Forsyth v. Allison, 274 M 246, 908 P2d 205, 52 St. Rep. 1212 (1995).

Statement of Witness Outside Trial Record Not Fit for Direct Appeal — Remand: Defendant asserted ineffective assistance of trial counsel for failure to call a witness with exculpatory testimony. Since this allegation on appeal included a statement outside the trial record made by the witness in defense counsel's office, the court considered it an improper attempt to supplement the record on appeal and remanded for an evidentiary hearing on the issue of effective assistance of counsel, rather than considering the issue on direct appeal. St. v. Field, 215 M 361, 697 P2d 1339, 42 St. Rep. 431 (1985).

Invited Error: Section 45-5-104 is not ambiguous and does not fail to give a person notice of to what he must conform his conduct. The Supreme Court was disinclined to review a claim to that effect where the State charged and attempted to prove deliberate homicide and objected to any instruction on mitigated deliberate homicide or negligent homicide, and defense counsel convinced the judge to give instructions on those two offenses. Any errors alleged by defendant in that respect were thus invited. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Review of Sentence for Inequity:

Review of a sentence for mere inequity or disparity is for the Sentence Review Division, not the Supreme Court, which will review only for legality of the sentence, under the abuse of discretion standard. St. v. Lloyd, 208 M 195, 676 P2d 229, 41 St. Rep. 263 (1984), followed in St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991). See also St. v. Moorman, 279 M 330, 928 P2d 145, 53 St. Rep. 1173 (1996).

Defendant was convicted of negligent homicide and sentenced to 10 years and to an additional consecutive 5 years for the knowing use of a gun while committing the offense. At the time of sentencing, the court had discretion to make the 5 years run either consecutively or concurrently. Section 46-18-221, under which the 5 years was imposed, was later amended to require that a sentence under the section run consecutively. Defendant's contention on appeal that it was error to require the 5 years to run consecutively went to the equity of the requirement and not to its legality and should be directed to the Sentence Review Board rather than to the Supreme Court on appeal from the sentence. St. v. Hubbard, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982).

Exhibits Attached to Brief on Appeal to Be Disregarded if Not Contained in Record: Where the defendant was convicted of forgery by the District Court and on appeal sought to challenge the adequacy of his counsel by attaching three exhibits to his appellate brief that were not included in the record on appeal, the Supreme Court held that the exhibits may not be considered on appeal, as the court may consider only those matters ascertainable from the record. St. v. Dess, 207 M 396, 674 P2d 501, 41 St. Rep. 31 (1984), followed in St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Pro Se Appeal Filed Without Briefs — General Review of Transcript on Court's Motion: Where the defendant made the defense of his deliberate homicide case difficult by failing to cooperate with his several attorneys, and after conviction was granted several extensions by the Supreme Court for filing a transcript and his first brief, but nevertheless failed to file a brief and specifications of error, the Supreme Court on its own motion reviewed the District Court transcript for typical kinds of errors and found: (1) that the evidence was sufficient to support the defendant's conviction as the defendant was convicted on the basis of his own testimony; (2) that there were no errors in the jury instructions given on the evidence and the elements of the crime; (3) that assistance of counsel was adequate and that the failure of defendant's counsel to subpoena evidence or witnesses was not relevant to the crime charged; and (4) that the statutory penalties for deliberate homicide with a dangerous weapon did not constitute cruel and unusual punishment. St. v. Graham, 206 M 49, 669 P2d 691, 40 St. Rep. 1499 (1983).

Inadmissible Evidence — Prejudicial Error Test: The test of prejudicial error requiring reversal of a conviction due to admission of inadmissible evidence is whether there is a reasonable possibility that the inadmissible evidence might have contributed to the conviction. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983), followed in St. v. Brush, 228 M 247, 741 P2d 1333, 44 St. Rep. 1495 (1987), and St. v. McKeon, 282 M 397, 938 P2d 643, 54 St. Rep. 404 (1997).

Federal Habeas Corpus Standard of Review Inapplicable to Appeals: In an appeal by the defendant from his conviction of aggravated assault against two police officers, the Supreme Court declined to review the record to determine, as urged by the defendant, that no rational trier of fact could have found beyond a reasonable doubt that the defendant's actions were not justified as a matter of self-defense. The cases raised by the defendant urging this standard of

review are cases applicable to federal habeas corpus review of a state court conviction. Those cases and that standard of review are not applicable to an appeal to the Supreme Court. St. v. Warnick, 202 M 120, 656 P2d 190, 39 St. Rep. 2369 (1982).

Failure to Raise Issue Below — Presence of Victim During Defendant's Testimony: Defense counsel who did not object to the presence of sexual assault victim in the courtroom while defendant testified could not legitimately present for review the claim that trial court erred by permitting her presence. St. v. Lamb, 198 M 323, 646 P2d 516, 39 St. Rep. 1021 (1982).

Independent Knowledge of Juror — Failure to Object: The fact that a juror had acted as a special prosecutor in a disbarment action against an attorney under a workers' compensation indictment and had used the defendant's disbarment, which dealt at length with the facts involved in the defendant's criminal case, as a model in drafting his pleadings did not require a reversal of the defendant's conviction when, at the conclusion of the trial, the juror met with the judge and counsel and told them what he knew and the defendant made no objection. The defense failed to meet its responsibility by its failure to properly object and thereby give the trial court an opportunity to remedy any alleged defects. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Specific Objection to Evidence Required in Persistent Felony Offender Hearing: By failing to make a specific objection, the defendant waived his right to assert that the State's certificate of prior conviction without proof that he was the person named in the certificate was not competent evidence. The defendant was informed well in advance of the time he entered his guilty plea that he would be tried as a persistent felony offender. At the hearing to determine whether the defendant was a persistent felony offender, he had an opportunity to object to the State's lack of identification but failed to do so. St. v. Metz, 184 M 533, 604 P2d 102 (1979).

Deferred Sentence Conditioned on Repayment of Attorney's Fees — Objection Not Necessary: Lenihan pleaded guilty to a charge of burglary and received a deferred sentence. One of the conditions of his deferred sentence was that he pay the county $250 as reimbursement for his court-appointed attorney. Lenihan did not object to this condition when sentence was imposed but raised the issue on appeal. On appeal [under this section as it read prior to the 1983 amendment], the court said that it may review any sentence in a criminal case if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing. St. v. Lenihan, 184 M 338, 602 P2d 997 (1979).

Duty of Court and Defendant: It is up to the Supreme Court to decide whether an error affects the substantial rights of the defendant, and the defendant must demonstrate prejudice from the record. St. v. Bubnash, 142 M 377, 382 P2d 830 (1963); St. v. Straight, 136 M 255, 347 P2d 482 (1959).

Necessity of Transcript of Evidence: In order to give effect to a predecessor section to determine whether the erroneous instructions were merely technical errors or affected the substantial rights of the accused, it was necessary that the Supreme Court have before it a transcript of the evidence. St. v. Hay, 120 M 573, 194 P2d 232 (1948).

Curing Prejudice — Evidence of Similar Offenses: The withdrawal of evidence of similar offenses, on motion or by instruction, is ineffective to cure prejudice unless the Supreme Court on inspection of the record can say that the effect of the evidence was clearly removed; when a general objection was interposed, the failure to move to strike or withdraw it from the jury's consideration is immaterial. St. v. Simanton, 100 M 292, 49 P2d 981 (1935), overruled on related issue in St. v. Knox, 119 M 449, 175 P2d 774 (1946).

No Prejudice:

In criminal cases no judgment will be reversed for technical errors or defects which do not affect the substantial rights of the defendant, and when the record is sufficient to establish the guilt of the defendant, a new trial will not be granted, even though there was error, unless it clearly appears that the error complained of actually prejudiced the defendant in his right to a fair trial. St. v. Ray, 88 M 436, 294 P 368 (1930); St. v. Dixson, 80 M 181, 260 P 138 (1927).

A judgment of conviction will not be reversed unless the error prejudiced or tended to the prejudice of the defendant. St. v. Vanella, 40 M 326, 106 P 364 (1910); St. v. Rhys, 40 M 131, 105 P 494 (1909).

FAILURE OF PROOF ON APPEAL

Prosecutor's Comments on Credibility of Witnesses and Defendant's Failure to Present Evidence — Plain Error Review Declined: Lindberg claimed reversible error because the prosecutor, in closing arguments during Lindberg's trial on sex crimes, made personal comments regarding the credibility of witnesses and evidence presented by the defense, which Lindberg asserted shifted the burden to Lindberg to prove his innocence and violated the right to a fair trial. Because defense counsel did not object to the comments, Lindberg contended that the

rights violation was reviewable under the plain error doctrine. Although not condoning the prosecutor's comments, the Supreme Court nevertheless declined to apply the plain error doctrine because, given the totality of the circumstances, the comments did not rise to a level sufficient to invoke plain error. The comments did not unconstitutionally shift the burden of proof to Lindberg. Failure to review Lindberg's claims would not have resulted in a manifest miscarriage of justice, so plain error review was unwarranted. St. v. Lindberg, 2008 MT 389, 347 M 76, 196 P3d 1252 (2008).

Failure of Defendant to Submit Photographs on Appeal — Review for Prejudice Precluded: Johnson asserted that the trial court erred by allowing the introduction of photographs showing injuries suffered by the victim during an alleged assault because the photographs were per se prejudicial because they were inherently inflammatory and because the existence of injury to the victim was not disputed. The Supreme Court noted that Johnson's failure to submit the photographs as part of the record on appeal inhibited the court's ability to review whether the photographs were prejudicial, and absent any explanation from Johnson of how or why the photographs prejudiced his case, Johnson failed to establish that the District Court abused its discretion in admitting the photographs at trial. St. v. Johnson, 2008 MT 227, 344 M 313, 187 P3d 662 (2008), following St. v. Kearney, 2005 MT 171, 327 M 485, 115 P3d 214 (2005).

Improper Admission of Coconspirator's Out-of-Court Statements and Confession — Reversible Error: In a videotaped interview with detectives, Steilman admitted that he and Francis had murdered a man to prove their worth to each other in conducting other criminal activity. Steilman was offered a plea agreement and was called to testify at Francis's trial. When called as a witness, Steilman refused to answer any questions on fifth amendment grounds, so the state sought the admission of the videotaped interview and Steilman's out-of-court statements to lay witnesses. The state contended that the statements to lay witnesses were admissible as statements of a coconspirator made in furtherance of a conspiracy and that the statements to police were admissible as admissions against Steilman's penal interests. The District Court allowed the statements, but not the videotape, although the videotape was subsequently shown to the jury pursuant to a motion by defense counsel, in response to the ruling on the admissibility of the out-of-court statements, in order to give the jury an opportunity to observe Steilman. Francis was ultimately convicted of deliberate homicide and appealed on grounds that admission of the out-of-court statements was reversible error. The state conceded on appeal that the statements to lay witnesses were inadmissible because statements made after attainment of the conspirator's object are not admissible unless the movant can prove that an express agreement existed among the coconspirators to continue to act in concert to cover up the crime after its commission, and the state offered no such proof. Moreover, the statements were not admissible as testimony regarding out-of-court statements made by Francis, or admissible as statements made by Steilman and adopted by Francis. The state also conceded on appeal that the statements made to police were not admissible as statements against Steilman's penal interests. Pursuant to St. v. Castle, 285 M 363, 948 P2d 688 (1997), the fact that portions of a declarant's confession are admissible because they are self-inculpatory does not necessarily make the collateral noninculpatory statements either credible or admissible, particularly when the declarant implicates another person, as in this case when Steilman's confession consisted mainly of blaming Francis. The Supreme Court then applied this section, in light of St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine whether admission of the out-of-court statements constituted structural error or trial error and whether the error was reversible. The error here was trial error. In order to be considered harmless, it was necessary that the state demonstrate that there was no reasonable possibility that the inadmissible evidence contributed to the verdict. The court agreed that there was sufficient cumulative admissible evidence regarding Francis's purposeful participation in the killing. However, the court was forced to conclude that there was also a reasonable possibility that the erroneously admitted testimony of Steilman's out-of-court statements implicating Francis might have contributed to the conviction, so the case was reversed and remanded for a new trial. St. v. Francis, 2001 MT 233, 307 M 12, 36 P3d 390 (2001).

District Court Exceeding Scope of Appellate Review — Abuse of Discretion in Applying Particularized Suspicion of DUI to Traffic Stop Triggered by Report of Vandalism: Robertson was stopped after a vehicle of the description that he was driving was reported leaving the scene of a vandalism. He was subsequently convicted of DUI in City Court and appealed to District Court on grounds that his right to confront witnesses was denied and that the city had not sustained the necessary burden of proof to support the conviction. The District Court remanded to the City Court for dismissal on grounds that the arresting officer did not have a sufficient particularized suspicion to justify the investigative stop for DUI. However, the issue of a

sufficient particularized suspicion was never raised or ruled on in City Court by either Robertson or the city. When a District Court exercises its power of appellate review, it must refrain from deciding issues not properly raised or objected to in the court below; thus, the District Court abused its discretion by exceeding the scope of its appellate review in addressing the issue of particularized suspicion, so the Supreme Court reversed the order of the District Court dismissing the City Court judgment against Robertson. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000). See also Missoula v. Asbury, 265 M 14, 873 P2d 936, 51 St. Rep. 383 (1994), and St. v. Herrera, 1998 MT 173, 289 M 499, 962 P2d 1180 (1998).

Prosecutor's Comments in Response to Defense Counsel's Opening Statement Not Prejudicial: Defense counsel told the jury in opening statements that a witness had made inconsistent statements, referring to a statement given to the investigator for the public defender's office. The investigator was never called, and the theory was not substantiated. The prosecutor referred to the theory in closing, noting that the defense had failed to present the evidence that defense counsel had referred to in opening. Although it is improper to comment on a criminal defendant's failure to testify, it is proper for a prosecutor to direct the jury's attention to facts in issue that could be controverted by persons other than the defendant. The prosecutor was entitled to comment on the theory suggested by defense counsel because the theory lacked evidentiary support. The District Court did not err in refusing to grant a mistrial on grounds of prosecutorial comments because the comments were plainly in response to defense counsel's opening statements. St. v. Soraich, 1999 MT 87, 294 M 173, 979 P2d 206, 56 St. Rep. 370 (1999).

Mere Allegations of Prejudice Insufficient to Satisfy Cumulative Error Doctrine: Defendant contended that the overall demeanor of the prosecution and the District Court, together with other alleged errors, required a reversal of his conviction; however, he articulated no particular comments or remarks and alleged no prejudice to his substantial rights. The Supreme Court has acknowledged the cumulative error doctrine, which is the accumulation of errors which prejudice a defendant's right to a fair trial, but noted that mere allegations of error without proof of prejudice are insufficient to satisfy the doctrine. The resolution of the alleged errors indicated no error meriting reversal of this case, and the court held that defendant failed to carry his burden of showing prejudice and declined to reverse his conviction on grounds of cumulative error. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986). See also St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994), St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004), St. v. Kearney, 2005 MT 171, 327 M 485, 115 P3d 214 (2005), St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005), and St. v. Racz, 2007 MT 244, 339 M 218, 168 P3d 685 (2007).

Assignment of Error in Denying New Trial — No Record, Not Argued: When an alleged error in denying the defendant's motion for a new trial was not argued and nothing appeared in the record to sustain it, the assignment did not merit consideration. St. v. Wong Sun, 114 M 185, 133 P2d 761 (1943).

Verdict Contrary to Law or Evidence: An alleged error in an instruction will not be reviewed on appeal when the only ground designated is that the verdict is contrary to the law and evidence. St. v. Gawith, 19 M 48, 47 P 207 (1896), overruled in St. v. Mason, 24 M 340, 61 P 861 (1900).

SUFFICIENCY OF EVIDENCE

Defendant's Probationary Status Considered Inadmissible Trial Evidence of Prior Crimes — New Trial Warranted: At Derbyshire's trial on drug charges, defense counsel moved to exclude any references to the fact that Derbyshire was on probation or that the drug search was conducted by probation officers. The trial court denied the motion and allowed references to probation but gave cautionary instructions prohibiting the jury from using the information to assume that Derbyshire was more likely to be guilty of the offense. Derbyshire was convicted and appealed on grounds that probation references should have been disallowed because they constituted inadmissible evidence of prior crimes. The state did not comply with the requirement of Rule 404(b), M.R.Ev., inasmuch as Derbyshire was never notified that evidence of other crimes would be introduced. However, the state asserted that the evidence was admissible under the transaction rule in 26-1-103 and therefore not subject to the procedural requirements of Rule 404(b). The District Court agreed with the state's theory and reasoned that the involvement of probation officers was part of the whole transaction and that the officers' status as probation officers was relevant to why they had certain knowledge and why they acted the way they did. Derbyshire contended that specific roles and titles of the officers who gathered the evidence were immaterial to the ultimate issue of whether Derbyshire possessed a dangerous drug with intent to distribute. The Supreme Court noted that a defendant may not be convicted based on the inference that because he committed crimes in the past he was more likely to have committed the

crime charged, and that evidence of Derbyshire's status as a probationer constituted evidence that Derbyshire committed other crimes and thus was generally inadmissible unless an exception such as the transaction rule applied. However, in this case the transaction rule was inapplicable. The officers' status as probation officers and Derbyshire's status as probationer were neither part of nor evidence of the disputed issue of whether Derbyshire possessed a dangerous drug, nor were they "evidence of what transgressed immediately prior and subsequent to the commission of the offense charged" or inextricably linked to and explanatory of the charged offense. Therefore, the District Court erred in denying Derbyshire's motion to exclude evidence of his status as a probationer. Further, the error was considered trial error rather than structural error, and although not presumptively prejudicial, the error was subject to harmless error review. In this case, there was a reasonable possibility that the tainted evidence might have contributed to Derbyshire's conviction, and the state failed to show that, qualitatively, there was no possibility that the tainted evidence might have contributed to Derbyshire's conviction. Absent a showing that the error was harmless, the conviction was reversed and the case remanded for a new trial. St. v. Derbyshire, 2009 MT 27, 349 M 114, 201 P3d 811 (2009), applying the prejudicial error analysis from St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001).

Failure to Argue Prejudicial Effect of Malfunctioning Breathalyzer Printer — No Error in Denial of Motion to Suppress: When Otto was tested with a Breathalyzer, the machine registered a 0.159 blood alcohol content but failed to print a card with the test results. Otto moved for dismissal of the Breathalyzer results because a complete test, including the printed results, was not accomplished. The dismissal motion was denied, and on appeal, the Supreme Court affirmed. Otto failed to argue prejudice based on the admission of the test results. Given ample additional evidence of Otto's intoxicated condition, failure to suppress the Breathalyzer results did not constitute reversible error. St. v. Otto, 2004 MT 338, 324 M 217, 102 P3d 522 (2004).

Defendant Present in Apartment Where Methamphetamine Lab Found — Totality of Circumstances Justifying Warrantless Arrest: Officers raided Savage's apartment, identified by an anonymous tip as a suspected methamphetamine laboratory. Nalder was also present, and although officers had no previous suspicions regarding Nalder, they arrested her after hearing a toilet running and observing her standing in the kitchen, which was adjacent to the bathroom, near what appeared to be a jar filled with a substance in the first stage of the methamphetamine-producing process. During an interview, Nalder admitted to flushing substances used to make methamphetamine down the toilet when she heard the officers announce themselves. Nalder was charged with tampering with physical evidence, but Nalder moved to suppress the statements and the charge on grounds that probable cause did not exist for her warrantless arrest. The motion was denied, and Nalder was convicted and appealed, contending error in denial of the motion to suppress based on certain findings that were allegedly incorrect. The Supreme Court affirmed. The trial court's finding that the officers announced their presence twice before entering the apartment, contrary to Nalder's claim that she did not hear any knocking, was supported by the evidence and not clearly erroneous because failure to hear did not constitute evidence contradicting the officers' testimony that they announced themselves. The trial court's finding that the officers broke down the door was not supported by substantial evidence and was thus erroneous, but the error was not prejudicial in light of the totality of the circumstances. Nalder correctly asserted that her mere presence at the scene did not justify arrest and that there must be some connection with criminal activity before her warrantless arrest was justified. However, considered in light of the totality of the circumstances and the trained officers' knowledge, there was sufficient probable cause for Nalder's arrest. The officers received extensive training in what to reasonably expect while raiding a methamphetamine laboratory, and evaluated in accordance with the officers' perceptions, they could reasonably believe that Nalder was committing, and had just committed, a crime. St. v. Nalder, 2001 MT 270, 307 M 280, 37 P3d 661 (2001).

Improper Admission of Coconspirator's Out-of-Court Statements and Confession — Reversible Error: In a videotaped interview with detectives, Steilman admitted that he and Francis had murdered a man to prove their worth to each other in conducting other criminal activity. Steilman was offered a plea agreement and was called to testify at Francis's trial. When called as a witness, Steilman refused to answer any questions on fifth amendment grounds, so the state sought the admission of the videotaped interview and Steilman's out-of-court statements to lay witnesses. The state contended that the statements to lay witnesses were admissible as statements of a coconspirator made in furtherance of a conspiracy and that the statements to police were admissible as admissions against Steilman's penal interests. The District Court

allowed the statements, but not the videotape, although the videotape was subsequently shown to the jury pursuant to a motion by defense counsel, in response to the ruling on the admissibility of the out-of-court statements, in order to give the jury an opportunity to observe Steilman. Francis was ultimately convicted of deliberate homicide and appealed on grounds that admission of the out-of-court statements was reversible error. The state conceded on appeal that the statements to lay witnesses were inadmissible because statements made after attainment of the conspirator's object are not admissible unless the movant can prove that an express agreement existed among the coconspirators to continue to act in concert to cover up the crime after its commission, and the state offered no such proof. Moreover, the statements were not admissible as testimony regarding out-of-court statements made by Francis, or admissible as statements made by Steilman and adopted by Francis. The state also conceded on appeal that the statements made to police were not admissible as statements against Steilman's penal interests. Pursuant to St. v. Castle, 285 M 363, 948 P2d 688 (1997), the fact that portions of a declarant's confession are admissible because they are self-inculpatory does not necessarily make the collateral noninculpatory statements either credible or admissible, particularly when the declarant implicates another person, as in this case when Steilman's confession consisted mainly of blaming Francis. The Supreme Court then applied this section, in light of St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine whether admission of the out-of-court statements constituted structural error or trial error and whether the error was reversible. The error here was trial error. In order to be considered harmless, it was necessary that the state demonstrate that there was no reasonable possibility that the inadmissible evidence contributed to the verdict. The court agreed that there was sufficient cumulative admissible evidence regarding Francis's purposeful participation in the killing. However, the court was forced to conclude that there was also a reasonable possibility that the erroneously admitted testimony of Steilman's out-of-court statements implicating Francis might have contributed to the conviction, so the case was reversed and remanded for a new trial. St. v. Francis, 2001 MT 233, 307 M 12, 36 P3d 390 (2001).

No Abuse of Discretion in Failure to Dismiss Case on Court's Own Motion for Insufficient Evidence: Brady was charged with DUI, fourth or subsequent offense, arising from circumstances surrounding a single-vehicle accident in which Brady swerved off the highway, hit a rock wall, and rolled the vehicle. After the state's case in chief, Brady moved for a directed verdict of acquittal, but the motion was denied. Brady was subsequently convicted and contended on appeal that the trial court erred when it did not dismiss the case on its own motion because the evidence was far from overwhelming, arguing that taken as a whole, the evidence was insufficient to submit to the jury because there was no direct or even circumstantial evidence that he had anything to drink, much less was intoxicated, at the time of the accident. However, there was circumstantial evidence of conduct before and after the accident that could have led the jury to believe Brady had been drinking. When circumstantial evidence is susceptible to differing interpretations, it is within the province of the jury to decide which will prevail. The jury apparently did not believe that the wreck happened because Brady's car malfunctioned, that his injuries accounted for his drunken behavior, or that his apparent intoxication when officers tracked him down at home after the accident was the consequence of a single beer that he drank after the accident. Taken in a light most favorable to the state, a reasonable juror could have found Brady guilty beyond a reasonable doubt, and it was not error for the trial court to allow the evidence to go to the jury. St. v. Brady, 2000 MT 282, 302 M 174, 13 P3d 941, 57 St. Rep. 1178 (2000).

Victim's Unsupported and Self-Contradicted Word Against Defendant's — Sufficiency of Evidence: An aggravated kidnapping and assault prosecution essentially consisted of defendant's word against victim's. Defendant's claim on appeal that the evidence was insufficient to support the convictions because victim's testimony was not corroborated by other testimony or by physical evidence and was contradicted by her statements to police after the events in question was rejected on appeal. The trial judge believed victim to be more credible than defendant; prior inconsistent statements do not necessarily render testimony inherently noncredible; and the trial took place almost 4 years after the offenses, and the victim said that she had trouble remembering everything. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Allegation That Evidence Is Circumstantial and Susceptible of Different Interpretations: Allegation that evidence of guilt was circumstantial and susceptible of different interpretations relates to the weight of the evidence, not its sufficiency, and was properly refused as a basis for granting a motion of acquittal. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Sufficiency of Evidence — Test:

When sufficiency of the evidence or elements of the offense issues are presented on appeal, the standard of review applied by the Supreme Court will be whether, after review of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992), overruling the portion of St. v. Cope, 250 M 387, 819 P2d 1280 (1991), that holds that a "clearly erroneous" standard is to be applied to judge-made findings of fact on the substantive elements of a criminal offense, but leaving intact the Cope standard for review of findings of fact on other issues in criminal proceedings, distinguishing Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285 (1991), and followed, with regard to findings of fact regarding suppression hearing evidence, in St. v. Kaluza, 262 M 360, 865 P2d 263, 50 St. Rep. 1596 (1993). See also St. v. Riley, 252 M 469, 830 P2d 549, 49 St. Rep. 408 (1992), and St. v. Carter, 285 M 449, 948 P2d 1173, 54 St. Rep. 1235 (1997).

The applicable rule on review of the sufficiency of the evidence to support a criminal conviction is whether there is substantial evidence to support the conviction, viewed in a light most favorable to the state. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. St. v. Plouffe, 198 M 379, 646 P2d 533, 39 St. Rep. 1064 (1982), followed in St. v. Lapp, 202 M 327, 658 P2d 400, 40 St. Rep. 120 (1983). For application to civil proceedings, see Bushnell v. Cook, 221 M 296, 718 P2d 665, 43 St. Rep. 825 (1986).

The "clearly erroneous" test does not apply to review sufficiency of the evidence to support a jury verdict in a criminal case, and a conviction must be affirmed if reasonable and prudent persons could have concluded that taken in the light most favorable to the government the evidence warranted a finding of guilt beyond a reasonable doubt. U.S. v. Kipp, 624 F2d 84 (9th Cir. 1980).

Sufficiency of Evidence When Self-Defense Claimed: On appeal, defendant convicted of aggravated assault argued that she met her burden of proof of self-defense, which she correctly stated as raising a reasonable doubt as to her guilt. The Supreme Court's function on appeal is not to determine whether she raised a reasonable doubt as to her guilt but whether the evidence was sufficient to support her conviction when viewed in the light most favorable to the state (see St. v. Lamb, 198 M 323, 646 P2d 516, 39 St. Rep. 1021 (1982)). Disputed questions of fact and the credibility of witnesses will not be considered on appeal (see St. v. DeGeorge, 173 M 35, 566 P2d 59 (1977)). Finding substantial evidence in the record, the court held that defendant was not justified in using force likely to cause death or serious bodily harm. St. v. Tonkovich, 221 M 8, 716 P2d 615, 43 St. Rep. 592 (1986).

Victim's Contradictory Statements — Sufficiency of Evidence: There was sufficient evidence to support the conviction of defendant for felony assault (now assault with a weapon) despite the victim's contradiction of her prior statements about the assault when the victim and her child arrived at the battered women's shelter with swollen lips and mouths and when the victim stated at the shelter and immediately thereafter that she and her daughter had been violently beaten by the defendant. St. v. Oman, 218 M 260, 707 P2d 1117, 42 St. Rep. 1565 (1985). See also St. v. Brown, 239 M 453, 781 P2d 281, 46 St. Rep. 1825 (1989).

Sufficiency of Evidence — Arson: Sufficient evidence supported appellant's arson conviction when evidence presented at trial indicated that appellant: (1) had been angered by his son's conveyance of the cabin; (2) had twice threatened to burn down the cabin; (3) had been seen driving from the direction of the cabin by a deputy sheriff soon after the fire was reported; (4) when followed by the deputy sheriff, drove in excess of 85 miles an hour until the deputy was able to stop him; and (5) had tires on his vehicle that matched tire tracks left at the cabin. St. v. Berklund, 217 M 218, 704 P2d 59, 42 St. Rep. 1147 (1985).

Inconsistent Statements of Victims — Sufficiency of Evidence: Inconsistencies in the testimony of the complaining witnesses did not make the evidence insufficient to support a conviction or show that it inherently lacked credibility. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984).

Test for Sufficiency of Evidence — Proof of Felonious Intent: In an appeal from a conviction for criminal mischief and attempted burglary, the defendant argued that it was mere happenstance that he was found hiding in a packing crate with burglary tools near the scene of an attempted burglary, that there was no direct proof of his participation in the attempted burglary or of his felonious intent, and that the record therefore did not support his conviction. The Supreme Court followed the test for sufficiency of the evidence reviewed in St. v. Graham, 206 M 49, 669 P2d 691, 40 St. Rep. 1499 (1983), and the rationale of St. v. Pascgo, 173 M 121, 566 P2d 802 (1977) (holding that circumstantial evidence may be used to prove criminal intent), and found that there was

substantial evidence to uphold the conviction. St. v. Gladue, 209 M 235, 679 P2d 1256, 41 St. Rep. 669 (1984).

Sentence — Improper Vindictiveness Claim on Appeal: Defendant was convicted of negligent arson and given the maximum sentence. On appeal, counsel argued that since defendant was a 38-year-old man employed as a teacher, was a captain in the army reserve, and had no criminal record, the maximum sentence indicated judicial vindictiveness. In the absence of any evidence indicating vindictiveness on the part of the judge, it was improper to suggest its presence and the issue was summarily dismissed. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Sufficiency of Evidence — Negligent Homicide by Means of Vehicle — Identity of Driver: Defendant was convicted of negligent homicide after a vehicle owned by defendant and his wife struck and killed a pedestrian. Defendant's wife first admitted having been the driver of the vehicle at the time of the accident but later withdrew her statement. Subsequently her husband was arrested, tried, and convicted of the crime. In reviewing the conviction on the issue of sufficiency of the evidence, the Supreme Court ruled the evidence sufficient and based its ruling on the following factors: (1) defendant's wife testified that he was the driver; (2) a witness saw defendant driving shortly before the accident; (3) witnesses testified that it appeared that the driver was a male and that the passenger had long hair; and (4) medical evidence on the location of the injuries defendant sustained in the accident indicated that defendant was the driver. St. v. Henricks, 201 M 157, 653 P2d 479, 39 St. Rep. 2022 (1982).

Lack of Record — Unlawfully Sequestered Witness: Supreme Court would not consider claim that prosecution unlawfully sequestered a subpoenaed witness who may have provided exculpatory testimony for defense where there was nothing on the record to which court could look. St. v. Lamb, 198 M 323, 646 P2d 516, 39 St. Rep. 1021 (1982).

Circumstantial Evidence — Review Standard:

A review of the evidence following conviction in a criminal trial, whether the evidence is wholly direct, wholly circumstantial, or a combination of the two, must begin with the principles: (1) that the correct test is whether there is substantial evidence supporting the conviction, viewed in the light most favorable to the state; and (2) that "substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conviction. A conviction based upon circumstantial evidence may require a greater degree of scrutiny but does not require a separate or unique evidentiary test on review. St. v. Johnson, 197 M 122, 641 P2d 462, 39 St. Rep. 419 (1982), followed in St. v. Green, 212 M 20, 685 P2d 370, 41 St. Rep. 1562 (1984), and St. v. Lias, 218 M 124, 706 P2d 500, 42 St. Rep. 1453 (1985).

Appellant alleged that to justify a conviction on circumstantial evidence, the facts and circumstances must not only be entirely consistent with the theory of guilt but must also be inconsistent with any other rational conclusion. The allegation did not set forth the full standard for review of a verdict based primarily upon circumstantial evidence; the court should inquire whether the facts and circumstances are of such a quality and quantity as to legally justify a jury in determining guilt beyond a reasonable doubt, and if such be the case, the court cannot set aside the conviction. St. v. Johnson, 197 M 122, 641 P2d 462, 39 St. Rep. 419 (1982).

Sufficiency of Evidence — Assault With Dangerous Weapon: Evidence was not insufficient to convict for assault with a dangerous weapon where appellant had an altercation in the dark, and there was testimony that he struck victim, had a knife in hand shortly before he struck, and victim suffered a knife cut. U.S. v. Kipp, 624 F2d 84 (9th Cir. 1980).

Sufficiency of Evidence — Theft: In a theft proceeding, if the evidence shows that defendant was in possession of recently stolen property, either singly or jointly with others, an inference of guilt is warranted. Evidence of possession by the defendant is not rebutted merely by showing another's presence. Where this evidence is presented, there is sufficient evidence to send the case to the jury and the trial court may properly reject a motion to dismiss for failure to establish a prima facie case and the verdict, supported by substantial evidence, will be upheld on appeal. St. v. White, 185 M 213, 605 P2d 191 (1980).

SUBSTANTIAL RIGHTS AFFECTED

Defendant's Right to Be Present at In-Chambers Conference on Evidentiary Issues — Reversal Granted Absent Waiver of Right: At the close of the state's case in chief during Matt's deliberate homicide trial, the trial judge, prosecutor, and defense counsel met in the judge's chambers to discuss evidentiary matters and Matt's motion to dismiss for lack of evidence. Matt was not present during the conference, and defense counsel stated that Matt's presence was unnecessary because the issues were legal and Matt "doesn't get any of this anyway". Following conviction, Matt appealed on grounds that he had the right to be present at the conference because it was a critical stage of the trial. The Supreme Court agreed and reversed. The in-chambers conference

was a critical stage of the trial, so Matt's right to be present applied. Defense counsel's statement that Matt did not need to be present was not a valid waiver of Matt's right to be present because there was no on-the-record personal waiver, so Matt did not knowingly and intelligently waive the right. Once it was established that Matt's fundamental right to be present was violated, prejudice was presumed. Although not all constitutional violations amount to reversible error, if the violation contaminates the framework within which the trial proceeds or if the constitutional right is so basic that its infraction cannot be treated as harmless, the violation is considered a structural error and reversal is automatic. If the violation does not fall within this category, the question is whether the violation was harmless, and the burden is on the state to demonstrate that there is no possibility that violation of the right to be present prejudiced the defendant. In this case, nothing discussed at the conference and ruled on by the District Court concerned or affected the framework within which Matt's trial proceeded or necessarily rendered the trial unfair, so the violation was not considered structural and subject to automatic reversal. Thus, the burden fell to the state to show that the violation was harmless and not prejudicial. The state did not provide a harmless error analysis on appeal and therefore did not meet its burden. The case was remanded for a new trial. St. v. Matt, 2008 MT 444, 347 M 530, 199 P3d 244 (2008), following Chapman v. Calif., 386 US 18 (1967), Ranta v. St., 1998 MT 95, 288 M 391, 958 P2d 670 (1998), St. v. Tapson, 2001 MT 292, 307 M 428, 41 P3d 305 (2001), St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), and St. v. McCarthy, 2004 MT 312, 324 M 1, 101 P3d 288 (2004), and followed in St. v. Godfrey, 2009 MT 60, 349 M 335, 203 P3d 834 (2009), regarding determination of trial error rather than structural error.

Exclusion of Defendant From Pretrial Meeting to Determine Whether Defendant Be Allowed to Proceed Pro Se Violative of Right to Be Present and Defend Oneself — Reversible Error: An alleged violation of the constitutional right to be present and appear at all criminal proceedings does not warrant automatic reversal. Rather, the Supreme Court considers the effect that a violation has on a defendant to determine whether a defendant has suffered any conceivable prejudice. In this case, Mann was excluded from a pretrial meeting to determine whether Mann would be represented by counsel or proceed pro se at trial on burglary and misdemeanor assault charges. This important determination implicated a substantial issue in the scope of the criminal proceedings, and excluding Mann from the meeting, at which Mann's counsel portrayed Mann in a negative light, violated Mann's right to be present and defend himself and right to effective assistance of counsel. Violation of these fundamental constitutional rights was sufficiently prejudicial to constitute reversible error, and the case was remanded for a new trial. St. v. Mann, 2006 MT 160, 332 M 476, 139 P3d 159 (2006).

Tainted Character Evidence Considered Prejudicial — New Trial Warranted: During Nolan's trial for resisting arrest, criminal endangerment, and bail-jumping, Nolan was asked why he did not appear on the original trial date and jumped bail instead. Nolan stated that he was taking pain medication for a bad tooth and overslept, and had just started a new job and did not want to miss work because he needed the money to pay the bills and feed his children, whom he loved. Over objection, the prosecutor pursued an extended series of questions regarding Nolan's job history and personal relationships, which revealed that Nolan had fathered a number of children by several women, none of whom he had married, and that he did not pay child support because none had been ordered. Other testimony related to Nolan's character, including rebuttal testimony from one woman that Nolan acted as pimp for her prostitution activities. The state contended that Nolan opened the door to the questioning by asserting that he was a decent man and member of the community who cared about his family. Nolan contended that the cross-examination and rebuttal evidence forced him to defend his lifestyle choices and impermissibly turned a bail-jumping trial into a trial of his morals. The Supreme Court agreed with Nolan. The state's right to a full cross-examination of a defendant's character traits, once placed at issue, is not limitless. Here, the prosecutor went beyond permissible cross-examination and rebuttal and ended up trying Nolan's character. Because trial error is not presumptively prejudicial, the Supreme Court reviewed the error under this section to determine whether the error prejudiced Nolan's case. The court concluded that the evidence was highly inflammatory and presented a significant possibility that the qualitative effect of the cross-examination and rebuttal contributed to Nolan's conviction. Because of the prejudice involved, Nolan's conviction was reversed and the case was remanded for further proceedings related to the charges. St. v. Nolan, 2003 MT 55, 314 M 371, 66 P3d 269 (2003).

Confession a Result of Exploitation of Unlawful Arrest — Miranda Warning Insufficient to Negate Cumulative Effect of Circumstances Leading to Confession: Officers had insufficient probable cause to arrest Van Dort, resulting in an unlawful arrest, and the Supreme Court then considered whether Van Dort's subsequent confession was legitimate. The state maintained that

because Van Dort was given Miranda warnings, the confession should be admissible. Van Dort averred that the Miranda warnings alone were insufficient to sever the causal connection between the confession and the arrest. The court noted that as set out in St. v. Beach, 217 M 132, 705 P2d 94 (1985), which adopted the federal rule set out in Brown v. Ill., 422 US 590 (1975), the general principle is that a confession obtained as a result of an unlawful arrest is inadmissible; however, there must be a causal connection between the arrest and the confession. In determining whether a causal connection exists, the court considers: (1) the presence or absence of timely Miranda warnings; (2) whether there was an intervening independent act by the defendant or some third party; (3) the temporal proximity of the arrest and confession; and (4) the degree of the alleged constitutional violation. Miranda warnings will not, in all cases, attenuate the corruptive effect of a prior constitutional violation or remove the taint of a prior constitutional violation. In this case, the Miranda warnings did not sever the chain of causality between Van Dort's unlawful arrest and the confession and were insufficient to negate the cumulative effect of all the relevant circumstances leading to Van Dort's confession. The court distinguished Beach, holding that despite the issuance of Miranda warnings, Van Dort's confession was the result of the exploitation of the unlawful arrest and inadmissible as fruit of the poisonous tree, and the Supreme Court reversed the District Court's denial of Van Dort's motion to suppress. St. v. Van Dort, 2003 MT 104, 315 M 303, 68 P3d 728 (2003).

Possibility That Statements Made During Custodial Interrogation, After Lawyer Requested, Contributed to Conviction — New Trial Warranted: Spang was charged in connection with a double homicide. He made statements to police after being read his rights at arrest and again 2 days later after requesting a lawyer. Spang moved to suppress the statements, but the motion was denied on grounds that Spang waived the right to counsel after voluntarily answering interrogators' questions on both occasions. Transcripts of the interrogations were made available to the jury, and Spang was subsequently convicted on two counts of intimidation by accountability, but appealed based on insufficiency of evidence. The Supreme Court reviewed the denial of the suppression motion to determine whether the trial court's findings of fact were clearly erroneous and whether they were correctly applied as a matter of law. Here, Spang's request for counsel was neither ambiguous nor equivocal, so cessation of questioning was required until Spang either reinitiated conversation with the officers or was provided an attorney. Because neither event occurred, the trial court erred when it denied Spang's motion to suppress the statements. To determine whether the error was prejudicial, the Supreme Court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), determining in this case that the error was trial error, because it occurred during presentation of the case to the jury and was amenable to qualitative assessment for prejudicial impact relative to other evidence introduced at trial. Under the cumulative evidence test, the state was required to show admissible evidence that proved the same facts as the tainted evidence. Although there was other sufficient evidence tending to prove that Spang committed intimidation by accountability, qualitatively there existed a reasonable possibility that the statements that Spang made during the second interrogation contributed to his conviction because of the strong emphasis placed on those statements during trial. Therefore, the District Court committed reversible error when it admitted the statements during the state's case in chief. The case was remanded for a new trial, and the District Court was directed not to admit the statements made during the second interrogation. Statements from the first interrogation were admissible, however, because Spang had waived the right to counsel. Spang's argument that the first interrogation statements also be suppressed on unnecessary delay grounds failed, absent evidence that the delay between arrest and initial appearance influenced the voluntariness of those statements. St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002), distinguishing St. v. Brubaker, 184 M 294, 602 P2d 974 (1979), and overruled, to the extent that the right to counsel for self-incrimination purposes may be invoked in custodial interrogation, in St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006).

Failure to Summon Jurors in Statutory Manner — Lamere Per Se Rule Retroactively Applied — Rule of Law Inapplicable Considering Substantial Change in Law: In St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359 (1998), Robbins moved to quash the jury panel because prospective jurors had been summoned by telephone instead of by mail or personal service, as required in 3-15-505. The motion was denied because Robbins failed to introduce any evidence that he was prejudiced, rendering the error harmless. The Supreme Court subsequently decided St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), holding that improper jury summons constituted denial of the fundamental right to a fair trial and thus was per se prejudicial. Robbins then petitioned for postconviction relief on grounds that Lamere should be retroactively applied. The District Court denied the petition, concluding that under the law of the case doctrine, Lamere was not retroactively applicable. The Supreme Court disagreed and reversed.

The law of the case doctrine provides that when a decision is rendered by the Supreme Court, the decision is binding and cannot be relitigated in the trial court or on a subsequent appeal. However, a court may reconsider the issue in postconviction proceedings when there has been a substantial change in applicable law. Lamere specifically overruled the opinion in Robbins' 1998 direct appeal to the extent that a violation of 3-15-505 could be harmless error, which constituted a substantial change in the law, so the law of the case doctrine did not preclude the application of Lamere to Robbins' 2002 postconviction proceedings. Robbins was entitled to retroactive application of Lamere because the state's action in procuring the jury denied Robbins of a right that goes to the very integrity of the justice system, and is implicit in the concept of ordered liberty for purposes of coming within the exception to the retroactivity analysis in Teague v. Lane, 489 US 288 (1989). Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002).

Plenary Review of Criminal Sentence by Supreme Court Even Though No Objection Made at Sentencing: Brister was sentenced to 20 years for felony sexual assault with 10 years suspended, served the 10-year prison sentence, and then was released and began the 10-year suspended sentence. About 6 years into the suspended sentence, Brister was arrested for felony theft and for violating various parole conditions. The District Court then revoked the suspended sentence and reimposed another 10-year suspended sentence to run consecutively with a 5-year felony theft sentence. The new suspended sentence included 26 additional conditions. Brister did not object to any of the conditions when they were imposed, but filed a motion objecting to the sentence 2 months later, claiming that the conditions were not and could not have been included in the original suspended sentence, and thus violated double jeopardy and ex post facto laws. The state maintained that Brister waived any objections to the conditions by failing to contemporaneously object when the sentence was pronounced, and that the appeal from the sentence was not timely filed. The Supreme Court disagreed and reversed. Under St. v. Lenihan, 184 M 338, 602 P2d 997 (1979), the court will review a sentence imposed in a criminal case if it is alleged that the sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing. Further, Brister provided the District Court with an opportunity to correct any sentencing errors by filing an objection under 46-18-117 (now repealed), which allowed 120 days for correction of an illegal sentence, so Brister retained the right to appeal the purportedly illegal sentence. St. v. Brister, 2002 MT 13, 308 M 154, 41 P3d 314 (2002), overruling St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019 (2000), St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001), and St. v. Smith, 2001 MT 111, 305 M 298, 27 P3d 39 (2001), to the extent that those cases held that failure to raise a contemporaneous objection to an illegal sentence at the time of hearing resulted in waiver of defendant's objection, and followed in St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002). See also St. v. Southwick, 2007 MT 257, 339 M 281, 169 P3d 698 (2007).

Prejudicial Error in Failure to Accept Guilty Pleas: Peplow was charged with and convicted of DUI, driving with a suspended or revoked license, driving without insurance, failing to report an accident, and tampering with evidence. Prior to trial, Peplow tried to enter guilty pleas to the driving with a suspended or revoked license and driving without insurance counts, but the trial court ruled that it was not required to accept the pleas. Peplow appealed. The Supreme Court held that the tampering with evidence charge was not applicable and that Peplow had a right to plead guilty and thus the trial court erred in refusing the pleas. The Supreme Court then applied St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine whether denial of the pleas prejudiced Peplow's right to a fair trial. The court first determined that the error did not undermine the fairness of the entire trial proceeding, nor was it of constitutional dimensions, so it was considered a trial error rather than a structural error. Once a convicted person establishes that the evidence in question was erroneously admitted and has alleged prejudice, the state must then demonstrate that the error was not prejudicial, i.e., that the quality of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the conviction. Therefore, pursuant to Van Kirk, the Supreme Court was required to determine whether the evidence proving that Peplow drove with a suspended license and without insurance went to prove an element of either of the substantive charges of DUI or failing to report an accident. The court noted that if Peplow's guilty pleas had been properly accepted, the evidence in question would not have been admissible. Further, the jury was presented with ample admissible evidence that Peplow was under the influence, so it was not necessary that the state object to the guilty pleas in order to buttress the record at trial. However, the qualitative effect of the inadmissible evidence was such that there was a reasonable possibility that the tainted evidence might have contributed to the DUI conviction, so that conviction was reversed and the case was remanded for a new trial. St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

Pervasive Misconduct of Plaintiffs' Counsel Preventing Fair Trial on Merits: At Josephson's trial for assault, plaintiffs' counsel attempted to put inadmissible matters before the jury by

repeatedly asking objectionable questions and raising impermissible inferences. Although the trial court repeatedly admonished plaintiffs' counsel not to bolster with inadmissible evidence, attempt to introduce inadmissible hearsay, and ignore the court's rulings on certain issues, plaintiff's counsel blithely proceeded to do what he knew he should not. As set out in St. v. Eklund, 264 M 420, 872 P2d 323 (1994), the repeated asking of questions that are clearly intended to keep the assumption of damaging facts that cannot be proved before the jury, in order to impress upon their minds the probability of the existence of the assumed facts upon which the questions are based, constitutes gross misconduct. In this case, despite the trial court's attempts to eliminate the prejudicial impact of the conduct with admonitions and curative instructions, the conduct of plaintiffs' counsel was so pervasive that it prevented Josephson from receiving a fair trial on the merits, raising the presumption of prejudice and warranting reversal of Josephson's conviction and a new trial. Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001). See also Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160 (1998).

Failure to Summon Entire Panel by Telephonic Juror Summoning — New Trial Warranted: Of the 200-juror panel randomly drawn for Lamere's murder trial, over one-third of the prospective jurors were excluded from possible jury service by virtue of the manner in which a telephone-only notification method skewed the random nature and objectivity of the statutory jury selection procedures. By failing to summon the entire panel or array drawn for the trial, the purpose of juror notification was undermined. Jury duty cannot be lightly shirked, as a telephone summoning system allowed, without doing violence to the democratic nature of the jury system. Because the substantial failure to comply with the statutory requirements materially undermined the jury selection process, Lamere was granted a new trial. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), following Thiel v. S. Pac. Co., 328 US 217, 90 L Ed 1181, 66 S Ct 984 (1946), and applied retroactively in Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002). See also St. v. Groom, 49 M 354, 141 P 858 (1914), and State ex rel. School District v. Carroll, 87 M 45, 284 P 1008 (1930).

Substantial Compliance Standard Clarified With Regard to Statutory Process for Forming Jury: The objective statutory procedures established by the Legislature for the random selection of jurors are intended to protect a defendant's fundamental right to a fair and impartial jury and must be substantially complied with. Under Montana case law, the substantial compliance standard is not an absolute rule inasmuch as it permits minor deviations from statutory procedure. These technical deviations do not constitute a substantial failure to comply and therefore do not give rise to a presumption of prejudice. In clarifying the substantial compliance standard, the Supreme Court took guidance from federal case law developed under the federal Jury Selection and Service Act of 1968, 28 U.S.C. 1861, et seq. In order to establish a violation under the federal Act, a defendant must show that the government substantially failed to comply with the methods set forth by statute for jury selection. Substantial failure has been construed as a violation that contravenes one of two basic principles: (1) random selection of jurors; and (2) determination of juror disqualification, excuses, exemptions, and exclusion on the basis of objective criteria. A successful challenge to the jury panel may be founded only on a material departure from the law, a deviation amounting to more than a technical irregularity. Thus, a substantial or material statutory departure that affects the random nature or objectivity of the jury selection process establishes a violation independently of the departure's consequences in an individual case, while a technical or nonmaterial violation constitutes nonprejudicial error under the substantial compliance standard. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), overruling St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998).

Telephone Jury-Summoning Procedure Violative of Statutory Selection Process — Showing of Substantial Compliance, Not Prejudice, Required — Reversible Error: Lamere, charged with killing Brownlee, filed a pretrial motion to strike the jury panel, but the motion was denied. The question on appeal was whether the District Court erred in concluding that Lamere failed to show that the telephone-dependent summoning procedure used in Cascade County prejudiced Lamere's substantial rights to a jury drawn and summoned according to law. The Supreme Court applied St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998), in holding that the method of summoning jurors by telephone failed to comply with statutes governing the impaneling of a jury because jurors were neither served by mail nor served personally by the Sheriff. However, to warrant reversal, Robbins also required a showing of actual prejudice in addition to a substantial failure to comply with statutory law in drawing a jury panel. The Supreme Court chose to return to the per se rule of reversal for failure to substantially comply with statutes governing procurement of a trial jury, overruling the Robbins requirement of prejudice. The decision turned on the U.S. Supreme Court's contemporary

distinction between trial error, to which harmless error review applies, and structural error, to which harmless error review is inapplicable (see Johnson v. U.S., 520 US 461, 137 L Ed 2d 718, 117 S Ct 1544 (1997), and its predecessors). In Lamere's case, the automatic rule of reversal prevailed because errors in the jury selection process are structural in nature, affecting the very framework within which a trial proceeds—errors that indelibly affect the essential fairness of the trial itself. A material failure to substantially comply with Montana statutes governing procurement of a trial jury may not be treated as harmless error because: (1) it precedes the presentation of evidence to the jury and cannot be analyzed as a mere trial error without resorting to speculation; (2) it precedes the trial process and cannot be quantitatively assessed for its prejudicial impact relative to the evidence introduced at trial; (3) it affects the very framework within which the trial proceeds; and (4) the impartiality of the jury goes to the very integrity of the justice system and because the right to an impartial jury is so essential to the concept of a fair trial that its violation cannot be considered harmless error. The substantial compliance standard vindicates not only the rights of the individual defendant but also the rights of the public in ensuring that the jury system remains inviolate, protecting a defendant's right to an impartial jury by encouraging reasonably strict compliance with statutory procedures intended to implement the fair cross-section guarantee of the sixth amendment of the U.S. Constitution. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), following Chapman v. Calif., 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (1967), Satterwhite v. Tex., 486 US 249, 100 L Ed 2d 284, 108 S Ct 1792 (1988), and Ariz. v. Fulminante, 499 US 279, 113 L Ed 302, 111 S Ct 1246 (1991), and followed in St. v. Lopez, 2001 MT 97, 305 M 218, 26 P3d 745 (2001).

Prejudice Through Inadmissible Evidence — Fair Trial Denied: Generally, character evidence is inadmissible to prove conduct. The prosecution is allowed to rebut the accused's offer of a pertinent trait of character; however, the prosecution must present legitimate and relevant character evidence. An accused's entire life should not be searched in an effort to convict. In this case, the trial court improperly allowed cross-examination of Eklund's character witness regarding Eklund's prior murder charges when the witness was called to rebut the nonviolent character evidence. The danger of unfair prejudice of evidence of charges, not a conviction, clearly outweighed the probative value. After considering the totality of the circumstances, the Supreme Court determined that there was a reasonable possibility that the inadmissible evidence of Eklund's murder charge denied him a fair and impartial trial and remanded for a new trial. St. v. Eklund, 264 M 420, 872 P2d 323, 51 St. Rep. 335 (1994).

Wearing "Women Against Rape" Buttons at Rape Trial — Risk to Fair Trial: If it occurred, the presence of at least 20 women wearing "Women Against Rape" buttons at a kidnapping and rape trial posed, for various reasons, an unacceptable risk to a fair trial. The case was remanded for an evidentiary hearing on whether the allegation was true and, if true, whether a fair trial was denied. Norris v. Risley, 878 F2d 1178 (9th Cir. 1989).

Reversible Error — Prosecutor's Unethical Conduct — District Court Abuse of Discretion: After a jury trial, defendant was convicted of assault. In his opening statement, defendant's attorney had said he would call two witnesses who would testify that defendant had acted in self-defense. The State did not object to this assertion. In cross-examining the victim, defendant's attorney laid the foundation for the impeachment testimony to come from the two witnesses alluded to in the opening statement. The State did not object to this line of questioning. However, after resting its case, the State filed a motion in limine requesting that the defense not be permitted to present the testimony of the two witnesses because of the defendant's failure to comply with the notice provisions of 46-15-301 (repealed in 1985 and replaced with 46-15-321 [now repealed] through 46-15-329). The District Court granted the State's motion. Later, in the State's rebuttal in closing argument, the State mentioned defendant's failure to produce the witnesses he had promised during the opening statement. On appeal, the Supreme Court reversed and ordered a new trial. The court ruled that reversal was required by the State's unethical argument to the jury. The Supreme Court further ruled that although no formal, written notice within the time limits required under 46-15-301 (repealed in 1985 and replaced with 46-15-321 [now repealed] through 46-15-329) had been given, the trial court abused its discretion in not permitting the defense witnesses to testify because the State knew the defendant intended to rely on self-defense and the State's motion in limine was filed too late under local court rules. Finally, the court ruled that the State by its failure to object earlier had waived its right to file the motion in limine. St. v. Keller, 204 M 1, 662 P2d 604, 40 St. Rep. 614 (1983).

Reasonable Possibility That Inadmissible Testimony Contributed to Conviction: Defendant, convicted of aggravated assault, aggravated burglary, and attempted sexual intercourse without consent, contended that a mistrial should have been granted when a witness made reference to

the fact that defendant had been in the state penitentiary. Defendant's motion was denied, but the court struck the material from the record and gave the jury an instruction to ignore evidence stricken from the record. The Supreme Court, applying the test of whether there was a reasonable possibility the inadmissible evidence might have contributed to the conviction, therefore requiring reversal, held that there was no evidence defendant was denied a substantial right. There was no showing that the reference might have contributed to his conviction in the face of overwhelming evidence directly proving his guilt. St. v. Wells, 202 M 337, 658 P2d 381, 40 St. Rep. 127 (1983). See also St. v. Brush, 228 M 247, 741 P2d 1333, 44 St. Rep. 1495 (1987).

Sandstrom Instruction With Statement Presumption Disputable — Intent Disputed: Reversal of mitigated deliberate homicide conviction was required where the court gave the following Sandstrom instruction: "The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him. This presumption, however, is termed a disputable presumption and may be controverted by other evidence." The error was not harmless. The instruction obviously permitted the jury to presume intent without proof beyond a reasonable doubt. Intent was hotly contested and an important element of the crime charged, and because of the instruction the jury could disregard the defendant's claim that he intended only to fire a warning shot. Then, with the presumption of intent, the jury could have concluded that defendant used deadly force to intentionally kill the victim. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982).

Effective Assistance of Counsel — No Objection Raised to Improper Argument by Prosecution — Appealability: Although objection to the prosecutor's argument may not be raised on appeal if it has not been raised at trial, if it forms a basis for an effective assistance of counsel issue, it will be considered on appeal [but see 1983 amendment changing the law]. If a prejudicial prosecutorial argument is alleged, it will not be presumed. Rather, it must be established from the record that a substantial right has been denied. St. v. Dupre, 200 M 165, 650 P2d 1381, 39 St. Rep. 1660 (1982).

Presence of Accused at Trial: Under former law, the presence of the defendant at his trial was a matter that affected the substantial rights of both parties, and therefore the provision requiring the Supreme Court to give judgment on appeal without regard to technical errors or defects not affecting the substantial rights of the parties had no application. St. v. Reed, 65 M 51, 210 P 756 (1922).

SUBSTANTIAL RIGHTS NOT AFFECTED

No Prejudice Arising From Lesser Included Offense Instruction — Reversal Unwarranted: Potter was charged with aggravated assault. At trial, the District Court included two lesser included offense instructions for attempted aggravated assault and assault, and Potter objected to including the attempted aggravated assault instruction. The jury returned a guilty verdict on the aggravated assault charge. On appeal, Potter contended that the court erred by instructing the jury on attempted aggravated assault because attempted aggravated assault is not a lesser included offense of aggravated assault. However, the jury never reached the question of whether Potter committed the lesser offense, so Potter was not prejudiced by inclusion of the attempted aggravated assault instruction. Absent prejudice, the Supreme Court declined to reverse the conviction. St. v. Potter, 2008 MT 381, 347 M 38, 197 P3d 471 (2008).

Mere Allegations of Cumulative Error — Reversal Not Required: Tennell identified an amalgam of errors that he alleged warranted reversal under the doctrine of cumulative error, even if no single error was sufficient to warrant reversal. The Supreme Court noted that the doctrine requires a reversal when a number of errors, taken together, prejudices the right to a fair trial, but that prejudice must be established, not merely alleged. Although some error occurred in this case, Tennell did not establish that it was prejudicial, so the court declined to apply the cumulative error doctrine. St. v. Tennell, 2007 MT 266, 339 M 381, 170 P3d 965 (2007), following St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Counsel Ready for Trial — Motion for Continuance Properly Denied: Molder asserted that a motion to continue trial should have been granted because his substitute counsel was unprepared for trial. The Supreme Court applied the factors in St. v. Sotelo, 209 M 86, 679 P2d 779 (1984), to determine whether the trial court abused its discretion in denying a continuance, including: (1) the length of the requested delay; (2) whether the state's case would be prejudiced; (3) reasons for the requested continuance; (4) whether defense counsel was diligent in preparing for trial; (5) whether defendant's right to a speedy trial would be violated; and (6) defendant's right to effective assistance of counsel. Despite Molder's assertion to the contrary, his counsel stated that a trial strategy was in place and that counsel was prepared for trial. The Supreme Court held that the trial strategy was reasonable, that Molder suffered no prejudice, and that

Molder's substantial rights were not affected. Denial of the motion for continuance was affirmed. St. v. Molder, 2007 MT 41, 336 M 91, 152 P3d 722 (2007).

Failure of State to Provide Defendant With Exhibit List at Trial — Substantial Rights Not Affected: Despite the fact that the trial court had ordered the state to provide Hicks with an exhibit list 20 days before Hicks's trial for sexual intercourse without consent, the state did not comply. On the first morning of trial, Hicks moved to exclude all of the state's proposed exhibits, but the motion was denied, and Hicks later appealed on grounds of unfair surprise and prejudice. However, Hicks did not refer to specific exhibits or analyze why the exhibits were prejudicial, and Hicks's mere conclusory statement was insufficient to establish that the defense was prejudiced. In addition, the state contended that Hicks knew about the exhibits well prior to trial, that he had been provided copies of the exhibits, and that he knew the state intended to introduce the exhibits, so Hicks could not argue surprise despite not being provided with an exhibit list. Hicks's substantial rights were not affected, and denial of the motion to exclude the exhibits was affirmed. St. v. Hicks, 2006 MT 71, 331 M 471, 133 P3d 206 (2006).

Only Error Curable by Resentencing — Cumulative Error Doctrine Inapplicable: Although Ferguson asserted many errors in his trial and sentencing, the only error found by the Supreme Court was that Ferguson was sentenced as a violent offender, and that error was cured by remand for resentencing Ferguson as a nonviolent offender. Therefore, because Ferguson was not prejudiced, the court declined to apply the cumulative error doctrine. St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Counsel's Failure to Interview and Call Witnesses Within Range of Reasonable and Sound Professional Decisions — Failure to Prove Ineffective Assistance of Counsel: Weaver contended that his defense counsel was ineffective in failing to interview and call certain witnesses and in not introducing an entomologist's report that might have created a reasonable doubt as to Weaver's role in a homicide. Under the first prong of the Strickland test, Weaver needed to overcome the strong presumption that counsel's defense strategies and trial tactics fell within a wide range of reasonable and sound professional decisions. The Supreme Court examined each of Weaver's contentions and determined that: (1) counsel's decision not to investigate potential witnesses did not fall below an objective standard of reasonableness; (2) Weaver failed to meet the burden of showing that counsel's failure to interview potential witnesses constituted ineffective assistance to the extent that it resulted in prejudice raising a reasonable probability that the trial outcome would have been different; (3) counsel's decision not to call every witness that Weaver identified actually carried fewer risks and promoted Weaver's best interest at trial; and (4) failure to introduce the entomologist's report was tactical and the result of a conscientious, weighed decision made after consultation with Weaver and thus was not erroneous. Weaver's ineffective assistance claim failed. Weaver v. St., 2005 MT 158, 327 M 441, 114 P3d 1039 (2005), following Clausell v. St., 2005 MT 33, 326 M 63, 106 P3d 1175 (2005).

Prosecutor's Comments Not Affecting Outcome of Trial — Failure to Prove Prosecutorial Misconduct: Clausell's defense in a deliberate homicide trial was that the victim's death was a "tragic accident". Because of Clausell's defense, his counsel failed to object to numerous comments by the prosecutor that focused on rebutting the "tragic accident" theory. On appeal, Clausell contended that the prosecutor's statements constituted prosecutorial misconduct and that his attorney's failure to object to the comments or to move to suppress evidence of the search of Clausell's apartment amounted to ineffective assistance of counsel. The Supreme Court disagreed on both issues. Given that the state presented sufficient evidence of deliberate homicide and that the jury was admonished to consider only the evidence, Clausell failed to show that the prosecutor's comments affected the trial's outcome. Because no prosecutorial misconduct occurred, defense counsel's failure to object to the comments could not be considered ineffective assistance, and defense counsel's trial tactics, including failure to seek to suppress evidence that was in plain view, fell within the wide range of reasonable and sound professional decisions. Clausell failed to establish that his attorney's lack of objections fell below the objective reasonableness standard or that he was prejudiced to the point that a reasonable probability existed that the result of the trial would have been different had counsel not performed ineffectively. The deliberate homicide conviction was affirmed. Clausell v. St., 2005 MT 33, 326 M 63, 106 P3d 1175 (2005), followed in St. v. Misner, 2007 MT 235, 339 M 176, 168 P3d 679 (2007). See also St. v. Gray, 207 M 261, 673 P2d 1262 (1983).

Failure to Provide Notice That Arresting Officer Would Appear as Witness — No Error: At Boettiger's DUI bench trial in Justice's Court, the arresting officer testified regarding Boettiger's actions on the day in question. Boettiger was convicted and appealed to District Court, but the state did not provide Boettiger with written notice that the officer would again be a witness. Nevertheless, the District Court allowed the officer to testify over Boettiger's objection, and

Boettiger's counsel subjected the officer to extensive cross-examination. Boettiger was again convicted and on appeal alleged error in the state's failure to list the officer as a potential witness. The Supreme Court did not condone the failure to provide notice but found that Boettiger knew that the officer would testify again and failed to demonstrate prejudice as a result of the officer's testimony. The Supreme Court disregarded the irregularity because it did not affect Boettiger's substantive rights, and the conviction was affirmed. St. v. Boettiger, 2004 MT 313, 324 M 20, 101 P3d 285 (2004), following St. v. Sol, 282 M 69, 936 P2d 307 (1997).

Error for Prosecutor to Comment on Defendant's Post-Miranda Silence Regardless When Warning Given: Following arrest on sexual assault and attempted sexual intercourse without consent charges, Godfrey received an acknowledgment of rights form from his attorney. Godfrey initialed the form and subsequently went over the form with the District Court during his initial appearance. Godfrey later complained that the state prosecutor violated Godfrey's due process rights by commenting at trial on Godfrey's silence, in violation of Doyle v. Ohio, 426 US 610 (1976). The state contended that because Godfrey did not have his Miranda rights read to him by a police officer at the time of arrest, Doyle did not apply. The Supreme Court found the state's argument to be without merit and declined to distinguish between a situation when a defendant is advised of the right to remain silent by an arresting officer and a situation when a defendant is advised of the right by a court, or to distinguish between an oral warning and a written form. However, in this case, Godfrey's counsel did not object to the prosecutor's comments at trial, so the court had to decide whether the trial error was sufficiently prejudicial to trigger plain error review. After reviewing the record, the court concluded that it was not plain that the prosecutor's comments had created an inference for the jury that by remaining silent, Godfrey must have been guilty. Absent a clear comment on or infringement of Godfrey's fundamental right to remain silent and absent a contemporaneous objection by Godfrey's counsel to the prosecutor's comments, the conviction was affirmed. St. v. Godfrey, 2004 MT 197, 322 M 254, 95 P3d 166 (2004). See also St. v. Finley, 276 M 126, 915 P2d 208 (1996), and St. v. Sullivan, 280 M 25, 927 P2d 1033 (1996).

Record-Based Claims of Ineffective Counsel for Failure to Object Considered on Direct Appeal and Denied: Daniels claimed on direct appeal that he was denied effective assistance of counsel because defense counsel failed to investigate and interview certain witnesses in order to present a case in chief and failed to object to certain trial testimony. The state responded that Daniels could not demonstrate that counsel's actions were not objectively reasonable or that there was a reasonable possibility that counsel's errors caused a prejudicial result. The Supreme Court noted that Daniels' claims concerning failure to investigate were not record-based and thus not subject to review on direct appeal, pursuant to Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), and St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001). Regarding the record-based claims of failure to object, the court agreed with the state. The evidence in question was admissible, so counsel was not required to object and could not be considered ineffective for failing to do so. Absent a showing of counsel's deficient performance, Daniels' conviction was affirmed. St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003).

Attorney's Actions Reasonable and Not Prejudicial — Strickland Test for Ineffective Assistance Not Met: Allen contended on appeal that he received ineffective assistance from trial counsel because counsel failed to: (1) conduct an adequate investigation of the underlying facts of the case; (2) call a witness at trial regarding Allen's possession of a gun; and (3) present evidence at the sentencing hearing that Allen had four rather than five prior felony convictions. The Supreme Court applied the Strickland test for ineffective assistance of counsel and affirmed. Nothing in the record showed that counsel failed to investigate; in fact, counsel's investigative choices were reasonable. The decision not to call a witness to testify that Allen did not have a gun was also reasonable, given that the jury had already heard testimony from other witnesses that Allen did not have a gun before or after the offense, and counsel was not obligated to present cumulative evidence. Moreover, Allen failed to demonstrate how counsel's failure to investigate the number of Allen's prior felony convictions was prejudicial or would have affected the outcome of the trial because there was plenty of prior conviction information in Allen's record upon which to base the felony offender sentence, so even if the information was incorrect as to the number of convictions, it was not material to Allen's sentence. St. v. Allen, 2001 MT 266, 307 M 253, 37 P3d 655 (2001).

Improper for Prosecutor to Inform Jury of Potential Sentences During Closing Argument — Prejudice Because of Prosecutorial Misconduct Not Established: In closing arguments, the prosecutor commented to the jury that because Martin did not face a death penalty, he could argue that the judge could give him whatever sentence falls within the judge's power, ranging from probation to life in prison. The Supreme Court has held that it is improper to instruct the

jury on possible sentences (see St. v. Zuidema, 157 M 367, 485 P2d 952 (1971)), and it is likewise considered misconduct for a prosecutor to inform a jury regarding possible sentences in closing arguments. However, the court will not presume prejudice from charges of prosecutorial misconduct, but will also consider whether the misconduct prejudiced the defendant's substantial rights. Martin asserted that the prosecutor raised the subject of the judge's sentencing discretion in order to influence the jury to find Martin guilty of all the greater offenses rather than any of the lesser included offenses, making a light sentence unlikely. Here, the Supreme Court reviewed the evidence and found it sufficient to support the jury's verdicts. In light of the surrounding circumstances, including the context in which the comments were made, Martin failed to establish prejudice from the sentencing-related remark by the prosecutor during rebuttal closing arguments. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001), followed in St. v. Roubideaux, 2005 MT 324, 329 M 521, 125 P3d 1114 (2005).

Admission of Murder by Schizophrenic Held Voluntarily Made — No Prejudice to Defense Case: Scarborough, a schizophrenic, was arrested for the murder of Willis and made incriminating statements in the back of a police car. He was taken to the police station where he was read his Miranda rights, waived those rights, and gave a recorded interview with a detective. The Supreme Court affirmed the District Court's decision not to suppress the statements made in the police car or the tape of the interview with the detective. After reviewing all of the evidence, the Supreme Court held that the single fact that raised doubts about the voluntariness of Scarborough's inculpatory statements is the fact that he is schizophrenic and was therefore subject to the suggestion by the arresting and interviewing officers that he had committed the crime rather than someone else. The Supreme Court reviewed the record of the circumstances of the confessions and held that they were not made because the police had suggested Scarborough's guilt to him. The Supreme Court also held that even if the confessions were involuntary, the admission of those confessions by the District Court did not prejudice Scarborough's defense because, as his defense, Scarborough admitted committing the murder but claimed that the murder was committed during an acute psychotic episode. St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Jurors' Notes to Court During Deliberations Not Grounds for Mistrial: During deliberations, the jury sent several notes and questions to the court regarding one of the jurors, who was felt to be obstructing deliberations. Defendant's motion for mistrial based on breakdown in the deliberative process was denied. Following conviction, the juror in question prepared an affidavit alleging that he was unaware of the notes and would not have voted for a guilty verdict had he known about them. The District Court struck the affidavit, finding no juror misconduct, in effect denying defendant's motion for a new trial. The Supreme Court held that the notes constituted an entirely internal process and did not introduce an extraneous or outside element into deliberations, signal a breakdown in deliberations, or have any bearing on defendant's guilt or innocence. Even assuming that the notes had somehow affected the juror's vote, introduction of such testimony is prohibited under Rule 606(b), M.R.Ev. (Title 26, ch. 10), and the affidavit was properly stricken. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Prosecutorial Comments During Closing Not Violative of Defendant's Right to Fair Trial: Raugust argued on appeal that the prosecutor's comments during closing arguments deprived Raugust of a fair trial, notwithstanding the failure of Raugust's attorney to object, which Raugust characterized as ineffective assistance of counsel. Under 46-20-104, review is barred of any alleged errors not objected to at trial, unless the error falls within the exceptions in subsection (2) of this section, but Raugust nevertheless urged review under the plain error doctrine. The Supreme Court held that this case did not present the requisite exceptional case to invoke the plain error doctrine because the alleged errors were either misstatements of fact, taken out of context of the prosecutor's argument, constituted the state's analysis of the evidence, or were later cured by the jury instructions. Raugust's claim of ineffective assistance of counsel also failed because Raugust did not meet the first prong of the Strickland test by showing that his counsel's performance was deficient. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827 (1999), St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), and St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008).

Testimonial Privilege Not Extended to Nonclerical Church Member — No Prejudice in Admission of Member's Testimony: Testimonial privileges must be strictly construed because they contravene the fundamental principle that the public has the right to everyone's evidence; however, the clergy-penitent privilege in 26-1-804 will not be so strictly construed as to violate the right to freedom of religion in Art. II, sec. 5, Mont. Const. Here, Gooding claimed that testimony regarding his confessions of sexual molestation of his stepdaughter in the presence of

the wife of a nonordained junior minister was privileged. However, nothing in the record indicated that the wife was a clergy member acting in a professional character, a counselor, or anything more than an ordinary confidant. The Supreme Court declined to extend the clergy-penitent privilege to nonclerical church members and, in light of overwhelming uncontradicted evidence of Gooding's guilt, affirmed his conviction regardless of the wife's testimony. St. v. Gooding, 1999 MT 249, 296 M 234, 989 P2d 304, 56 St. Rep. 977 (1999). See also St. v. MacKinnon, 1998 MT 78, 288 M 329, 957 P2d 23, 55 St. Rep. 331 (1998).

No Pretrial Determination Regarding Whether Statement Admissible for Impeachment Purposes — Waiver of Right to Object to Admissibility: At the time of arrest, Harris admitted an act of sexual intercourse with his adopted daughter. Prior to trial, Harris moved to suppress the statement on grounds that it was involuntary and obtained in violation of his fifth amendment rights under the United States Constitution. The District Court agreed that the statement could not be used, but expressly stated that its limited suppression order did not address whether it could be used by the state for impeachment purposes in the event that Harris testified, essentially reserving its ruling for a later time, as authorized in 46-13-104. Harris's testimony about the statement during direct examination brought the statement into evidence by his own volition, constituting waiver of the right to appeal the admissibility of the statement for use as impeachment. St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), distinguishing St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996), and St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Error in Requiring Summaries of Defense Witnesses' Testimony — Due Process Violated — No Prejudicial Error Found: When Huerta was tried on charges of felony assault (now assault with a weapon) of a juvenile, he attempted to introduce testimony of 26 witnesses who would testify that the child's mother had the habit of severely punishing the child. In an effort to reduce delay caused by redundant testimony, the District Court required Huerta to summarize the testimony of all of the witnesses by affidavits. Huerta claimed that the required affidavits were ordered in violation of 46-15-328 and in violation of his due process rights because a similar burden was not placed upon the prosecution. The Supreme Court held that the District Court's order was in violation of 46-15-323(8), which specifically prohibits summaries of defense testimony, and in violation of Huerta's right of due process because Wardius v. Oreg., 412 US 470 (1973), and State ex rel. Carkulis v. District Court, 229 M 265, 746 P2d 604 (1987), require reciprocal discovery. However, the Supreme Court also held that Huerta did not establish that the violation of his rights was reversible error pursuant to this section because he failed to show how the violations of statute and due process affected the outcome of the trial. St. v. Huerta, 285 M 245, 947 P2d 483, 54 St. Rep. 1133 (1997).

Failure to Use Different Test Solution Than That Used in Prior Test in Testing Breathalyzer That Failed Prior Certification Test: Administrative rules require the state to use a fresh ethyl alcohol testing solution in retesting and certifying a Breathalyzer when the results of a prior test of the Breathalyzer are outside the range specified by the rules. The state did not do so and used the same solution as that used in the prior test. However, DUI defendant was not prejudiced thereby because the evidence showed that the problem was clearly with the Breathalyzer, not the solution. St. v. Woods, 285 M 124, 947 P2d 62, 54 St. Rep. 1074 (1997).

Jury Request for Replay of Partial Testimony — Failure to Give Harris Instruction Not Prejudicial to Defendant: Henrich was charged with various crimes resulting from sexual assault upon his daughters. The jury requested that it be allowed to hear a recording of certain testimony, whereupon the District Court determined the relevant portion of the testimony and allowed part of a victim's testimony to be played to the jury during its deliberations. The Supreme Court noted that it was error for the District Court not to give the instruction required by St. v. Harris, 247 M 405, 808 P2d 453 (1991). However, the Supreme Court held that because the only testimony as to the issues concerned in the recording was given by the witness and the defendant, the jury's need to balance the statements in the recording against the defendant's denial of committing the offense was obvious and therefore the need for the Harris instruction was minimal. The Supreme Court therefore held that the defendant was not prejudiced by the playing of the recording. St. v. Henrich, 268 M 258, 886 P2d 402, 51 St. Rep. 1275 (1994).

Failure to Object to Alleged Prosecutorial Misconduct Not Violation of Right to Fair Trial: Defendant alleged that the state engaged in prosecutorial misconduct by eliciting inadmissible evidence with no factual basis, characterizing witnesses as liars, using misleading and inflammatory arguments, expressing personal opinions, and using the complaining witness's religious beliefs to enhance her credibility. The Supreme Court refused to exercise discretionary review in light of the fact that not one objection was made by defense counsel in any instance of claimed misconduct. Absent any record of error not objected to that demonstrated an

infringement of the substantial rights of defendant, the right to a fair trial was not infringed. St. v. Ogle, 255 M 246, 841 P2d 1133, 49 St. Rep. 932 (1992), followed in St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996).

Interpretation of Law by Counsel in Jury's Presence: In response to a question from the jury, the County Attorney stated to the judge his interpretation of whether sexual gratification is a requirement of the crime of sexual intercourse without consent. While counsel should avoid stating their interpretation of the law in the presence of the jury, in this case the comments were a correct statement of the law and therefore did not adversely affect substantial rights of the defendant. St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991).

Identification of Witness During Closing Argument as Defendant's Probation Officer — No Prejudice: In accord with an order in limine that no reference was to be made at trial to defendant's criminal record, the testimony of defendant's probation officer and records introduced in connection with her testimony were sanitized at trial. However, in closing, the prosecution referred to the testimony of the defendant's probation officer, which defendant contended on appeal was a violation of the Rule 404(b), M.R.Ev. (Title 26, ch. 10), restriction on introduction of evidence of other crimes without formal notice. The Supreme Court, noting that several references had been made to defendant's criminal record by defendant's own witnesses by the time closing arguments were made, found that identification of the parole officer was not prejudicial to the defense. St. v. West, 245 M 298, 800 P2d 1047, 47 St. Rep. 2129 (1990).

Introduction of Two Prior DUI Convictions Not Prejudicial: The defendant argued that he was prejudiced by the introduction of two prior DUI convictions and that his attorney's failure to object constituted inadequate legal assistance. The Supreme Court found that although the lower court was mistaken in its belief that the prior convictions had to be introduced as an element of this offense, their admission did not prejudice the defendant, particularly in light of the substantial evidence against the defendant and an almost total absence of evidence on his behalf. St. v. Kolberg, 241 M 105, 785 P2d 702, 47 St. Rep. 120 (1990).

Prosecutor's Solicitation of Excluded Evidence: The defendant contended that he was denied a fair trial because the prosecutor elicited testimony from the arresting officer concerning statements made by the defendant at the time of his arrest that had been ruled inadmissible by the trial court. The Supreme Court ruled that the error in admitting the evidence was cured by the trial court's admonishing the jury to disregard the inadmissible statements. St. v. Kolberg, 241 M 105, 785 P2d 702, 47 St. Rep. 120 (1990).

Prosecution Comments on Witnesses in Opening and Closing — No Objection — No Effect on Substantial Rights: The prosecution in opening and closing made comments on the truthfulness and credibility of witnesses and other matters not related to the defendant's right not to testify. A lack of objection does not preclude consideration in the trial court of error that affects the defendant's substantial rights, but these matters were subject to free comment to the jury under the circumstances of this case and thus did not affect substantial rights of the defendant. St. v. Harris, 209 M 511, 682 P2d 159, 41 St. Rep. 866 (1984).

Instructions Given and Instructions Rejected — Review of Both Precluded by Failure to Object: Defendant contended that jury instructions given by the District Court were improper and that rejected instructions should have been given. No objection to the instructions was raised at trial. Instructions cannot be challenged for the first time on appeal. The errors asserted did not affect the substantial rights of the defendant and were disregarded. St. v. Wurtz, 195 M 226, 636 P2d 246, 38 St. Rep. 1808 (1981).

PLAIN ERROR

Prosecutor's Repeated and Deliberate Use of Defendant's Invocation of Right to Silence — New Trial Warranted: During Wagner's trial for attempted deliberate homicide, the prosecutor repeatedly and deliberately used Wagner's invocation of the right to silence as evidence of Wagner's guilt. The prosecutor also referenced Wagner's failure to tell his version of events until trial and raised as further evidence of Wagner's guilt the fact that Wagner had requested to speak with an attorney and, after invoking his Miranda rights, had commented that he didn't want to dig himself a deeper hole. The Supreme Court found that Wagner's request to speak with an attorney and the comment that Wagner didn't want to dig himself a deeper hole were in fact an invocation of Wagner's right to remain silent. The prosecutor's conduct raised questions regarding the fundamental fairness of the trial by violating Wagner's right to due process and privilege against self-incrimination, constituting plain error, and the Supreme Court concluded that the constitutional violations entitled Wagner to a new trial. The case was reversed. St. v. Wagner, 2009 MT 256, 352 M 1, 215 P3d 20 (2009), following Doyle v. Ohio, 426 US 610 (1976). See also St. v. Sullivan, 280 M 25, 927 P2d 1033 (1996).

Issue Decided Prior to Appeal — No Substantial Reason for Plain Error Review: Foston appealed a drug conviction on grounds that plain error review was appropriate because officers improperly used warrantless electronic monitoring of drug transactions in violation of St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008). However, Foston made no warrant-based objection at trial, and Goetz was decided after Foston's conviction. The Supreme Court also noted that a motion to retroactively apply Goetz to Foston's case had previously been denied. The court therefore refused to grant plain error review absent any substantial reason provided by Foston why plain error review was warranted. St. v. Foston, 2009 MT 191, 351 M 85, 209 P3d 262 (2009).

Failure to Object to Prosecutor's Closing Arguments — Waiver of Objection: Defendant contended that he was denied a fair trial because of comments made by the prosecutor during closing arguments regarding defendant's credibility. However, defendant failed to object and preserve the issue for appeal, so the objection was waived. Nevertheless, defendant urged the Supreme Court to employ discretionary plain error review and reverse, but the court was not persuaded that the comments resulted in a manifest miscarriage of justice, undermined the fundamental fairness of the trial, or compromised the integrity of the judicial process, so plain error review was denied. St. v. Rose, 2009 MT 4, 348 M 291, 202 P3d 749 (2009).

Involuntary Commitment — Failure to Appoint Friend of Respondent Reversible Error: In an involuntary commitment case, the District Court made no serious attempt to appoint a friend of respondent for the individual and committed the individual to the state mental hospital. The individual appealed. Because the case involved a substantial liberty interest and failure to review the error would compromise the integrity of the judicial process, the Supreme Court reviewed the case under the plain error doctrine and remanded. The District Court essentially ignored the statutory requirement in 53-21-122 to appoint a friend of respondent, constituting reversible error. In re Mental Health of J.D.L., 2008 MT 445, 348 M 1, 199 P3d 805 (2008), followed in In re Mental Health of A.S.F., 2008 MT 450, 348 M 45, 199 P3d 808 (2008).

Delay in Bringing Defendant Before District Court on Petition to Revoke Suspended Sentence Implicated Due Process Rights: Defendant made a threshold showing that plain error review of his claim was appropriate for a delay of 26 months in bringing him before the court on a petition to revoke a suspended sentence. However, delay was only one of several factors for the court to consider in the totality of circumstances approach to unreasonableness of delay, and thus the case was remanded for an evidentiary hearing. St. v. West, 2008 MT 338, 346 M 244, 194 P3d 683, (2008).

Failure to Preserve Issue for Appeal by Failure to Object at Trial — Plain Error Review Inappropriate Absent Implication of Defendant's Fundamental Rights: At Price's trial for assault with a weapon, a stun gun, the trial court allowed evidence of Price's prior conviction for intimidation. Following conviction, Price appealed on grounds that the evidence was improperly introduced because the state failed to give notice of the intent to introduce other crimes evidence in violation of Price's due process rights. The state contended that Price waived the right to appeal the issue by failing to object to introduction of the evidence and by actively participating in its introduction. The Supreme Court declined to review the issue because Price failed to object to the evidence at trial and thus did not preserve the issue for appeal. Further, plain error review was inappropriate because Price's fundamental constitutional rights were not implicated by introduction of the evidence. St. v. Price, 2007 MT 269, 339 M 399, 171 P3d 293 (2007).

Plain Error Review of Effective Assistance Claim Denied When Error Not Plain: Defendant sought to have the Supreme Court review whether it was error for defense counsel to withdraw a juror challenge, resulting in ineffective assistance of counsel. The court could not plainly determine from the record if the withdrawal was erroneous, given possible tactical reasons for the withdrawal. Absent a record-based showing that the alleged error was plain, plain error review was inappropriate. St. v. Tennell, 2007 MT 266, 339 M 381, 170 P3d 965 (2007).

Absence of Record Prevents Review of Defendant's Claim of Lack of Speedy Trial Under Plain Error Doctrine: The state charged Lewis with certain drug-related crimes on May 19, 2004, and on October 12, 2004, informed the trial court that it intended to charge Lewis with an additional offense, whereupon the trial court vacated the trial date. The state did not amend the charges until March 10, 2005, and Lewis was convicted after a 3-day trial in June of 2005. Lewis did not assert the right to a speedy trial until appeal. The Supreme Court agreed that the right to a speedy trial is not necessarily waived by failure to assert the right at trial and that the Supreme Court could review the issue under the plain error doctrine. However, the Supreme Court held that the review must be based upon the facts of the case, and in the present instance, no record existed upon which to review the matter. St. v. Lewis, 2007 MT 16, 335 M 331, 151 P3d 883 (2007).

Valid Designated Representative Allowed to Remain in Court During Trial and to Testify — Former State Employee Not Considered Proper Designated Representative at Trial: The trial court granted the state's motion to exclude all witnesses pursuant to Rule 615, M.R.Ev. (Title 26, ch. 10). The state designated former employee Weaver as its representative, and Weaver was allowed to remain in the courtroom at the counsel table while other witnesses testified. Plaintiffs were unaware until Weaver began to testify that Weaver was no longer employed by the state and contended that Weaver should not have been permitted to testify as a fact witness after all witnesses had been excluded, citing St. v. Claric, 271 M 141, 894 P2d 946 (1995), and St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004). The Supreme Court clarified Rule 615, M.R.Ev., noting that the plain language of the rule provides that both a natural person who is a party and a designated representative of a party who is not a natural person may remain in the courtroom notwithstanding the exclusion of other witnesses. Thus, Claric and Flowers were overruled to the extent that those cases held that a valid designated representative may not both remain in the courtroom and testify. However, the rule also provides that an appropriate designated representative is an officer or employee of a party who is not a natural person. Weaver was no longer a state employee and thus did not qualify as a proper representative at retrial. Faulconbridge v. St., 2006 MT 198, 333 M 186, 142 P3d 777 (2006).

Alleged Error Must Be Plain to Trigger Plain Error Review: English argued that the Supreme Court should apply plain error review to consider whether certain trial testimony violated English's constitutional right to remain silent. However, English could not point to how the allegedly offensive testimony affected the fairness of the trial or resulted in a miscarriage of justice, especially because part of the testimony was elicited by English's own counsel, who had the opportunity to object to any erroneous testimony but declined to so do. A fundamental aspect of the plain error doctrine is that the alleged error must be plain. In this case, if there was any error, it was not plain, and the Supreme Court declined to invoke the doctrine to address English's constitutional issues. St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Ineffective Counsel Claims Insufficient to Invoke Plain Error Doctrine on Direct Appeal: On direct appeal, Novak contended that his counsel's failure to object to certain prejudicial, inadmissible evidence compromised his right to a fair trial and asserted that the Supreme Court should apply the plain error doctrine to review counsel's failure. The Supreme Court held that all of the alleged errors were encompassed in Novak's effective assistance of counsel claim, which could be raised in postconviction proceedings, but were insufficient to invoke the plain error doctrine on direct appeal. St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005).

Failure of Counsel to Ensure Impartial Jury During Voir Dire Constituting Ineffective Assistance — Reversible Structural Error: A potential juror disclosed in a juror questionnaire that her daughter was a paralegal at the County Attorney's office. Defense counsel failed to take note of the disclosure, to question the juror regarding any potential bias during voir dire, or to challenge the juror for cause. Defense counsel acknowledged the error on the record. The juror was picked for the panel, and Lamere was convicted. On appeal, the Supreme Court applied the two-pronged Strickland test for ineffective assistance, and because the error was on the record, the court reviewed the ineffective assistance claim de novo on direct appeal. The court concluded that counsel failed to ensure that Lamere received a fair trial by an impartial jury and that counsel's performance fell below the reasonably required level, satisfying the first Strickland prong. In addition, counsel's deficient performance constituted a structural error that undermined the fairness of the entire trial and thus was presumed to be prejudicial, satisfying the second Strickland prong. Lamere did not receive effective assistance during voir dire, the verdict was reversed, and the case was remanded for a new trial. St. v. Lamere, 2005 MT 118, 327 M 115, 112 P3d 1005 (2005). See also St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002).

Failure to Object to Jury Instruction — Ineffective Assistance of Counsel Claim Unfounded — Plain Error Doctrine Inapplicable: The trial court instructed the jury that Gray could be convicted of assault on a peace officer if the state proved that Gray caused a reasonable apprehension of bodily harm in any of three police officers. Gray contended that the instruction erroneously allowed the jury to convict for assault of one or more of the officers without agreeing to one specific set of facts, in violation of the unanimity requirement that the jury must be in agreement as to the principal factual elements underlying the offense. Even though Gray's counsel acquiesced to the instruction, Gray contended that the fundamental right to a unanimous jury verdict is inviolate, so plain error review was appropriate. However, Gray not only failed to contemporaneously object to the instruction, but specifically asked the trial court to add the language that he argued on appeal was insufficient. The Supreme Court declined to apply the doctrine, refusing to put the trial court in error for an action in which Gray acquiesced and actively participated. Additionally, Gray's claim of ineffective assistance of counsel based on

his attorney's acquiescence and participation in the jury instruction for strategic purposes also failed. In light of the overwhelming evidence of guilt, Gray could not show that the trial outcome was prejudiced because of the lack of a specific unanimity instruction or that the result would have been different if the attorney had not engaged in the legal strategy. The conviction was affirmed. St. v. Gray, 2004 MT 347, 324 M 334, 102 P3d 1255 (2004), followed in St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

Plain Error in Allowing Youth's Extrajudicial Statements When Youth Not Advised of Right to Counsel and Right Against Self-Incrimination: A youth asserted for the first time on appeal that the Youth Court improperly admitted extrajudicial statements that the youth made regarding the youth's whereabouts when a burglary and criminal mischief were committed. Despite the state's contention that the arguments should not be considered because they were not raised at trial, the Supreme Court nevertheless considered the argument under the plain error doctrine because the youth was not notified while in custody of the fundamental right to counsel and the right to avoid self-incrimination, nor were the youth's parents notified as required. The youth's rights under the Montana Youth Court Act and the constitution were simply ignored in this case, so in order to avoid a question of the fundamental fairness of the trial by admission of constitutionally infirm extrajudicial statements, the Supreme Court reversed the trial court's decision to admit the statements. In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004).

No Plain Error in Presenting Different Stories of Same Witness for Jury's Consideration: At Daniels' trial for robbery, witnesses presented inconsistent testimony regarding Daniels' involvement. The state was entitled to point out the inconsistencies to the jury, and the jury was entitled to choose which version to believe. There was no fundamental unfairness or error in presenting different stories of the same witness for the jury's consideration, and thus Daniels was not entitled to consideration on appeal under the plain error doctrine. St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003).

Theory of Erroneous Jury Instruction Raised for First Time on Appeal — No Plain Error: At trial, the District Court instructed the jury to view with distrust the testimony of a witness who was legally accountable for the same crime as Daniels. Daniels objected to the instruction on grounds that the witness's testimony had changed and was no longer inculpatory, so the instruction was unnecessary. On appeal, Daniels argued that the instruction violated his right to a fair trial because it could have been construed to instruct the jury to distrust his exculpatory statements given to police immediately after his arrest, having implicated the witness in those statements. The Supreme Court found no prejudicial effect in the jury instruction, and Daniels could not argue on appeal a theory of error that was changed from the theory raised in trial court. St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), followed in St. v. Rinkenbach, 2003 MT 348, 318 M 499, 82 P3d 8 (2003).

Conviction of Felony Nonsupport Prior to Legislative Creation of Felony Offense Considered Improper Ex Post Facto Application Warranting Reversal — Common-Law Plain Error Doctrine Applied: Price was convicted of felony nonsupport for failure to make payments from 1988 through 1996 and was given the maximum 2-year sentence; however, the felony nonsupport statute was not enacted until 1993. On appeal, Price contended that the manner in which the felony nonsupport statute was applied violated the fundamental constitutional right to be free from ex post facto laws. The state argued that because Price failed to object at trial, the issue could not be raised on appeal. The issue of whether Price was convicted of felony nonsupport that occurred before the statute was enacted brought into question the fundamental fairness of Price's trial. The Supreme Court held that because a fundamental right was at issue, the common-law plain error doctrine applied despite Price's failure to preserve the issue at trial. A jury instruction allowed the jury to find Price guilty based on acts committed from 1988 through 1996 and thus subjected Price to increased punishment for conduct that occurred prior to enactment of the felony statute. This was an unconstitutional ex post facto application of the felony nonsupport law, constituting reversible error. St. v. Price, 2002 MT 284, 312 M 458, 59 P3d 1122 (2002).

Prosecutor's Comment Alleging Uncontradicted Evidence Erroneous When Defendant Who Asserted Right to Remain Silent Was Only Person Who Could Offer Contradictory Evidence — Error Harmless: Harrington was arrested for DUI, was read his Miranda rights, and chose to remain silent. Harrington contended that his due process rights and privilege against self-incrimination were violated by testimony elicited and statements made by the prosecution during trial. Although Harrington failed to preserve the issues in the District Court, the Supreme Court applied the plain error doctrine pursuant to its discretionary power enunciated in St. v. Finley, 276 M 126, 915 P2d 208 (1996), considering the totality of the circumstances and

evaluating the nature of the constitutional rights implicated, rather than the sufficiency of the evidence. The court decided that because no comment was made that Harrington at any time refused to give a statement or refused to testify and because the prosecutor did not insinuate that an innocent person would have given a statement or testified, no Doyle error occurred (see Doyle v. Ohio, 426 US 610 (1976)). However, the prosecutor did comment during rebuttal that there was no evidence to contradict the state's case, which was error as an improper reference to Harrington's decision not to testify because Harrington was the only person who could have offered contradictory testimony (see St. v. Hart, 154 M 310, 462 P2d 885 (1969)). To determine whether the error was prejudicial, the court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001). The error was considered a trial error rather than a structural error, and because the error concerned comment rather than evidence, the court went on to determine whether it was harmless and contributed to the conviction. In this case, the single comment that the evidence was uncontradicted was an isolated one, and there was no reasonable possibility that it contributed to Harrington's conviction given the fact that during closing, the prosecutor focused on the driving errors Harrington made before being stopped, the videotape of Harrington's field sobriety tests, the arresting officer's expertise, and the results of the preliminary breath test. Harrington's constitutional rights were not prejudiced by the improper reference to his decision not to testify. Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001).

Common-Law Plain Error — Defendant Must Demonstrate With Specifics That a Fundamental Constitutional Right Was Violated at Trial: Whipple claimed that the trial court erred in allowing five witnesses to testify as to the credibility of the testimony of two minors who testified that Whipple had sexually abused them. The Supreme Court stated that because claims of plain error are almost always raised for the first time on appeal, a defendant must do more than simply make a generalized claim that the defendant's rights were violated by the alleged error. See St. v. Finley, 276 M 126, 915 P2d 208 (1996). The Supreme Court stated that it would not exercise its power of common-law plain error review of alleged errors not objected to at trial because Whipple had not met his burden of demonstrating specifically how a constitutional right of his had been violated by an error of the trial court. St. v. Whipple, 2001 MT 16, 304 M 118, 19 P3d 228 (2001).

Prosecutor's Comments on Defendant's Post-Miranda Silence — Violation of Right to Due Process and Privilege Against Self-Incrimination Reviewable Under Plain Error Doctrine: At trial for deliberate homicide, the prosecutor commented on the defendant's post-Miranda silence in the opening statement, introduced testimony regarding the defendant's refusal to make a statement, and commented twice during the closing statement about the defendant's silence. The defense counsel did not comment or object at trial. The defendant did not testify at trial. The Supreme Court held that the defendant's due process rights and the privilege against self-incrimination were violated by the prosecutor's comments and that the issue was reviewable under the common-law plain error doctrine. The Supreme Court reversed and remanded. St. v. Sullivan, 280 M 25, 927 P2d 1033, 53 St. Rep. 1282 (1996), distinguished in St. v. Baker, 2000 MT 307, 302 M 408, 15 P3d 379, 57 St. Rep. 1297 (2000).

Appeal From Failure to Grant Self-Defense Instruction — Failure to Object: Assault defendant who failed to object to or offer other instructions regarding the "no aggressor" rule contained in the court's self-defense instructions could not, on appeal, raise the issue of failure to instruct on exceptions to that rule. The issue would not be addressed under the common-law plain error rule because declining review did not rise to the level of a manifest miscarriage of justice, did not leave unsettled the question of the fundamental fairness of the trial, and did not compromise the integrity of the judicial process. St. v. Gonzales, 278 M 525, 926 P2d 705, 53 St. Rep. 1015 (1996).

Sexual Abuse — Failure of District Court to Consider Sentencing Alternatives — No Objection — Sentence Not Illegal or Violation of Due Process: Swoboda pleaded guilty to sexual abuse of children, was classified as a nondangerous offender, and was sentenced to 15 years with the Department of Corrections. On appeal, she claimed as error the District Court's failure to consider alternatives to incarceration. The Supreme Court noted that she had not objected at sentencing to the District Court's failure and declined to review the judgment. The Supreme Court noted that in the past, it had made an exception and reviewed such a failure of the District Court when the state conceded the failure of the District Court or when the sentence was illegal. Here, however, the Supreme Court noted that the sentence was not beyond the District Court's jurisdiction. Citing St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep 310 (1996), the Supreme Court also held that the failure of the District Court was not a manifest miscarriage of justice

and would not leave unsettled the question of the fundamental fairness of the trial or the proceedings. St. v. Swoboda, 276 M 479, 918 P2d 296, 53 St. Rep. 478 (1996).

Common-Law Plain Error: Despite the clear language of 1-1-108 precluding application of the common law in cases in which the law is declared by statute, the doctrine of common-law plain error review by the Montana Supreme Court continues to exist to allow correction of errors not objected to at trial but that affect the fairness, integrity, and public reputation of judicial proceedings. The doctrine continues in spite of the passage of this section, Montana's plain error statute restricting the review of errors not objected to at trial. Although failing to address the applicability of 1-1-108, the Supreme Court nevertheless retained the inherent power and obligation to interpret the constitution, protect individual rights, prevent manifest injustice, and correspondingly review lower court decisions and actions for error on a selective case-by-case basis, as inherent in the appellate process, despite the statutory restrictions and legislative intent of this section. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), contrasted in St. v. Swoboda, 276 M 479, 918 P2d 296, 53 St. Rep. 478 (1996), and followed in St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), St. v. Pizzichiello, 1999 MT 123, 294 M 436, 983 P2d 888, 56 St. Rep. 499 (1999), and St. v. Hanson, 1999 MT 226, 296 M 82, 988 P2d 299, 56 St. Rep. 891 (1999). See also Seyferth v. St., 277 M 377, 922 P2d 494, 53 St. Rep. 698 (1996).

Common-Law Plain Error — Case-by-Case Review: Despite the passage of this section, Montana's plain error statute restricting the review of errors not objected to at trial, the doctrine of common-law plain error review by the Montana Supreme Court continues to exist to allow correction of errors not objected to at trial but that affect the fairness, integrity, and public reputation of judicial proceedings. The Supreme Court retains the inherent power and obligation to interpret the constitution, protect individual rights, prevent manifest injustice, and correspondingly review lower court decisions and actions for error. The power of such review is inherent in the appellate process itself. Thus, while acknowledging the constraints of this section, the Supreme Court will discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights even if no contemporaneous objection is made and notwithstanding the statutory criteria, in the class of cases when failure to conduct the review may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of trial proceedings, or compromise the integrity of the judicial process. The doctrine will be applied sparingly and on a case-by-case basis. Nevertheless, the necessity for contemporaneous objection to claimed error remains because this section will be applied, except in the class of cases mentioned above. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), followed in St. v. Monaco, 277 M 221, 921 P2d 863, 53 St. Rep. 604 (1996), St. v. Sullivan, 280 M 25, 927 P2d 1033, 53 St. Rep. 1282 (1996), St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996), St. v. Weaver, 1998 MT 167, 290 M 58, 964 P2d 713, 55 St. Rep. 668 (1998), St. v. Herrera, 1998 MT 173, 289 M 499, 962 P2d 1180, 55 St. Rep. 703 (1998), in which the Supreme Court refused to apply the plain error doctrine, St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), St. v. Pizzichiello, 1999 MT 123, 294 M 436, 983 P2d 888, 56 St. Rep. 499 (1999), St. v. Hanson, 1999 MT 226, 296 M 82, 988 P2d 299, 56 St. Rep. 891 (1999), Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001), St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), St. v. Dubois, 2006 MT 89, 332 M 44, 134 P3d 82 (2006), and St. v. Auld, 2006 MT 189, 333 M 125, 142 P3d 753 (2006). See also Halldorson v. Halldorson, 175 M 170, 573 P2d 169 (1977), St. v. Wilkins, 229 M 78, 746 P2d 588 (1987), St. v. Gray, 2004 MT 347, 324 M 334, 102 P3d 1255 (2004), and St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

Improper Comments by Prospective Jurors During Voir Dire — Prejudicial Effect Warranting Reversal: Comments made in the presence of the entire jury panel indicating that certain potential jurors not only knew the defendant but also were aware of the defendant's high propensity for violence were prejudicial, thereby poisoning the perspective of the entire jury panel in such a way that the court could not rectify the problem through admonishment or curative jury instructions and constituting reversible error. This opinion was narrowly drawn and reserved only for the most egregious and prejudicial juror comments—comments that indicate a bias that the juror cannot lay aside or comments that, when made in the presence of other prospective jurors, amount to inadmissible opinions about the defendant's character or propensities. The Supreme Court suggested that District Courts advise prospective jurors, before voir dire commences, not to volunteer the substance of any comments or opinions that they may have about the parties but rather to notify the court that they have information or an opinion about a party. The trial judge can then explore the substance of that information in camera and avoid any taint to the entire jury panel. St. v. McMahon, 271 M 75, 894 P2d 313, 52 St. Rep. 353 (1995), following principles established in Putro v. Baker, 147 M 139, 410 P2d 717

(1966), and followed in St. v. Hardaway, 1998 MT 224, 290 M 516, 966 P2d 125, 55 St. Rep. 936 (1998).

Prosecution Comment on Sexual Abuse in Opening Statement — Door Not Opened — Testimony Properly Excluded Under Rape Shield Law: Stuit was charged with sexual abuse of S.M., a minor. At trial, the District Court cautioned both the defense and prosecution that testimony concerning prior acts of abuse of S.M. would not be admitted. However, in an opening statement, the prosecution made reference to past sexual abuse of S.M. No objection was made by the defense at the time. Later, in a conference in chambers, the District Court noted that the statement came close to opening the door on the issue of past abuse, but ultimately ruled that the door had not been opened on the issue. The Supreme Court held that failure of defense counsel to make a contemporaneous objection waived the issue and that the doctrine of plain error did not apply under the statute. The Supreme Court also held that any evidence of prior abuse was inadmissible under the rape shield law. St. v. Stuit, 268 M 176, 885 P2d 1290, 51 St. Rep. 1238 (1994).

Limited Applicability of Plain Error Doctrine: Arlington contended that the prosecutor suppressed a victim's claim form, filed by the victim with the Department of Justice crime victims unit in order to obtain benefits, and that the suppression constituted plain error for which a new trial was warranted. Notwithstanding the fact that the issue was not raised at trial, the Supreme Court noted the limited applicability of the plain error doctrine, which exists to prevent manifest injustice by providing a remedy when a party's substantial rights have been infringed. The doctrine will be invoked only when necessary to ensure a fair and impartial trial. In this case, there was nothing in the claim form that was even remotely exculpatory as regards the criminal charges filed against Arlington or that would assist in his defense. Given that the claim form was a public document available to Arlington for the asking and that Arlington did not preserve a claim of error by including it in the record once it was obtained, there was no evidence of prosecutorial misconduct or prejudice, much less plain error. St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Petition to Revoke Filed After Period of Suspension — Question of Jurisdiction Properly Raised and Sentence Voided: The County Attorney's office petitioned for revocation of Voegele's suspended sentence 2 days after the term of the suspended sentence had expired. While Voegele rightfully asserted that allowing the tardy revocation petition was prejudicial to his punishment, he acknowledged that he was precluded from challenging the District Court's jurisdiction under subsection (2) of this section. However, the Supreme Court found that until Voegele obtained new counsel on appeal, no one was aware that the suspended sentence had expired. Under the plain error doctrine, the power of discretionary review was applied to address the arithmetic jurisdictional error and prevent manifest injustice. Voegele was therefore not barred from raising the jurisdictional issue, and the Supreme Court held that the imposition of sentence was void for lack of jurisdiction because the petition to revoke the suspended sentence was filed after the sentence had expired. St. v. Voegele, 243 M 222, 793 P2d 832, 47 St. Rep. 1183 (1990), following St. v. Wilkins, 229 M 78, 746 P2d 588 (1987). See also St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Use of Expert Testimony to Identify Victim of Sexual Abuse — Not Plain Error: Defendant argued that even though no objection was made at trial, the admission of expert testimony indicating a child had been sexually abused was improper because it was not scientifically reliable and constituted plain error. However, defendant presented no evidence that the testimony was prejudicial as to his guilt or innocence or that the alleged error met any of the criteria of subsection (2) of this section. Further, when expert testimony in child abuse cases has not been objected to at trial as improper, the Supreme Court will not entertain the issue on appeal. St. v. Reynolds, 243 M 1, 792 P2d 1111, 47 St. Rep. 1143 (1990), following St. v. Eiler, 234 M 38, 762 P2d 210 (1988).

Anonymous Tip — Hearsay — Plain Error: In the prosecution of defendant for conspiracy to commit arson and attempted criminal mischief, admission of the contents of an anonymous tip was error as the tip was hearsay. However, because defendant did not object to admission of the tip at trial, the inquiry of whether admission constituted reversible error extends only to determining whether the admission was plain error affecting substantial rights of the defendant under Rule 103, M.R.Ev. St. v. Cain, 220 M 509, 717 P2d 15, 43 St. Rep. 568 (1986).

Violation of Order Granting Motion In Limine: The "plain error" rule does not apply when only nonsubstantial rights of appellant are affected by testimony entered in violation of a motion in limine. St. v. Lias, 218 M 124, 706 P2d 500, 42 St. Rep. 1453 (1985).

Standard Self-Defense Instruction Given — Second Instruction Tailored to Facts Improper: In aggravated assault trial, the 9th instruction fully set forth the elements of self-defense and

the 10th instruction related to self-defense by one assaulted with fists, as defendant claimed he had been. The 10th instruction was repetitious and may have placed undue emphasis on the requirements for self-defense. On remand following reversal on another issue, the court recommended that the repetitious instruction not be given. St. v. White, 202 M 491, 658 P2d 1111, 40 St. Rep. 235 (1983).

Instructions — Elements of Crime — Plain Error Not to Instruct: The jury was not instructed on the statutory elements of the crime. The jury's instructions on the defendant's civil remedy, an agister's lien, permitted the inference, from his failure to pursue the civil remedy, that he was guilty of theft. In granting a new trial, the Supreme Court noted that the issue of jury instructions not offered or objected to at trial, usually a nonappealable issue, was reviewed here to determine if the jury was properly instructed. The failure to instruct on the elements of the crime constituted "plain error". Instructing the jury that each element of the crime had to be proved was insufficient if the elements were not given to the jury as well. St. v. Lundblade, 191 M 526, 625 P2d 545, 38 St. Rep. 441 (1981). However, in St. v. Smith, 228 M 258, 742 P2d 451, 44 St. Rep. 1503 (1987), the Supreme Court noted that due to the 1983 amendment of 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987), Lundblade is no longer authority under the theory of plain error not to instruct on elements of a crime.

NO ERROR FOUND

Any Defect Cured — No Mistrial: During a homicide trial, the judge grew dissatisfied with the pace of the trial and admonished counsel before retiring for the day. Hixon moved for a mistrial asserting that the judge's comments on "wasting time" deprived him of his right to a fair trial. Hixon contended that the judge's assertion that his statements were directed toward the state and his general apology the next day did not rectify the wrong done. Outside the presence of the jury the judge explained to counsel that his comments were directed towards the prosecution, given that the state had moved at an extremely slow pace. The next day the judge apologized to the jury for his comments and instructed the jury that no comment he made was intended in any way to express his opinion about the facts of the case or the verdict they should reach. The Supreme Court held that where the trial judge strikes improper statements from the record with an accompanying cautionary instruction to the jury, any error committed is presumed cured. There was no indication that Hixon was prejudiced by the judge's statements. St. v. Hixon, 2008 MT 365, 346 M 427, 197 P3d 918 (2008).

Prosecutor's Inaccurate Description of DNA Evidence — Curative Jury Instruction — No Error Requiring New Trial: Defendant contended that a new trial was warranted because the prosecutor inaccurately stated that the victim's and defendant's DNA were found together at the scene of an alleged sexual assault. The trial court agreed that the evidence was mischaracterized and gave a curative instruction that the jury was to disregard any statement that mixed DNA was found and denied defendant's motion for a new trial. On appeal, the Supreme Court affirmed on this point. Given the curative instruction, defendant did not demonstrate that the trial court acted arbitrarily without conscientious judgment or exceeded the bounds of reason in denying the new trial motion. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007).

Statute Prohibiting Impeding Traffic Not Vague or Fundamentally Unfair: Benders argued that 61-8-311, which prohibits driving in a manner that impedes traffic, is unconstitutionally vague and fundamentally unfair. The Supreme Court held that none of the circumstances of Benders' case were applicable to the constitutional claim, but considered whether the claim warranted review under the plain error doctrine on the issue of unfairness. The fairness issue was based on the assertion that it was unfair to convict Benders of impeding traffic when there was no finding that Benders had violated a minimum speed limit. However, the relevant determination under 61-8-311 is not the speed of the vehicle, but the effect of the slow speed on the flow of traffic. Therefore, Benders failed to demonstrate that the statutory language was vague, much less that it amounted to a fundamental unfairness resulting in plain error. The challenge to the constitutionality of 61-8-311 failed. St. v. Benders, 2006 MT 275, 334 M 231, 146 P3d 751 (2006).

Definition of Sexual Contact Allowing Two Means of Satisfying Mental State, Not Two Separate Offenses: Following trial for sexual assault, Clark asserted that the District Court erred in failing to instruct the jury that it was required to unanimously find that Clark had subjected his stepdaughter to sexual contact for purposes of either 45-2-101(67)(a) or (67)(b) and that failure to do so should be reviewed under the plain error doctrine. The Supreme Court held that the definition allows for two means of satisfying the purposely or knowingly element of sexual contact, rather than articulating two separate offenses. Therefore, the District Court did not err in instructing the jury as to any unanimity required regarding the elements of sexual

contact, and the Supreme Court declined to implement the plain error doctrine to discuss the issue. St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), distinguishing St. v. Weldy, 273 M 68, 902 P2d 1 (1995), and St. v. Weaver, 1998 MT 167, 290 M 58, 964 P2d 713 (1998).

Prosecutor's Closing Statement Considered in Context — Burden of Proof Not Shifted: In closing argument, the prosecutor told the jury that this was a case in which the jury had to decide between two conflicting stories, rather than a case in which a defendant chose to remain silent and the jury had to decide whether the prosecution met its burden of proof. Defense counsel immediately objected based on the prosecutor's implication that the state did not have to prove the elements of the crime. The prosecutor then reiterated that the state did have the burden of proving the elements of the crime. Taken in context, the closing statement did not impermissibly shift the burden of proof and deny defendant a fair trial, and the conviction was affirmed. St. v. Roubideaux, 2005 MT 324, 329 M 521, 125 P3d 1114 (2005), following St. v. Hart, 191 M 375, 625 P2d 21 (1981), and followed in St. v. Kolb, 2009 MT 9, 349 M 10, 200 P3d 504 (2009).

No Prejudice in Property Valuation When Less Than Full Restitution Required: The total losses incurred by individuals and businesses in a fire started by Gilbert was $5,721,684.57. In calculating the value of a building destroyed in the fire for establishing restitution, the District Court used replacement value rather than actual value. Gilbert contended that failure to use actual value was reversible error under St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000). The Supreme Court agreed that actual value should have been used but that Gilbert failed to show that any prejudice resulted from the error. Gilbert's presentence investigation report adequately documented Gilbert's financial resources and future ability to pay restitution, and Gilbert was ordered to pay only $24,000 in restitution, which was but a minuscule fraction of the losses. Any error by the District Court in using replacement value for the building did not prejudice Gilbert because he was not required to pay full restitution. St. v. Gilbert, 2004 MT 368, 324 M 530, 106 P3d 127 (2004), following St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004).

No Prejudice Warranting New Trial on Grounds of Cumulative Error: Larson contended that he was denied a fair trial and was entitled to a new trial because of the cumulative errors argued in his appeal. The doctrine of cumulative error requires reversal of a conviction when a number of errors taken together prejudice a defendant's right to a fair trial. However, in this case, the Supreme Court declined to apply the doctrine after reviewing all the issues on appeal. There was no prejudice shown, there was no abuse of judicial discretion, none of the evidentiary rulings were erroneous, and there was sufficient evidence to support the conviction. Larson's mere allegations of error without proof of prejudice were insufficient to satisfy the doctrine, and Larson's conviction was affirmed. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

No Prejudice in Change of Venue: The trial court granted Bar-Jonah's motion for a change of venue from Great Falls to Butte. Even though the venue change was requested by Bar-Jonah, following conviction, he asserted that pretrial publicity in Butte precluded a fair trial. The Supreme Court found that Bar-Jonah failed to demonstrate prejudice by the decision to hold the trial in Butte and declined to reverse the judgment absent a showing that any error in changing the venue was prejudicial. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Jury Instruction Disallowing Evidence of Intoxication in Determining State of Mind Not Error — Full and Fair Instructions on Law: Following Raugust's criminal trial, the court instructed the jury that it could not consider evidence of intoxication for any purpose, pursuant to 45-2-203. Raugust maintained on appeal that the instruction was in error because depriving him of the ability to admit intoxication evidence lessened the state's burden of proof and confused the jury, in violation of his due process rights. However, the error urged on appeal was not contained in the objection made to the instruction during the final settling of jury instructions, constituting waiver of the argument on appeal. Moreover, the plain error doctrine did not apply because review under that doctrine was requested for the first time on appeal. Here, the jury was instructed regarding: (1) the elements of each offense charged and the state's burden of proving each element beyond a reasonable doubt; (2) the definition of the applicable mental states—purposely and knowingly; (3) the fact that the existence of a mental state may be inferred from the acts of the accused and from the facts and circumstances connected with the offense; (4) the difference between direct and circumstantial evidence; (5) witness credibility; and (6) the need for a unanimous verdict. Read as a whole, these instructions fairly and fully instructed the jury on the law applicable to the case, and giving the instruction disallowing the defense of intoxication was not erroneous. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Hagen, 283 M 156, 939 P2d 994 (1997).

Evidence of Victim's Character and Prior Violent Act Inadmissible as Element of Self-Defense: Sattler claimed that his homicide of Martinson was in self-defense and sought to introduce

evidence of a prior act of violence that was committed by Martinson 8 years before his death as proof of Martinson's aggressiveness and Sattler's need to use force in his defense. However, nothing in 45-3-102 relates directly to the question of the identity of the aggressor as an essential element of the justifiable use of force defense. Further, evidence of the prior act did not support any claim that the force used against Martinson was reasonable based on Sattler's knowledge of Martinson's history of violence. Also, the act was remote in time, and the lapse of time between the prior act and Martinson's death rendered the probity of the act minimal at best. Refusing to admit the evidence would not have resulted in prejudicial and reversible error or affected Sattler's substantial rights in light of the other evidence of record. Thus, reversal was not warranted. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998), distinguished in Red Lodge v. Nelson, 1999 MT 246, 296 M 190, 989 P2d 300, 56 St. Rep. 955 (1999). See also St. v. Benton, 251 M 401, 825 P2d 565 (1992).

Judge's Questions About Foreigner's Immigration Status as Showing Racial Bias: The District Court erred in asking Ahmed, a resident and native of Bangladesh and a student at MSU-Bozeman, about his immigration status in a trial for aggravated kidnapping and assault but cured the error by sustaining an objection and striking the questioning from the record. Ahmed offered no specific evidence that the questioning showed racial bias by the judge, and the Supreme Court would not presume bias from the mere posing of the questions. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Racial Bias of Judge Who Illegally Made Deportation Condition of Parole Not Shown by Mere Unsupported Speculation: Upon an aggravated kidnapping and assault conviction of a native of Bangladesh, the court ordered deportation as a condition of parole. This was an illegal condition but did not alone show the judge was racially biased against defendant. A claim of bias was not upheld when it was supported by mere speculation or conjecture by defendant. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Impeachment of Verdict With Juror Testimony That .357 Magnum Handgun Cannot Be Rapidly Fired — Defense Claim That Victim Shot Himself: The trial court properly refused to allow defendant to impeach the verdict with juror testimony that one juror told the others that he knew that a .357 magnum handgun could not be fired rapidly. Defendant argued that this allowed the jury to conclude that defendant's theory that the victim shot himself was inherently incredible. Rule 606, M.R.Ev. (Title 26, ch. 10), does not allow inquiry into the internal mechanisms of a jury's decisionmaking process. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Judge's Failure to Inform Defense of Juror Contact With Defendant: It was not error for the judge to fail to immediately notify the defense counsel after the bailiff told the judge that a juror had told the bailiff that, during the trial, she served defendant coffee at a cafe in which she was a waitress. Defendant was given a hearing on the matter after trial and could not show prejudice. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Waitress-Juror's Statements to Jury That She Served Defendant and Report of Dream — Not Juror Misconduct: There was no juror misconduct or prejudice to defendant when a juror told other jurors that she twice served defendant as a waitress during the trial, that he made her uncomfortable, and that she had a dream in which they found defendant guilty and in which he had a gun and shot his counsel, grabbed her, and ran off with her. Therefore, a new trial was properly denied. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Failure to Object — No Plain Error in Admitting Mug Shot in Evidence: Absent proof that his substantial rights were prejudiced, appellant who did not object during the trial was not entitled to review of introduction into evidence of his mug shot, which he claimed indicated to the jury that he had a past criminal record. Even under the plain error doctrine, which provides a remedy to prevent manifest injustice when objection was not made below, reversal was not warranted. A mug shot is generally admissible, at the discretion of the judge, if disguised, as it was here, to remove law enforcement information. Appellant could not prove prejudice because eyewitnesses to the theft could not absolutely identify defendant from the mug shot, his own testimony showed that he in fact had a past criminal record, and his defense was that he was not the person who committed the theft. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992).

No Prejudice in Permitting Jury to Hear Discussion on Evidence Later Held Inadmissible: Defendant contended he was highly prejudiced when the trial court allowed the jury to hear discussion on admissibility of a transcript of a tape recording and on a motion to dismiss, pointing out that no jury instruction was given regarding the problem. The Supreme Court, noting that the transcript was not admitted into evidence, found no reason to believe that the jury would understand that it could consider material not in evidence. An instruction would only have told the jury to disregard what it had not seen; therefore, there was no prejudice in the

jury's witnessing of the exchange regarding the transcript. St. v. Moreno, 248 M 91, 809 P2d 574, 48 St. Rep. 339 (1991).

Disallowance of Cumulative Character Evidence Not Reversible Error — Offer of Proof: Defendant was not allowed to impeach a witness directly through introduction of character evidence. Defendant was allowed to make an offer of proof, but he made no statement as to what facts were to be proved or that an alternative manner would be less objectionable. The evidence defendant attempted to present was cumulative in that it came out in various forms, directly and indirectly, throughout the trial after the witness testified. The exclusion of the character evidence affected no substantial right and was not reversible error. St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988).

Evidence Overwhelming to Sustain Mitigated Deliberate Homicide Conviction: On appeal of his conviction of mitigated deliberate homicide, defendant claimed that the shooting that was the basis of his conviction was accidental. The Supreme Court affirmed the conviction, ruling that the evidence was overwhelming that the shooting was not an accident since all of the witnesses except defendant and his wife testified that defendant had the gun in both hands, arms extended. The gun was pointed toward the decedent immediately after the shot was fired. St. v. Sage, 221 M 192, 717 P2d 1096, 43 St. Rep. 738 (1986).

Mere Allegations of Prejudice Insufficient to Satisfy Cumulative Error Doctrine: Defendant contended that the overall demeanor of the prosecution and the District Court, together with other alleged errors, required a reversal of his conviction; however, he articulated no particular comments or remarks and alleged no prejudice to his substantial rights. The Supreme Court has acknowledged the cumulative error doctrine, which is the accumulation of errors which prejudice a defendant's right to a fair trial, but noted that mere allegations of error without proof of prejudice are insufficient to satisfy the doctrine. The resolution of the alleged errors indicated no error meriting reversal of this case, and the court held that defendant failed to carry his burden of showing prejudice and declined to reverse his conviction on grounds of cumulative error. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986). See also St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994), St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004), St. v. Kearney, 2005 MT 171, 327 M 485, 115 P3d 214 (2005), St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005), and St. v. Racz, 2007 MT 244, 339 M 218, 168 P3d 685 (2007).

Robbery With Gun Apparently Under Coat — Sentence of Thirty Years Permissible: Defendant claimed that his 30-year sentence for robbery of a convenience store was disproportionate to the facts (which included a finding that he had his hand under his coat and the store clerk believed he had a gun). The sentence was within the permissible statutory range, there was no clear abuse of discretion, and the sentence was properly reviewable in the Sentence Review Division, not the Supreme Court. St. v. Lewis, 220 M 418, 715 P2d 1064, 43 St. Rep. 492 (1986), following St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

Failure to Object to Jury Instruction — No Show of Prejudice — No Reversible Error: Appellant failed to object at the time the court informed the parties that it would not give the omnibus instruction or reread the preliminary jury instructions and would instead send the preliminary instruction with the final instructions to the jury. Because of the failure to make a timely objection and failure upon appeal to show any prejudice affecting substantial rights, there was no reversible error. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986). See also St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Six and a Half Weeks to Prepare for Burglary-Theft Trial — Sufficient Time: There was nothing to indicate that, when counsel for defendant convicted of two counts of burglary and one of theft had 6 ½ weeks to prepare for trial, the attorney had insufficient time to adequately prepare and nothing to indicate that effective assistance of counsel was denied. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985).

Prosecutorial Discretion — Deputy's Prior Representation: The Lemmons were divorced after 20 years of marriage. Leroy was seeing Donna Myers, and Koralyn was seeing John Sweeting. Myers and Sweeting had just ended a personal and business relationship. Sweeting asked Koralyn to get a briefcase out of Leroy's truck. The briefcase actually belonged to Myers. Leroy and Myers returned to the truck and found the briefcase missing. They concluded Koralyn had taken it since the truck was not broken into. Leroy and Myers went to Koralyn's home. She heard them drive up and put a gun in the waistband of her pants. Leroy and Koralyn fought, and Leroy struck her in the head with the gun. Leroy and Myers put Koralyn on the floor of the truck and went to the Sheriff's department. The Sheriff was not immediately available, so Leroy and Myers left, with Koralyn still on the floor of the truck, to find Sweeting. A high speed chase ensued in which the cars rammed together and gunshots were exchanged. The chase ended when Leroy's transmission caught fire. The charges arising from the pursuit were dropped. Leroy was charged

with aggravated assault and kidnapping. He was convicted of assault and unlawful restraint. Leroy contended the County Attorney abused his discretion in not acting on his complaints against Koralyn and for not disqualifying the office since a deputy had represented Koralyn in the divorce. On appeal, the Supreme Court held that the abuse of discretion issue had not been raised at trial and could not be raised on appeal. The court also stated that selectivity in enforcement is not a violation of the U. S. Constitution if the selection is not based on an unjustifiable or arbitrary classification. The court construed DR 5-105(D) to concern conflicts in representation, not prosecution. Also, the court stated that it was not established that the County Attorney would have been disqualified from the prosecution for representing Koralyn, let alone a deputy. St. v. Lemmon, 214 M 121, 692 P2d 455, 41 St. Rep. 2359 (1984), followed, with regard to the broad applicability of prosecutorial discretion, in St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999).

Criminal Mischief for Damage to One's Own Property to Defraud Insurer — Relevance of Pictures of Property: Defendant was charged with criminal mischief in that he purposely drove his pickup over a steep bank to wreck it so he could collect from his insurance company. Later the pickup was vandalized. Pictures of the pickup taken after the vandalism were properly admitted as proof of defendant's motive, and their probative value was substantial and was not outweighed by prejudice to defendant, who claimed that they should not have been admitted because they were evidence of other crimes as well as the one with which he was charged and that he had not been charged with vandalism. St. v. Gray, 207 M 261, 673 P2d 1262, 40 St. Rep. 2023 (1983).

Issue Created by Complainant's Counsel: Defendant convicted of mitigated deliberate homicide could not successfully claim prejudicial error occurred when the issue of his failure to obtain a concealed weapon permit arose, for the issue was created by his own counsel during opening argument. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982).

Discretion of Court — Different Sentences for Co-Offenders: On appellate review, undermining the legality of a sentence requires a showing that the judge abused his discretion in the sentencing process. There was no abuse of discretion where defendant and another were separately convicted of the same burglary, the other person was offered and accepted a bargain for a 3-year deferred sentence, and defendant was offered a bargain for a 10-year sentence with 5 years suspended, refused it, and was tried, convicted, and sentenced to 10 years. There was a strong possibility that his alibi defense was frivolous, and he had a prior felony record. St. v. White, 200 M 123, 650 P2d 765, 39 St. Rep. 1619 (1982).

Inquiry as to Time Served — Letter to Warden From Judge: Letter written by judge who revoked suspended sentence to warden of penitentiary, inquiring as to prison time to be credited against sentence, was not prejudicial. The evidence indicated the letter was written at defendant's instigation and that defendant complimented the judge on judge's efforts in defendant's behalf. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Failure to Object to Jury Instructions — Issue Precluded on Appeal: Where the defendant was convicted of felony murder, aggravated kidnapping, and robbery and either failed to object at trial to certain instructions to the jury or concurred in those instructions, the Supreme Court found the defendant was precluded from raising alleged errors in those instructions for the first time on appeal. The Supreme Court also found that the objections had no merit as the instructions objected to, or instructions substantially similar to them, had been approved in St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 1134 (1979). St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Instruction That Rape Easily Charged and Difficult to Prove Allowable: Where the record showed evidence corroborating the victim's testimony and no evidence of any desire for revenge, the District Court did not err in not giving the following instruction: "You are instructed that no charge can be more easily made and none is more difficult to disprove than that of rape. The jury is instructed that they must examine the complainant's testimony with caution and be satisfied with all aspects thereof beyond a reasonable doubt." St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Sexual Assault — Resistance — Proper Instruction: In a sexual intercourse without consent case, the jury was instructed that the victim need only resist to the extent that is reasonable and that continued resistance is not necessary to show that the act was done without consent. That was a correct statement of the law, and the District Court properly refused defendant's proposed instructions. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Prosecutor's Remarks on Lack of Defense Case Held Permissible: The defendant appealed his conviction for theft and alleged that the prosecution's closing statement included impermissible remarks. The County Attorney's comments in part referred to the fact that the defense presented

no case at all. Certainly the prosecution, as an adversary for the state, cannot be prohibited from arguing the strength of its case to the jury. The manifest fact that the defense presented no testimony of its own may be detrimental to the defendant, but that fact cannot deny the prosecution its right to stress the strength of its own evidence. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Suppression of Confession — Voluntariness — Waiver of Right to Counsel After Making Request: To determine whether a confession should have been suppressed, it had to be determined whether the confession was voluntary and whether there was an unconstitutional denial of the right to counsel. In so doing, the following questions had to be answered: What was the totality of the circumstances? Was there effective assertion of the right to counsel, and if so, was there an effective waiver later? Since the evidence answered a large number of the requisite questions about the circumstances, the decision of the trial court was held not to have clearly contravened the weight of the evidence and its holding of voluntariness was upheld. Since any indication by a defendant in any manner that he wishes to consult with an attorney suffices, and evidence showed the defendant had met this requirement, the trial court erred in concluding that there was ineffective assertion of the right to counsel. After adopting the rule that a defendant can validly waive the right to counsel after making a request for counsel, the Supreme Court found the trial court properly found that the State had carried its "heavy burden" of showing waiver of counsel. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979); certiorari granted in Blakney v. Mont., 451 US 1013, 69 L Ed 2d 384, 101 S Ct 2999 (1981), and judgment vacated and case remanded for further consideration in light of Edwards v. Ariz., 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880 (1981); affirmed on remand in St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Voluntariness of Confession — Burdens of Proof — Harmless Error: A trial judge can properly require a party moving for suppression of evidence (involuntary confession) to initiate suppression hearing proceedings. The rationale for such a procedure is the requirement that the movant establish a prima facie case that a constitutional infringement has occurred. Once this has been accomplished, the ultimate burden of proving the propriety of the State's action (obtaining a confession) shifts to the State, notwithstanding 46-13-301(4), which is unconstitutional in that it requires defendant to prove that a confession or admission was involuntary. Thus, the District Court did not err in requiring appellant to present his evidence first at the suppression hearing but did err in putting the ultimate burden on the defendant at the hearing. The Supreme Court, however, upheld the District Court's denial of the motion to suppress because its error was harmless beyond a reasonable doubt. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979). [Annotator's Note: A 1981 amendment requires the state to prove by a preponderance of the evidence that the confession or admission was voluntary. Certiorari was granted in Blakney v. Mont., 451 US 1013, 69 L Ed 2d 384, 101 S Ct 2999 (1981), and the judgment vacated and the case remanded for further consideration in light of Edwards v. Ariz., 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880 (1981). The court affirmed its original decision on remand, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).]

Motion to Suppress Not Timely — Waiver: The defendant's failure to make a timely motion to suppress evidence waived the search and seizure issue for appeal, notwithstanding his objection to the introduction of the evidence seized. St. v. Gallagher, 162 M 155, 509 P2d 852 (1973).

Absence of Prospective Juror: The failure of a properly notified juror to be present when the jury was impaneled did not invalidate the trial as the defendant had the right only to reject jurors and not to select any particular juror. St. v. Moran, 142 M 423, 384 P2d 777 (1963).

Waiver of Error — Approval of Instructions on Subject: Objection to references by the County Attorney as to the nature of the trial, an appeal from Justice's Court, claimed as prejudicial error in the District Court, was waived by counsel for the defendant when he approved instructions to be given by the District Court which included reference to Justice's Court proceedings and thereafter obtained a deletion from the instructions of the phrase which read "and was found guilty following a jury trial". St. v. Gilbert, 139 M 204, 362 P2d 221 (1961).

Objection That Facts Do Not Constitute an Offense — When Taken: Under former law, the objection that the facts stated in an information do not constitute a public offense could be taken by demurrer, at the trial under a plea of not guilty, or after the trial in arrest of judgment. St. v. Smith, 58 M 567, 194 P 131 (1920).

Verdict Contrary to Law or Evidence: An alleged error in an instruction will not be reviewed on appeal when the only ground designated is that the verdict is contrary to the law and evidence. St. v. Gawith, 19 M 48, 47 P 207 (1896), overruled in St. v. Mason, 24 M 340, 61 P 861 (1900).

HARMLESS ERROR

Harmless Error for Detective Nonexpert to Testify Regarding Genuineness of Handwriting: The District Court allowed a detective to testify in Dewitz's trial regarding handwriting samples that the detective believed were from Dewitz. However, the detective was not a handwriting expert and was not familiar with Dewitz's writing outside the litigation, so the testimony was improperly admitted. Nevertheless, the Supreme Court concluded that the error was harmless, based on the existence of other admissible evidence that proved the same facts. Thus, Dewitz's right to a fair trial was not prejudiced. St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009).

Failure of State to Disclose Findings of Forensics Expert in Homicide Trial — Harmless Error: Morrisey retained a forensics expert to testify during Morrisey's homicide trial. The state had a forensics expert as well, and Morrisey moved for disclosure of the state's expert's findings. The state declined to disclose the findings on grounds that its expert would not be called as a witness during the state's case in chief, but only to rebut Morrisey's expert. The trial court denied Morrisey's discovery motion. Following trial, Morrisey appealed on grounds that the state violated 46-15-322 by failing to disclose its expert's conclusions. The Supreme Court agreed that under 46-15-322(1)(c), the prosecution was required to disclose the written report of the state's expert who examined the evidence, regardless of whether the expert was a witness in the state's case in chief, and noted that by refusing the disclosure request, the prosecution bound itself not to call the expert as a witness. When the state subsequently called its expert to give an opinion on the evidence, that testimony was objectionable. However, Morrisey had the opportunity to cross-examine the state's expert at length, so any error in allowing the expert's testimony was not prejudicial and was considered harmless. The trial court was affirmed. St. v. Morrisey, 2009 MT 201, 351 M 144, 214 P3d 708 (2009).

Admission of Officer's Personal Observation Testimony Cumulative and Harmless: At Foston's trial for distribution of dangerous drugs, the trial court, pursuant to Rule 803, M.R.Ev., admitted testimony by an officer that conversations overheard between Foston and a confidential informant were consistent with drug transactions. Foston appealed on grounds that the testimony constituted plain error. The Supreme Court noted that the testimony was admissible under Rule 701, M.R.Ev., as a statement of the officer's personal observation. The court further found that even without the officer's testimony, there was ample evidence from which the jury could conclude that Foston was selling drugs, so the testimony was cumulative and harmless if it was error at all. St. v. Foston, 2009 MT 191, 351 M 85, 209 P3d 262 (2009).

Defendant's Absence From In-Chambers Trial Conferences Not Considered Prejudicial — No New Trial Based on Lack of Fair Trial: At Price's trial for sexual intercourse without consent, Price was excluded from 11 in-chambers conferences. Price contended that his absence from the conferences violated his right to be present at all criminal proceedings against him and that he was therefore denied a fair trial. The Supreme Court assumed for purposes of analysis that the conferences constituted critical stages of the trial and that Price did not validly waive the right to be present at the conferences. Nevertheless, the court concluded that failure to include Price in the conferences at worst constituted trial error, rather than structural error that would require automatic reversal, so the court examined the record to determine whether Price was prejudiced and concluded that he was not. The record was not ambiguous as to what occurred at the conferences, and nothing that occurred at the conferences concerned or affected the framework within which Price's trial proceeded or necessarily rendered the trial fundamentally unfair. The one conference at which Price particularly contended that his presence should have been required was one in which a juror expressed concern regarding possible bias toward Price. However, Price's concern was irrelevant when the juror was removed from the jury. After review of the complete trial record, the court concluded that Price's absence from the conferences did not cause any conceivable prejudice depriving Price of a fair trial. Absent reversible error, the District Court was affirmed. St. v. Price, 2009 MT 129, 350 M 272, 207 P3d 298 (2009). See also St. v. Kennedy, 2004 MT 53, 320 M 161, 85 P3d 1279 (2004), St. v. Mann, 2006 MT 160, 332 M 476, 139 P3d 159 (2006), and St. v. Matt, 2008 MT 444, 347 M 530, 199 P3d 244 (2008).

Error for District Court to Impose Parole Conditions for Felony DUI — Error Harmless Given That No Parole Available: The District Court sentenced Kampf to 13 months with the Department of Corrections for felony DUI, followed by a suspended term of 2 years with the Department. The court then attached 25 conditions on the sentence during any term of parole or probation. Kampf contended that the court was without authority to impose conditions on any time period when Kampf might be released on parole. Citing St. v. Burch, 2008 MT 118, 342 M 499, 182 P3d 66 (2008), the Supreme Court agreed. Other than in limited and expressly authorized instances, such as for sexual and violent offenders, sentencing courts do not have a

residual or inherent authority to generally impose parole conditions. Felony DUI is not a sexual or violent offense, so the District Court had no authority to impose parole conditions. However, pursuant to 61-8-731, the imposition or execution of the 13-month sentence for felony DUI may not be deferred or suspended and the offender is not eligible for parole, so even though Kampf's sentence containing parole conditions was illegal, the error was harmless because parole was unavailable. St. v. Kampf, 2008 MT 198, 344 M 69, 186 P3d 223 (2008).

Trial Error in Admitting Written Witness Statements Based on Failure to Show That Prior Statements Made Before Alleged Motive to Fabricate — Error Harmless: At McOmber's trial for felony solicitation to issue a bad check, the trial court admitted a written statement and a police interview transcript made by a testifying witness. Admission of the evidence as a prior consistent statement was error because the state failed to show that the statements were made before the witness's alleged motive to fabricate occurred. However, pursuant to the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), the error was trial error rather than structural error and was therefore subject to harmless error review. Upon review, the Supreme Court concluded that the state had demonstrated, qualitatively and in comparison with the witness's testimony, that there was no possibility that the erroneously admitted prior consistent statements contributed to McOmber's conviction, so the error was harmless, and the conviction was affirmed. St. v. McOmber, 2007 MT 340, 340 M 262, 173 P3d 690 (2007).

Prosecutor's Closing Comments Improper but Not Egregious — Failure of Counsel to Object Not Ineffective Assistance: On appeal, defendant argued that the prosecutor's comments that the prosecutor did not put any stock in the defense theory was an impermissible expression of personal opinion about the defendant's credibility and that defense counsel erred by failing to object to the comments. The Supreme Court agreed that the comments were improper, but did not conclude that the comments rose to a level of egregiousness that prejudiced defendant or that rendered the trial unfair, so any error by defense counsel in failing to object was harmless. St. v. Tennell, 2007 MT 266, 339 M 381, 170 P3d 965 (2007).

Enhanced Sentence for Use of Weapon — Apprendi Applied Retroactively Under Harmless Error Test — Enhanced Sentence Without Unanimous Jury Finding Harmless Error: After Adams received an enhanced sentence for use of a weapon during an aggravated assault, Adams appealed on grounds that there was insufficient evidence to support a finding that a weapon was used and that the enhanced sentence violated due process because there was no separate jury finding that a weapon was used, as required by Apprendi v. N.J., 530 US 466 (2000). The 2001 Legislature updated the law to address the Apprendi requirement, but as it read in 1997 during Adams's sentencing, 46-1-401 did not require a separate jury finding, so Adams argued that 46-1-401 was therefore unconstitutional. The Supreme Court held that Apprendi imposes a new obligation on the state and is thus a new rule that applies retroactively to cases pending on direct appeal or not final at the time that the new rule was issued, so Apprendi applied retroactively to Adams's direct appeal. Nevertheless, the Supreme Court affirmed the sentence on both issues. First, there was uncontroverted evidence that a weapon was involved in the crime. Second, the Supreme Court applied Neder v. U.S., 527 US 1 (1999), to determine the proper test to apply when a trial court fails to instruct the jury to make a finding of materiality. Under Neder, the proper test is the harmless error test, i.e., whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Thus, in this case, the question was whether, beyond a reasonable doubt, Adams would have received an enhanced sentence based on the display or use of a weapon had the question been submitted to the jury. Given evidence that a gun was used was uncontroverted, the result would have been the same, so any error in failing to present the question to the jury was harmless. Adams v. St., 2007 MT 35, 336 M 63, 153 P3d 601 (2007), applying St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001).

Failure of Trial Court to Rule on Motion to Dismiss Not Violative of Due Process Rights — Plenary Review of Constitutional Question: Following a sentencing hearing, Smerker simultaneously filed notice of appeal to the Supreme Court and a motion to dismiss a felony DUI charge on grounds that two prior misdemeanor DUI violations were constitutionally invalid and could not be used to enhance the current charge to a felony. The sentencing court declined to rule on the motion to dismiss, which Smerker contended was a violation of due process rights. The Supreme Court disagreed. Smerker's arguments were based on documentary evidence related to the prior offenses, and the Supreme Court is in as good a position as a District Court to judge the weight of documentary evidence. Therefore, the Supreme Court exercised plenary review of the constitutional validity of the prior convictions. Because the Supreme Court could adequately address the issue, the District Court's failure to rule on the motion to dismiss did not affect Smerker's substantial due process rights. St. v. Smerker, 2006 MT 117, 332 M 221, 136 P3d 543 (2006).

Personal Possession of Pipe Insufficient Probable Cause to Search Vehicle — Evidence in Plain View in Vehicle Sufficient Probable Cause for Subsequent Search of Residence: When Griffin was lawfully arrested for driving without a license, the arresting officer found a pipe in Griffin's pocket that, in the officer's opinion, contained drug residue. The officer then obtained a search warrant for Griffin's truck. When approaching the truck, the officer observed items in plain view in the open truck bed that could be used to manufacture methamphetamine. Pursuant to another search warrant based on the evidence in the truck bed, officers searched Griffin's residence and found a drug lab that was booby-trapped with explosives. Griffin moved to suppress all the evidence because the first search warrant was issued without probable cause. The motion was denied, but on appeal, the Supreme Court agreed that the only evidence supporting the vehicle search warrant—the existence of a pipe on Griffin's person and the fact that Griffin recently exited the truck—provided insufficient probable cause for a warrant to search the truck. Just because a person has a pipe in a pocket that contains untested white residue does not mean that the person's vehicle will contain evidence of a drug offense. However, in this case, the majority of evidence seized from the truck was in plain view in the truck bed. Griffin had no expectation of privacy regarding items in plain view, nor was a warrant required to seize the items in the truck bed. Therefore, any error in issuing the search warrant for the truck was harmless and not prejudicial. Additionally, the lawfully seized evidence in the truck bed was sufficient to support a finding of probable cause for issuance of another warrant to search Griffin's residence. Denial of Griffin's motion to suppress was affirmed. St. v. Griffin, 2004 MT 331, 324 M 143, 102 P3d 1206 (2004).

Admission of Allegedly Erroneous Evidence Regarding Charge for Which Defendant Acquitted — Harmless Error: Teters was charged with sexual intercourse without consent and with intimidation. The trial court allowed Teters' wife to testify that Teters was abusive, and Teters asserted on appeal that admitting the testimony was erroneous. The Supreme Court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine whether the alleged error was fundamental and automatically reversible or trial error and reversible if found to be prejudicial. The alleged error here was trial error. Part two of the Van Kirk test requires a showing of a reasonable possibility that the erroneously admitted evidence contributed to the conviction. In this case, the wife's testimony related only to the intimidation charge, and Teters was acquitted of intimidation, so any error in allowing the testimony was harmless. St. v. Teters, 2004 MT 137, 321 M 379, 91 P3d 559 (2004).

Exclusion of Testimony by Newspaper Editor and Reporter — Harmless Error: Defendant subpoenaed a newspaper editor and a reporter who had interviewed defendant's assault victim, but the District Court quashed the subpoenas pursuant to the Media Confidentiality Act, Title 26, ch. 1, part 9. Defendant contended that the District Court's action deprived him of the right to compel the attendance of witnesses and that his constitutional right should prevail over the media shield statutes. However, the state met its burden of showing that defendant was not prejudiced by the trial error because defendant was able to introduce the same evidence during cross-examination of the victim and made no additional offer of proof demonstrating the additional evidence that defendant sought to introduce through the editor and reporter. The media testimony would have added little or nothing to the report in the newspaper and other evidence introduced at trial. Absent a reasonable possibility that excluding the testimony contributed to defendant's conviction, quashing of the subpoenas was affirmed. St. v. Slavin, 2004 MT 76, 320 M 425, 87 P3d 495 (2004), followed in St. v. Kolb, 2009 MT 9, 349 M 10, 200 P3d 504 (2009).

Allowing Investigating Officer Witness to Remain in Courtroom — Harmless Error: Defendant requested that all witnesses be excluded from the courtroom during trial, but the trial court allowed a police officer who investigated the crime and who was a state witness to remain in the room when all other witnesses were excluded. Although it was error to allow the officer to remain and hear the testimony of the other witnesses, the Supreme Court applied St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), in determining that the trial error in this instance was harmless because the officer's presence did not prejudice defendant's case. St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004), overruled in Faulconbridge v. St., 2006 MT 198, 333 M 186, 142 P3d 777 (2006), to the extent that a valid designated representative may not both remain in the courtroom and testify.

Character Evidence Improperly Admitted — Harmless Error: Defendant was charged with manufacture of dangerous drugs and sex crimes. The drug charge was severed, and defendant was convicted. When the sex crimes came to trial, the District Court allowed evidence of defendant's drug use. Defendant contended that the evidence was improperly admitted as bad character evidence because the state failed to meet the procedural requirements of the modified

Just rule. The state asserted that the evidence was not admitted as character evidence, but rather admitted pursuant to the transaction rule because the drug use explained the circumstances surrounding the alleged sex offenses. The Supreme Court held that although the challenged evidence may have been relevant to explain the transaction, the evidence was improperly admitted in this case because the District Court had earlier determined that the charges were sufficiently distinct to warrant separate trials, so admission of drug use evidence in the sex crimes trial somewhat undermined the benefit that defendant gained from the earlier granting of the request for severance. Having defended against the drug charges in the first trial, defendant was faced with the evidence again. However, the Supreme Court then went on to apply the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine if admission of the evidence prejudiced defendant's right to a fair trial and found that the error was harmless. The evidence of drug use did not go to the proof of an element of the sex crimes, and only brief mention was made of drug use in closing arguments and then only in conjunction with other admissible evidence related to the transaction. Thus, the impact of the tainted evidence was minimal, and given other ample evidence upon which the state could develop its case, there was no reasonable possibility that the tainted evidence contributed to the conviction, which was therefore affirmed. St. v. Insua, 2004 MT 14, 319 M 254, 84 P3d 11 (2004).

Failure to Notify Defendant of State's Intent to Use Evidence of Alleged Violations at Probation Revocation Hearing Considered Due Process Violation — Harmless Error: At a hearing on the revocation of Pedersen's suspended sentence, the District Court allowed the state to introduce drug test results, even though drug use was not alleged prior to the hearing. Pedersen asserted that the failure to notify him that the drug test results would be used was a due process violation. The Supreme Court agreed. Even though a revocation hearing is not subject to the Montana Rules of Evidence, the hearing must be fundamentally fair, and minimum due process rights, including notice, extend to a revocation hearing. Thus, because Pedersen was not notified in advance, the District Court erred in admitting the drug test results. However, the error was harmless. The District Court's findings did not reference the drug test results, nor did the court rely on the results in revoking the suspended sentence, relying instead on the abundant evidence of Pedersen's violation of four other probation conditions. Therefore, the Supreme Court affirmed the sentence revocation. St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003). See also St. v. Nelson, 225 M 215, 731 P2d 1299 (1987).

Jury Instruction Regarding False Exculpatory Statements Not to Be Given — Fabrication Instruction Improper but Not Prejudicial: During Nelson's trial on five felony charges, the trial court gave the jury an instruction allowing consideration of any showing of fabrication by Nelson as a circumstance tending to prove a consciousness of guilt, although not proof of guilt itself. Nelson argued that the instruction allowed improper comment on his credibility by interjecting argument into the court's instructions. The Supreme Court agreed. Citing the Ninth Circuit Model Jury Instruction Committee's recommendation, the court held that an instruction concerning false exculpatory statements should not be given, and expressly disapproved the use of such instructions in future trials. If evidence permits an adverse inference on statements by a defendant, counsel should be allowed to make arguments accordingly. General instructions on credibility of witnesses should suffice in most instances, obviating the need for more specific instructions. Here, in addition to the fabrication instruction, the trial court also provided a general jury instruction regarding the credibility of witnesses. The jury was free to reject Nelson's story and was entitled to accept all or part of the other key witnesses' testimony, so Nelson was not prejudiced by the giving of the fabrication instruction. St. v. Nelson, 2002 MT 122, 310 M 71, 48 P3d 739 (2002). See also St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929 (1999).

Improper Admission of Testimony by Highway Patrol Officer Regarding Effect of Prescription Medication on Driving Ability — Harmless Error: During Nobach's DUI trial, the District Court allowed testimony from a highway patrol officer regarding the effect of prescription medications on Nobach's driving ability, without specifically determining whether the testimony would be considered expert or lay opinion. The officer opined that Nobach's ability to drive safely was diminished as a result of the consumption of drugs. Following conviction, Nobach appealed on grounds that the testimony was an expert opinion that was improperly allowed without the requisite foundation. The state contended that the testimony was a lay opinion, and cited St. v. Bradley, 262 M 194, 864 P2d 787 (1993), and St. v. Carter, 285 M 449, 948 P2d 1173 (1997), for the proposition that a lay witness may give an opinion regarding intoxication based on the witness's personal observations. The Supreme Court first distinguished Bradley and Carter because the type of intoxication in those cases involved alcohol, while in Nobach's case, the officer concluded that drugs were involved only when alcohol use was ruled out by the

administration of a Breathalyzer test. The court was not convinced that lay people are sufficiently knowledgeable about common symptoms of drug consumption and its effect on driving ability to offer lay testimony on the subject based on personal observation. The officer's opinion testimony was thus considered expert testimony rather than lay testimony, requiring an adequate foundation under Rule 702, M.R.Ev. (Title 26, ch. 10). The officer's training and experience did not provide a sufficient foundation for admitting the expert testimony, so the District Court abused its discretion in allowing it. However, because the abuse was trial error rather than structural error, the error did not warrant automatic reversal. Rather, the question was whether the finder of fact was presented with admissible evidence that proved the same facts as the tainted evidence and, if so, whether the tainted evidence would have contributed to the conviction qualitatively by comparison. In this case, the state provided other expert testimony from a pharmacist that tended to prove the same facts as the officer's testimony, and because the officer's testimony would not have contributed to Nobach's conviction, the error was harmless and the conviction was affirmed. St. v. Nobach, 2002 MT 91, 309 M 342, 46 P3d 618 (2002).

Unredacted Reference to Expiration Date of Felony Sentences — Harmless Error: At Bauer's incest trial, the District Court barred mention by the prosecution of Bauer's two prior felony convictions, but did rule that the fact of Bauer's lengthy prior prison incarceration and status as a probationer at the time of the incest were admissible as part of the transaction. To comply with the ruling, the state redacted the portions of two travel permits that listed Bauer's actual felony offenses; however, the state failed to black out the dates that the felony sentences would expire. The trial court ordered the state to redact the sentence expiration dates as well, and offered to instruct the jury to disregard any reference to Bauer's prior felony convictions on the travel permits. Defense counsel contended that a corrective instruction would only draw more attention to the prior felonies, and moved for a mistrial instead. The motion was denied and Bauer appealed. The Supreme Court applied the two-part analysis in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001) to determine if the error prejudiced Bauer's right to a fair trial. The erroneous presentation to the jury of the unredacted dates did constitute trial error, however, it was harmless beyond a reasonable doubt and did not contribute to Bauer's conviction or prejudice his right to a fair trial. The District Court did not abuse its discretion in denying Bauer's motion for a mistrial. St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002).

Prosecutor's Comment Alleging Uncontradicted Evidence Erroneous When Defendant Who Asserted Right to Remain Silent Was Only Person Who Could Offer Contradictory Evidence — Error Harmless: Harrington was arrested for DUI, was read his Miranda rights, and chose to remain silent. Harrington contended that his due process rights and privilege against self-incrimination were violated by testimony elicited and statements made by the prosecution during trial. Although Harrington failed to preserve the issues in the District Court, the Supreme Court applied the plain error doctrine pursuant to its discretionary power enunciated in St. v. Finley, 276 M 126, 915 P2d 208 (1996), considering the totality of the circumstances and evaluating the nature of the constitutional rights implicated, rather than the sufficiency of the evidence. The court decided that because no comment was made that Harrington at any time refused to give a statement or refused to testify and because the prosecutor did not insinuate that an innocent person would have given a statement or testified, no Doyle error occurred (see Doyle v. Ohio, 426 US 610 (1976)). However, the prosecutor did comment during rebuttal that there was no evidence to contradict the state's case, which was error as an improper reference to Harrington's decision not to testify because Harrington was the only person who could have offered contradictory testimony (see St. v. Hart, 154 M 310, 462 P2d 885 (1969)). To determine whether the error was prejudicial, the court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001). The error was considered a trial error rather than a structural error, and because the error concerned comment rather than evidence, the court went on to determine whether it was harmless and contributed to the conviction. In this case, the single comment that the evidence was uncontradicted was an isolated one, and there was no reasonable possibility that it contributed to Harrington's conviction given the fact that during closing, the prosecutor focused on the driving errors Harrington made before being stopped, the videotape of Harrington's field sobriety tests, the arresting officer's expertise, and the results of the preliminary breath test. Harrington's constitutional rights were not prejudiced by the improper reference to his decision not to testify. Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001).

Improper Admission of Rape Examination Evidence as Not Probative of Issue of Consent — Error Harmless in Light of Other Admissible Evidence on Consent: At defendant's trial for sexual assault, the District Court admitted the testimony of a nurse practitioner regarding the

mechanics of completing a rape kit. Defendant maintained on appeal that the evidence was not probative of the ultimate issue of consent, and the Supreme Court agreed. The evidence was irrelevant and admitted erroneously. However, the jury was presented with enough cumulative admissible evidence on the issue of consent as to render introduction of the inadmissible rape examination evidence harmless. Qualitatively, and in comparison to the victim's testimony concerning the examination, there was no reasonable possibility that the erroneously admitted evidence contributed to defendant's conviction or resulted in prejudice. St. v. Detonancour, 2001 MT 213, 306 M 389, 34 P3d 487 (2001).

Clarification of Harmless Error Analysis in Determining Whether Trial Court Error Resulted in Prejudice — Structural Error Versus Trial Error — Cumulative Evidence Test Versus Overwhelming Weight of Evidence Test: When determining whether trial court error has prejudiced a defendant, the Supreme Court has applied slightly different standards in various cases, resulting in some inconsistency and confusion over the proper test to be applied in a harmless error analysis. Over time, the "overwhelming weight of the evidence" test expressed in St. v. McKenzie, 186 M 481, 608 P2d 428 (1980) (affirmed in In re Petition of Brodniak v. St., 239 M 110, 779 P2d 71 (1989), and St. v. Fuhrmann, 278 M 396, 925 P2d 1162 (1996)), eclipsed the more substantive inquiry of whether erroneously admitted evidence might have contributed to a conviction, resulting in an inclination to simply tally the quantity of the admissible evidence of guilt instead of evaluating the qualitative impact that the inadmissible evidence might have had on the finder of fact—an approach that the court found unacceptable. In order to preserve the substantial rights of the accused and the fundamental fairness of the criminal trial and to provide consistent guidance to practitioners, the Supreme Court found it appropriate to formally adopt an approach to harmless error issues that first defined the type of error in question and that second, depending on the type of error, set a uniform standard against which the error must be analyzed to determine if the error was sufficiently prejudicial to warrant reversal, completing the analysis begun in St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000). The first step is to analyze whether the claimed error is structural error or trial error. Structural error is the type that affects the framework within which the trial proceeds, such as errors in jury selection, total deprivation of the right to counsel, and lack of an impartial judge, and is automatically reversible without additional analysis or review. Trial error is the type that typically occurs during presentation of the case to a jury. It is not presumptively prejudicial and is thus subject to harmless error review pursuant to this section. Once a convicted person raises and establishes that evidence was erroneously admitted and has alleged that there is a reasonable possibility that the evidence might have contributed to a conviction, the state must demonstrate that the error was not prejudicial. To determine whether that reasonable possibility exists, the Supreme Court abandoned the "overwhelming weight of the evidence" test in McKenzie, Brodniak, and Fuhrmann in favor of the "cumulative evidence" test set out in Harrington v. Calif., 395 US 250 (1969). In making its proof under the cumulative evidence standard, the state must show admissible evidence that proved the same facts as the tainted evidence and demonstrate that the quality of the tainted evidence was such that there was no possibility that it might have contributed to the conviction. If the only evidence tending to prove an element of the crime is tainted, then reversal will be compelled. If the tainted evidence does not go to the proof of an element of the crime and there is no other evidence that proves the same facts as the tainted evidence, then the tainted evidence will be considered harmless only if there is no possibility that it might have contributed to the conviction. In the present case, the trial court erred in admitting evidence related to Van Kirk's performance on a horizontal gaze nystagmus test; however, there was other admissible cumulative evidence that proved that same fact of Van Kirk's DUI as the tainted evidence, so Van Kirk's right to a fair trial was not prejudiced and the DUI conviction was affirmed. St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), followed in St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001), St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002), St. v. Slavin, 2004 MT 76, 320 M 425, 87 P3d 495 (2004), St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006), and St. v. Russette, 2008 MT 413, 347 M 285, 198 P3d 791 (2008). See also Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006).

DUI Test Result Improperly Admitted Without Establishing Requisite Basis for Reliability — Harmless Error: The City Court abused its discretion when it allowed horizontal gaze nystagmus (HGN) field test results into evidence without first establishing the requisite scientific basis for the test's reliability, as required by Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998). However, in this case, Robertson failed two other field sobriety tests, refused to perform the tests again after having already failed them, refused to submit to a Breathalyzer test, smelled of alcohol, had slurred speech, and exhibited an obvious lack of balance after getting out of his vehicle—all of which constituted other overwhelming evidence of guilt of DUI,

rendering the error in allowing HGN test results harmless. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000).

Harmless Error Statute Inapplicable to Structural Errors: This section, although applicable to the review of most constitutional rights, does not apply to structural errors, such as an error in the jury selection process, because these types of errors cannot be assessed by the Supreme Court against the record for prejudicial impact. A structural error precedes the trial process and therefore cannot be quantitatively weighed against the evidence introduced at trial to determine whether the defendant was prejudiced by the error. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), following Chapman v. Calif., 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (1967). See also Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

Telephone Jury-Summoning Procedure Violative of Statutory Selection Process — Showing of Substantial Compliance, Not Prejudice, Required — Reversible Error: Lamere, charged with killing Brownlee, filed a pretrial motion to strike the jury panel, but the motion was denied. The question on appeal was whether the District Court erred in concluding that Lamere failed to show that the telephone-dependent summoning procedure used in Cascade County prejudiced Lamere's substantial rights to a jury drawn and summoned according to law. The Supreme Court applied St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998), in holding that the method of summoning jurors by telephone failed to comply with statutes governing the impaneling of a jury because jurors were neither served by mail nor served personally by the Sheriff. However, to warrant reversal, Robbins also required a showing of actual prejudice in addition to a substantial failure to comply with statutory law in drawing a jury panel. The Supreme Court chose to return to the per se rule of reversal for failure to substantially comply with statutes governing procurement of a trial jury, overruling the Robbins requirement of prejudice. The decision turned on the U.S. Supreme Court's contemporary distinction between trial error, to which harmless error review applies, and structural error, to which harmless error review is inapplicable (see Johnson v. U.S., 520 US 461, 137 L Ed 2d 718, 117 S Ct 1544 (1997), and its predecessors). In Lamere's case, the automatic rule of reversal prevailed because errors in the jury selection process are structural in nature, affecting the very framework within which a trial proceeds—errors that indelibly affect the essential fairness of the trial itself. A material failure to substantially comply with Montana statutes governing procurement of a trial jury may not be treated as harmless error because: (1) it precedes the presentation of evidence to the jury and cannot be analyzed as a mere trial error without resorting to speculation; (2) it precedes the trial process and cannot be quantitatively assessed for its prejudicial impact relative to the evidence introduced at trial; (3) it affects the very framework within which the trial proceeds; and (4) the impartiality of the jury goes to the very integrity of the justice system and because the right to an impartial jury is so essential to the concept of a fair trial that its violation cannot be considered harmless error. The substantial compliance standard vindicates not only the rights of the individual defendant but also the rights of the public in ensuring that the jury system remains inviolate, protecting a defendant's right to an impartial jury by encouraging reasonably strict compliance with statutory procedures intended to implement the fair cross-section guarantee of the sixth amendment of the U.S. Constitution. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), following Chapman v. Calif., 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (1967), Satterwhite v. Tex., 486 US 249, 100 L Ed 2d 284, 108 S Ct 1792 (1988), and Ariz. v. Fulminante, 499 US 279, 113 L Ed 302, 111 S Ct 1246 (1991), followed in St. v. Lopez, 2001 MT 97, 305 M 218, 26 P3d 745 (2001), and applied retroactively in Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002).

Testimonial Tape-Recorded Interview Improperly Submitted to Jury — Error Harmless Because of Cumulative Nature of Evidence: Following an automobile accident in which his girlfriend was killed, Bales was interviewed by a highway patrol officer who taped the interview, during which Bales failed the HGN test and made allegedly prejudicial statements. Over Bales' objection, the District Court admitted the tape as an exhibit that the jury could listen to during deliberations. The Supreme Court noted that because the jury had not requested the playing of the tape, 46-16-504 applied, rather than 46-16-503. The Supreme Court found that the tape had a testimonial character and, citing St. v. Harris, 247 M 405, 808 P2d 453 (1991), for the common-law rule against submitting testimonial materials to the jury for unsupervised and unrestricted review during deliberations, held that the District Court abused its discretion in allowing the tape to go to the jury. However, allowing the jury to hear the tape did not unduly emphasize that testimony to the exclusion of other witnesses, nor were statements on the tape inconsistent with statements given by the witnesses at trial. Rather, the tape was merely cumulative of other evidence and did not prejudice Bales, so the error was harmless. St. v. Bales,

1999 MT 334, 297 M 402, 994 P2d 17, 56 St. Rep. 1334 (1999), distinguishing St. v. Morse, 229 M 222, 746 P2d 108, 44 St. Rep. 1919 (1987), and overruling it to the extent that it is inconsistent with St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991), regarding the submission of testimonial materials to a deliberating jury. See also St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992), and St. v. Evans, 261 M 508, 862 P2d 417, 50 St. Rep. 1431 (1993).

Improper Admission of Hearsay Regarding Rape Victim's Prior Statements — Harmless Error: Four requirements must be met before a witness may testify as to a declarant's prior testimony. It was undisputed that in Mensing's trial for rape, the first three requirements were met: (1) the victim testified at trial; (2) the victim was available for cross-examination about her prior statements; and (3) the victim's statements to which arresting officers were testifying were consistent with the victim's testimony. However, the fourth requirement, that the statements must rebut an express or implied charge of fabrication, improper influence, or motive, was not met. Mensing made none of the requisite charges against the victim, and as a result, the officers' testimony regarding the victim's testimony was inadmissible hearsay and was improperly admitted. However, the hearsay statements were separately admitted through the victim's testimony, and Mensing had an opportunity to cross-examine regarding the statements at issue. Therefore, although the District Court abused its discretion in allowing the officers' testimony regarding prior consistent statements made by the victim, the error did not prejudice Mensing and was harmless. St. v. Mensing, 1999 MT 303, 297 M 172, 991 P2d 950, 56 St. Rep. 1220 (1999), following St. v. Veis, 1998 MT 162, 289 M 450, 962 P2d 1153 (1998).

Exclusion of Witnesses Constituting Abuse of Discretion — Harmless Error: Berg's counsel failed to previously disclose witnesses by timely filing a witness list with the District Court pursuant to 46-15-323. The court imposed the harshest sanction available by excluding Berg's witnesses, and Berg contended that he was entitled to a new trial because the court erred by excluding his witnesses. Berg's failure to disclose was not willful, nor would the state have been unduly prejudiced or surprised by Berg's noncompliance because the witnesses were known to the state, being among the same witnesses that the state intended to call. Thus, the District Court abused its discretion in imposing such a harsh sanction, and a less severe sanction should have been imposed. However, the exclusion of Berg's witnesses was not so prejudicial that Berg was deprived of a fair trial. The jury was provided with the essence of the witnesses' testimony through the cross-examination of one of the state's witnesses, so the exclusion of Berg's witnesses was harmless error. St. v. Berg, 1999 MT 282, 296 M 546, 991 P2d 428, 56 St. Rep. 1138 (1999), followed in St. v. Dezeeuw, 1999 MT 331, 297 M 379, 992 P2d 1276, 56 St. Rep. 1323 (1999).

Abuse of Discretion in Admission of Testimony That, Based on Shell Casing Pattern, Shots Fired From Van — Harmless Error: The District Court abused its discretion in admitting expert testimony from a police officer regarding whether shots were fired from a van. The testimony was based on the ejection pattern of shell casings at the scene of a shooting. There was an insufficient foundation to qualify the officer as an expert because he lacked specialized knowledge that would distinguish him from a lay person in opining whether the shots came from a van. Citing this section, the Supreme Court held nevertheless that, in light of testimony from several eyewitness that the shots were indeed fired from a van, the abuse of discretion was harmless error and should be disregarded. St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999).

Irrelevant Testimony Improperly Admitted but Not Prejudicial — Conviction Affirmed: The trial court improperly admitted witness testimony that was unrelated to the crime and clearly irrelevant. However, after evaluating the testimony under the totality of the circumstances in the context of the trial record, the Supreme Court concluded that admitting the testimony did not constitute undue prejudicial error and affirmed the conviction. St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358, 55 St. Rep. 344 (1998).

Admission of Psychiatrist's Opinion of Defendant's State of Mind During Theft Not Error With Respect to Conviction for Murder: Santos appealed his murder convictions on the basis that the state's expert witness commented on his mental state during the theft committed in conjunction with the murders. He also stated that the commission comments to 46-14-213 prohibit expert testimony before a jury on the ultimate issue of the defendant's mental state or mental capacity. The Supreme Court held that the admission of testimony concerning Santos's mental state during the theft was error but was harmless error with respect to his murder convictions. The Supreme Court also held that the commission comments to 46-14-213 go beyond the scope of the statutory language, that the statute is clear on its face, and that an expert witness may give an opinion on mental state or mental capacity. St. v. Santos, 273 M 125, 902 P2d 510, 52 St. Rep. 865 (1995).

Prison Officer's Recitation of Prison Policy as Harmless Error: Defendant objected to the testimony of a prison officer who had discovered a potentially dangerous weapon in defendant's cell on grounds that the officer's statement that the object had been sharpened was speculative and that the description of the object as evidence, tagging it, and taking steps to preserve it called for a legal conclusion that the officer was not qualified to make. Admission of the speculative statement was error but was cured by the court's striking it from the record and admonishing the jury to disregard it. The officer's descriptive testimony was a mere recitation of prison policy that was not related to the controlling facts of the case and did not cast defendant or his actions in a negative light. Because no reasonable possibility existed that the improperly admitted evidence contributed to the verdict, any error was harmless. St. v. Birthmark, 253 M 526, 833 P2d 1103, 49 St. Rep. 583 (1992).

Comment on Defendant's Failure to Testify: The defendant appealed his conviction, alleging that the jury instruction provided by the prosecution commented on his refusal to testify and prejudiced his case. The Supreme Court held that even though the appeal was not timely, the court would hear it in order to preserve the substantial rights of the defendant. The court stated that the instruction would not have been prejudicial if requested by the defendant and that the third paragraph of the instruction relating to evaluating a testifying defendant's credibility should not have been given but was harmless error. St. v. Amsk, 243 M 39, 792 P2d 1109, 47 St. Rep. 1075 (1990).

Prosecutor's Remarks Improper — Evidence of Guilt Overwhelming: The prosecutor's remarks concerning defendant's delayed notice of a theory of self-defense and concerning his silence were improper and unnecessary to the case, but the evidence of defendant's guilt was so overwhelming that the improper comments can be classified as harmless error beyond a reasonable doubt. St. v. Mix, 239 M 351, 781 P2d 751, 46 St. Rep. 1740 (1989).

Exhibit Offered Into Evidence by Trial Judge — Harmless Error: Although there is no provision in Montana law that permits the trial court to offer its own exhibits, the court offered a document into evidence. If this was error, it was harmless because the document had been read into evidence in full by the prosecutor. St. v. Hibbs, 239 M 308, 780 P2d 182, 46 St. Rep. 1705 (1989).

Overwhelming Evidence — Totality of Circumstances: In an earlier opinion in this criminal matter, the Supreme Court held that it was harmless error for the trial court to admit evidence of the state's expert witness concerning his belief that the rape victim was not malingering and the statistical percentages of false rape accusations. In response to defendant's argument that the court did not apply the proper harmless error test, the Supreme Court held that the analysis of the issue of an expert's comment on a witness's credibility centers on the rules of evidence, not on a constitutional analysis. The overwhelming evidence rule is one method of ascertaining whether there is a reasonable possibility that the inadmissible evidence contributed to the verdict. When assessing the prejudicial effect of an error, the court will examine the totality of the circumstances in which the error occurred. The overwhelming evidence in this case supports the guilty verdict. In re Petition of Brodniak v. St., 239 M 110, 779 P2d 71, 46 St. Rep. 1550 (1989), followed in St. v. Birthmark, 253 M 526, 833 P2d 1103, 49 St. Rep. 583 (1992), St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992), St. v. Williams, 262 M 530, 866 P2d 1099, 50 St. Rep. 1672 (1993), and in St. v. Eklund, 264 M 420, 872 P2d 323, 51 St. Rep. 335 (1994). Bower was followed in St. v. Gustafson, 2000 MT 364, 303 M 386, 15 P3d 944, 57 St. Rep. 1554 (2000).

Unanimity Among Appellate Members — No Prerequisite to Finding of Harmless Error: Defendant argued that, as a matter of law, evidence cannot be overwhelming for purposes of a harmless error analysis if one or more members of the appellate tribunal are not convinced that it is. The Supreme Court held that unanimity among the appellate tribunal has never been a prerequisite to a finding of harmless error when using the overwhelming evidence test, even if the test is used to determine the magnitude of constitutional error. In re Petition of Brodniak v. St., 239 M 110, 779 P2d 71, 46 St. Rep. 1550 (1989).

Victim's Version of Facts Not Inherently Incredible: The victim testified that her estranged husband broke into her house and attempted to get into bed with her. She went to another room with him so he would not see her boyfriend who was in her bed. She testified that her husband assaulted and raped her after she left the bedroom. The defendant's jury conviction was affirmed on appeal, with the Supreme Court ruling that the weight of evidence and credibility of witnesses are exclusively in the province of the trier of fact and the court would uphold the verdict if there was substantial evidence to support it. St. v. Urness, 239 M 58, 778 P2d 419, 46 St. Rep. 1510 (1989).

Misrepresentation of Statute by Prosecutor — Not Prosecutorial Misconduct or Suppression of Evidence: Defendant claimed that the prosecution misrepresented the immunity statute to the court in an effort to prevent testimony by a witness, which amounted to a suppression of evidence. The Supreme Court found the prosecutor was incorrect in his interpretation, due to a statutory amendment, but that neither the court nor defense counsel was aware of the amendment either; therefore, the innocent misstatement of the law did not rise to the level of a knowing, bad faith scheme or action constituting misconduct. St. v. Dannels, 226 M 80, 734 P2d 188, 44 St. Rep. 472 (1987).

Negligent Suppression of Evidence — Harmless Error: In an appeal involving the negligent suppression of evidence, the court agreed with appellant that the state acted improperly in suppressing four taped witness statements during discovery and a possibly incriminating statement made by appellant during his arrest and in endorsing an additional witness on the first day of trial. However, the court found that the suppressed evidence was either repetitive of other testimony or minimally supportive of a self-defense theory, and that since the defense knew of the additional witness' connection with and importance in the case, it could not convincingly claim surprise at the endorsement. Therefore, all errors were held to be harmless and not grounds for reversal. St. v. Wallace, 223 M 454, 727 P2d 520, 43 St. Rep. 1908 (1986), followed, with regard to application of harmless error rule to admissibility of hearsay testimony, in St. v. Alexander, 265 M 192, 875 P2d 345, 51 St. Rep. 474 (1994).

Robbery by Person With Hand Under Coat — Testimony About Abdominal Illness: Defendant put a hand under his coat during a robbery and the store clerk testified he believed defendant had a gun. Defendant testified he was holding his hand on a place where he had severe abdominal pain. It was error to sustain the state's objection to the relevance of testimony of defendant's mother as to the nature of his illness, but the error was harmless because there was abundant testimony by defendant, his brother, and his sister on the matter of his physical condition. St. v. Lewis, 220 M 418, 715 P2d 1064, 43 St. Rep. 492 (1986).

Admission of Death Certificate With Hearsay Statement That Decedent Was Passenger — Harmless Error: In a negligent homicide case, defendant contended decedent was driving. The trial court admitted a death certificate with a statement in it that decedent was a passenger in the truck that crashed. While the death certificate was admissible to prove the victim's death, the statement about the victim being a passenger was based on hearsay and should have been excised. However, the Supreme Court held that failure to do so was harmless error in light of the testimony by other witnesses that established a substantial basis for concluding that decedent was a passenger. St. v. Gould, 216 M 455, 704 P2d 20, 42 St. Rep. 946 (1985).

Withholding of Informants' Names — Harmless Error: Defendant moved for a continuance when, with a trial date set for August 2, the informants' names were not revealed to defendant's attorney until late July 30 and the County Attorney knew defendant's attorney would be out of town on August 1. The District Court denied defendant's motion, and the Supreme Court affirmed. The Supreme Court held that although the Sheriff and police acted improperly in refusing to comply with the District Court's order to disclose the informants' names, this was harmless error in this case and was not grounds for a continuance. The District Court did not abuse its discretion in denying the continuance because the informants could provide nothing that would refute the state's case. The Supreme Court stated that it did not condone the actions of the law enforcement agencies or the County Attorney. St. v. Warnick, 216 M 102, 699 P2d 1049, 42 St. Rep. 675 (1985).

Misleading Jury as to Effect of Acquittal of Defendant: In his closing argument in a trial on the charge of sexual intercourse without consent, the prosecutor told the jury that in order to find the defendant not guilty, the jury would have to tell the alleged victim that she was a drug pusher, slut, and liar. On appeal, the Supreme Court rejected defendant's claim that the statements were so inflammatory and prejudicial that he had been denied his right to a fair trial, ruling that the prosecutor's error did not affect defendant's substantial rights. St. v. Sanderson, 214 M 437, 692 P2d 479, 42 St. Rep. 94 (1985).

Admission of Defendant's Spontaneous Remarks — Motion to Strike During Cross-Examination: Defendant was charged with and convicted of sexual intercourse without consent. During his trial, the arresting officer was asked if defendant had made any statements. Defense counsel objected on the grounds of hearsay. The court was prepared to accept the evidence under the "excited utterance" exception to the hearsay rule. The officer testified defendant said, "Which bitch did it?". No immediate objection was raised, but during cross-examination defense counsel made a motion to strike, which was denied. The prosecution made no further reference to the statement. On appeal, the Supreme Court relied on Poindexter & Orr Livestock Co. v. Oreg. Short Line Ry., 33 M 338, 83 P 886 (1905), which held that "the

practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated". The court said that even if it were to focus on the allegations of prejudice, there was no reasonable possibility that the evidence might have contributed to the conviction. St. v. Bauer, 210 M 298, 683 P2d 946, 41 St. Rep. 1066 (1984).

Judge Asking Attorney Witness if He Practiced Criminal Law — No Prejudicial Error: A witness for defendant charged with felonious issuing of a bad check testified that as defendant's attorney he told defendant not to pay the check, which the bank had returned unpaid, because the auto had a defect and defendant might have a setoff under the Uniform Commercial Code. The trial judge asked the witness-attorney if he practiced criminal law. The question was not prejudicial error. St. v. Lloyd, 208 M 195, 676 P2d 229, 41 St. Rep. 263 (1984).

Judge Calling Testimony "Self-Serving" — No Plain Error: At trial of defendant for felonious issuing of a bad check in payment for an auto, defendant sought to have one of his attorneys testify that defendant did not pay the check, which the bank had returned unpaid, because the auto had a defect and the attorney had advised defendant not to pay the check as he might have a setoff under the Uniform Commercial Code. The prosecution objected to the questioning and the court called the testimony "self-serving", but allowed it. Any error in the judge's comment need not be considered on appeal as no objection was made below. The plain error doctrine would not be invoked because any prejudice was so slight that there was no reversible error. Any technical error was rendered harmless by judge's instruction to disregard his comment. St. v. Lloyd, 208 M 195, 676 P2d 229, 41 St. Rep. 263 (1984).

Failure to Object to Judge Qualifying Ten-Year-Old Sexual Crime Victim as Witness in View of Jury — Not "Plain Error" — Mass of Damaging Evidence Precluding Any Prejudice: In the presence of the jury, the District Court Judge questioned the 10-year-old victim of a sexual crime and an aggravated assault about whether she was aware of the consequences of taking an oath and testifying. Defense counsel did not object. Although it would have been better to have conducted the questioning away from the jury and the questions should have been framed differently, any mistake did not warrant the application of the "plain error" rule of 46-20-702 (renumbered 46-20-701(2) by Code Commissioner, 1987) because the defendant was not prejudiced by the manner of qualifying the victim in light of all of the independent and highly damaging evidence against him. St. v. Smith, 208 M 66, 676 P2d 185, 41 St. Rep. 176 (1984).

Parole Status of Defendant — Prosecution Questions Eliciting:

On the first day of trial, the prosecutor agreed to caution his witnesses to avoid mention of defendant's parole status. The prosecutor breached his promise by twice asking one of his witnesses a question eliciting the answer that defendant was on parole. The court cautioned the jury to disregard the testimony. As a matter of law, the Supreme Court could not hold that failure to grant motion for mistrial was an abuse of discretion. Prejudice would not be presumed. Defendant failed to show that a substantial right was denied and that there was a reasonable possibility the inadmissible evidence might have contributed to his conviction. The evidence supporting conviction was substantial, if not overwhelming, and defendant's version of the events was simply incredible. St. v. Gray, 207 M 261, 673 P2d 1262, 40 St. Rep. 2023 (1983).

If intent was a disputed issue at trial, a reviewing court could not rationally conclude beyond a reasonable doubt that an unconstitutional Sandstrom instruction was harmless error and could not have tainted a jury verdict, even if the evidence of intent was overwhelming. The appropriate inquiry is whether any reasonable juror could have given the presumption raised by the instruction persuasion-shifting or conclusive effect. [Annotator's Note: See McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981), apparently holding to the contrary.] In re Hamilton, 721 F2d 1189 (9th Cir. 1983).

Admission of Pre-Miranda Statement Not Prejudicial — Untimely Motion to Suppress: The defendant made the same damaging statements to the police before and after Miranda warnings were given. A motion to suppress the prior damaging statements was denied because of the motion's untimeliness under 46-13-301. Although the Supreme Court has the power under this section to overturn a conviction if the substantial rights of the defendant have been prejudiced, the slight cumulative effect of admitting the prior statements and the untimeliness of the motion to suppress do not warrant a consideration of the constitutionality of admission of the prior statements. St. v. Hart, 200 M 185, 650 P2d 768, 39 St. Rep. 1673 (1982).

Expert Testimony on Ultimate Issue: In a prosecution for sexual intercourse without consent, the County Attorney asked a doctor if he had formed a clinical impression of the victim. The doctor replied that it was his impression that the woman had been raped. The doctor's statement was admissible under Rule 704, Montana Rules of Evidence, since he was qualified by experience

and personal observation. Further, the statement was not sufficiently prejudicial to constitute reversible error. St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982).

Prosecutorial Comment on Presumption of Intoxication: In negligent homicide trial of defendant involved in auto collision while he was driving after drinking, a forensic scientist testified that blood taken from defendant 2 hours after the accident had a .17 blood alcohol content and that at that level one's driving ability would be obviously impaired and speech, hearing, balance, judgment, reaction time, and other motor skills would be affected. The trial judge ruled that because the charge was negligent homicide he would not instruct the jury on the statutory presumption that one with a .10 blood alcohol content level is under the influence. Prosecutor twice disregarded the ruling, stating in the cross-examination of a witness and in his closing argument that .10 is the legal rate of intoxication. Prosecutor used an improper and unacceptable tactic, but defendant was not prejudiced as there was already sufficient evidence as to what a .17 blood alcohol content level meant. St. v. Morgan, 198 M 391, 646 P2d 1177, 39 St. Rep. 1072 (1982).

Right of Confrontation — Harmless Error: A sheriff testified as to statements made by a defendant to the sheriff that incriminated codefendants. Because the defendant did not testify at trial, the codefendants' rights of confrontation were violated. However, because there was overwhelming independent admissible evidence of the facts contained in the defendant's statements, the error was harmless. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Sandstrom Instruction — Overwhelming Evidence of Intent: Petitioner was convicted of deliberate homicide by shooting victim four times in the head. Federal District Court found it to be a violation of due process that a Sandstrom instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" had been given at trial, and granted habeas corpus. The circuit court reversed on appeal, stating that it was inconceivable that any rational juror could have been convinced beyond a reasonable doubt that petitioner shot victim four times in the head without also being convinced beyond a reasonable doubt that he did so "knowingly or purposefully" (the mental element of deliberate homicide in Montana). Thus the error was harmless, for the jury would beyond a reasonable doubt have reached the same conclusion even absent the instruction. McGuinn v. Crist, 657 F2d 1107 (9th Cir 1981), reversing McGuinn v. Crist, 492 F. Supp. 478 (D.C. Mont. 1980).

Harm to Credibility of Probationer — Alleged Error Versus Weak Alibi Testimony: Defendant's assertion that admission in probation revocation hearing of inadmissible probation violations had a detrimental impact on his credibility was pure fantasy. The record on appeal disclosed that if anything affected his credibility, it was his own testimony and that of his alibi witnesses that he was not present at the time and place of the alleged assault on his mother-in-law (one of the bases for petition for probation revocation) in the face of her positive identification of him as her assailant. St. v. Steffans, 195 M 395, 636 P2d 836, 38 St. Rep. 1976 (1981).

Evidence of Offenses Not Charged — Probation Revocation: Admission in evidence, in probation revocation hearing, of alleged probation violations not contained in the petition to revoke was error but did not affect defendant's substantial rights and must be disregarded where two of the alleged violations were not made a basis of revocation of probation and, although the third was, the State introduced no evidence on the matter and all evidence on it was introduced by defendant. Defendant could not predicate reversible error on testimony he himself introduced. St. v. Steffans, 195 M 395, 636 P2d 836, 38 St. Rep. 1976 (1981). See also St. v. Nelson, 225 M 215, 731 P2d 1299, 44 St. Rep. 181 (1987).

Police Officer — Foundation for Testimony: Defendant was charged with intimidation. He had threatened the victim, who took his license plate number and reported it to the police. At the trial an officer testified that a license check had been run and that the car was registered to the defendant. Defendant objected that no foundation had been laid to establish that the officer had personally made the license check and that the testimony was hearsay. The Supreme Court agreed, saying the State should have introduced a certified copy of the car's registration record. The Supreme Court also held that the evidence of ownership was a small part of the case against defendant and that the admission of the testimony did not affect defendant's substantial rights. The error was disregarded. St. v. Wurtz, 195 M 226, 636 P2d 246, 38 St. Rep. 1808 (1981).

Mistrial Properly Denied — Testimony Violating Order In Limine Reaching Jury by Other Means: Where, in a prosecution for burglary and forgery, the prosecution technically violated an order in limine prohibiting the prosecution from soliciting any testimony from any witness regarding statements made by one Anna Doney, the District Court did not err in refusing to grant the defendant's motion for a mistrial. The testimony elicited in violation of the order in

limine was also put before the jury when Anna Doney was called as a rebuttal witness for the state. Thus, the error caused by the testimony objected to was merely technical and did not affect the substantial rights of the defendant. St. v. Wilson, 193 M 318, 631 P2d 1273, 38 St. Rep. 1040 (1981).

Sandstrom Instruction — Permissive Inference or Conclusive Presumption: A "Sandstrom-type" instruction was given at petitioner's trial, which resulted in his conviction on seven counts of armed robbery and one count of assault. No objection to the instruction was made at the trial, but the Supreme Court reviewed the instruction under the "plain error" rule [however, see 1983 amendment changing the law]. Petitioner contended that the instruction either shifts the burden of proof on the issue of intent from the State to the defendant or constitutes a presumption against the defendant, either of which is constitutionally impermissible under Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979). The instruction given was a permissive inference and not a conclusive presumption. The questioned instruction was not a "naked" presumption as in Sandstrom; the instructions as a whole made it abundantly clear that the State bears the burden of proving beyond a reasonable doubt every essential element of the crimes of which defendant was charged. The court found that the error, if any, was harmless. Parker v. Crist, 190 M 376, 621 P2d 484, 37 St. Rep. 2048 (1980).

Errors in Jury Instructions on Accomplice Testimony, Oral Admissions, and Intent Minimized by Other Instructions and Nature of Evidence: Appealing his conviction for theft, a defendant alleged errors in the trial court's jury instructions. Error was claimed in the rejection of cautionary instructions regarding accomplice testimony and oral admissions. The reviewing court agreed that the cautionary instructions should have been given but disagreed with the contention that the error was reversible. They noted that the instructions were elaborate and misleading and lacked the simple language of 26-1-303(4). The error was minimized by other instructions. The defendant also alleged error in the giving of the Sandstrom instruction on intent. The reviewing court found the instruction harmless here because the evidence of intent was overwhelming and the essential issue of the case was the identity of the gunman, not his intent. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Admission of Statements by Defendant: The Supreme Court found no substantial prejudicial effect on the defendant arising from the introduction of statements made by the defendant and admitted by the trial court as a verbal act exception. St. v. McGuinn, 177 M 215, 581 P2d 417 (1978).

Denial of Discovery: A motion to discover papers went unruled upon, and no objection was made. Therefore, the substantial rights of the defendant were not violated, and a conviction will not be overturned due to harmless error. St. v. Armstrong, 172 M 296, 562 P2d 1129 (1977).

Hearsay: When the defendant voluntarily testified and admitted he had fired shots at the victim, the admission of testimony by a witness that someone said "Grady did it" was harmless error. St. v. Grady, 166 M 168, 531 P2d 681 (1975).

Comments on Defendant's Past Record:

Remarks of the prosecutor referring to the defendant's association with the drug culture, although offensive, were reasonably founded on the testimony and evidence, and such remarks did not deny the defendant a fair trial. St. v. Flamm, 165 M 128, 526 P2d 119 (1974).

A statement by prosecuting attorney in closing argument that the perpetrators of the crime were "thick as thieves" was not construed as a comment on the past record of the defendant but merely as an argument that the defendant was guilty of the robbery with which he was charged in that prosecution and did not affect any substantial right of the defendant. St. v. Romero, 161 M 333, 505 P2d 1207 (1973).

Remarks About Request for Counsel: The testimony of the police officer that the defendant did not want to talk to the police but asked to call his lawyer, although irrelevant and improper, was harmless error when the State presented overwhelming evidence of guilt and the defendant himself testified at trial. St. v. Flamm, 165 M 128, 526 P2d 119 (1974).

Remark in the Presence of Jurors: A statement of opinion made in the presence of other jurors by a prospective juror who was never seated that she was convinced that the defendants were guilty was not a sufficient showing of prejudice to require a new trial. St. v. Rhodes, 164 M 455, 524 P2d 1095 (1974).

Invitation to Juror to Participate in Experiment: The prosecuting attorney's invitation to a juror to participate in an experiment not supported by the evidence was harmless error because the juror did not participate and the trial court immediately sustained the defendant's objection. St. v. Thompson, 164 M 415, 524 P2d 1115 (1974).

Inaccurate Instructions: Instructing the jury on assault by willfully inflicting grievous bodily harm when the defendant had been charged with assault with intent to prevent or resist his

lawful detention or apprehension was harmless error because the evidence conclusively demonstrated the defendant's guilt of the offense charged. St. v. Jones, 161 M 117, 505 P2d 97 (1973).

Witness' Remarks: When the trial court on the defendant's motion directed the state's witnesses not to reveal the victim's pregnancy, the fact that one witness mentioned the pregnancy to the jury did not provide a basis for a mistrial since no substantial right was affected. St. v. Bentley, 155 M 383, 472 P2d 864 (1970).

Improper Questions by Prosecution: In a prosecution under former law for first degree assault, questions posed by the prosecution relating to potential criminal bribery, if error, were technical errors that did not provide a basis for a reversal in view of the facts that the questions posed were not evidence, they were answered in the negative, and the trial court had instructed the jury not to consider the remarks of counsel. St. v. Gallagher, 151 M 501, 445 P2d 45 (1968).

Anonymous Witnesses on Indictment: Under former law, if a person went to trial under an indictment on which the witnesses' names were designated as Richard Roe and John Doe and was convicted, the Supreme Court was required to sustain the conviction if possible and the burden was on the defendant to show prejudice. State ex rel. Porter v. District Court, 124 M 249, 220 P2d 1035 (1950).

Erroneous Instruction: Erroneous instructions are not cause for reversal in the absence of any prejudice. St. v. Hay, 120 M 573, 194 P2d 232 (1948).

Instructions to Jury: On an appeal from a judgment of conviction for forgery, while it was error to advise the jury, in an instruction as to the purpose for which testimony of other like acts had been admitted, that testimony had been admitted relating to certain "forgeries", since whether or not a forgery had been committed was the fact to be determined by the jury, in view of other portions of the charge carefully safeguarding the rights of the defendant, the inadvertent use of the term "forgeries" could not have worked to his prejudice. St. v. Daems, 97 M 486, 37 P2d 322 (1934).

Refusal to Strike Testimony: In a prosecution for the larceny of two calves, the refusal of the trial court to strike the testimony of a cattleman that two cows, the condition of the bags of which indicated that they had lost their calves but a short time theretofore, were acting as though they were looking for them, was held not reversible error under the circumstances, among them that the defendant killed the calves after being charged with their theft and thus blocked the test proposed by the stock inspector to get the cows and see whether they would claim the calves. St. v. Grimsley, 96 M 327, 30 P2d 85 (1934).

Challenge to Juror: In a prosecution for receiving stolen property, a juror answered voir dire questions propounded by the State by admitting that he was a close friend of the defendant but could try him as if he were a stranger but that he would like to be excused. He then stated that he would not convict the defendant even if he believed him guilty beyond a reasonable doubt. Thereafter, however, on examination by the defendant's counsel, he again asserted that he would vote for conviction regardless of his friendship for the defendant if proper under the law and the evidence. The court's ruling excusing the juror may not be held reversible error even though it be conceded that technical error was committed in sustaining the challenge on an improper ground. St. v. Huffman, 89 M 194, 296 P 789 (1931).

Improper Admission of Judgment Roll: While the trial court erred in permitting the State in a perjury trial to introduce the judgment roll in the cause in which the alleged false testimony was given, containing papers not properly part thereof under statute, the procedure amounted to a mere irregularity which could not in any manner have prejudiced the defendant. St. v. Jackson, 88 M 420, 293 P 309 (1930).

Leading Questions: Alleged error in overruling objections to several questions claimed to have been leading but which were of no special importance and merely explanatory in character was not grounds for a new trial. St. v. Wong Fong, 75 M 81, 241 P 1072 (1925).

Judge's Remarks: A remark of the trial judge in passing upon an objection to a question asked a witness for the defense in a criminal cause to the effect: "I don't think that is very material; let him answer", while improper, was a technical error and nonprejudicial when considered in connection with the particular circumstances. St. v. Sedlacek, 74 M 201, 239 P 1002 (1925); St. v. Cassill, 71 M 274, 229 P 716 (1924).

Introduction in Evidence of Rape Victim's Clothing: In a prosecution for attempted rape, the introduction in evidence of the clothing worn by the prosecuting witness, though immaterial, was not reversible error when there was no evidence that the articles were muddy, torn, and bloodstained, as claimed, and thus likely to inflame the minds of the jurors and when the original exhibits were not certified to the Supreme Court for inspection. Prejudice cannot be presumed

but must be made to appear affirmatively. Lindeberg v. Howe, 67 M 195, 215 P 230 (1923); St. v. Prouty, 60 M 310, 199 P 281 (1921).

Admission of Evidence: An erroneous ruling of the court in admitting evidence which could not affect the substantial rights of the parties must be disregarded. Church v. Zywert, 58 M 102, 190 P 291 (1920).

Technical Error — Defective Information: The Supreme Court will not reverse a judgment of conviction on account of technical errors or defects in the information when the defendant was fully advised of the nature of the charge against him to enable him to prepare to meet that charge and his substantial rights were not affected by the defect. St. v. Wehr, 57 M 469, 188 P 930 (1920).

Unresponsive Answer of Witness: Though refusal to strike out an unresponsive answer in which the witness volunteers a statement of facts from which the complaining party has probably suffered prejudice will result in a reversal of the judgment, such refusal is harmless error when the objectionable statement was volunteered on cross-examination after having been twice before made on his direct examination. St. v. Jones, 48 M 505, 139 P 441 (1914).

Prejudice to Substantial Right: A judgment of conviction will not be reversed for error in the trial proceedings unless it has prejudiced or tended to prejudice the defendant in respect to a substantial right. St. v. Rhys, 40 M 131, 105 P 494 (1909).

Presence of Jurors When Verdict Delivered: When the record did not show that the jurors were not all present when the verdict was delivered and from the minutes no other fair inference could be drawn than that they were actually present at the time, the omission from the minutes of a statement that their names were called prior to delivery of the verdict was not an error that prejudiced the defendant in his substantial rights. St. v. De Lea, 36 M 531, 93 P 814 (1908).

Information Defective in Form With Immaterial Averments: An information charging an attempt to obtain money by false pretenses, though defective in form and containing immaterial averments, is sufficient to sustain a conviction when it is apparent that the defendant has suffered no prejudice. St. v. Phillips, 36 M 112, 92 P 299 (1907).

Technical Error: A judgment will not be reversed for a purely technical error in giving an instruction. St. v. Tracey, 35 M 552, 90 P 791 (1907).

Law Review Articles

The Scope of Appellate Review in Criminal Cases: Who Has the Final Word, Anders, 53 Mont. L. Rev. 223 (1992).

Collateral References

Criminal Law *key* 1131(4), 1186(4).

5 Am. Jur. 2d Appellate Review §§809, 810.

Effect of escape by, or fugitive status of, state criminal defendant on availability of appeal or other post-verdict or post-conviction relief—state cases. 105 ALR 5th 529.

Nature and determination of prejudice caused by remarks or acts of state trial judge criticizing, rebuking, or punishing defense counsel in criminal case as requiring new trial or reversal—individualized determinations. 104 ALR 5th 357.

Validity, construction, and application of concurrent-sentence doctrine—state cases. 56 ALR 5th 385.

Gestures, facial expressions, or other nonverbal communication of trial judge in criminal case as ground for relief. 45 ALR 5th 531.

Unauthorized view of premises by juror or jury in criminal case as ground for reversal, new trial, or mistrial. 50 ALR 4th 995, §8[b].

Coram nobis on ground of other's confession to crime. 46 ALR 4th 468.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal. 46 ALR 4th 11.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case. 43 ALR 4th 410.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal. 38 ALR 4th 1170.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—post-Parker cases. 35 ALR 4th 890.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases. 32 ALR 4th 774.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial. 31 ALR 4th 229.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial. 29 ALR 4th 659.

Counsel's reference, in presence of sequestered witness in state criminal trial, to testimony of another witness as ground for mistrial or reversal. 24 ALR 4th 488.

Parole: jury's discussion of parole law as ground for reversal or new trial. 21 ALR 4th 420.

Presence of alternate juror in jury room as ground for reversal of state criminal conviction. 15 ALR 4th 1127.

Instruction to jury: modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR 4th 118.

46-20-703. Action reviewing court may take.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, [section] 121-9.

This section is designed to reduce the number of appeals, retrials, and delays in each case by giving the Supreme Court the power to do complete justice in every case. It will also aid in reducing expense and the massive compilation of records which results in numerous appeals of the same case.

Subsections (1), (2) and (5) are part of our present code.

Subsections (3) and (4) broaden the power of the Supreme Court so that it may more effectively give a complete answer to the parties before it.

Case Notes

Exclusion of Defendant From Pretrial Meeting to Determine Whether Defendant Be Allowed to Proceed Pro Se Violative of Right to Be Present and Defend Oneself — Reversible Error: An alleged violation of the constitutional right to be present and appear at all criminal proceedings does not warrant automatic reversal. Rather, the Supreme Court considers the effect that a violation has on a defendant to determine whether a defendant has suffered any conceivable prejudice. In this case, Mann was excluded from a pretrial meeting to determine whether Mann would be represented by counsel or proceed pro se at trial on burglary and misdemeanor assault charges. This important determination implicated a substantial issue in the scope of the criminal proceedings, and excluding Mann from the meeting, at which Mann's counsel portrayed Mann in a negative light, violated Mann's right to be present and defend himself and right to effective assistance of counsel. Violation of these fundamental constitutional rights was sufficiently prejudicial to constitute reversible error, and the case was remanded for a new trial. St. v. Mann, 2006 MT 160, 332 M 476, 139 P3d 159 (2006).

Supreme Court Reduction of Offense of Sexual Intercourse Without Consent to Sexual Assault — Relevance of Testimony of Victims Regarding Belief That Massage Therapist's Actions Were Criminal: Stevens was convicted of two counts of sexual intercourse without consent after having sexual contact with two female patients at his massage clinic. The Supreme Court determined that there was insufficient proof that the offenses were committed without consent and, without addressing whether sexual assault was a lesser included offense of sexual intercourse without consent, reduced the offenses to sexual assault. Even though Stevens was not specifically charged with sexual assault, there was no question that he was reasonably apprised of the sexual assault charges against him. Stevens offered a jury instruction, which was given without objection, stating that sexual intercourse without consent necessarily included the offense of sexual assault. Evidence clearly showed that Stevens had sexual contact with the victims, and testimony from the victims regarding whether they considered sexual contact by a massage professional to be criminal was relevant and admissible, tending to make the existence of a material element of the crime, namely whether the crime was committed without consent, more likely than without the evidence. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002), distinguishing St. v. Black, 270 M 329, 891 P2d 1162 (1995).

Modification of Conviction From Sexual Intercourse Without Consent to Sexual Assault: Defendant was convicted under 45-5-503 of sexual intercourse without consent. On appeal, he claimed that penetration had not been proved at trial. The Supreme Court agreed and reversed the conviction. The victim had testified indirectly on the issue, but her testimony was ambiguous, and she was not asked to explain her statements. The Supreme Court stated that the fact that this is a delicate subject does not eliminate the requirement that the state prove each element of its case beyond a reasonable doubt. The court further ruled that it would be a violation of the constitutional protection against double jeopardy to remand for a new trial. The state had its opportunity to prove its case and failed to do so. Under its authority set forth in 46-20-703 to reduce the offense of which a defendant has been convicted to a lesser included offense because the record contains evidence establishing all of the elements of sexual assault, the Supreme

Court remanded the case to the District Court for entry of judgment finding the defendant guilty of the crime of sexual assault. St. v. Lundblade, 221 M 185, 717 P2d 575, 43 St. Rep. 732 (1986).

Mere Allegations of Prejudice Insufficient to Satisfy Cumulative Error Doctrine: Defendant contended that the overall demeanor of the prosecution and the District Court, together with other alleged errors, required a reversal of his conviction; however, he articulated no particular comments or remarks and alleged no prejudice to his substantial rights. The Supreme Court has acknowledged the cumulative error doctrine, which is the accumulation of errors which prejudice a defendant's right to a fair trial, but noted that mere allegations of error without proof of prejudice are insufficient to satisfy the doctrine. The resolution of the alleged errors indicated no error meriting reversal of this case, and the court held that defendant failed to carry his burden of showing prejudice and declined to reverse his conviction on grounds of cumulative error. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986). See also St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994), St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004), St. v. Kearney, 2005 MT 171, 327 M 485, 115 P3d 214 (2005), St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005), and St. v. Racz, 2007 MT 244, 339 M 218, 168 P3d 685 (2007).

Robbery With Gun Apparently Under Coat — Sentence of Thirty Years Permissible: Defendant claimed that his 30-year sentence for robbery of a convenience store was disproportionate to the facts (which included a finding that he had his hand under his coat and the store clerk believed he had a gun). The sentence was within the permissible statutory range, there was no clear abuse of discretion, and the sentence was properly reviewable in the Sentence Review Division, not the Supreme Court. St. v. Lewis, 220 M 418, 715 P2d 1064, 43 St. Rep. 492 (1986), following St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

New Trial Denied — Alleged Perjury Unproven — Testimony on Count of Which Defendant Acquitted: Appellant contended that certain testimony was blatant perjury. Perjury could not be discerned from the face of the testimony, and appellant offered no other evidence to support his claim. Furthermore, the testimony was on a count of which appellant was found not guilty and was immaterial to the two counts of which he was found guilty. A new trial requested on the ground of the testimony was properly denied. St. v. Harris, 210 M 382, 682 P2d 185, 41 St. Rep. 1107 (1984).

Pro Se Appeal Filed Without Briefs — General Review on Court's Own Motion: Where the defendant made the defense of his deliberate homicide case difficult by failing to cooperate with his several attorneys, and after conviction was granted several extensions by the Supreme Court for filing a transcript and his first brief, but nevertheless failed to file a brief and specifications of error, the Supreme Court on its own motion reviewed the District Court transcript for typical kinds of errors and found: (1) that the evidence was sufficient to support the defendant's conviction as the defendant was convicted on the basis of his own testimony; (2) that there were no errors in the jury instructions given on the evidence and the elements of the crime; (3) that assistance of counsel was adequate and that the failure of defendant's counsel to subpoena evidence or witnesses was not relevant to the crime charged; and (4) that the statutory penalties for deliberate homicide with a dangerous weapon did not constitute cruel and unusual punishment. St. v. Graham, 206 M 49, 669 P2d 691, 40 St. Rep. 1499 (1983).

Double Jeopardy — Remand Order Not Required to Specify New Trial: A defendant was convicted of aiding and abetting another in witness tampering and aggravated assault. The conviction was reversed, and the defendant was rearraigned on the original charges. The defendant was convicted of lesser included offenses. On appeal, the defendant alleged double jeopardy. He argued that the failure to order specifically and expressly a new trial precluded further action. A remand order need not order a new trial for one to occur. The remand order in this case was supported by the opinion of the Supreme Court, which stated that in ordering dismissal the court did not mean to preclude a refiling of charges. On review, the Supreme Court said it was clear its intention was to leave the door open to retrial, and accordingly a new trial was granted. Therefore, the defendant's double jeopardy rights were not violated by his second trial. St. v. Cardwell, 191 M 539, 625 P2d 553, 38 St. Rep. 451 (1981).

Duty of District Court on Remand: In 1971 Olson was acquitted by reason of insanity of two counts of rape. He was committed to the state hospital but walked away from the hospital shortly after his arrival. In 1977 Olson was arrested and returned to the state hospital. He petitioned for his discharge, and the Supreme Court remanded the case to the District Court with instructions to make specific findings. On remand, the District Court set aside the 1971 acquittal on the basis that it was procured by Olson's fraud upon the court. Olson appealed this decision, and the Supreme Court found that the District Court cannot vacate an earlier District Court judgment and further instructed the District Court to determine Olson's present dangerousness as

directed in the Supreme Court's original opinion. St. v. District Court, 184 M 346, 602 P2d 1002 (1979).

Reduction of Sentence: The sentence of a defendant who pleaded guilty to grand larceny to 4 years in the state prison was reduced to 1 year by the Supreme Court when the trial court passed sentence upon receipt of private reports without allowing the defendant or his counsel to learn of the representations in the reports and have a hearing to present evidence to refute such representations. Kuhl v. District Court, 139 M 536, 366 P2d 347 (1961).

Degree Presumed Correct:

Under former law, when the judgment was silent as to the degree of burglary of which the defendant was convicted and the sentence imposed was such as might be imposed for first degree burglary only, the Supreme Court would presume, when no appeal was taken, that the trial court ascertained that the defendant was guilty of burglary in the first degree. State ex rel. Williams v. Henry, 119 M 271, 174 P2d 220 (1946).

Under former law, in the absence of testimony it was presumed on appeal that the trial court in a burglary case had evidence before it justifying a finding that, if guilty at all, the defendant was guilty of an attempt to commit burglary in the nighttime, which constituted the first degree of the offense, and that the punishment inflicted was proper. St. v. Mish, 36 M 168, 92 P 459 (1907).

Lack of Agreement as to Grounds for Retrial: When on appeal in a homicide case three of the Justices of the Supreme Court, a majority, are of the opinion that the trial court committed error resulting in the denial of a fair trial to the defendant but are unable to agree as to any one of the grounds urged by him in his assignment of errors being sufficient to warrant a reversal of the judgment, a retrial will be ordered. Under such circumstances it is immaterial that the majority do not agree as to any particular error set forth in his assignment of errors—a mere procedural requirement—the real question being whether or not the defendant had a fair trial. St. v. Le Duc, 89 M 545, 300 P 919 (1931).

Reduction of Degree of Offense: Under former law, the Supreme Court had the power to reduce a verdict of murder in the first degree to make it fit the crime established by the evidence, murder in the second degree. St. v. Gunn, 89 M 453, 300 P 212 (1931).

Review of Ruling on Motion for New Trial: Upon an appeal from an order granting or denying a motion for a new trial, the Supreme Court sits as a court of error and review, not as a court of original jurisdiction or as an appellate court that is clothed with authority to try the motion de novo. St. v. Schoenborn, 55 M 517, 178 P 294 (1919).

Modification of Judgment — Costs of Prosecution: A judgment of conviction for a crime that erroneously included payment by the defendant of the costs of prosecution is not on that account void as a whole, but it may be modified by striking therefrom the provision as to costs and, as so modified, be allowed to stand. St. v. Stone, 40 M 88, 105 P 89 (1909).

Collateral References

Criminal Law *key* 1181 through 1193.

5 Am. Jur. 2d Appellate Review §552.

Failure of state prosecutor to disclose pretrial statement made by crime victim as violating due process. 102 ALR 5th 327.

Failure of state prosecutor to disclose exculpatory medical reports and tests as violating due process. 101 ALR 5th 187.

Failure of state prosecutor to disclose exculpatory ballistic evidence as violating due process. 95 ALR 5th 611.

Failure of state prosecutor to disclose fingerprint evidence as violating due process. 94 ALR 5th 393.

Failure of state prosecutor to disclose exculpatory photographic evidence as violating due process. 93 ALR 5th 527.

Prosecution: withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR 3d 16, §18(a) through (c) superseded by 101 ALR 5th 187, §19(a) superseded by 95 ALR 5th 611, §19(b) superseded by 94 ALR 5th 393, §21 superseded by 93 ALR 5th 527, §24 superseded by 102 ALR 5th 327.

Harmless error: violation of federal constitutional rule (Mapp v. Ohio) excluding evidence obtained through unreasonable search or seizure, as constituting reversible or harmless error. 30 ALR 3d 128.

46-20-706. Termination of appeal — remand.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, [sections] 121-10 and 121-14; R.C.M. 1947, sections 94-8210, 94-8214 and 94-8215.

Case Notes

Remand or Order to Lift Stay Unnecessary Upon Affirmation by Appellate Court — Supreme Court Jurisdiction of Municipal Court Appeal Affirmed but Remanded by District Court: A Municipal Court sentenced Costa for misdemeanor traffic offenses, then stayed imposition of sentence pending Costa's appeal to District Court. The District Court affirmed judgment and remanded to the Municipal Court for imposition of sentence. The question then arose as to whether the Supreme Court had jurisdiction to address the District Court's decision. The Supreme Court noted that the definition of remand is to send something back for further action; however, the Legislature did not intend to require an appellate court to formally remand in cases involving affirmed criminal judgments. In addition, it is unnecessary for an appellate court to direct that a stay pending appeal be lifted once a defendant has exhausted the right to appeal and the underlying judgment and sentence have been affirmed. Therefore, the District Court's remand was premature, unnecessary, and of no immediate consequence and had no effect on the Municipal Court's final judgment and sentence. The Municipal Court stayed Costa's sentence pending appeal, which presumably encompassed an appeal to the Supreme Court, so because the District Court's remand was unnecessary, the Supreme Court had jurisdiction over Costa's appeal. Billings v. Costa, 2006 MT 181, 333 M 84, 140 P3d 1070 (2006).

Mandate on Remand Binding: When the Supreme Court reversed the conviction of the defendant and remanded the case to the District Court with directions that, if the defendant had a new trial, the District Court should first make inquiry into the defendant's insanity but, if the prosecution was dismissed, the District Court should deliver the defendant to the court of another county which had continuing jurisdiction over the defendant so that the latter court could inquire into his mental condition and make such disposition of the defendant as is required by law, and thereafter the prosecution was dismissed, the trial court then was compelled to deliver the defendant to the other District Court and the County Attorney could not file a new information. The trial court was bound to follow the mandate of the Supreme Court as found in the remittitur and mandamus will lie to require that the District Court follow such mandate. State ex rel. Kitchens v. District Court, 130 M 57, 294 P2d 907 (1956). (Dissenting opinion, 130 M 57, 294 P2d 907 (1956).)

Supreme Court's Loss of Jurisdiction: When the Supreme Court reversed a conviction and the remittitur went down in due course and was filed with the lower court, the Supreme Court at that time lost jurisdiction in the case. Specifically it lost any jurisdiction it may have had theretofore to alter in any particular either the opinion or the mandate which followed upon that opinion, certainly unless the remittitur was first recalled. State ex rel. Kitchens v. District Court, 130 M 57, 294 P2d 907 (1956).

Collateral References

Criminal Law *key* 1192, 1193.

5 Am. Jur. 2d Appellate Review §§753, 754.

46-20-707. Discharge of defendant on reversal of judgment.

Commission Comments

Source: [R.C.M. 1947, section] 94-8212.

No change.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Dismissal of Amended Information — Retrial Under Original Information: A defendant was convicted of aiding and abetting another in witness tampering and aggravated assault. The conviction was reversed. The defendant was rearraigned on the original charges and convicted of lesser included offenses. The defendant alleged the filing of an amended information left the original information of no effect. He argued that when the amended information was dismissed there was no information then existing and that he was thereafter illegally detained. The Supreme Court disagreed, saying then when an unauthorized or otherwise improper amended information is quashed or dismissed, further proceedings may be had on the original information. St. v. Cardwell, 191 M 539, 625 P2d 553, 38 St. Rep. 451 (1981), following St. v. Thompson, 392 S. W. 2d 617 (Mo. 1965).

Double Jeopardy — Remand Order Not Required to Specify New Trial: A defendant was convicted of aiding and abetting another in witness tampering and aggravated assault. The conviction was reversed, and the defendant was rearraigned on the original charges. The

defendant was convicted of lesser included offenses. On appeal, the defendant alleged double jeopardy. He argued that the failure to order specifically and expressly a new trial precluded further action. A remand order need not order a new trial for one to occur. The remand order in this case was supported by the opinion of the Supreme Court, which stated that in ordering dismissal the court did not mean to preclude a refiling of charges. On review, the Supreme Court said it was clear its intention was to leave the door open to retrial, and accordingly a new trial was granted. Therefore, the defendant's double jeopardy rights were not violated by his second trial. St. v. Cardwell, 191 M 539, 625 P2d 553, 38 St. Rep. 451 (1981).

Collateral References

Criminal Law *key* 1186(7).

5 Am. Jur. 2d Appellate Review §§796 through 803.

CHAPTER 21
POSTCONVICTION HEARING

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

Chapter Case Notes

No Evidence of Prejudicial State Involvement in Parole Proceedings — Postconviction Petition Properly Denied: As part of a plea agreement, the state agreed to not involve itself in Maldonado's parole proceedings. Maldonado contended that the state breached the plea agreement when the County Attorney sent a letter to the Board of Pardons and Parole recommending against Maldonado's parole. The District Court concluded that the state's action was harmless, and on appeal the Supreme Court agreed. Although the Board did receive the County Attorney's letter and one Board member met with a Deputy County Attorney, the state withdrew the letter of opposition, and the Board member who met with the Deputy County Attorney recused herself. Maldonado failed to present any evidence that the state's actions figured into the decision of the Board of Pardons and Parole or that Maldonado was prejudiced in any way, and the District Court did not err in denying Maldonado's request for postconviction relief on this issue. Maldonado v. St., 2008 MT 253, 345 M 69, 190 P3d 1043 (2008).

Petition for Postconviction Relief Alleging Ineffective Assistance of Counsel Filed in District Court — Immunity of Attorney Assisting in Proceedings — Gillham Clarified: At the time of the decision in In re Gillham, 218 M 187, 707 P2d 1100 (1985), petitions for postconviction relief were addressed to the Supreme Court. Because the postconviction procedure has changed, pursuant to 46-21-105, petitions for postconviction relief are now initially filed in District Court. Thus, the Supreme Court clarified that petitions for postconviction relief alleging ineffective assistance of counsel may now be filed in the District Court where the postconviction proceeding is pending. The court affirmed that an attorney ordered to respond to a Gillham order issued by a District Court is not subject to a disciplinary proceeding before the Commission on Practice or subject to

charges of malpractice. The immunity extends to all information, testimony, or documents necessarily provided in response to the allegations of ineffective assistance of counsel. Marble v. St., 2007 MT 98, 337 M 99, 169 P3d 1148 (2007).

Boot Camp Confessions — No Classic Penalty Situation Compelling Self-Incriminating Statements: Woods volunteered for boot camp. A qualification for successful completion of the camp was full disclosure of past crimes in order to receive a sentence reduction. Unsuccessful completion of boot camp required a return to prison. In an anger management class at boot camp and later to several other persons, Woods made self-incriminating statements regarding a prior double homicide, and Woods was subsequently arrested based on the statements. Woods asserted that he received ineffective assistance of counsel because his attorney failed to raise the classic penalty situation to explain that use of his statements were violative of his right against self-incrimination. The Supreme Court noted that the classic penalty situation did not apply because Woods volunteered for boot camp and volunteered the statements. However, the statements were uncoerced, so the information upon which the state relied for its homicide investigation was not compelled by any threat of penalty from the state, and because no classic penalty situation existed, Woods could not argue ineffective assistance of counsel for failing to argue that it did. Woods did not invoke self-incrimination protection at boot camp, and the privilege against self-incrimination could not be considered self-executing. Thus, Woods's petition for postconviction relief was properly denied. St. v. Woods, 2005 MT 186, 328 M 54, 117 P3d 152 (2005), following St. v. Fuller, 276 M 155, 915 P2d 809 (1996), and distinguishing Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002).

Counsel's Act or Omission Not Considered Trial Strategy Reviewable on Direct Appeal: Lucero contended that he received ineffective assistance of counsel because his attorney did not adequately explain the nature and terms of the state's plea bargain offer. Applying the Strickland test for ineffective assistance claims, the Supreme Court noted that before an ineffective assistance claim will be considered on direct appeal, the record must adequately document the reason why counsel acted in a particular manner, and if the record does not supply the reason, the claim is more appropriately raised in a petition for postconviction relief. However, the claimed act or omission in this case was not considered trial strategy because counsel's communication of the oral plea offer to Lucero was obligatory, not strategic. Thus, the question was not why counsel acted in a particular manner but whether counsel acted and, if so, whether counsel acted adequately, and review of an obligatory action may be reviewed on direct appeal. Lucero was fully informed of the offer and chose to go to trial anyway. Counsel's conduct in communicating the plea offer did not fall below the standard of reasonable representation,. Lucero's claim failed to meet the first prong of the Strickland test and was properly denied. St. v. Lucero, 2004 MT 248, 323 M 42, 97 P3d 1106 (2004). See also Hans v. St., 283 M 379, 942 P2d 674 (1997), St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001), and St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003).

Admission by Counsel That Defendant Resisted Arrest When Defendant Charged With Assaulting Peace Officer — Not Ineffective Assistance of Counsel: Audet was charged with assaulting a peace officer and resisting arrest. At the time of trial, Audet told the court that he wished to plead guilty to the resisting arrest charge but to go to trial on the assault charge, even though his attorney had advised otherwise. The court entered not guilty pleas for both counts. Counsel informed the jury in opening and closing statements that Audet was not contesting the resisting arrest charge, but lacked the purposeful and knowing elements required to commit officer assault. The prosecutor then convinced the jury that Audet had essentially conceded the mental state by conceding guilt for resisting arrest, and Audet was convicted on both counts. On appeal, Audet contended that counsel's conduct constituted ineffective assistance, warranting reversal. The Supreme Court applied the Strickland test and dismissed the claim. The record did not reveal why counsel chose to concede the resisting arrest charge to the jury, so the court was unable to determine whether the decision constituted an unreasonable defense strategy that would overcome the presumption that counsel's actions fell within the range of reasonable professional conduct. Pursuant to St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), Audet's direct appeal was dismissed without prejudice to the ineffective assistance issue being raised in a postconviction relief proceeding. St. v. Audet, 2004 MT 224, 322 M 415, 96 P3d 1144 (2004). See also St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003).

Appointed Counsel — No Ineffective Assistance of in Postconviction Relief Proceedings: Kallowat contended that he received ineffective assistance from his appointed counsel who failed to represent him in postconviction relief proceedings and to follow Kallowat's instruction to file an appeal in federal court. The Supreme Court disagreed. Kallowat was appointed two different attorneys, one of whom withdrew because of an excessive workload, and another who withdrew

citing no discernible basis entitling Kallowat to relief, so Kallowat was allowed to proceed pro se. There was no error in allowing counsel to withdraw. Further, attorneys in criminal cases are required to represent a client only until final judgment is rendered, including appeals to the Montana Supreme Court, so counsel was not required to represent Kallowat in appealing to the federal courts. Thus, Kallowat's argument that he did not receive effective assistance of counsel failed. Kallowat v. St., 2004 MT 152, 321 M 501, 92 P3d 1176 (2004).

Actual Innocence Standard Applied to Postconviction Claim Based on Incomplete DNA Results at Trial — Burden of Postconviction Statute of Limitations Met: Pope's petition for postconviction relief was denied by the District Court as barred by the 5-year statute of limitations in the 1993 version of 46-21-102 (now 1 year) and because the issues were not raised on direct appeal. The court concluded that the jurisdictional bar could be overcome only by a clear miscarriage of justice and that the exception did not apply unless Pope did not commit the offense. The court relied on an inadmissible confession that Pope committed the crime, reasoning that even if the confession was not admissible at trial, it could be considered in a postconviction proceeding because it refuted Pope's claim of innocence. Pope contended that the exception applied because newly available DNA evidence tended to show that he did not commit the crime. The Supreme Court reversed. Based on Murray v. Carrier, 477 US 478 (1986), a petitioner must demonstrate that a constitutional violation at trial has probably resulted in conviction of an individual who is actually innocent and the claim must be supported by new evidence that indicates that the individual is innocent. Montana case law provides that the miscarriage of justice must be so obvious that the judgment is rendered a complete nullity and that the exception does not apply unless the defendant did not commit the crime from which relief is sought. Further, under Schlup v. Delo, 513 US 298 (1995), actual innocence requires that no reasonable, properly instructed juror would have found the defendant guilty. Schlup also allows review only of the record and new evidence to determine what a reasonable juror would find, so the District Court improperly relied on the failed plea confession to determine that Pope was not actually innocent. Pope correctly pointed out that the use of "and/or" language in the jury instructions made it impossible to determine whether Pope was convicted of raping one or two women. Thus, Pope satisfied the Schlup actual innocence burden in light of the complete DNA report, and when coupled with the error of using "and/or" language in the alternative charge, the jury instructions, and the verdict, waiver of the time bar in 46-21-102 was required by the clear miscarriage of justice, warranting reversal. St. v. Pope, 2003 MT 330, 318 M 383, 80 P3d 1232 (2003).

Claim of Ineffective Assistance of Counsel During Voir Dire Dismissed on Direct Appeal — Chastain Overruled: Following a felony DUI conviction, Herrman appealed, claiming ineffective assistance of counsel during voir dire. Counsel failed to remove several jurors for cause, but later removed the jurors by peremptory challenge, effectively causing the loss of peremptory challenges to which Herrman was entitled. The Supreme Court noted that jury impartiality goes to the very integrity of the justice system and that the presence of even one juror who cannot fairly assess the credibility of witnesses must be presumed prejudicial and result in reversal. Herrman cited St. v. Chastain, 285 M 61, 947 P2d 57 (1997), for the proposition that ineffective assistance occurred because counsel failed to develop information in the record demonstrating an individual juror's bias and to exercise challenges for cause against those jurors expressing bias. However, the Supreme Court overruled Chastain because it was a mistake to determine that counsel was ineffective during voir dire based on the lack of a reason apparent on the record. Although lawyers will state their reasons on the record for challenging a juror for cause, they do not state their reasons for not challenging a juror. Herrman's lawyer might have had tactical reasons for not challenging certain jurors for cause, but those reasons were not on the record, so the Supreme Court could not address Herrman's ineffective assistance claims without considering matters outside the record. Contentions based on matters outside the record are more appropriately raised in a petition for postconviction relief. Thus, Herrman's direct appeal was dismissed to allow a petition for postconviction relief that could address why counsel did not challenge certain jurors for cause. St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), followed in St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003), and, with regard to lack of a record regarding defense counsel's trial tactics as necessitating a postconviction hearing in lieu of direct appeal, in St. v. Henderson, 2003 MT 285, 318 M 31, 78 P3d 848 (2003). Herrman was also followed in St. v. Olsen, 2004 MT 158, 322 M 1, 92 P3d 1204 (2004). See also St. v. Whitlow, 2001 MT 208, 306 M 339, 33 P3d 877 (2001), and St. v. Racz, 2007 MT 244, 339 M 218, 168 P3d 685 (2007).

Petition for Postconviction Relief Filed With Supreme Court — No District Court Jurisdiction to Amend Pleadings on Remand: Boucher filed with the Supreme Court for postconviction relief.

The Supreme Court remanded to District Court for an evidentiary hearing on whether Boucher was denied effective assistance of counsel because of counsel's failure to investigate and formulate a defense based on the victim's history of making false accusations of sexual assault. On remand, Boucher sought to offer additional evidence of ineffective counsel unrelated to the issue remanded. Although a District Court has the discretion to grant or deny a motion to amend a postconviction petition when the petition is filed with that court, in cases like this when the petition is originally filed with the Supreme Court and remanded, the District Court does not have authority to grant leave to amend the pleadings to include allegations not included in the original petition. St. v. Boucher, 1999 MT 102, 294 M 296, 980 P2d 1058, 56 St. Rep. 431 (1999), distinguishing Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997), and Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997).

"Motion to Vacate Conviction" Construed as Motion for Postconviction Relief and Not Motion to Withdraw Guilty Plea — Attorney Conflict of Interests — Petition Previously Denied: Howard filed a motion for postconviction relief in 1993, asserting that his attorney in his 1981 trial for felony theft had a conflict of interests because the attorney also represented a codefendant. The Supreme Court denied his petition as time-barred under 46-21-102. Howard then filed with the District Court a "Motion to Vacate Conviction", which the District Court construed as another petition for postconviction relief and also denied as time-barred. The Supreme Court held that it was proper for the District Court to construe the "Motion to Vacate Conviction" as another motion for postconviction relief. Despite Howard's argument that his motion did not meet the formal prerequisites for a motion for postconviction relief and that motions to withdraw a guilty plea are allowed after judgment by virtue of 46-16-105, the Supreme Court held: (1) that it had not always strictly enforced the requirements for a motion for postconviction relief, especially for persons appearing pro se; (2) that the content of Howard's motion was of the type usually made in motions for postconviction relief; and (3) that although other means of review of a sentence other than postconviction relief may sometimes be necessary because of exigent circumstances, the circumstances of Howard's situation, in which he waited over 10 years to challenge his conviction the first time, did not demonstrate those exigent circumstances. The Supreme Court held that this petition, like Howard's first petition for postconviction relief, was time-barred by 46-21-101. St. v. Howard, 282 M 522, 938 P2d 710, 54 St. Rep. 464 (1997).

Denial of Appeal Allowed When Right to Postconviction Relief Exercised — No Due Process Violation Found: Finney argued on appeal that he had been denied his right to effective assistance of counsel. Citing Evitts v. Lucey, 469 US 387 (1985), the Supreme Court held that when, as in this case, a criminal defendant was afforded a remedy in postconviction proceedings that have already been reviewed under a different part of the Supreme Court's opinion, there is no violation of the defendant's due process rights in denial of appeal. St. v. Finney, 281 M 58, 931 P2d 1300, 54 St. Rep. 58 (1997), distinguished in Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Failure to Give Mandatory Accomplice Jury Instruction — Harmless Error — Not Ineffective Assistance of Counsel: In petitioner's trial on the charge of attempted deliberate homicide, his lawyer withdrew a previous request, in a jury instruction mandated by 26-1-303, that testimony of an accomplice must be viewed with distrust. Petitioner's theory of defense was that his alleged accomplices had fabricated their testimony. The judge did instruct the jury that testimony of accomplices must be corroborated. In a proceeding for postconviction relief, the Supreme Court ruled that the court's failure to give the mandatory instruction was harmless error and that the withdrawal by petitioner's lawyer of the request for the mandatory instruction was not ineffective assistance of counsel under Strickland v. Wash., 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984). In re Gillham, 218 M 187, 707 P2d 1100, 42 St. Rep. 1508 (1985).

Action for Postconviction Relief Exclusive Means of Establishing District Court Jurisdiction to Modify Sentence: Once a valid sentence has been pronounced by a District Court, that court lacks jurisdiction to modify the sentence upon postjudgment motion by the defendant. The District Court can only modify the sentence if the defendant files a motion for postconviction relief under Title 46, ch. 21. To reduce duplication of effort, the Supreme Court considered defendant's postjudgment motion to be a motion for postconviction relief. Dahlman v. District Court, 215 M 470, 698 P2d 423, 42 St. Rep. 550 (1985), followed in St. v. George, 224 M 495, 730 P2d 412, 43 St. Rep. 2363 (1986), In re Petition of Arledge, 232 M 450, 756 P2d 1169, 45 St. Rep. 1188 (1988), and in St. v. Fertterer, 260 M 397, 860 P2d 151, 50 St. Rep. 1135 (1993).

Motion Filed After Notice of Appeal — Treated as Petition for Postconviction Relief: A motion to withdraw a guilty plea that was filed after a notice of appeal had been filed was treated as a petition for postconviction relief under this chapter because the notice of appeal had removed

jurisdiction from the District Court. St. v. Laverdure, 212 M 31, 685 P2d 375, 41 St. Rep. 1570 (1984).

State Immune From Suit for Illegal Imprisonment When Imprisonment Later Declared Contrary to Statute: In 1979, petitioner was convicted of issuing a bad check. Her sentence was deferred, and she was placed on probation for 3 years. In 1982, petitioner's deferral was revoked because she was convicted of another crime. As a result of the revocation, she was sentenced to serve 5 years in prison. Later in 1982, the Supreme Court, relying on its interpretation of 53-30-105 (as it read prior to its amendment in 1981) (now repealed) in Crist v. Segna, 191 M 210, 622 P2d 1028, 38 St. Rep. 150 (1981), ordered petitioner's release because at the time of her imprisonment she had accumulated sufficient good time credit on probation that her deferred sentence would have been fully served. Petitioner then sued for damages for illegal imprisonment. The Supreme Court held that the State was immune from suit under 2-9-112 because the sentence imposed on petitioner for her violation of probation was a judicial act. Knutson v. St., 211 M 126, 683 P2d 488, 41 St. Rep. 1258 (1984).

District Judge Who Had Represented Petitioners in Same Criminal Case — Disqualification Required: A petition for postconviction relief was filed in the District Court before a judge who, 7 years earlier, had been involved as defense counsel in the preliminary stages of the criminal prosecution. The petition was denied, and petitioners appealed. The Supreme Court ruled that the District Judge had committed error in not disqualifying himself. The case was remanded for a postconviction hearing before another District Judge. St. v. Hintz, 205 M 295, 667 P2d 434, 40 St. Rep. 1280 (1983).

Fully and Finally Litigated Issues Not Considered: An issue that has been fully and finally litigated in the proceeding leading to the judgment of the conviction will not be relitigated in postconviction hearings. An issue is considered fully and finally litigated when the Supreme Court of this state has ruled on the merits of the question. McKenzie v. Osborne, 195 M 26, 640 P2d 368, 38 St. Rep. 1745 (1981).

Applicability of Postconviction Procedure to Capital Convictions Following Automatic Sentence Review: A defendant sentenced to death is entitled to an automatic sentence review under 46-18-307, et seq. This automatic review does not stand in the place of postconviction relief, and after the automatic review, a defendant may petition for postconviction relief under Title 46, ch. 21. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981); Coleman v. St., 194 M 428, 633 P2d 624, 38 St. Rep. 1352 (1981).

Competence of Trial Judge to Preside Over Petition When He May Be Called as Witness: Coleman argued that the sentencing judge would likely be called to testify in his hearing for postconviction relief and the sentencing judge should therefore recuse himself as presiding judge over his petition for postconviction relief. Coleman never made clear what testimony he hoped to elicit from the District Judge. The Supreme Court is of the view that the postconviction court judge should only recuse himself if the petitioner shows that the judge is the source of material evidence otherwise unobtainable. A trial judge's familiarity with a case does not automatically make him a material witness in postconviction proceedings. Coleman v. St., 194 M 428, 633 P2d 624, 38 St. Rep. 1352 (1981).

Remedy Civil in Nature: Montana's postconviction remedy contained in Title 46, ch. 21, is civil in nature and independent of the criminal action. Coleman v. St., 194 M 428, 633 P2d 624, 38 St. Rep. 1352 (1981).

Res Judicata — When Previously Litigated Issues Barred: Res judicata cannot be applied in such a manner as to deprive Coleman of the right to file a postconviction petition and to use postconviction procedure. However, res judicata can be used to bar the rehearing of issues already litigated if: (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application; (2) the prior determination was on the merits; and (3) the ends of justice would not be served by reaching the merits of the subsequent application. Coleman v. St., 194 M 428, 633 P2d 624, 38 St. Rep. 1352 (1981), following Sanders v. U.S., 373 US 1, 10 L Ed 2d 148, 83 S Ct 1068 (1963), and followed in St. v. Perry, 232 M 455, 758 P2d 268, 45 St. Rep. 1192 (1988), and in Walker v. McCormick, 260 M 301, 858 P2d 373, 50 St. Rep. 1053 (1993).

Chapter Law Review Articles

Post-Conviction Relief in Montana, Renz, 55 Mont. L. Rev. 331 (1994).

Post-Conviction Relief, Everly & Mullowney, 42 Mont. L. Rev. 407 (1981).

Criminal Procedure—Montana Law and the Federal Impact: Paragraph IV discusses postinvestigative concerns. Elison, 38 Mont. L. Rev. 52 (1977).

"Coram Nobis"—Is It Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings?, Briggs, 17 Mont. L. Rev. 160 (1956).

Part 1
Initiating Proceedings

Part Case Notes

Failure of Counsel to Object to Introduction of Inconsistent Prior Statements on Confrontation Grounds Not Considered Ineffective Assistance: Jenkins was convicted of deliberate homicide, aggravated kidnapping, and robbery after having been implicated in the crimes based in part on statements made to police and at trial by his wife, Mary. Mary suffered from dementia related to Alzheimer's disease and periodic memory lapses. As a result, in some pretrial interviews, she answered questions with declarative statements while in other interviews, even when asked the same or similar questions, she responded that she didn't know or couldn't remember. Nevertheless, at a pretrial hearing, it was determined that she knew the difference between truth and falsity, could express herself in court, and was competent to testify. At trial, she exhibited the same behavior. On direct examination, the prosecutor asked many of the same questions asked during the pretrial interviews, and although she answered some questions definitively, most of her testimony was that she didn't know or couldn't remember. On cross-examination, she often retracted the definitive answers she gave on direct examination, saying again that she could not remember. Following her testimony, the trial court allowed the prosecution to introduce the content of Mary's pretrial interviews through the testimony of the interviewing officers pursuant to the prior inconsistent statement exception to the hearsay rule, as set out in Rule 801(d)(1)(A), M.R.Ev. (Title 26, ch. 10). Jenkins objected on evidentiary grounds, but not on confrontation grounds, so the issue was not preserved for appeal. In a petition for postconviction relief, Jenkins claimed that he was denied effective assistance of counsel because his attorney should have objected on confrontation grounds. The District Court denied the petition, holding that there was no confrontation clause violation and that even if the objection had been made, it would not have affected the outcome of the trial. Jenkins then appealed the denial of the petition for postconviction relief. The state contended that Jenkins' right to confront witnesses was satisfied by his opportunity to cross-examine Mary and demonstrate to the jury her poor and unreliable memory. The Supreme Court concurred. The implications of admitting prior inconsistent statements was addressed in Calif. v. Green, 399 US 149 (1970), in which it was held that the confrontation clause is not violated by admitting a declarant's out-of-court statements as long as the declarant is testifying as a witness and is subject to full and effective cross-examination. Further, under U.S. v. Owens, 484 US 554 (1988), the confrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in a way that the defendant might wish. Even though Mary suffered from memory lapses, she was competent, appeared at trial, and was subjected to unrestricted cross-examination, giving Jenkins ample opportunity to demonstrate her inability to recall past events and giving the jury the opportunity to observe her testimony and judge the reliability of her memory as it pertained to both her in-court and out-of-court statements. Jenkins failed to show that an objection on confrontation grounds would have been sustained, therefore failing to demonstrate that his defense was prejudiced by his trial counsel's failure to preserve the issue for appeal. Jenkins was thus not denied effective assistance of counsel and his petition for postconviction relief was properly denied. St. v. Jenkins, 2001 MT 79, 305 M 95, 23 P3d 201 (2001).

46-21-101. When validity of sentence may be challenged.

Commission Comments

1991 Comment: Established procedure has assumed that the proper place for filing a challenge to a lower court sentence is in the District Court of the same county. Subsection (2) merely puts this practice into statute form. Subsection (3) is derived from the first sentence of 46-21-103. The Commission felt that the occasion for filing of a postconviction petition directly in the Supreme Court would be very rare. However, the Supreme Court preferred not to eliminate this option completely but preferred to restrict it to cases in which the petitioner is in custody.

Uniform State Law — Note on Commission Comments: The following states have enacted the Uniform Post-Conviction Procedure Act: Arkansas, Idaho, Iowa, Maryland, Minnesota, Nevada, North Dakota, Oregon, South Carolina, and South Dakota.

The commission comments summarize the Uniform Commission Comments and distinguish Montana changes to the U.P.C.A.; thus the Uniform Commission Comments are not set forth.

Source: Uniform Post-conviction Procedure Act, section 1.

This section defines the scope of the remedy and is similar to the one provided for by the federal statute, 28 U.S.C. 2255. The aim of this section is to bring together and consolidate into one simple statute all the remedies, beyond those that are incident to the usual procedures of

trial and review, which are at present available for challenging the validity of a sentence of imprisonment. This section has attempted to provide an expeditious remedy without violating Article I, Section 9 of the U.S. Constitution, and similar provisions in the state constitution [Montana Constitution, Article II, section 19], that: "The privilege of the Writ of Habeas Corpus shall not be suspended . . ." This has been effected by providing a single remedy which does not restrict a prisoner's rights of collateral attack, which preserves and simplifies the procedures under the writ of coram nobis, and which affords a remedy in lieu of, and fully as broad as habeas corpus.

The scope of the post-conviction remedy is more expansive than the Uniform Post Conviction Act or any post-conviction remedy heretofore enacted or proposed by any state. Because, by this petition anybody adjudged guilty of an offense in a court of record, even though not incarcerated, may attack the validity of his conviction.

Compiler's Comments

1997 Amendment: Chapter 378 in (1), near end after "imposed the sentence", deleted "or the supreme court"; in (2), at end of first sentence, inserted "may not be filed unless the petitioner has exhausted all appeal remedies provided by law"; deleted (3) that read: "(3) If the person is in custody, the person may elect to file the petition directly with the supreme court"; and made minor changes in style. Amendment effective April 24, 1997.

Severability: Section 8, Ch. 378, L. 1997, was a severability clause.

Applicability: Section 9(1), Ch. 378, L. 1997, provided: "Except as provided in subsection (2), [sections 3 through 6] [amending 46-21-101, 46-21-102, 46-21-105, and 46-21-201] apply to proceedings in which the conviction becomes final:

(a) after [the effective date of this section] [effective April 24, 1997]; or

(b) during the 12 months prior to [the effective date of this section] [effective April 24, 1997] if a petition under Title 46, chapter 21, is filed within the 12 months after [the effective date of this section] [effective April 24, 1997]."

1991 Amendment: Inserted (2) concerning District Court in which petition must be filed; inserted (3) concerning direct filing with Supreme Court; and made minor changes in style.

1985 Amendment: Near middle inserted "that a suspended or deferred sentence was improperly revoked"; and at end inserted "or revocation order".

1981 Amendment: Deleted "or any justice of the supreme court" following "the supreme court" near the end of the section.

Case Notes

Illegal Revocation of Sentence — Habeas Corpus Relief Warranted: The state petitioned to revoke Borgen's suspended sentence, and the District Court granted the petition and resentenced Borgen to incarceration for an additional 14 years. Borgen petitioned for habeas corpus relief. The Supreme Court determined that after an illegal weapon enhancement sentence was subtracted from Borgen's original sentence, the total time remaining on Borgen's suspended sentence was about 9 years, 1 month. However, the petition to revoke the suspended sentence was not filed until 9 years, 8 months after sentencing. Because the legal portion of Borgen's sentence had expired before the petition to revoke was filed, revocation of Borgen's sentence was facially illegal, and Borgen's incarceration constituted a grievous wrong and a miscarriage of justice warranting habeas corpus relief. Therefore, the Supreme Court granted Borgen's petition, vacated the sentence revocation, and ordered that Borgen be released from custody. Borgen v. Sorrell, 2009 MT 143, 350 M 339, 217 P3d 1022 (2009). See also Lott v. St., 2006 MT 279, 334 M 270, 150 P3d 337 (2006).

What Constitutes Similarly Situated Case for Purposes of Retroactive Application of New Rule — Issue Required to Be Raised in Trial Court: As a general principle, in order for a case to be similarly situated for purposes of retroactive application of a newly announced rule, the issue addressed by the new rule should be raised by the movant at the trial court level and properly preserved for appeal. The only exception would be a challenge under the common-law plain error doctrine or if unique circumstances apply, such as those in St. v. Carter, 2005 MT 87, 326 M 427, 114 P3d 1001 (2005). Here, Foster-DeBerry contended that the new rule regarding suppression of telephone and transmission recordings announced in St. v. Goetz & St. v. Hamper, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), should retroactively apply to Foster-DeBerry's case, which was pending when the Goetz-Hamper rule was announced. However, Foster-DeBerry never filed a motion to suppress or raised the legal issues addressed in Goetz-Hamper in trial court, and thus did not preserve the issue for appeal, so Foster-DeBerry was not entitled to retroactive application of the Goetz-Hamper rule. Further, Foster-DeBerry did not argue for application of the plain error doctrine, so the Supreme Court declined to apply it. St. v. Foster-DeBerry, 2008

MT 397, 347 M 164, 197 P3d 1004 (2008), following Griffith v. Kentucky, 479 US 314 (1987), and St. v. Zivcic, 598 NW2d 565 (Wis. Ct. App. 1999).

Application for Extraordinary Relief From Montana Supreme Court Only Recourse for Defendant Who Wishes to Challenge Decision of the Sentence Review Division: The District Court lacked jurisdiction to review decisions of the Sentence Review Division because it is a division of the Montana Supreme Court. Jordan v. St., 2008 MT 334, 346 M 193, 194 P3d 657, (2008).

Defendant's Failure to Discover Alleged Error in Sentencing Process Until Time for Appeal Expired — Postconviction Proceeding Not Barred: Phillips sought postconviction relief on grounds that his tribal court juvenile record had been illegally requested by the state and incorporated into the presentence investigation report and sentencing proceedings in violation of due process. The state asserted that the matter could have been raised on direct appeal and was thus inappropriate for postconviction relief. However, by the time that Phillips discovered the alleged error, the time for appeal of his conviction had passed, so the Supreme Court held that the claim was not procedurally barred from postconviction consideration. St. v. Phillips, 2007 MT 117, 337 M 248, 159 P3d 1078 (2007).

Postconviction Claim That Counsel Failed to Investigate Case Properly Denied in Light of Voluntary Plea: After entering a nolo contendere plea on a sexual offense, Hardin filed a petition for postconviction relief, asserting that he received ineffective assistance because defense counsel failed to investigate the case prior to the plea. The petition was denied. On appeal, the Supreme Court noted that after voluntarily and knowingly entering a guilty plea, a defendant can challenge only the voluntary character of the plea. In this case, when Hardin entered the plea, he signed a plea agreement form and a plea of guilty and waiver of rights form, acknowledging that the plea was entered knowingly, that he understood that he was waiving his rights, and that he was satisfied with the attorney's services. Absent any allegation or evidence in the record that the plea was not entered voluntarily and knowingly, the postconviction claim of ineffective assistance of counsel was properly denied. Hardin v. St., 2006 MT 272, 334 M 204, 146 P3d 746 (2006).

Sentencing Judge to Preside Over Postconviction Proceedings: A District Court judge was substituted for the original judge early in Jordan's criminal proceedings and ultimately sentenced Jordan. When Jordan petitioned for postconviction relief, the original judge handled the proceedings and dismissed Jordan's petition. The Supreme Court held that the sentencing judge should preside over postconviction proceedings. Substitution of a trial judge does not suddenly evaporate in subsequent postconviction proceedings involving the same parties, witnesses, and factual background as the underlying case from which a judge was previously removed. In this case, the original judge's substitution in Jordan's criminal action also prevented the original judge from presiding over Jordan's postconviction proceedings. The postconviction claim was remanded for consideration by the sentencing judge. Jordan v. St., 2007 MT 165, 338 M 113, 162 P3d 863 (2007), following Coleman v. St., 194 M 428, 633 P2d 624 (1981).

Only Record-Based Ineffective Assistance of Counsel Claim on Appeal: Frasure claimed on appeal that her attorney provided ineffective assistance at trial by failing to object to the introduction of certain evidence. However, the Supreme Court will determine that there was ineffective assistance of counsel only if that conclusion can be based on the record on appeal or if there is no plausible justification for counsel's actions or inactions. Frasure failed to establish that her ineffective assistance claim was record-based, so the claim was dismissed without prejudice to the filing of a petition for postconviction relief. St. v. Frasure, 2004 MT 305, 323 M 479, 100 P3d 1013 (2004). See also St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003).

Person Pleading Guilty in Justice's Court Not Entitled to Appeal to District Court for Trial De Novo: Fyant pleaded guilty in Justice's Court to failure to provide proof of insurance and received a suspended sentence and a $350 fine with the understanding that all or part of the fine would be suspended upon a finding by the court of an inability to pay on the part of Fyant. Fyant offered proof of the inability to pay, but the Justice's Court made no finding regarding her ability to pay and refused to suspend the fines. Fyant filed an appeal with the District Court on the grounds that the sentence was illegal. The Supreme Court held that according to 46-17-203, a person who pleads guilty in Justice's Court waives the right of trial de novo and that Fyant failed to take advantage of the other methods of postconviction relief available to her. St. v. Fyant, 2004 MT 298, 323 M 408, 104 P3d 434 (2004).

Criteria of Effective Assistance of Defense Counsel — Prejudice From Ineffective Counsel Warranting Withdrawal of Alford Plea: In a petition for postconviction relief from a drug conviction, Henderson contended that he received ineffective assistance of counsel and should be allowed to withdraw his Alford plea, but the District Court denied the petition. On appeal, the Supreme Court applied the Strickland test to determine whether Henderson's counsel was

ineffective. The first part of the test requires that defendant show that counsel's performance was deficient. The overarching duty of a criminal defense counsel is to advocate on behalf of the defendant and to meet, test, and refute the prosecution's case. Henderson met the first Strickland requirement by showing that counsel performed no investigation, research, or analysis, filed no pretrial motions, and spent only 4 hours on the case, which included clerical work, appearing in court with Henderson on two occasions, and an hour persuading Henderson to plead guilty. The sum of counsel's actual legal work was asking the County Attorney to propose a plea bargain and then signing the prosecution's first offer. Counsel's utter failure to advocate for Henderson in a meaningful way constituted deficient performance. The second Strickland requirement is a showing by defendant of a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Henderson also met this test by showing that the decision to enter the Alford plea was clearly influenced by counsel's lack of effective assistance and that, but for the ineffective assistance, he would not have entered the plea. Thus, the lack of effective assistance in this case constituted sufficient good cause to authorize Henderson to withdraw the Alford plea and proceed to trial. The Supreme Court granted the petition for postconviction relief and remanded for trial. St. v. Henderson, 2004 MT 173, 322 M 69, 93 P3d 1231 (2004).

Petition for Postconviction Relief Required to Be Filed in Sentencing Court — General Provisions Regarding Substitution of Judge Inapplicable in Postconviction Proceedings: Harris moved to substitute the judge in a proceeding for postconviction relief, citing 3-1-804, which allows each adverse party one substitution of a District Judge in civil and criminal proceedings. The motion was denied, and Harris appealed. The Supreme Court held that the general provisions of Title 3, ch. 1, part 8, do not apply to the substitution of a District Judge in postconviction proceedings because the more specific provisions of this section require that petitions for postconviction relief be filed in the court that imposed the sentence. Harris v. St., 2003 MT 258, 317 M 406, 77 P3d 272 (2003).

Prison Behavior Modification Plans Violative of Excessive Sanction Protection and Equal Protection — State Directed to Revise Incarceration Procedures: Walker, an inmate with diagnosed mental illness, alleged that conditions at the state prison violated constitutional sanctions against excessive punishment and equal protection guarantees because of his mental condition. Although Walker had been released from the state prison when his petition for postconviction relief was considered by the Supreme Court, the case was not moot, as the state contended, because the prison programs remained in place. The court went on to consider whether behavior modification programs used at the prison unconstitutionally exacerbated inmates' mental health conditions and concluded that they do. The plain meaning of the dignity clause in Art. II, sec. 4, Mont. Const., commands that the intrinsic worth and basic humanity of persons may not be violated, and if the particular conditions of confinement cause serious mental illness to be greatly exacerbated or deprive inmates of their sanity, those conditions then cross into the realm of psychological torture. Thus, prison behavior modification programs and living conditions in maximum security constitute an affront to the inviolable right to human dignity and constitute cruel and unusual punishment when they exacerbate an inmate's mental health condition. The prison was directed to conform the operations of its administrative segregation units to the requirements of this opinion. Walker v. St., 2003 MT 134, 316 M 103, 68 P3d 872 (2003). See also Campbell v. Mahoney, 2001 MT 146, 306 M 45, 29 P3d 1034 (2001).

One-Year Limitation on All Postconviction Proceedings, Including Second or Subsequent Petitions — Exception: Defendant contended that the 1-year period of limitation in 46-21-102 applies only to an initial or original petition for postconviction relief, not to a second or subsequent petition. The Supreme Court disagreed. The 1-year period of limitation applies to the initiation of all postconviction proceedings, including those initiated by a second or subsequent petition. Further, under 46-21-105, in order to avoid dismissal, a second or subsequent petition must also demonstrate good cause why its claims were not asserted in the original petition. A narrow exception to the 1-year limitation period is allowed under 46-21-102(2), which provides that a petition that alleges newly discovered evidence may be filed 1 year after the evidence was discovered or reasonably should have been discovered. St. v. Root, 2003 MT 28, 314 M 186, 64 P3d 1035 (2003).

Failure of Counsel to Properly Withdraw or Preserve Direct Appeal — Denial of Postconviction Petition Erroneous: Adams filed a pro se petition for postconviction relief, alleging ineffective assistance of counsel because his original court-appointed attorney failed to move to dismiss for lack of a speedy trial and because his subsequently appointed trial counsel offered a lesser included instruction on aggravated assault to the jury and failed to appeal to the Supreme Court following Adams' conviction, despite Adams' request to do so. The petition was denied on grounds

that Adams failed to file an appeal within 60 days of judgment as required by former Rule 5, M.R.App.P. (now superseded), and Adams appealed. The Supreme Court reversed. Under 46-8-103, appointed counsel is required to continue representation until final judgment, including appellate review, unless counsel is relieved by court order. Adams' counsel failed to comply with the requirements of 46-8-103 and effect a valid withdrawal, so the right to appeal was not preserved. When a defendant would have appealed but for counsel's deficient performance, the error is prejudicial. Thus, denial of Adams' petition for postconviction relief on procedural grounds was reversible error, and on remand, Adams was allowed to raise the issues that would have been raised on direct appeal but for counsel's abandonment of the appeal, as well as the issues raised in the petition for postconviction relief that were not previously raised. St. v. Adams, 2002 MT 202, 311 M 202, 54 P3d 50 (2002), following In re Petition of Hans, 1998 MT 7, 288 M 168, 958 P2d 1175 (1998), and St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Contrary Instructions Regarding Appeal Process From Justice's Court — Appeal to District Court Considered Petition for Postconviction Relief: Boucher pleaded guilty to DUI in Justice's Court, signing a form stating that the plea was voluntary and constituted waiver of the right to appeal to District Court. Despite the waiver, the written judgment stated that Boucher could appeal to the District Court within 10 days. Boucher subsequently learned that his driving privileges would be revoked in Washington as a result of the guilty plea, so he moved to withdraw the guilty plea following conviction. The motion was denied, and Boucher appealed to District Court, but that court held that the guilty plea was voluntary and dismissed the appeal for lack of subject matter jurisdiction because under 46-17-203, entry of a guilty plea in Justice's Court waives a defendant's right to a trial de novo in District Court. Further, 46-17-311 procedurally requires adjudication of a matter by trial in a Justice's Court or City Court as a prerequisite to an appeal in District Court. Boucher then appealed to the Supreme Court, which exercised subject matter jurisdiction by considering Boucher's appeal to District Court as a petition for postconviction relief. Under this section, a defendant who asserts the illegality of a sentence and has exhausted all appeal remedies provided by law may petition for postconviction relief with the District Court in the county where the court of limited jurisdiction is located. A petition for postconviction relief is not another form of appeal from a criminal case, but a separate civil proceeding aimed at vacating, setting aside, or correcting a sentence, and is available to a defendant whose sentence is imposed by a court of limited jurisdiction. Here, the District Court correctly determined that Boucher had no right to appeal the Justice's Court's denial of the motion to withdraw the guilty plea. However, given the contrary instructions concerning the appeals process issued by the Justice of the Peace, the fact that the Justice's Court is not a court of record, and the nature of Boucher's constitutional challenge to the validity of his plea, the District Court held an evidentiary hearing to establish a factual basis for ruling on the issues, and those proceedings constituted the functional equivalent of a postconviction hearing. Boucher was eligible to pursue postconviction relief given the absence of an appellate remedy and the constitutional claims asserted, and the District Court erred in finding that it had a lack of subject matter jurisdiction. St. v. Boucher, 2002 MT 114, 309 M 514, 48 P3d 21 (2002), following St. v. Christensen, 265 M 374, 877 P2d 468 (1994), and St. v. Liefert, 2002 MT 48, 309 M 19, 43 P3d 329 (2002).

Issue of Counsel's Effective Use of Peremptory Juror Challenges More Appropriate When Raised as Petition for Postconviction Relief Rather Than on Direct Appeal When Record Silent: Russell was convicted of attempted deliberate homicide and appealed claiming ineffective assistance of counsel during jury selection. Russell contended that counsel failed to challenge for cause a relative of the victim and used two peremptory challenges to strike jurors who were outside the jury pool. Under the Strickland test for ineffective assistance of counsel, challenged actions of counsel are presumed to be matters of trial strategy and a silent record cannot rebut the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Pursuant to St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001), when the record does not illuminate the basis for the challenged acts or omissions of counsel, a claim of ineffective assistance is more appropriately raised in a petition for postconviction relief so that a supplemental record may be made. Here, the record was silent as to why Russell's counsel acted or failed to act regarding the juror challenges. Thus, the Supreme Court declined to discuss the issue on direct appeal. St. v. Russell, 2001 MT 278, 307 M 322, 37 P3d 678 (2001).

Requirement for Unanimous Verdict on at Least One Criminal Act Before Finding Guilt for Multiple Act Count — Continuous Course of Conduct Exception: In St. v. Weaver, 1998 MT 167, 290 M 58, 964 P2d 713 (1998), the Supreme Court held that a specific unanimity instruction to

the jury was required when different criminal acts were charged in one count. When a genuine possibility exists that different jurors will conclude that a defendant committed disparate illegal acts subsumed under the single count, the special instruction serves to direct the jurors to reach a unanimous verdict on at least one specific criminal act before finding guilt for the multiple act count. Harris contended that the failure to give the unanimity jury instruction violated his due process rights and warranted retroactive application of Weaver and reversal of his conviction of incest. However, Weaver also established a continuous course of conduct exception to this rule when the criminal acts are so closely connected that they form part of one and the same transaction and thus one offense. In Harris's case, the criminal conduct occurred over a multiple-year period; however, the persistent illegal acts were so frequently perpetuated and so closely connected as to be viewed as a single, continuous, running offense. There was no possibility of jury confusion regarding Harris's incessant criminal acts. The conduct fell within the Weaver exception, so no unanimity instruction was necessary. The absence of District Court error on the issue mirrored the Supreme Court's refusal to invoke the plain error doctrine on appeal, so Harris was held to have received due process. St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001). Weaver was followed in St. v. Dasen, 2007 MT 87, 337 M 74, 155 P3d 1282 (2007).

Effect of 1997 Amendment on Supreme Court Authority to Resolve Postconviction Claims: Prior to 1997, it was allowable for a petition for postconviction relief to be filed either with the District Court that imposed the sentence or directly with the Supreme Court. The 1997 amendments to this section eliminated a postconviction petitioner's right to file a petition for postconviction relief directly with the Supreme Court, thereby removing Supreme Court authority to resolve issues cognizable only as postconviction claims under the court's original jurisdiction. Henceforth, if inmate petitions are for habeas corpus relief or other relief and are properly before the Supreme Court as an original proceeding, those petitions will be addressed and resolved accordingly. However, to the extent that the Supreme Court receives petitions that include claims cognizable or potentially cognizable only pursuant to postconviction proceedings, those petitions will be forwarded, pursuant to this section, for filing in the District Court that imposed the sentence, with a filing date identical to the date on which the petition was filed with the Supreme Court. Schrapps v. Mahoney, 2001 MT 214, 306 M 402, 36 P3d 338 (2001).

Question Whether Parole Denied for Failure to Satisfy Additional Treatment Conditions — Remand: Ringewold pleaded guilty to two counts of felony assault and was sentenced to a total of 14 years' commitment to the Department of Corrections. The next day, Ringewold was placed in the state hospital. The placement order allowed Ringewold to petition for a conditional release from the hospital, but did not specify any conditions. About 17 months later, Ringewold petitioned for release from the hospital. The state agreed that a hearing on the petition was proper, but argued that if it was found that Ringewold no longer suffered from a mental disease or defect that presented a risk to Ringewold or others, it was appropriate to remand Ringewold to the Department. The District Court ordered an independent mental evaluation, but it was never performed. Ringewold then filed another petition for release, but about the same time, the hospital staff determined that Ringewold would no longer benefit from active inpatient treatment and transferred him to the state prison pursuant to 46-14-312. At the request of counsel, Ringewold was transferred back to the state hospital, with the state conceding that hospital placement was proper and that Ringewold should be allowed to petition for release pursuant to 46-14-312. About 4 months later, the Department Director sought an order transferring Ringewold back to the prison on grounds that Ringewold continued to suffer from a dangerous mental disorder but would no longer benefit from active inpatient treatment for the disorder. At a conditional release hearing about 9 months later, the District Court orally resentenced Ringewold to 8 years in prison. The court specified that the total sentence not exceed more than the original sentence, but the court also conditioned Ringewold's parole on completion of an anger management course, moral reconation therapy, and chemical dependence treatment. In a written amended judgment about 1 month later, the District Court reimposed the original 14-year sentence and restated the parole conditions. Ringewold appealed. The Supreme Court held that under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the oral pronouncement of sentence was legally effective and constituted final judgment. However, it was not possible to determine from the record whether the additional conditions added to the sentence improperly lengthened Ringewold's sentence, so the case was remanded for supplementation of the factual record to determine if Ringewold was being denied consideration for parole because of failure to satisfy the additional treatment conditions and, if so, to strike the conditions from the amended judgment, because under those circumstances, the practical effect of the conditions would be to

lengthen the sentence in violation of 46-14-312. St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001).

Record-Based or Nonrecord-Based Information Determinative of Appropriateness of Direct Appeal or Petition for Postconviction Relief — Direct Appeal Dismissed When Record Insufficient to Substantiate Effectiveness of Counsel: In 1999, White moved for an evidentiary hearing to allow the development of facts that were not part of the record but that were necessary to sustain a claim of ineffective assistance of counsel. The Supreme Court declared by order that a petition for postconviction relief would be the proper avenue for White's nonrecord-based ineffective assistance of counsel claim. Nevertheless, in late 2000, White appealed, contending that the claim of prejudicial error resulting from her trial counsel's various failures to provide representation, such as the failure to call witnesses, make an opening statement, or offer a theory of the case at any stage of the proceedings, was supported by the record and proper for direct appeal. The general rule set out in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), is that when ineffective assistance claims are based on facts of record, they must be raised on direct appeal, while claims based on allegations not documented in the record must be raised by petition for postconviction relief. The underlying principle of the rule is that a silent record cannot rebut the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The two distinct classifications of on-record and off-record actions tend to overlap at times, and though not easily distilled into a formula, the definitive question that decides whether actions are on-record or off-record is whether the record fully explains why counsel took the particular course of action. Generally, an alleged failure to object to the introduction of evidence, to the testimony of a witness, or to prosecutorial misconduct at trial is considered record-based and appropriate for direct appeal. Likewise, counsel's own conduct in presenting the case, such as improperly eliciting damaging testimony from a witness or rendering an improper opening statement or closing argument, may be pointed to as record-based. Decisions regarding the timing and number of objections and whether to offer no opening statement at all lie within counsel's tactical discretion, indicating that nonrecord-based information explaining the tactic may be involved. Similarly, counsel's failure to adequately investigate, to prepare a defense, to become familiar with critical areas of the applicable law, to offer a particular jury instruction, to object to the trial court's failure to consider sentencing alternatives, to object to the admission of evidence that is evidenced by the record, or to fully inform defendant of the consequences of various options and rights, even though the prejudicial results of the ineffectiveness appear on the record, may constitute a nonrecord-based claim. In White's case, the record supplied some indicia of why a certain objection was raised at a particular time, but was still insufficient to determine to what extent counsel's actions were purely tactical or resulted from deficient representation. Thus, the information was considered nonrecord-based and should have been raised by petition for postconviction relief, so White's direct appeal was dismissed without prejudice. St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001), followed in St. v. Earl, 2003 MT 158, 316 M 263, 71 P3d 1201 (2003), St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), St. v. Rinkenbach, 2003 MT 348, 318 M 499, 82 P3d 8 (2003), St. v. Bowser, 2005 MT 279, 329 M 218, 123 P3d 230 (2005), St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005), Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006), St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006), St. v. Upshaw, 2006 MT 341, 335 M 162, 153 P3d 579 (2006), St. v. Fender, 2007 MT 268, 339 M 395, 170 P3d 971 (2007), and St. v. Herman, 2008 MT 187, 343 M 494, 188 P3d 978 (2008). See also St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003), St. v. Adgerson, 2003 MT 284, 318 M 22, 78 P3d 850 (2003), and St. v. Davis, 2003 MT 341, 318 M 459, 81 P3d 484 (2003). See also St. v. St. Germain, 2007 MT 28, 336 M 17, 153 P3d 591 (2007), in which the Supreme Court declined to address a direct appeal of defense counsel's nonrecord-based reasons for making a double jeopardy argument and for failing to call a witness to testify in an incest case because the issues were appropriate for postconviction proceedings. See also St. v. Green, 2009 MT 114, 350 M 141, 205 P3d 798 (2009), in which an ineffective counsel appeal based on counsel's failure to request an accomplice instruction in a homicide trial was dismissed in favor of postconviction relief proceedings because plausible justifications existed for counsel's conduct that could not be addressed on appeal since the record did not resolve the factual questions surrounding counsel's actions.

Claim of Ineffective Assistance Not in Record — Claim Must Be Brought by Petition for Postconviction Relief: When the record does not provide for the basis for the challenged acts or omissions of counsel, a defendant claiming ineffective assistance must raise that claim by petition for postconviction relief. St. v. Weaver, 2001 MT 115, 305 M 315, 28 P3d 451 (2001), following St. v. Black, 270 M 329, 891 P2d 1162 (1995), St. v. Bromgard, 273 M 20, 901 P2d 611

(1995), and St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001). See also St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

No Prejudice From Alleged Ineffective Assistance of Counsel During Pretrial Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the pretrial phase, applying the two-pronged test in Strickland v. Wash., 466 US 668 (1984). Dawson alleged that counsel was ineffective in failing to: (1) object to the procedure and use of Dawson's psychiatric evaluation; (2) advise him of his rights during the evaluation process; and (3) conduct an adequate pretrial investigation. On the first point, the procedure followed and the use of the psychiatric evaluation were consistent with the statutory procedure in effect at the time, and counsel had no reason to question it. On the second point, Dawson satisfied the deficiency prong of the Strickland test because he should have been informed of the potential consequences of participating in the evaluation; however, there was no evidence that Dawson was prejudiced at trial or sentencing. Dawson's version of the crimes was consistent with his defense theory, and at no time did he admit killing the victims, so counsel's failure to advise him of his Miranda rights was not prejudicial. On the third point, Dawson could not establish prejudice as a result of counsel's failure to obtain complete records and staff notes of the evaluation, to investigate Dawson's possible epilepsy, or to investigate or pursue Dawson's drug use—at trial or at sentencing as a mitigating factor. The District Court did not err when it found that Dawson did not receive ineffective assistance at the pretrial phase. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000). See also St. v. Armfield, 214 M 229, 693 P2d 1226 (1984), St. v. Smith, 217 M 453, 705 P2d 1110 (1985), and Hans v. St., 283 M 379, 942 P2d 674 (1997).

Out-of-Time Appeal Based on Claim of Ineffective Counsel Denied: An out-of-time appeal is a remedy that may be available to a defendant involved in a criminal proceeding who, through no fault of the defendant, misses a deadline for filing an appeal. Here, Garner moved for an out-of-time appeal on grounds of ineffective counsel. The trial court denied the motion after finding substantial factual evidence that Garner was fully advised of his right to appeal the postconviction relief order, as well as of the 60-day deadline for filing notice of appeal. The ineffective assistance argument was without merit, and the trial court was affirmed. St. v. Garner, 1999 MT 295, 297 M 89, 990 P2d 175, 56 St. Rep. 1180 (1999).

Presumption of Ineffective Counsel — Irreconcilable Conflict — Error in Failure to Investigate Timely Request for Substitution of Counsel: Generally, a defendant must establish both parts of the two-part test in Strickland v. Wash., 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984), to prevail in showing ineffectiveness of counsel: (1) that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the constitution; and (2) that counsel's deficient performance prejudiced the defense and deprived defendant of a fair trial. However, in some cases, counsel's performance is so deficient that a presumption of ineffectiveness arises and the second part of the test becomes unnecessary. Only when surrounding circumstances justify a presumption of ineffectiveness can a constitutional claim of ineffective counsel be sufficient without inquiry into counsel's actual performance at trial. Here, a presumption of ineffectiveness could have arisen by an actual conflict of interest or by an irreconcilable conflict, but in either case, once the presumption was established, the second part of the test did not need to be satisfied. To establish an irreconcilable conflict, defendant must show a complete collapse of the attorney-client relationship. New counsel should be appointed if defendant shows by material facts that there is a total lack of communication or ineffective assistance of counsel, but bare unsupported allegations are insufficient to justify appointment of new counsel. In the present case, Wilson filed a pro se petition for postconviction relief, alleging ineffective assistance of counsel. The District Court found that it had erred by denying a hearing when Wilson requested substitution of counsel but denied the petition on grounds that Wilson had received a fair trial. On appeal, the Supreme Court applied St. v. Vessey, 967 P2d 960 (Utah Ct. App. 1998), holding that when reviewing an error in failing to investigate a defendant's timely request for substitution, the question is not whether the defendant received effective assistance of counsel at a subsequent trial, but whether the conflict with counsel was sufficient that it required substitution of counsel at the time that the request was made. In Wilson's case, it could

not be determined whether the District Court gave adequate consideration to the merits of Wilson's substitution request based on the facts at the time that the request was made or whether denial of the petition for postconviction relief was based simply on the court's observation of counsel at the time of trial. The order denying the petition was vacated and the case remanded for further proceedings. Wilson v. St., 1999 MT 271, 296 M 465, 989 P2d 813, 56 St. Rep. 1096 (1999), overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001). See also St. v. Zackuse, 250 M 385, 833 P2d 142 (1991), St. v. Jones, 278 M 121, 923 P2d 560, 53 St. Rep. 864 (1996), and St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371, 55 St. Rep. 284 (1998), which was overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001). See also St. v. Molder, 2007 MT 41, 336 M 91, 152 P3d 722 (2007), in which it was held that because no request for new counsel was made, a separate hearing to consider a continuance motion was unnecessary. Molder was followed in St. v. Racz, 2007 MT 244, 339 M 218, 168 P3d 685 (2007).

Extra Conditions in Sentencing Order Not Mentioned in Oral Sentence Stricken: The District Court that sentenced Waters imposed two extra conditions in the sentencing order that were not contained in the plea agreement or presentence investigation or contained in the oral sentence: (1) payment of supervision fees; and (2) submission to Texas authorities. Pursuant to St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), the oral pronouncement controls. Thus, Waters contended that only the conditions contained in the oral sentence could be imposed. The Supreme Court clarified Lane, noting that Waters was on notice of the conditions in the plea agreement and presentence investigation and that those terms applied despite the ambiguous sentencing conditions that were imposed orally. However, the court remanded for an amendment of the written sentence to strike the submission to Texas authorities, which was never mentioned, and to strike the payment of supervision fees as well, unless it was determined that payment of the fees would not impose a significant hardship on Waters, pursuant to 46-23-1031. St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999), followed in St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000), and St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001).

Retroactive Applicability of Judicial Rule Regarding Oral Pronouncement of Sentence: Retroactivity is a threshold matter that compels the evenhanded application of a new rule for the conduct of criminal prosecutions to all similarly situated cases that are pending on direct appeal or not yet final. Therefore, all defendants whose cases meet those criteria are entitled to the retroactive application of a new judicial rule of criminal procedure. This standard applies irrespective of whether the new judicial rule constitutes a clear break from existing precedent and without regard to whether the rule was available to the District Court at the time that it ruled. Thus in the present case, the rule in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), that oral pronouncement of sentence controls over the written sentence for purposes of finality applied retroactively to Waters' appeal, even though the District Court did not have the Lane rule at the time of sentencing. St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999), following St. v. Egelhoff, 272 M 114, 900 P2d 260 (1995), and St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999), overruling St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), Peterson v. Mont. Bank of Bozeman, N.A., 212 M 37, 687 P2d 673 (1984), and their progeny, and followed in St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361, 56 St. Rep. 1032 (1999). See also Teague v. Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989).

Exceptions to General Rule of Retroactivity — Guillaume Inapplicable to Case Finalized Before Adoption of New Constitutional Rule: Although Nichols' conviction, resulting in an enhanced penalty for use of a weapon, was finalized more than 5 years prior to the Supreme Court's decision in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999), which created a new constitutional rule barring enhanced weapon sentences when the underlying offense requires proof of use of a weapon, Nichols nevertheless argued that the portion of his sentence precluded by Guillaume should be stricken from his sentence. The Supreme Court applied the retroactivity criteria in Teague v. Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989), noting that two exceptions apply to the general rule of retroactivity. The first exception applies when the constitutional rule puts primary, private individual conduct beyond the power of the criminal law to proscribe; the second exception applies when the procedures used to convict the defendant are so implicit in the concept of ordered liberty as to constitute watershed rules of criminal procedure. Finding that Guillaume was not dictated by prior precedent and did not set out a watershed rule, the court held that the new rule did not

require retroactive application to cases not pending on direct appeal or to cases that were final when the Guillaume opinion was issued. Not only was Nichols' claim time-barred under the pre-1997 version of 46-21-102, his argument that the sentence should be reduced to prevent a miscarriage of justice also failed because miscarriage of justice refers to actual, not legal, innocence. St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999), followed in St. v. Baker, 1999 MT 251, 296 M 253, 989 P2d 335, 56 St. Rep. 987 (1999), and overruled in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002). See also St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Guilty Plea Constituting Waiver of Nonjurisdictional Defects and Defenses: Gordon was charged in Montana with the murder, aggravated kidnapping, and robbery of an Idaho man. Gordon sought a ruling on a motion to require enforcement of the second of two plea agreements entered into with Idaho authorities regarding a sentence that might be imposed if Gordon's implicity was proved in the homicide or if he was not truthful in the ongoing investigation. The state argued that Idaho could not bind Montana to a pretrial agreement in which Montana had not participated and contended that Idaho had previously voided the second plea agreement because of Gordon's untruthfulness. The District Court denied the motion. Gordon subsequently entered a plea agreement with Montana. The court obtained Gordon's understanding of the rights that he would give up by pleading guilty, including the right to an appeal. The court accepted Gordon's guilty plea to aggravated kidnapping and dismissed the other charges, ultimately imposing an 80-year sentence as recommended in the state plea agreement. On appeal, Gordon asserted that his constitutional rights were violated when the District Court did not sentence him pursuant to the second Idaho plea agreement. Citing St. v. Wheeler, 285 M 400, 948 P2d 698, 54 St. Rep. 1213 (1997), the Supreme Court held that after a criminal defendant pleads guilty of the offense charged, only the voluntary and intelligent character of the guilty plea may be attacked and that independent claims relating to prior deprivations of constitutional rights may not be raised. A voluntary and intelligent guilty plea constitutes a waiver of nonjurisdictional defects and defenses. St. v. Gordon, 1999 MT 169, 295 M 183, 983 P2d 377, 56 St. Rep. 654 (1999).

Petition for Postconviction Relief Filed With Supreme Court — No District Court Jurisdiction to Amend Pleadings on Remand: Boucher filed with the Supreme Court for postconviction relief. The Supreme Court remanded to District Court for an evidentiary hearing on whether Boucher was denied effective assistance of counsel because of counsel's failure to investigate and formulate a defense based on the victim's history of making false accusations of sexual assault. On remand, Boucher sought to offer additional evidence of ineffective counsel unrelated to the issue remanded. Although a District Court has the discretion to grant or deny a motion to amend a postconviction petition when the petition is filed with that court, in cases like this when the petition is originally filed with the Supreme Court and remanded, the District Court does not have authority to grant leave to amend the pleadings to include allegations not included in the original petition. St. v. Boucher, 1999 MT 102, 294 M 296, 980 P2d 1058, 56 St. Rep. 431 (1999), distinguishing Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997), and Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997).

Counsel's Abandonment of Appeal — Postconviction Claims: All claims foreclosed from appeal because of counsel's abandonment of appeal may be raised in a postconviction petition. Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997). In a subsequent proceeding, the state and Hans disagreed as to which claims were properly before the Supreme Court as part of the second amended petition for postconviction relief. Clarifying the 1997 Hans I decision, the court held that under this case scenario, Hans was entitled to raise two types of issues: (1) those issues that could have been raised in a direct appeal but for counsel's abandonment of the appeal; and (2) those issues properly raised in a petition for postconviction relief under this section that had not already been raised. In the future, a defendant whose counsel has abandoned an appeal should raise, in one petition for postconviction relief, the claim that counsel was ineffective in abandoning the appeal, all claims that could have been raised on direct appeal, and all claims that would normally be appropriate in a petition for postconviction relief, including challenges to the validity of the sentence and other ineffective assistance claims. In this case, Hans's objections to sentencing procedures were not properly preserved but were properly brought under the postconviction relief proceeding pursuant to this section. Those objections, as well as the ineffective assistance claims not raised in the first petition for postconviction relief, were not subject to dismissal as requested by the state. In re Petition of Hans, 1998 MT 7, 288 M 168, 958 P2d 1175, 55 St. Rep. 21 (1998). See also In re Petition of Evans, 250 M 172, 819 P2d 156 (1991),

St. v. Nelson, 274 M 11, 906 P2d 663 (1995), and Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999).

Ineffective Assistance Claims Denied — No Right to Miranda Warning When Defendant Requests Psychiatric Exam — Duty to Inform Defendant of Consequences of Participation in Evaluation: The defendant alleged that counsel failed to provide effective counsel based on lack of communication, adequacy of advice regarding mitigated deliberate homicide, adequacy of advice regarding mental illness, requesting and agreeing to the dissemination of mental health evaluations, ineffectiveness of the investigation and preparation for trial, and abandonment of the appeal. The Supreme Court denied the petition for postconviction relief except to allow the defendant to amend the petition to address appealable sentencing issues. The defense counsel's acquiescence to dissemination of the mental health report pursuant to 46-14-202 is not grounds for a finding of ineffective assistance of counsel. Subsequently decided case law cannot be used to judge an attorney's conduct at the time of representation. A defendant has no constitutional right to be informed of Miranda rights when, through the defendant's attorney, the defendant requests a psychiatric exam. Counsel has a duty to inform a defendant of the consequences of participation in a psychiatric evaluation. In this case, the defendant was not prejudiced by the defense counsel's alleged failure to inform the defendant of the right to remain silent during the mental health evaluation. Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Postconviction Relief Denied — Counsel Not Ineffective — Guilty Plea Properly Entered — Mental Health Evaluators' Failure to Advise Defendant of Rights Not Violation of Due Process — Petition Allowed on Appealable Sentencing Issues: The defendant, who was 14 years old at the time of a school shooting incident, pleaded guilty to four counts and was sentenced to the Department of Corrections for 100 years. The defendant petitioned for postconviction relief based on the claims of ineffective assistance of counsel; that the guilty plea was not entered knowingly, voluntarily, and intelligently; and that the defendant was denied due process because the mental health evaluators did not advise the defendant of the right to counsel, of the right not to submit to evaluation, and that statements could be used against him. The Supreme Court denied the petition for postconviction relief except to allow the defendant to amend the petition to address appealable sentencing issues. Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997). Reconsideration of the second petition for postconviction relief was denied in Hans v. St., 1998 MT 255, 291 M 227, 967 P2d 396, 55 St. Rep. 1052 (1998).

"Motion to Vacate Conviction" Construed as Motion for Postconviction Relief and Not Motion to Withdraw Guilty Plea — Attorney Conflict of Interests — Petition Previously Denied: Howard filed a motion for postconviction relief in 1993, asserting that his attorney in his 1981 trial for felony theft had a conflict of interests because the attorney also represented a codefendant. The Supreme Court denied his petition as time-barred under 46-21-102. Howard then filed with the District Court a "Motion to Vacate Conviction", which the District Court construed as another petition for postconviction relief and also denied as time-barred. The Supreme Court held that it was proper for the District Court to construe the "Motion to Vacate Conviction" as another motion for postconviction relief. Despite Howard's argument that his motion did not meet the formal prerequisites for a motion for postconviction relief and that motions to withdraw a guilty plea are allowed after judgment by virtue of 46-16-105, the Supreme Court held: (1) that it had not always strictly enforced the requirements for a motion for postconviction relief, especially for persons appearing pro se; (2) that the content of Howard's motion was of the type usually made in motions for postconviction relief; and (3) that although other means of review of a sentence other than postconviction relief may sometimes be necessary because of exigent circumstances, the circumstances of Howard's situation, in which he waited over 10 years to challenge his conviction the first time, did not demonstrate those exigent circumstances. The Supreme Court held that this petition, like Howard's first petition for postconviction relief, was time-barred by this section. St. v. Howard, 282 M 522, 938 P2d 710, 54 St. Rep. 464 (1997).

Review of Decision of Sentence Review Division: A petition for postconviction relief or other extraordinary writ is appropriate for the purpose of challenging a decision of the Sentence Review Division. St. v. Torres, 277 M 514, 922 P2d 1180, 53 St. Rep. 826 (1996).

Substantial Change in Applicable Law — Teague Criteria: Byers filed for postconviction relief based on allegations that the Montana Supreme Court had reversed its position on the constitutionality of two sets of jury instructions regarding the mental element of the offense of deliberate homicide and voluntary intoxication subsequent to Byers' previous appeal. The U.S. Supreme Court's decision in Teague v. Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989), analyzing the retroactive application of judicial decisions to cases on collateral review, stated that a new rule will not be applied to cases coming before the court on collateral review after the date of the decision. A new rule was defined as a rule in which the result was not dictated by

precedent at the time that the defendant's conviction became final. The Montana Supreme Court found that Byers' objection to jury instructions in his previous appeal had been overruled in St. v. Rothacher, 272 M 303, 901 P2d 82 (1995), amounting to a substantial change in applicable law that was not barred by Teague, but that the instructional error in Byers' trial was harmless beyond a reasonable doubt. The court declined to apply the new rule regarding instructions on voluntary intoxication set out in St. v. Egelhoff, 272 M 114, 900 P2d 260 (1995), because that decision specifically precluded retroactive application and because it had been subsequently overruled by the U.S. Supreme Court, resulting in no substantial change in the applicable law. Byers v. Mahoney, 279 M 28, 929 P2d 202, 53 St. Rep. 624 (1996). The Teague criteria were applied in St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999). The Teague criteria were also applied in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999).

Failure to Appoint New Counsel During Posttrial Hearing on Counsel's Effectiveness: Finley contended that the District Court denied him his right to counsel's undivided loyalty under 46-21-201 by failing to appoint new counsel to represent him at a posttrial hearing regarding his counsel's effectiveness, at which his counsel confronted him concerning the sufficiency of his allegations of ineffectiveness and then took the stand to rebut those allegations. Section 46-21-201 was not in effect at the time of the hearing and thus did not apply; however, under this section, a postconviction hearing is a separate proceeding that is available after sentencing and applies when there is no adequate remedy of appeal. Further, under Art. II, sec. 24, Mont. Const., the right to counsel is composed of two correlative rights—the right to counsel of reasonable competence and the right to counsel's undivided loyalty. The Supreme Court applied St. v. Zackuse, 250 M 385, 833 P2d 142 (1991), in holding that when a defendant and counsel have a conflict so great that it results in a total lack of communication or that if counsel fails to render effective assistance, new counsel should be appointed. The potential for substantial prejudice to Finley existed at the posttrial hearing, qualifying the hearing as a critical stage in the proceedings. It was error for the trial court to fail to appoint new counsel, at least for purposes of the competency hearing. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996).

Jury Misconduct Alleged in Newspaper and Not in Evidence in Record: Alleged jury misconduct was disclosed by a newspaper article the day after the trial. The related issue that counsel was ineffective for failure to challenge the misconduct could not be considered on direct appeal because the evidence of misconduct was not part of the District Court trial record. The issue had to be raised in a petition for postconviction relief, and the District Court erred in denying the petition on the grounds that the issue could have been and was not raised on direct appeal. St. v. Bromgard, 273 M 20, 901 P2d 611, 52 St. Rep. 947 (1995).

Lower Court's Ruling on Untimely Motion Upheld: The state argued that the trial court should have summarily dismissed Barrack's motion for a new trial because it was filed late and that the trial court should not have treated the motion as a petition for postconviction relief. The Supreme Court noted that at the time that the trial court incorrectly treated the untimely motion for a new trial as a petition for postconviction relief, Barrack could still have filed a timely appeal and may have been lulled into a position in which he did not timely pursue his appeal rights. The Supreme Court held that under the unique facts of the case, it would affirm the lower court's decision to rule on the untimely motion but that its decision could not be read as enlarging the scope of postconviction relief or as diminishing a defendant's obligation to timely file any motions. St. v. Barrack, 267 M 154, 882 P2d 1028, 51 St. Rep. 983 (1994).

Postconviction Relief From City Court Allowed — Plain Meaning Rule Followed: Christensen was convicted in Plentywood City Court of several traffic violations and, following conviction, filed a petition for postconviction relief in District Court. The District Court dismissed the petition based upon its conclusion that postconviction relief could be had only from judgments of a court of record. The Supreme Court reversed, holding that subsection (2) of this section clearly provides for postconviction relief from judgments of a City Court and that the statute is clear and unambiguous and should be followed. St. v. Christensen, 265 M 374, 877 P2d 468, 51 St. Rep. 542 (1994).

Claim That Another Offense More Applicable Than Offense to Which Defendant Pleaded Guilty — Nonjurisdictional Claims — Postconviction Relief Properly Denied: Hagan pleaded guilty to and was convicted of a charge of attempted sexual intercourse without consent. In a petition for postconviction relief, Hagan alleged that the conviction was improper and violated his constitutional rights because the victim was his natural daughter and thus the only crime with which he could have been charged, convicted, and sentenced was incest. The District Court dismissed the request based on its conclusion that Hagan's claims were jurisdictional, citing Sword v. St., 746 P2d 423 (Wyo. 1987). The Supreme Court disagreed, noting that U.S. v. Cortez,

973 F2d 764 (9th Cir. 1992), described jurisdictional claims in the context of waiver as "those cases in which the district court could determine that the government lacked the power to bring the indictment at the time of accepting the guilty plea from the face of the indictment or from the record". In this case, Hagan's claims were nonjurisdictional because at the time of accepting the guilty plea, the state did have the power to bring charges against Hagan based on his alleged conduct and nothing to the contrary was evident from the face of the information. Because the validity of Hagan's plea was not in question, he was precluded from seeking postconviction relief on the bases raised in the petition. The nonjurisdictional claims were waived when Hagan entered a guilty plea. Hagan v. St., 265 M 31, 873 P2d 1385, 51 St. Rep. 230 (1994). The applicability of the jurisdictional defect claim was followed in St. v. Cech, 2007 MT 184, 338 M 330, 167 P3d 389 (2007), in which it was decided that a defendant did not waive a double jeopardy claim when pleading guilty because the trial court had before it the record of defendant's conviction in another state that was sufficient for the court to determine whether the government lacked the power to bring the charges at issue. See also Stilson v. St., 278 M 20, 924 P2d 238 (1996).

Failure to Challenge Sentence Validity — Petition for Modification Properly Denied: Defendant did not dispute that her sentence for robbery was within the statutory maximum or that the District Court abused its discretion in imposing sentence, but rather alleged a conflict of interest and ineffective assistance of counsel. This did not provide a basis for postconviction relief under this section, and the petition for modification of the sentence was properly denied. St. v. Bull Coming, 253 M 71, 831 P2d 578, 49 St. Rep. 376 (1992).

Attorney's Performance Not Deficient: In evaluating ineffective assistance of counsel claims, the Supreme Court uses the two-part test set forth in Strickland v. Washington, 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984). First, counsel's performance must be deficient. To assess deficient performance, the court employs the "reasonably effective assistance test" of whether a defendant's counsel acted within the range of competence demanded of attorneys in criminal cases. Second, counsel's deficient performance must have so prejudiced defendant as to deprive him of a fair trial. The standard for evaluating prejudice is whether a reasonable probability exists that but for counsel's deficient performance, the trial's outcome would have been different. However, in evaluating a defense counsel's performance, the court will not second guess trial tactics and strategy. In this case, substantial evidence supports the trial court's conclusion that another lawyer would not have obtained a more favorable result for defendant considering the amount of evidence the state presented against him. St. v. Coates, 241 M 331, 786 P2d 1182, 47 St. Rep. 328 (1990), followed in St. v. Biehle, 251 M 257, 824 P2d 268, 49 St. Rep. 47 (1992), and St. v. Weaver, 2001 MT 115, 305 M 315, 28 P3d 451 (2001). See also Eiler v. St., 254 M 39, 833 P2d 1124, 49 St. Rep. 611 (1992).

Judge's Remarks on Defense Counsel's Conduct of Trial — No Showing of Bias: Defendant argued that the trial court judge's observations regarding the manner in which defense counsel conducted the defense indicated an unwillingness or inability by the judge to impartially consider that defense counsel ineffectively represented defendant. However, the mere fact that the trial judge articulated his observations does not, without more, constitute bias. The remarks came at the end of the hearing for postconviction relief after all evidence had been presented. St. v. Coates, 241 M 331, 786 P2d 1182, 47 St. Rep. 328 (1990), distinguishing St. v. Musgrove, 187 M 549, 610 P2d 710 (1980).

Prosecutor's Solicitation of Excluded Evidence: The defendant contended that he was denied a fair trial because the prosecutor elicited testimony from the arresting officer concerning statements made by the defendant at the time of his arrest that had been ruled inadmissible by the trial court. The Supreme Court ruled that the error in admitting the evidence was cured by the trial court's admonishing the jury to disregard the inadmissible statements. St. v. Kolberg, 241 M 105, 785 P2d 702, 47 St. Rep. 120 (1990).

Ineffective Assistance of Counsel at Trial and on Appeal — Not Established: The defendant argued that his trial and appeal attorneys did not argue his case fully. The Supreme Court reviewed the record and held that the attorneys had presented the strongest arguments in the defendant's favor and had performed in a competent manner. In re Petition of Martin, 240 M 419, 787 P2d 746, 46 St. Rep. 2213 (1989).

Mere Allegations of Prejudice Insufficient to Satisfy Cumulative Error Doctrine: Defendant contended that the overall demeanor of the prosecution and the District Court, together with other alleged errors, required a reversal of his conviction; however, he articulated no particular comments or remarks and alleged no prejudice to his substantial rights. The Supreme Court has acknowledged the cumulative error doctrine, which is the accumulation of errors which prejudice a defendant's right to a fair trial, but noted that mere allegations of error without proof

of prejudice are insufficient to satisfy the doctrine. The resolution of the alleged errors indicated no error meriting reversal of this case, and the court held that defendant failed to carry his burden of showing prejudice and declined to reverse his conviction on grounds of cumulative error. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986). See also St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994), St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004), St. v. Kearney, 2005 MT 171, 327 M 485, 115 P3d 214 (2005), St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005), and St. v. Racz, 2007 MT 244, 339 M 218, 168 P3d 685 (2007).

Right to Jury Trial — Not Applicable to Suspended Sentence Revocation Proceedings: Since a trial by jury under the seventh amendment to the U.S. Constitution and Art. II, sec. 26, Mont. Const., is guaranteed only in "criminal prosecutions", it does not apply in proceedings for revocation of a suspended sentence. St. v. Watts, 221 M 104, 717 P2d 24, 43 St. Rep. 670 (1986).

Action for Postconviction Relief Exclusive Means of Establishing District Court Jurisdiction to Modify Sentence: Once a valid sentence has been pronounced by a District Court, that court lacks jurisdiction to modify the sentence upon postjudgment motion by the defendant. The District Court can only modify the sentence if the defendant files a motion for postconviction relief under Title 46, ch. 21. To reduce duplication of effort, the Supreme Court considered defendant's postjudgment motion to be a motion for postconviction relief. Dahlman v. District Court, 215 M 470, 698 P2d 423, 42 St. Rep. 550 (1985), followed in St. v. George, 224 M 495, 730 P2d 412, 43 St. Rep. 2363 (1986), In re Petition of Arledge, 232 M 450, 756 P2d 1169, 45 St. Rep. 1188 (1988), and in St. v. Fertterer, 260 M 397, 860 P2d 151, 50 St. Rep. 1135 (1993).

Prison's Custody Classification as Alleged Violation of Plea Bargaining Agreement — Withdrawal of Plea Denied: Under a plea bargain agreement, defendant was sentenced to 10 years as a nondangerous offender (see 1995 repeal of 46-18-404) without parole. Upon entering prison, he was held in close custody for 24 months under prison rules calling for dangerous offenders and those sentenced without parole to serve 24 months in close custody prior to being considered for transfer to lower, more amenable custody levels. The prosecution, defense counsel, defendant, and judge were all unaware of those rules. Defendant was not entitled to withdraw his plea on the ground he was kept in close custody for 24 months in violation of his plea agreement. There was no violation of the agreement, nor was he entitled to the additional good time credits he would have received had he not been held so long in close custody. Prison officials take many factors into account in making custody reclassifications, and there was no guarantee he would have been held in close custody only for the time he claimed he should have been upon entry to the prison. St. v. Mesler, 210 M 92, 682 P2d 714, 41 St. Rep. 939 (1984).

Burden of Proving Ineffective Assistance of Counsel — No Prejudice Shown: Where the defendant alleged, in his petition for postconviction relief, that he had received ineffective assistance of counsel at trial because his attorney: (1) failed to invoke the spousal privilege on the defendant's behalf; (2) failed to interview a witness and call other witnesses; (3) was absent from a presentence investigation report interview; and (4) failed to object to alleged misconduct by the prosecutor, the Supreme Court found, under the rationale of St. v. LaValley, 203 M 393, 661 P2d 869, 40 St. Rep. 527 (1983), and Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983), that the defendant had an especially heavy burden of proving ineffective assistance of counsel when that issue was raised for the first time in a petition for postconviction relief and could have been previously raised on direct appeal. The court found that the defendant failed to show how he was prejudiced by the alleged acts constituting ineffective assistance. St. v. Henricks, 206 M 469, 672 P2d 20, 40 St. Rep. 1786 (1983), overruled, to the extent that it stands for the proposition that the Supreme Court can review issues in postconviction proceedings that could have been raised on direct appeal, in Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995). See also St. v. Coates, 241 M 331, 786 P2d 1182, 47 St. Rep. 328 (1990).

Abuse of Postconviction Relief to Raise Issues That Should Have Been Raised Earlier: After a second conviction on charges of homicide, aggravated kidnapping, and robbery, the Supreme Court affirmed the conviction of the defendant, who then filed a petition for postconviction relief on the issue of ineffective assistance of counsel, which was eventually denied by the District Court. On appeal of the denial of that petition, the Supreme Court held that the defendant's failure to raise the issue of ineffective counsel in earlier proceedings would not bar the court from considering that issue but stated that the fact that the issue was not raised at a pretrial hearing, during trial, or on appeal would be considered by the court as an element bearing on the merits of the defendant's claims. The language of 46-21-101 clearly intends that postconviction relief be available to convicted persons who have not had their conviction reviewed on appeal and that it is an abuse of the postconviction relief process to use it to raise an issue which should have been raised earlier in the proceedings. Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983).

Whether Relief Moot When Sentence Already Served:

Because of the violation of the conditions of his probation, the defendant's deferred imposition of sentence for selling dangerous drugs was revoked and the defendant was sentenced to 10 years' imprisonment by the District Court of the Fifth District. He was subsequently sentenced to 40 years' imprisonment by the District Court of the Fourth District for a robbery which was one of the grounds for revocation of the deferred sentence on the drug conviction. After the defendant had fully served his 10-year sentence, he appealed from the denial of a petition for postconviction relief in regard to the 10-year sentence. The Supreme Court affirmed the denial of the petition, holding that no challenge may be made to a sentence which has been fully served, under the decision of the U.S. Supreme Court in Lane v. Williams, 455 US 624, 71 L Ed 2d 508, 102 S Ct 1322 (1982), that the record did not show that he received a greater sentence on the robbery charge due to the 10-year drug charge sentence, and that the defendant's appeal was therefore moot. St. v. Jelle, 201 M 111, 651 P2d 1257, 39 St. Rep. 1989 (1982).

A petition for postconviction relief is not moot when the sentence for the conviction has been served unless there is no possibility of any resulting negative collateral legal consequence arising from the conviction. St. v. Standley, 192 M 54, 626 P2d 248, 38 St. Rep. 522 (1981), citing, to the same effect, White Sulphur Springs v. Voise, 136 M 1, 343 P2d 855 (1959).

Two-Judge Disqualification Unavailable to Postconviction Petitioner: Although a postconviction petition filed under this chapter is civil in nature, the petitioner is not entitled to two substitutions of presiding judges as allowed in 3-1-801 (now replaced by 3-1-802). An applicant for postconviction relief is directed by the more specific provisions of this chapter to bring the petition in the Supreme Court or in the court that sentenced him. A specific statute controls over a general statute. Coleman v. St., 194 M 428, 633 P2d 624, 38 St. Rep. 1352 (1981).

Venue in Sentencing Court for Postconviction Relief: Venue for a petition for postconviction relief properly lies in the court that imposes the sentence for the conviction under this section. Thus where a defendant petitions for postconviction relief in Silver Bow County from a rape conviction issued in Silver Bow County for the purpose of altering consideration of his criminal record in a sentencing for another, later conviction issued in Yellowstone County, it was error for the District Court in Silver Bow County to dismiss the petition for postconviction relief filed in Silver Bow County. St. v. Standley, 192 M 54, 626 P2d 248, 38 St. Rep. 522 (1981).

Petition for Postconviction Relief — No Time Limitation: Petitioner applied for postconviction relief 8 ½ years after he was sentenced. The County Attorney contended that he was barred by laches from attempting to withdraw his guilty plea. The postconviction hearing statutes are an attempt by the Legislature to consolidate all of the common-law statutory remedies normally available to challenge a sentence. The Legislature did not intend to impose an absolute time constraint on the filing of an application for postconviction relief [until 1981, when a limit of 5 years from the date of conviction was set], and therefore laches does not apply. The length of delay may be considered, however, in viewing the good faith and credibility of the moving party. Petitioner claimed ineffective assistance of counsel and wished to withdraw his guilty plea. Nothing in the record indicated ineffective counsel, and the long delay makes the situation even less favorable to the petitioner. The application for postconviction relief was denied. In re McNair, 189 M 321, 615 P2d 916 (1980).

Effective Counsel — Knowing and Intelligent Waiver of Time to Consult: The District Court did not err in refusing postconviction relief on the basis of ineffective counsel where defendant's past criminal record and the hearing transcript reflect that defendant was aware of "stand-in" counsel at a sentencing hearing yet knowingly and intelligently refused an opportunity to take the time necessary to talk with counsel. St. v. Haynie, 186 M 374, 607 P2d 1128 (1980).

Objection That Facts Do Not Constitute Offense — When Taken: Under former law, the objection that the facts stated in an information do not constitute a public offense could be taken by demurrer, at the trial under a plea of not guilty, or after the trial in arrest of judgment. St. v. Smith, 58 M 567, 194 P 131 (1920).

46-21-102. When petition may be filed.

Commission Comments

Source: 28 U.S.C. 2255.

This section is included to accommodate Fay v. Noia, 372 U.S. 391 (1963), which requires that when a constitutional question is involved that its determination cannot be precluded by a procedural time limitation.

Compiler's Comments

1997 Amendment: Chapter 378 in (1), at beginning of introductory clause, inserted exception clause, after "within" substituted "1 year" for "5 years", and at end inserted "becomes final. A

conviction becomes final for purposes of this chapter when"; inserted (1)(a) through (1)(c) outlining conditions of finality of a conviction; inserted (2) limiting an appeal based on newly discovered evidence to 1 year after final conviction or reasonable discovery of the evidence; and made minor changes in style. Amendment effective April 24, 1997.

Severability: Section 8, Ch. 378, L. 1997, was a severability clause.

Applicability: Section 9(1), Ch. 378, L. 1997, provided: "Except as provided in subsection (2), [sections 3 through 6] [amending 46-21-101, 46-21-102, 46-21-105, and 46-21-201] apply to proceedings in which the conviction becomes final:

(a) after [the effective date of this section] [effective April 24, 1997]; or

(b) during the 12 months prior to the [effective date of this section] [effective April 24, 1997] if a petition under Title 46, chapter 21, is filed within the 12 months after [the effective date of this section] [effective April 24, 1997]."

1991 Amendment: Inserted reference to 46-21-101; and made minor change in style.

1981 Amendment: Substituted "within 5 years of the date of the" for "after".

Case Notes

Second Petition for Postconviction Relief Not Procedurally or Time Barred: After a 1995 petition for postconviction relief was denied, Beach filed in 2008 for postconviction relief on grounds of newly discovered evidence, but the District Court, without a hearing, denied the petition on grounds that it was procedurally and time barred. On appeal, the Supreme Court disagreed. The 2008 petition claimed that the newly discovered evidence was only recently available and thus could not have been raised in the 1995 petition. Since nothing indicated a lack of diligence on Beach's part in locating the new evidence, the Supreme Court granted Beach the benefit of the doubt as to whether he acted with sufficient alacrity in locating the new evidence, so the 2008 petition was not procedurally barred. To determine whether Beach would be entitled to a new trial based on newly discovered evidence, the court applied the criteria in St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), regarding a trial court's consideration of what impact new evidence might have when looking prospectively at a new trial with a new jury. The court concluded that the District Court abused its discretion by denying the petition without holding an evidentiary hearing on the new evidence. The case was remanded to allow a hearing to evaluate whether the evidence was actually newly discovered and whether a reasonable jury would have found Beach guilty beyond a reasonable doubt. The newly discovered evidence must be material to the issues at trial and neither cumulative nor merely impeaching, and in order to prevail on a substantive innocence claim, Beach was required to show by clear and convincing evidence that but for a procedural error, no reasonable juror would have found him guilty. Beach v. St., 2009 MT 398, 353 M 411, 220 P3d 667 (2009). See also Schlup v. Delo, 513 US 298 (1995), St. v. Redcrow, 1999 MT 95, 294 M 252, 980 P2d 622 (1999), and St. v. Pope, 2003 MT 330, 318 M 383, 80 P3d 1232 (2003).

District Court's Subject Matter Jurisdiction Not Circumscribed by Statutory Time Bar: This section constitutes a rigid, categorical time prescription that governs postconviction petitions, and the statutory 1-year time bar on filing postconviction petitions does not circumscribe a District Court's subject matter jurisdiction. However, a District Court is not precluded from raising the timeliness of a petition sua sponte, nor does the court's decision to raise the timeliness issue on its own initiative invoke due process considerations. The court must afford the parties fair notice and an opportunity to present their positions before acting sua sponte to dismiss a petition as untimely and must determine whether the interests of justice would be better served by addressing the merits or dismissing the petition as time barred. Davis v. St., 2008 MT 226, 344 M 300, 187 P3d 654 (2008), overruling In re Petition of Gray, 274 M 1, 908 P2d 1352 (1995), St. v. Wells, 2001 MT 55, 304 M 329, 21 P3d 610 (2001), Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004), and other cases to the extent that they have held that the Legislature limited District Courts' subject matter jurisdiction by codifying a 1-year time bar on postconviction relief pursuant to 46-21-102.

Petition for Postconviction Relief Required Before Request for Counsel Considered: Davis filed a motion requesting counsel to prepare postconviction proceedings. While the motion was pending, the time for filing a postconviction petition expired. The District Court denied the motion for counsel on grounds that the time for a postconviction petition had run. Although the court erred in its conclusion because 42 days remained for filing a petition when the motion for counsel was filed, the Supreme Court nevertheless affirmed because Davis was required to file a petition for postconviction relief before the motion for appointment of counsel could be considered. Absent a valid petition, the motion for counsel was properly denied. Davis v. St., 2007 MT 207, 339 M 1, 167 P3d 892 (2007).

Failure of Counsel to Perfect Direct Appeal — Remand: Following conviction in Municipal Court for partner or family member assault, Woeppel's trial counsel filed a notice of appeal to District Court. Woeppel obtained new counsel, but counsel failed to file a brief to perfect the appeal, and the appeal was dismissed. The new counsel ultimately withdrew because of a conflict of interest, and Woeppel's next new counsel filed a petition for postconviction relief on grounds that Woeppel was denied effective assistance of counsel and was denied the right to confront witnesses in the underlying case because the conviction was based on hearsay testimony. The petition was denied, and Woeppel appealed. The Supreme Court noted that trial counsel's notice of appeal objectively indicated Woeppel's intent to appeal and that it was only because appellate counsel failed to file a brief that the appeal was dismissed, resulting in prejudice to Woeppel. Denial of the petition for postconviction relief was reversed, and the case was remanded for consideration of any claims that Woeppel could have made on direct appeal, including the claim that because the conviction was based on hearsay, Woeppel's right to confront witnesses was violated. Woeppel v. Billings, 2006 MT 283, 334 M 306, 146 P3d 789 (2006).

Facially Invalid Sentence — Statutory Bar Against Appeal Unconstitutional — Habeas Corpus Relief Granted: Lott was sentenced in 1992 for aggravated kidnapping, sexual intercourse without consent, aggravated burglary, and felony assault, and each sentence was enhanced by 10 years for use of a dangerous weapon. The 5-year limit on appealing the sentences that was in effect at sentencing (now a 1-year limit) expired, so Lott was procedurally barred from challenging the sentences. The Supreme Court subsequently decided in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), that application of the weapons enhancement to a felony offense that itself required proving use of a weapon constituted a double jeopardy violation. Guillaume was held to apply retroactively in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), so Lott's sentence was unconstitutionally enhanced with regard to the aggravated burglary and felony assault convictions. The state asserted that Lott was procedurally barred from raising the issue in a habeas corpus petition because Lott did not raise the issue on direct appeal or in a petition for postconviction relief. After analyzing habeas corpus and postconviction relief in Montana, the Supreme Court noted the constitutional guarantee that the writ of habeas corpus may never be suspended and concluded that as applied to a facially invalid sentence, the procedural bar in 46-22-101 unconstitutionally suspends the writ. Even if Lott had filed a direct appeal or petition for postconviction relief, the double jeopardy argument would have been unavailing because Guillaume and Whitehorn were not decided until well after both filing dates had expired. In order to avoid a grievous wrong and a miscarriage of justice, the Supreme Court granted Lott's petition for habeas corpus and remanded for resentencing pursuant to Guillaume and Whitehorn. Lott v. St., 2006 MT 279, 334 M 270, 150 P3d 337 (2006), followed in St. v. Jackson, 2007 MT 186, 338 M 344, 165 P3d 321 (2007), and St. v. Andersen-Conway, 2007 MT 281, 339 M 439, 171 P3d 678 (2007).

Facially Invalid Sentence — Statutory Procedural Bar Unconstitutionally Suspends Writ of Habeas Corpus: In 1992, the District Court enhanced Lott's sentence for aggravated burglary and felony assault because Lott used a dangerous weapon during the crimes. Under St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), and St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), the enhanced penalties were invalid because applying the weapons enhancement penalty to a felony offense that itself requires proving the use of a weapon violates double jeopardy. Lott challenged the sentence by a petition characterized as a writ of habeas corpus. The state argued that Lott could have raised the constitutional issues but did not and that Lott was statutorily barred from raising the issues in 2006. The Supreme Court found that Lott's sentence was enhanced unconstitutionally in light of Guillaume and Whitehorn, which apply retroactively. Because Art. II, sec. 19, Mont. Const., provides that the writ of habeas corpus may never be suspended, the procedural bar in 46-22-101(2) unconstitutionally suspends the writ, and implementing the statutory bar to allow incarceration of a person pursuant to a facially invalid sentence would be a grievous wrong and a miscarriage of justice. Therefore, habeas corpus relief was warranted, and Lott's petition was granted. However, Lott challenged only the sentence and not the underlying conviction, so on remand, Lott was not entitled to be released but only to be resentenced. Lott v. St., 2006 MT 240, 333 M 531 (2006).

Time for Challenge of Sentence Enhancement Expired — Postconviction Relief Properly Denied: In 2003, Bingman filed a petition for postconviction relief challenging a 1986 sentence enhancement. The District Court denied the petition as untimely, and the Supreme Court affirmed. Under the applicable 1995 version of this section, a petition for postconviction relief needed to be filed within 5 years of the final sentence (now 1 year), and because Bingman's petition was filed long after the statutory limit, the petition was properly denied. Bingman v. St., 2005 MT 272, 329 M 151, 122 P3d 1235 (2005).

Jurisdictional and Nonjurisdictional Claims Subject to Time Limitation: In a petition for postconviction relief, Daniels contended that the District Court lacked jurisdiction to preside over his case because, as a juvenile, Daniels never expressly waived his right to a hearing on whether the case should be moved from Youth Court to District Court. The Supreme Court did not reach the merits of the issue because Daniels' claim was time-barred. Both jurisdictional and nonjurisdictional claims are subject to the time limitation in this section. The time bar applies to all claims except claims alleging the existence of newly discovered evidence that would establish the petitioner's innocence. Daniels' jurisdictional claim was therefore properly dismissed as time-barred. St. v. Daniels, 2005 MT 110, 327 M 78, 111 P3d 675 (2005), following Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004).

Claim of Illegal Sentence Based on Lack of Jurisdiction to Be Raised on Direct Appeal, Not Postconviction Petition — Pena Applied: Camarillo was a minor when he was convicted in 1999 of deliberate homicide, robbery, and aggravated burglary and sentenced as an adult offender to 70 years in the state prison. The case was filed directly in District Court rather than Youth Court, as allowed under 41-5-206. Camarillo filed a petition for postconviction relief in 2003, claiming that the District Court lacked subject matter jurisdiction. The state responded that the claims could have been raised on direct appeal, and the District Court agreed and dismissed the petition. On appeal, the Supreme Court noted that the District Court properly exercised jurisdiction under Art. VII, sec. 4, Mont. Const., so Camarillo's jurisdiction argument failed. The court then applied Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004), and held that the issues that Camarillo attempted to raise in the petition for postconviction relief could have been but were not raised on direct appeal and, pursuant to 46-21-105, could not be brought in the petition for postconviction relief. In addition, under this section, petitions for postconviction relief must be filed within 1 year of final judgment. Camarillo's petition was not filed until more than 3 years after judgment and thus was untimely. The District Court was affirmed. Camarillo v. St., 2005 MT 29, 326 M 35, 107 P3d 1265 (2005).

Evidence Provided at Trial Not Considered Newly Discovered Evidence — Postconviction Claim Time-Barred: Oatman failed to bring a claim for postconviction relief within the 5-year statute of limitations under the 1993 version of this section that was in effect at the time of conviction, so the claim was time-barred. Nevertheless, Oatman contended that the claim should be considered based on newly discovered evidence that a victim had contradicted the allegation of robbery. However, the jury heard the testimony at trial, so the evidence could not be considered to be newly discovered. The alleged new evidence did not extend the statute of limitations, so denial of Oatman's claim was proper. Oatman v. St., 2004 MT 360, 324 M 472, 104 P3d 1048 (2004).

No Claim of Actual Innocence — Claim of Ineffective Assistance of Counsel Precluded: Oatman asserted that his counsel was ineffective in failing to bring a claim of Oatman's actual innocence during Oatman's first appeal. However, Oatman had no claim of actual innocence, so there was no need for counsel to bring the claim on appeal. Counsel diligently represented Oatman before and throughout trial and the first appeal, and Oatman's continued employment of counsel indicated that Oatman was satisfied with his representation. Oatman's ineffective assistance claim failed. Oatman v. St., 2004 MT 360, 324 M 472, 104 P3d 1048 (2004).

Right to Appeal Error in Length of Sentence Lost by Failing to File Petition Within Statutory Time Limit: Pena, who was 17 years of age at the time, was sentenced as an adult to 45 years in prison for deliberate homicide and aggravated burglary. Pena did not challenge the legality of his sentence on direct appeal, but more than a year after entering a guilty plea and being sentenced, Pena filed a petition alleging that his sentence was illegal because the Montana Youth Court Act provided that a youth could not be sentenced to the custody of the Department of Corrections for more than 5 years and therefore the District Court did not have subject matter jurisdiction to impose a longer sentence. Pena argued that the lack of subject matter jurisdiction was not subject to any statutory postconviction time limits for filing appeals and could be raised at any time. The Supreme Court held that an error in sentencing does not divest a court of subject matter jurisdiction over the case before it. The Supreme Court further held that all postconviction claims, both jurisdictional and nonjurisdictional, must be brought within the 1-year time limit provided by statute and that the time limit was jurisdictional and was not waived by the state's failure to raise the issue in District Court. Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004). Pena was overruled in Davis v. St., 2008 MT 226, 344 M 300, 187 P3d 654 (2008), to the extent that Pena held that the Legislature limited District Courts' subject matter jurisdiction by codifying a 1-year time bar on postconviction relief pursuant to 46-21-102.

Discretion of District Court to Set Time for Filing Amended Petition for Postconviction Relief: Sellner timely filed a petition for postconviction relief and subsequently filed an amended

petition more than 2 years after the original petition was filed. The state contended that under Maier v. St., 2003 MT 144, 316 M 181, 69 P3d 1194 (2003), the amended petition was untimely because it was not filed within 1 year after final conviction. The Supreme Court declined to apply Maier because Maier involved the time limit applicable to the discovery of new evidence, which did not apply here. Instead, the court applied the third sentence of 46-21-105(1)(a), which allows the District Court discretion to set deadlines as it sees fit as long as that discretion is not abused or is not subject to the new evidence deadline. Thus, Sellner's amended petition was not procedurally barred. Sellner v. St., 2004 MT 205, 322 M 310, 95 P3d 708 (2004).

Untimely Petition for Postconviction Relief Properly Denied: Judgment in Davis's aggravated kidnapping case was filed on January 12, 2001, and because Davis did not appeal, the judgment became final on March 13, 2001. Davis then had 1 year to file a petition for postconviction relief, but a petition was not filed until May 28, 2002. The District Court properly dismissed the petition as untimely because it was filed 76 days beyond the deadline. Davis v. St., 2004 MT 112, 321 M 118, 88 P3d 1285 (2004).

Petition for Postconviction Relief Time-Barred Absent Showing of Exceptions: Sanchez was convicted of deliberate homicide and sentenced to life in prison. Sentence was imposed on November 14, 1997, and Sanchez had 60 days to appeal. Sanchez filed no direct appeal, and sentence was final on January 13, 1998, for purposes of postconviction proceedings. Sanchez first filed for postconviction relief on August 31, 2000, and filed an amended petition for postconviction relief on December 5, 2002. Although this section allowed 5 years for filing for postconviction relief when the crime was committed, the section was amended in 1997 and allowed only a 1-year period for filing when Sanchez's conviction became final and when the petitions were filed. Thus, Sanchez's first filing was 1 ½ years late, and the amended petition was nearly 4 years late. Absent a showing that any exceptions to the statutory time bar applied, such as newly discovered evidence or that a miscarriage of justice occurred, Sanchez's petitions for postconviction relief were properly denied as untimely. Sanchez v. St., 2004 MT 9, 319 M 226, 86 P3d 1 (2004).

Alleged New Evidence Not Extending Statutory Time Bar for Postconviction Relief:

Raugust contended that the period for filing for postconviction relief should be extended based on newly discovered evidence that the state mishandled a weapon found at the crime scene and that a key eyewitness confessed to the offense while waiting in the County Attorney's office to testify in Raugust's trial and because of ineffective assistance of counsel at trial. The Supreme Court disagreed. Raugust could not establish that the evidence regarding the weapon was so material that it would probably produce a different result at trial or that the evidence could not have been discovered in a timely manner. Evidence regarding the eyewitness directly conflicted with other evidence given at trial that tended to preclude the possibility that the eyewitness could have committed the crime, nor could Raugust show that the evidence could not have been discovered in a timely manner. The claims of ineffective counsel were not newly discovered evidence because Raugust was aware of the asserted deficiencies at trial. Raugust v. St., 2003 MT 367, 319 M 97, 82 P3d 890 (2003), following St. v. Greeno, 135 M 580, 342 P2d 1052 (1959).

Abe was found guilty of accountability for deliberate homicide and was sentenced to 60 years in prison. One year and 14 days after the deadline, Abe filed a petition for postconviction relief on grounds of newly discovered evidence. Allegedly, two jurors from Abe's trial sat in on the trial of Abe's coconspirator and heard two of the state's witnesses testify differently than they did in Abe's trial. The Supreme Court applied the factors to be considered when a District Court evaluates a motion for a new trial based on newly discovered evidence as set out in St. v. Sullivan, 285 M 235, 948 P2d 215 (1997) (see also St. v. Greeno, 135 M 580, 342 P2d 1052 (1959)), including the requirement that the evidence must have come to the knowledge of the defendant since trial and the requirement that the evidence must not be such as will tend only to impeach the character or credit of a witness. Here, Abe's counsel knew about the alleged discrepancies after Abe's trial but prior to Abe's appeal, so the discrepancies in testimony could have been raised on direct appeal. Further, the petition for postconviction relief alleged that the discrepancies undermined the credibility of the witnesses but did not establish that Abe did not engage in the criminal conduct for which he was convicted. Thus, the District Court concluded, and the Supreme Court agreed, that the alleged new evidence did not serve to extend the statutory bar for filing a petition for postconviction relief beyond the 1-year period in this section. Although Abe correctly pointed out that the state did not raise the issue of the statutory bar in District Court and that the District Court did not rule on the issue, the general rule that the Supreme Court will not address issues raised for the first time on appeal did not apply in this case because that rule does not apply when the issue is jurisdictional. The 1-year statute of limitations for postconviction relief is a jurisdictional limit, and lack of subject matter

jurisdiction may be raised at any time under Rule 12(h), M.R.Civ.P. (Title 25, ch. 20). Dismissal of Abe's petition for postconviction relief was affirmed as procedurally barred. St. v. Abe, 2001 MT 260, 307 M 233, 37 P3d 77 (2001).

Period for Petitioning U.S. Supreme Court Commences Upon Date of Final Decision in Montana Supreme Court, Not From Date of Issuance of Remittitur: In calculating the timeliness of a petition for postconviction relief, the 90-day period for petitioning the U.S. Supreme Court begins on the date that a final decision is rendered by the Montana Supreme Court, not on the date of the issuance of remittitur from the Montana court. In the present case, the District Court incorrectly calculated the period as running from the date of remittitur when denying Raugust's petition for postconviction relief, but the decision was affirmed because the petition was nevertheless untimely even when the correct date of final decision was applied. Raugust v. St., 2003 MT 367, 319 M 97, 82 P3d 890 (2003).

Actual Innocence Standard Applied to Postconviction Claim Based on Incomplete DNA Results at Trial — Burden of Postconviction Statute of Limitations Met: Pope's petition for postconviction relief was denied by the District Court as barred by the 5-year statute of limitations in the 1993 version of this section (now 1 year) and because the issues were not raised on direct appeal. The court concluded that the jurisdictional bar could be overcome only by a clear miscarriage of justice and that the exception did not apply unless Pope did not commit the offense. The court relied on an inadmissible confession that Pope committed the crime, reasoning that even if the confession was not admissible at trial, it could be considered in a postconviction proceeding because it refuted Pope's claim of innocence. Pope contended that the exception applied because newly available DNA evidence tended to show that he did not commit the crime. The Supreme Court reversed. Based on Murray v. Carrier, 477 US 478 (1986), a petitioner must demonstrate that a constitutional violation at trial has probably resulted in conviction of an individual who is actually innocent and the claim must be supported by new evidence that indicates that the individual is innocent. Montana case law provides that the miscarriage of justice must be so obvious that the judgment is rendered a complete nullity and that the exception does not apply unless the defendant did not commit the crime from which relief is sought. Further, under Schlup v. Delo, 513 US 298 (1995), actual innocence requires that no reasonable, properly instructed juror would have found the defendant guilty. Schlup also allows review only of the record and new evidence to determine what a reasonable juror would find, so the District Court improperly relied on the failed plea confession to determine that Pope was not actually innocent. Pope correctly pointed out that the use of "and/or" language in the jury instructions made it impossible to determine whether Pope was convicted of raping one or two women. Thus, Pope satisfied the Schlup actual innocence burden in light of the complete DNA report, and when coupled with the error of using "and/or" language in the alternative charge, the jury instructions, and the verdict, waiver of the time bar in this section was required by the clear miscarriage of justice, warranting reversal. St. v. Pope, 2003 MT 330, 318 M 383, 80 P3d 1232 (2003).

Miscarriage of Justice Exception to Statute of Limitations for Postconviction Relief Applicable Only to Claim of Discovery of New Evidence — Recanted Victim Testimony Not Considered New Evidence: Maier cited 12 grounds for postconviction relief, including a claim alleging that newly discovered evidence in the form of the victim's recantation established that Maier did not commit attempted deliberate homicide. The District Court held that 10 of the claims were procedurally barred by 46-21-105, that 1 claim was improper under the facts of the case, and that the final claim of newly discovered evidence merited a response by the state. The state contended that the final claim was barred by this section because it was not raised within 1 year of final judgment. The District Court rejected the state's argument, but denied the claim anyway, and Maier appealed. The Supreme Court considered the nexus between 46-21-105 and this section, which address amendments to petitions for postconviction relief and require that amended claims alleging the existence of newly discovered evidence be filed within 1 year of final conviction or within 1 year of the time that the petitioner discovered or reasonably should have discovered the existence of the evidence, whichever is later. In this case, Maier discovered the evidence when the victim of the attempted deliberate homicide recanted testimony given at trial, but Maier's amended petition was not filed until more than 2 years after the recantation. Under St. v. Abe, 2001 MT 260, 307 M 233, 37 P3d 77 (2001), the 1-year statute of limitation may be waived only if justified by a clear miscarriage of justice that renders the judgment a complete nullity, and under St. v. Rosales, 2000 MT 89, 299 M 226, 999 P2d 313 (2000), the newly discovered evidence must establish that the defendant did not commit the offense for the miscarriage of justice exception to apply. Here, the victim never actually stated that Maier was not the person who shot him, but only mentioned that he could not see the shooter because he was hiding. However, two

other persons testified that Maier was the shooter, so the recanted testimony did not in itself establish that Maier did not commit attempted deliberate homicide. Thus, the miscarriage of justice exception did not apply, Maier's petition was not timely, and the District Court erred by not denying the claim on procedural grounds. Nevertheless, the proper result was reached, if for the wrong reason, so the District Court was sustained. Maier v. St., 2003 MT 144, 316 M 181, 69 P3d 1194 (2003).

One-Year Limitation on All Postconviction Proceedings, Including Second or Subsequent Petitions — Exception: Defendant contended that the 1-year period of limitation in this section applies only to an initial or original petition for postconviction relief, not to a second or subsequent petition. The Supreme Court disagreed. The 1-year period of limitation applies to the initiation of all postconviction proceedings, including those initiated by a second or subsequent petition. Further, under 46-21-105, in order to avoid dismissal, a second or subsequent petition must also demonstrate good cause why its claims were not asserted in the original petition. A narrow exception to the 1-year limitation period is allowed under subsection (2) of this section, which provides that a petition that alleges newly discovered evidence may be filed 1 year after the evidence was discovered or reasonably should have been discovered. St. v. Root, 2003 MT 28, 314 M 186, 64 P3d 1035 (2003).

Postconviction Relief Based on Claims of Newly Discovered Evidence Consisting of Defendant's Own Exculpatory Statements Properly Denied: Almost 2 years after pleading guilty to drug charges, Graham sought postconviction relief, contending that at the time that he pleaded guilty, he believed that he was admitting possessing only two drugs, not four, and that he was thus innocent of possessing the four drugs mentioned in the information. Graham also asserted that he received ineffective assistance of counsel because his attorney did not advise him that he was pleading guilty to possession of all four drugs, and that his plea was thus not made knowingly and voluntarily. Despite the untimely filing of the petition, the District Court considered the petition because the issues were significant and should be disposed of on the merits. Nevertheless, the petition was dismissed and Graham appealed. The Supreme Court noted that in order to waive the 1-year statute of limitations on petitions for postconviction relief, the petitioner must provide newly discovered evidence that demonstrates actual innocence, which must be a showing that no reasonable juror would have found the defendant guilty rather than a mere showing that reasonable doubt exists. Graham did not show a clear miscarriage of justice because his own exculpatory statements did not qualify as newly discovered evidence and were insufficient to establish Graham's actual innocence. Additionally, Graham's allegations that he received ineffective assistance of counsel were record-based and did not qualify as new evidence of actual innocence. Last, Graham's request to withdraw the guilty plea because it was not made knowingly or voluntarily was considered. The Supreme Court applied the factors in 46-16-105 and found that the trial court's interrogation was adequate, the motion to withdraw was not timely, and the plea bargain provided Graham a considerable benefit in exchange for dismissal of other charges. Therefore, the plea was knowing and voluntary and did not provide grounds for postconviction relief. The denial of Graham's petition for postconviction relief was affirmed. St. v. Graham, 2002 MT 237, 311 M 500, 57 P3d 54 (2002).

No Jurisdiction of District Court to Consider Postconviction Relief Upon Failure to File Petition Within Statutory Period: Carson sought relief from an amended sentencing order entered August 3, 1998. The amended sentencing order became final in October 1998, once the 60-day period for appeal expired. Carson filed the petition for postconviction relief on July 5, 2000, which was clearly beyond the 1-year period prescribed in this section for filing for postconviction relief. Thus, the District Court did not err in concluding that it did not have jurisdiction to entertain Carson's petition. St. v. Carson, 2002 MT 234, 311 M 485, 56 P3d 844 (2002).

Retroactivity of Substantive and Procedural Rules Distinguished — Nichols Rule Prohibiting Retroactive Applicability of Guillaume Sentencing Enhancement Restriction Overruled: Whitehorn was convicted in 1995 of felony assault, criminal endangerment, and possession of dangerous drugs, and the sentencing court added an additional 10-year sentence for use of a weapon. In 1999, the Supreme Court decided St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), which held that enhancing a defendant's sentence for use of a weapon when the underlying offense (felony assault in Guillaume's case) required proof of the use of a weapon violated the constitutional double jeopardy provision. Whitehorn moved for resentencing in light of Guillaume, arguing that the enhanced sentence should be stricken because his underlying offense of felony assault also required proof that he used a weapon. The state initially agreed that Guillaume applied and that resentencing was appropriate, but prior to resentencing, the state changed its position in light of St. v. Aguilar, 1999 MT 159, 295 M 133, 983 P2d 345 (1999),

and St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093 (1999), which provided that Guillaume would not be retroactively applied to cases not pending on direct appeal or to cases that were final when that opinion was issued. Whitehorn then filed a petition for postconviction relief under this section, arguing that his case was not final because he had not exhausted the 5-year time period for filing for postconviction relief (revised to 1 year in 1997). The District Court agreed that the petition was timely filed under this section, but, relying on Nichols, denied the petition and held that Whitehorn's case was final and not pending on direct review, and thus concluded that Guillaume could not be retroactively applied. Whitehorn appealed the denial of his petition for postconviction relief. The Supreme Court found that the District Court erred in not retroactively applying Guillaume and reversed, holding that under the common-law doctrine of plain error, Whitehorn was not procedurally barred from raising the retroactivity argument on appeal. The court distinguished between substantive and procedural rules when considering whether to apply a rule change retroactively. In Nichols, the court adopted the retroactivity analysis in Teague v. Lane, 489 US 288 (1989), which stands for the proposition that on collateral review, a new procedural rule of constitutional law will not be applied retroactively if it puts primary, private individual conduct beyond the power of the criminal law to proscribe or if the procedures used to convict the defendant are so implicit in the concept of ordered liberty as to constitute a watershed rule of criminal procedure. In Nichols, the court concluded that Guillaume announced a new rule, but that neither Teague exception applied. However, here the court decided that Guillaume was by its own terms a substantive rule to which the Teague exceptions should not even have been applied (accord, Chambers v. U.S., 22 F3d 939 (9th Cir. 1994)). Partially overruling Nichols and a similar holding in St. v. Wells, 2001 MT 55, 304 M 329, 21 P3d 610 (2001), the court concluded that it was illogical to refuse to extend constitutional protections to citizens simply because their claims are raised by collateral review rather than direct appeal. However, the court retained the Guillaume analysis, clarifying that sentences on convictions for felony assault with a weapon and aggravated burglary are the only offenses that may not be enhanced under 46-18-221. St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002). See also Desist v. U.S., 394 US 244 (1969), and Mackey v. U.S., 401 US 667 (1971).

Petition for Postconviction Relief Barred by Seven-Year Lapse: Following remand of St. v. Morrison, 257 M 282, 848 P2d 514 (1993), in 1993, the District Court set forth findings of fact supporting Morrison's 3-year dangerous offender sentence that had been added to Morrison's 20-year prison sentence for sexual intercourse without consent, and Morrison's sentence became final. In 2000, Morrison petitioned the District Court for a writ of habeas corpus, arguing that the 3-year sentence enhancement should be vacated because the use of a weapon had not been charged as a separate offense in the information and that the court relied on false or misleading evidence to support the enhancement. The court treated the petition as one for postconviction relief and denied it as untimely. Morrison appealed, and the Supreme Court affirmed. Under the version of this section in effect at the time of Morrison's final conviction in 1993, the statute of limitations required that petitions for postconviction relief be filed within 5 years after conviction became final. Morrison's petition was not filed until 7 years after conviction. Notwithstanding Morrison's argument that the statute of limitations should be equitably tolled, the petition was not timely and the District Court properly dismissed it. Morrison v. Mahoney, 2002 MT 21, 308 M 196, 41 P3d 320 (2002).

Postconviction Relief Barred by Statute of Limitations — Inapplicability of Civil Tolling Provisions in Postconviction Proceeding: Placzkiewicz pleaded guilty in 1992 to felony arson and was sentenced to 20 years in prison with 15 suspended. Following release to begin serving the suspended sentence, Placzkiewicz had four revocation hearings for various probation violations, until the remaining term was 10 years with no time suspended. Placzkiewicz later requested to file a petition for postconviction relief to challenge the original sentence, but the request was denied as time-barred. Placzkiewicz appealed, contending that the statute of limitations should be tolled pursuant to 27-2-401 to include months of incarceration, plus the 5-year limitations period in this section (reduced to 1 year in 1997). The Supreme Court noted that the statutory time bar may be waived when there is a clear miscarriage of justice and the petitioner provides newly discovered evidence that demonstrates actual innocence, but Placzkiewicz failed to satisfy the exception. Placzkiewicz's argument that the civil tolling provisions in 27-2-401 should apply also failed because that section does not apply to postconviction proceedings, despite the fact that such proceedings are civil in nature. Rather, the Legislature has provided a specific statute of limitations in this section for postconviction proceedings, and that specific provision controls over other statutes of limitations. The District Court's ruling that the petition was time-barred was affirmed. St. v. Placzkiewicz, 2001 MT 254, 307 M 189, 36 P3d 934 (2001).

Retroactive Effect of Statute of Limitations on Petitions for Postconviction Relief: In 1997, the Legislature revised procedures for seeking postconviction relief, including a reduction in the statute of limitations for filing a petition from 5 years to 1 year after the date of final conviction. The revised statute of limitations was made to apply retroactively to all convictions occurring during the 12 months prior to the April 24, 1997, effective date of the amendments. Because this procedural change neither altered the definition of a crime nor increased a petitioner's punishment, the amended statute of limitations was not subject to the constitutional prohibition against ex post facto legislation. Wright's conviction fell within the period of retroactive applicability, so Wright had until April 24, 1998, to file a petition for postconviction relief, but did not file until November 16, 2000, in violation of the statute of limitations. The postconviction statute of limitations is a jurisdictional limit on litigation that will be waived by the Supreme Court only when there is a clear miscarriage of justice so obvious as to render the judgment void, and the miscarriage of justice exception does not apply to postconviction claims unless a constitutional violation has resulted in the conviction of an innocent person or unless newly discovered evidence establishes innocence. Wright raised neither of those issues, so the Supreme Court declined to waive the statute of limitations. The District Court's denial of Wright's petition for postconviction relief was affirmed. St. v. Wright, 2001 MT 247, 307 M 100, 38 P3d 772 (2001).

Appeal to Montana Supreme Court Not Final Until Time for Petitioning U.S. Supreme Court Expires — Improper Dismissal of Petition for Postconviction Relief as Time-Barred: Following conviction on numerous felony charges, Whitlow appealed his conviction and sentence, but did not raise concerns about ineffective assistance of counsel in the appeal. The conviction and sentence were upheld by the Montana Supreme Court, and Whitlow subsequently petitioned for postconviction relief, claiming that he was denied the right to effective assistance of counsel when his trial counsel failed to ask followup questions during voir dire. The District Court held that the petition was time-barred by the 1-year statute of limitations in this section, because it was filed over 1 year after the conviction was affirmed and a request for rehearing was denied by the Montana Supreme Court. Whitlow appealed and the Supreme Court reversed. Under subsection (1)(b) of this section, if an appeal of a conviction is taken to the Montana Supreme Court, the conviction does not become final for purposes of the statute of limitations on postconviction relief petitions until the time for petitioning for review by the U.S. Supreme Court has expired. In this case, that time limit for petitioning the federal court occurred less than 1 year before Whitlow filed his petition for postconviction relief, so dismissal of the petition on grounds that it was time-barred was erroneous. St. v. Whitlow, 2001 MT 208, 306 M 339, 33 P3d 877 (2001).

Petition for Postconviction Relief Both Procedurally and Time Barred: Wells pleaded guilty to felony assault, and the District Court entered its written judgment and sentence on January 2, 1998. Wells did not appeal, and the time for filing an appeal expired 60 days later, on March 3, 1998, which became the date of final conviction. In order to come within the 1-year period for a petition for postconviction relief, Wells needed to file by March 3, 1999, but the petition was not filed until December 22, 1999, when Wells asserted a double jeopardy claim for weapons enhancement based on St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999). The District Court dismissed the petition as untimely. Wells argued on appeal that the 1-year limitation is not a jurisdictional limitation, but rather a statute of limitations subject to equitable tolling, and contended that a tolling should be applied to the time period that Wells was incarcerated in New Mexico without adequate legal assistance. The Supreme Court recalled the holding in St. v. Rosales, 2000 MT 89, 299 M 226, 999 P2d 313 (2000), when it was held that the postconviction statute of limitations is indeed a jurisdictional limit on litigation to be waived only if there is a clear miscarriage of justice and defendant alleges newly discovered evidence that defendant did not commit the offense. Wells presented no new evidence of innocence. Further, Wells could have raised the Guillaume claim on direct appeal, but did not. Wells' petition was thus both procedurally and time-barred. St. v. Wells, 2001 MT 55, 304 M 329, 21 P3d 610 (2001), overruled in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), to the extent that Wells was barred from raising a double jeopardy claim in a petition for postconviction relief pursuant to 46-21-105 for failing to raise the issue on direct appeal, and overruled in Davis v. St., 2008 MT 226, 344 M 300, 187 P3d 654 (2008), to the extent that Wells held that the Legislature limited District Courts' subject matter jurisdiction by codifying a 1-year time bar on postconviction relief pursuant to 46-21-102.

Petition for Postconviction Relief Filed Twelve Years After Conviction Time Barred — Guillaume Inapplicable: Charlo was convicted of aggravated assault in 1986 and sentenced to 20 years plus 10 years for use of a weapon, and the sentence was affirmed in 1987 (see St. v. Charlo, 226 M 213, 735 P2d 278 (1987)). Following the decision in St. v. Guillaume, 1999 MT 29,

293 M 224, 975 P2d 312 (1999), Charlo petitioned for postconviction relief in 1999 on grounds that the imposition of the additional 10-year weapon enhancement sentence violated his double jeopardy rights. The District Court concluded that Guillaume did not apply and that no miscarriage of justice would occur if the court applied the 5-year statute of limitations on postconviction relief provided in this section (now 1 year). The Supreme Court concurred. A petition filed 12 years after final conviction clearly violated the statute of limitations in this section. The court relied on St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000), for the holding that application of the weapon enhancement provision in 46-18-221 to a conviction in which the underlying offense does not require use of a weapon as an element of the crime does not constitute a double jeopardy violation. The offense of aggravated assault does not require use of a weapon, so Guillaume did not apply. The court also declined to apply the fundamental miscarriage of justice exception in St. v. Redcrow, 1999 MT 95, 294 M 252, 980 P2d 622 (1999). Guillaume was the sole basis of Charlo's petition, so Charlo could not show that the Redcrow exception would apply. St. v. Charlo, 2000 MT 192, 300 M 435, 4 P3d 1201, 57 St. Rep. 761 (2000).

Miscarriage of Justice Exception — Newly Discovered Evidence Necessary to Trigger Waiver of Postconviction Statute of Limitations: Rosales's deferred sentence for felony assault (now assault with a weapon) and use of a weapon was revoked in 1994 because Rosales violated the deferral conditions. He was sentenced to 10 years for assault and an additional 2 years for use of a weapon in violation of 46-18-221. About 5 years and 3 months later and about 2 ½ months after the decision in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), Rosales moved to amend the sentence, contending that the additional 2-year sentence for use of a weapon put him in double jeopardy, based on Guillaume. The District Court dismissed the motion because of the running of the 5-year statute of limitations for postconviction relief in this section (changed to a 1-year statute of limitations in 1997). On appeal, Rosales asked the Supreme Court to reverse its application of the statute of limitations and the bar against retroactive application of the law as established in a similar case, St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093 (1999), which procedurally barred a defendant from moving the court to amend the sentence based on Guillaume. The Supreme Court declined, holding that the postconviction statute of limitations is a jurisdictional limit on litigation and is waived only when there is a clear miscarriage of justice—one so obvious that the judgment is rendered a complete nullity. The miscarriage of justice exception refers to actual, not legal, innocence and does not apply to postconviction claims unless the defendant alleges newly discovered evidence establishing that the defendant did not commit the offense. The Supreme Court refused to alter the conditions upon which the statute of limitations will be waived, and because the District Court was affirmed on grounds that the statute of limitations had run, Rosales's argument regarding retroactive application of the law was not considered. St. v. Rosales, 2000 MT 89, 299 M 226, 999 P2d 313, 57 St. Rep. 385 (2000).

Exceptions to General Rule of Retroactivity — Guillaume Inapplicable to Case Finalized Before Adoption of New Constitutional Rule: Although Nichols' conviction, resulting in an enhanced penalty for use of a weapon, was finalized more than 5 years prior to the Supreme Court's decision in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999), which created a new constitutional rule barring enhanced weapon sentences when the underlying offense requires proof of use of a weapon, Nichols nevertheless argued that the portion of his sentence precluded by Guillaume should be stricken from his sentence. The Supreme Court applied the retroactivity criteria in Teague v. Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989), noting that two exceptions apply to the general rule of retroactivity. The first exception applies when the constitutional rule puts primary, private individual conduct beyond the power of the criminal law to proscribe; the second exception applies when the procedures used to convict the defendant are so implicit in the concept of ordered liberty as to constitute watershed rules of criminal procedure. Finding that Guillaume was not dictated by prior precedent and did not set out a watershed rule, the court held that the new rule did not require retroactive application to cases not pending on direct appeal or to cases that were final when the Guillaume opinion was issued. Not only was Nichols' claim time-barred under the pre-1997 version of this section, his argument that the sentence should be reduced to prevent a miscarriage of justice also failed because miscarriage of justice refers to actual, not legal, innocence. St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999), followed in St. v. Baker, 1999 MT 251, 296 M 253, 989 P2d 335, 56 St. Rep. 987 (1999), and overruled in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002). See also St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Death Row Not Considered Cruel and Unusual Punishment — Delay Attributed to Defendant's Appeals: Citing Lackey v. Tex., 514 US 1045, 131 L Ed 2d 304, 115 S Ct 1421 (1995),

Gollehon claimed that his right to be free from cruel and unusual punishment was violated by the amount of time that he spent on death row and by the number of sentencing hearings in his capital murder case. The Supreme Court declined to apply Lackey because the majority of the delay in Gollehon's case was caused by his own pursuit of constitutional and statutory rights in state and federal courts and was not caused by the state. Gollehon's claim for relief was denied. Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395, 56 St. Rep. 811 (1999). See also St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996).

"Conviction" Based on Verdict and Sentence in District Court — Petition for Postconviction Relief Time-Barred: Redcrow was convicted in February 1988, and sentence was imposed in October 1988. Following affirmation of the conviction by the Supreme Court in 1990, Redcrow filed a petition for postconviction relief in District Court in March 1995. The petition was denied as untimely. Redcrow appealed, asserting that the date of conviction was in 1990 on the date on which the Supreme Court affirmed the original murder conviction in St. v. Redcrow, 242 M 254, 790 P2d 449, 47 St. Rep. 672 (1990), rather than the date of the District Court conviction in 1988, which would render the statutory filing bar inapplicable. Applying the definition of "conviction" in 45-2-101 and Beach v. Day, 275 M 370, 913 P2d 622, 53 St. Rep. 184 (1996), the Supreme Court held that Redcrow was considered convicted when the jury rendered the guilty verdict and sentence was imposed in District Court in 1988; thus, the petition for postconviction relief, filed 6 1/2 years later, was time-barred under the 1988 version of this section. St. v. Redcrow, 1999 MT 95, 294 M 252, 980 P2d 622, 56 St. Rep. 409 (1999).

Waiver of Statute of Limitations Not Justified — No Clear Miscarriage of Justice: Redcrow was convicted in February 1988, and sentence was imposed in October 1988. Following affirmation of the conviction by the Supreme Court in 1990, Redcrow filed a petition for postconviction relief in District Court in March 1995. The petition was denied as untimely. The District Court held that although the petition was not filed within the 5-year statute of limitations in this section, as it read in 1988, the exception to the procedural bar allowed the state to examine the record to ascertain whether a constitutional violation resulted in a fundamental miscarriage of justice that would render the judgment a nullity. The court then examined the record, concluded that no constitutional violation occurred, and denied the petition. On appeal, the Supreme Court noted that a fundamental miscarriage of justice arises only when a jury could find, in light of new evidence, that the defendant is actually innocent of the crime. In Redcrow's case, defendant confessed and admitted to the crime of murder, which eliminated the possibility of innocence. Further, all of Redcrow's claims regarding ineffective assistance of counsel were record-based and not properly described as new evidence. Because the claims could have been presented prior to expiration of the 5-year statute of limitations, relief was barred. St. v. Redcrow, 1999 MT 95, 294 M 252, 980 P2d 622, 56 St. Rep. 409 (1999).

Ineffective Assistance of Counsel Claims Barred as Untimely:

Hawkins contended that his petition for postconviction relief was not time-barred because of ineffective counsel at his trial more than 20 years prior, asserting that witnesses whom his attorney failed to discover would have offered mitigating testimony that Hawkins had been under extreme mental and emotional stress and was provoked into murdering his wife. However, because Hawkins' original trial counsel was since deceased, a miscarriage of justice would have resulted if Hawkins were allowed to make a claim on the merits when the state's primary witness was no longer available. Thus, the claim was time-barred. Hawkins v. Mahoney, 1999 MT 82, 294 M 124, 979 P2d 697, 56 St. Rep. 345 (1999).

Claims of ineffective assistance of counsel and confession-related claims raised in a petition for postconviction relief filed 11 years after conviction were barred as untimely. Beach v. Day, 275 M 370, 913 P2d 622, 53 St. Rep. 184 (1996), distinguishing St. v. Perry, 232 M 455, 758 P2d 268 (1988).

"Newly Discovered" Evidence, Discoverable at Trial, Not New — Claim Time-Barred: Hawkins contended that his petition for postconviction relief was not time-barred because of newly discovered evidence of ineffective counsel at his trial more than 20 years prior, asserting that witnesses whom his attorney failed to discover would have offered mitigating testimony that Hawkins had been under extreme mental and emotional stress and was provoked into murdering his wife. However, rather than being newly discovered, the evidence of Hawkins' mental state was available at the time of trial through Hawkins himself, despite the fact that he did not testify at trial. Thus, the claim was time-barred. Hawkins v. Mahoney, 1999 MT 82, 294 M 124, 979 P2d 697, 56 St. Rep. 345 (1999).

Statute of Limitations on Petition for Postconviction Relief to Run From Time of Filing, Not Conviction: The statute of limitations applicable to Hawkins when he was convicted in 1973 provided that a petition for postconviction relief could be filed any time after conviction. In 1981,

the time period was changed to require filing within 5 years of conviction. Hawkins' petition for postconviction relief, filed in 1997, was subject to the 5-year statute of limitations in effect at the time of filing, not the one in effect at the time of conviction. Hawkins v. Mahoney, 1999 MT 82, 294 M 124, 979 P2d 697, 56 St. Rep. 345 (1999).

"Motion to Vacate Conviction" Construed as Motion for Postconviction Relief and Not Motion to Withdraw Guilty Plea — Attorney Conflict of Interests — Petition Previously Denied: Howard filed a motion for postconviction relief in 1993, asserting that his attorney in his 1981 trial for felony theft had a conflict of interests because the attorney also represented a codefendant. The Supreme Court denied his petition as time-barred under this section. Howard then filed with the District Court a "Motion to Vacate Conviction", which the District Court construed as another petition for postconviction relief and also denied as time-barred. The Supreme Court held that it was proper for the District Court to construe the "Motion to Vacate Conviction" as another motion for postconviction relief. Despite Howard's argument that his motion did not meet the formal prerequisites for a motion for postconviction relief and that motions to withdraw a guilty plea are allowed after judgment by virtue of 46-16-105, the Supreme Court held: (1) that it had not always strictly enforced the requirements for a motion for postconviction relief, especially for persons appearing pro se; (2) that the content of Howard's motion was of the type usually made in motions for postconviction relief; and (3) that although other means of review of a sentence other than postconviction relief may sometimes be necessary because of exigent circumstances, the circumstances of Howard's situation, in which he waited over 10 years to challenge his conviction the first time, did not demonstrate those exigent circumstances. The Supreme Court held that this petition, like Howard's first petition for postconviction relief, was time-barred by 46-21-101. St. v. Howard, 282 M 522, 938 P2d 710, 54 St. Rep. 464 (1997).

State Not Required to Wait Five Years to Execute Convict: Upon the dissolution of Gollehon's stay of execution, the District Court set a new execution date within 90 days of the hearing dissolving the stay, as required by 46-19-103. Gollehon argued that the state could not execute him prior to the expiration of the 5-year period provided in this section (see 1997 amendment) for petitioning for postconviction relief. The Supreme Court held that the provisions concerning postconviction relief do not override the statutory language requiring the setting of a new execution date upon the dissolution of a stay of execution. Gollehon v. District Court, 271 M 363, 897 P2d 1058, 52 St. Rep. 447 (1995), followed in State ex rel. Turner v. District Court, 271 M 392, 897 P2d 1060, 52 St. Rep. 498 (1995).

Motion for New Trial Based on Recantation by Accomplice Fifteen Years After Conviction: Some 15 years after defendant was convicted of second degree murder, an accomplice recanted his testimony, claiming that he, not defendant, committed the crime. Defendant then filed a motion for a new trial or other appropriate relief. The state argued the motion was essentially a petition for postconviction relief barred by the 5-year statute of limitations in this section. The Supreme Court disagreed, finding that under such an interpretation a defendant held in violation of his constitutional rights would be deprived of a method of redress regardless of his diligence or the justness of his claim. Rather, the claim sounded in the nature of a petition for habeas corpus, and the court determined the single issue to be whether defendant was entitled to a new trial based on the proffered evidence of another person doing the crime for which defendant was convicted. St. v. Perry, 232 M 455, 758 P2d 268, 45 St. Rep. 1192 (1988), overruled, to the extent that Perry stands for the proposition that a trial judge is required to grant a new trial only when satisfied that the recantation of the witness is true, in St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005). However, see In re Petition of Gray, 274 M 1, 908 P2d 1352, 52 St. Rep. 1041 (1995). Gray was overruled in Davis v. St., 2008 MT 226, 344 M 300, 187 P3d 654 (2008), to the extent that Gray held that the Legislature limited District Courts' subject matter jurisdiction by codifying a 1-year time bar on postconviction relief pursuant to 46-21-102.

Postconviction Relief Petition Barred by Twenty-Five Year Lapse: A defendant, despite this section and notwithstanding the rule in In re McNair, 189 M 321, 615 P2d 916 (1980), that a petition for postconviction relief cannot be defeated by a claim of Statute of Limitations, res judicata, or laches, is barred from petitioning for postconviction relief if 25 years have elapsed between the conviction and the petition for postconviction relief. The passage of time may make it impracticable to retry a case if the motion is granted and a new trial is ordered. Long delay may raise a question of good faith. St. v. Standley, 192 M 54, 626 P2d 248, 38 St. Rep. 522 (1981).

Petition for Postconviction Relief — No Time Limitation: Petitioner applied for postconviction relief 8 ½ years after he was sentenced. The County Attorney contended that he was barred by laches from attempting to withdraw his guilty plea. The postconviction hearing statutes are an attempt by the Legislature to consolidate all of the common-law statutory remedies normally

available to challenge a sentence. The Legislature did not intend to impose an absolute time constraint on the filing of an application for postconviction relief [until 1981, when a limit of 5 years from the date of conviction was set], and therefore laches does not apply. The length of delay may be considered, however, in viewing the good faith and credibility of the moving party. Petitioner claimed ineffective assistance of counsel and wished to withdraw his guilty plea. Nothing in the record indicated ineffective counsel, and the long delay makes the situation even less favorable to the petitioner. The application for postconviction relief was denied. In re McNair, 189 M 321, 615 P2d 916 (1980).

46-21-103. Commencement of proceedings.

Commission Comments

1991 Comment: This statute is identical to 1987 MCA 46-21-103, except that the opportunity for filing with the Clerk of the Supreme Court is eliminated. See 46-21-101(3), which authorizes the filing of a postconviction petition in the Supreme Court in situations in which the petitioner is in custody.

Source: Illinois Code of Criminal Procedure, [Chapter] 38, [section] 122-1.

This section sets forth the process by which proceedings are commenced. It further provides that the venue is at the place of conviction and not the place of confinement. The advantages of having the venue at the place of conviction are: 1. It will reduce the burden of the courts at the place of confinement; 2. Since most of the witnesses who are called are likely to be found in the area of conviction, the cost of the proceedings will be reduced; 3. The convicting court is more familiar with the background and facts of the case. (See U.S. v. Hayman, 342 U.S. 205.) This section will be supplemented by rules of the Supreme Court.

Compiler's Comments

1991 Amendment: In first sentence after "proceeding", inserted "for relief under 46-21-101" and at end substituted "appropriate court" for "court in which the conviction took place or the clerk of the supreme court"; and made minor changes in style.

Case Notes

Denial of Unsupported Petition for Postconviction Relief Not Abuse of Discretion: Although Hanson's verified petition satisfied the requirements of this section for commencing a proceeding for postconviction relief, it did not satisfy the separate requirement in 46-21-104 that evidence establishing the facts alleged to provide a basis for relief be attached to the petition. The unsupported petition was insufficient to entitle Hanson to an evidentiary hearing, and the District Court did not abuse its discretion in denying the petition. St. v. Hanson, 1999 MT 226, 296 M 82, 988 P2d 299, 56 St. Rep. 891 (1999).

46-21-104. Contents of petition.

Commission Comments

Source: Illinois Code of Criminal Procedure, [Chapter] 38, [section] 122-2.

This section describes what the petition should contain. The requirements that the petition shall also identify any previous proceedings the petitioner may have taken to secure relief from his conviction deserves special emphasis. This is intended to guide the district judge in exercising his discretion as to whether the relief available to the petitioner in this chapter shall be deemed waived. (See Fay v. Noia, 372 U.S. 391)

Compiler's Comments

1997 Amendment: Chapter 302 in (1)(c), at beginning, inserted "identify all facts supporting the grounds for relief set forth in the petition" and at end substituted "establishing the existence of those facts" for "supporting its allegations or state why the evidence is not attached"; and made minor changes in style. Amendment effective April 17, 1997.

Preamble: The preamble attached to Ch. 302, L. 1997, provided: "WHEREAS, it is the public policy of the State of Montana to provide persons accused of crimes with a fair and speedy trial and direct appellate review of legal issues fairly presented to the trial court; and

WHEREAS, the privilege of the writ of habeas corpus is preserved by Article II, section 19, of the Montana Constitution; and

WHEREAS, the Legislature has set forth in Title 46, chapter 21, MCA, procedures for protecting an offender's right to postconviction review of the judgment; and

WHEREAS, there is no federal constitutional right to a specific statutorily prescribed postconviction procedure; and

WHEREAS, it is the Legislature's intent that decisions of Montana juries and judgments of Montana trial courts in criminal cases, including death penalty cases, be respected and given

finality by other reviewing courts unless errors affecting an offender's substantial rights have occurred; and

WHEREAS, amendments to Montana's postconviction relief and death penalty statutes will further the goal of finality by codifying certain interpretations of those statutes by the Montana Supreme Court and clarifying legislative intent with respect to other provisions.

THEREFORE, it is the policy of the State of Montana to prescribe and limit, consistent with constitutional safeguards of the criminal justice process, the authority of an appellate or other reviewing court to consider legal and factual issues determined by the trial or sentencing court."

Severability: Section 5, Ch. 302, L. 1997, was a severability clause.

1991 Amendment: In (1), after "petition", inserted "for postconviction relief"; and made minor changes in style.

1981 Amendment: Deleted "Arguments" and inserted "The petition must be accompanied by a supporting memorandum including appropriate arguments" at the beginning of the last sentence; deleted "shall be omitted from this petition" following "discussion of authorities" at the end of the last sentence.

Case Notes

Second Petition for Postconviction Relief Not Procedurally or Time Barred: After a 1995 petition for postconviction relief was denied, Beach filed in 2008 for postconviction relief on grounds of newly discovered evidence, but the District Court, without a hearing, denied the petition on grounds that it was procedurally and time barred. On appeal, the Supreme Court disagreed. The 2008 petition claimed that the newly discovered evidence was only recently available and thus could not have been raised in the 1995 petition. Since nothing indicated a lack of diligence on Beach's part in locating the new evidence, the Supreme Court granted Beach the benefit of the doubt as to whether he acted with sufficient alacrity in locating the new evidence, so the 2008 petition was not procedurally barred. To determine whether Beach would be entitled to a new trial based on newly discovered evidence, the court applied the criteria in St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), regarding a trial court's consideration of what impact new evidence might have when looking prospectively at a new trial with a new jury. The court concluded that the District Court abused its discretion by denying the petition without holding an evidentiary hearing on the new evidence. The case was remanded to allow a hearing to evaluate whether the evidence was actually newly discovered and whether a reasonable jury would have found Beach guilty beyond a reasonable doubt. The newly discovered evidence must be material to the issues at trial and neither cumulative nor merely impeaching, and in order to prevail on a substantive innocence claim, Beach was required to show by clear and convincing evidence that but for a procedural error, no reasonable juror would have found him guilty. Beach v. St., 2009 MT 398, 353 M 411, 220 P3d 667 (2009). See also Schlup v. Delo, 513 US 298 (1995), St. v. Redcrow, 1999 MT 95, 294 M 252, 980 P2d 622 (1999), and St. v. Pope, 2003 MT 330, 318 M 383, 80 P3d 1232 (2003).

Death of Attorney Prior to Filing Response to Petition for Postconviction Relief — Unique Circumstance Warranting Evidentiary Hearing: Heath filed a timely petition for postconviction relief alleging ineffective assistance of counsel. The District Court ordered the attorney to respond to the charges, but before a response was filed, the attorney died. Heath then requested an evidentiary hearing, but the request for a hearing was denied on grounds that the court failed to see the benefit of a hearing without the attorney in attendance, and the petition was denied without holding a hearing. Heath appealed and the Supreme Court reversed. Although not all circumstances require the District Court to hold an evidentiary hearing on a petition for postconviction relief, a hearing may be appropriate in certain settings with unique circumstances. The attorney's death prior to filing a court-ordered response constituted one of those unique circumstances. The record failed to set forth the attorney's reasons for pretrial and trial actions, and denial of a hearing left Heath without any alternative means of inquiry into the attorney's actions and whether those decisions supported Heath's ineffective assistance claims. Therefore, under these unique circumstances the Supreme Court remanded for an evidentiary hearing to provide Heath a reasonable alternative means to inquire into the attorney's reasons for the pretrial and trial actions and to allow the District Court to evaluate Heath's claims. Heath v. St., 2009 MT 7, 348 M 361, 202 P3d 118 (2009). See also Williams v. St., 2002 MT 189, 311 M 108, 53 P3d 864 (2002), and Herman v. St., 2006 MT 7, 330 M 267, 127 P3d 422 (2006).

Petition for Postconviction Relief Required Before Request for Counsel Considered: Davis filed a motion requesting counsel to prepare postconviction proceedings. While the motion was pending, the time for filing a postconviction petition expired. The District Court denied the motion for counsel on grounds that the time for a postconviction petition had run. Although the court erred in its conclusion because 42 days remained for filing a petition when the motion for

counsel was filed, the Supreme Court nevertheless affirmed because Davis was required to file a petition for postconviction relief before the motion for appointment of counsel could be considered. Absent a valid petition, the motion for counsel was properly denied. Davis v. St., 2007 MT 207, 339 M 1, 167 P3d 892 (2007).

Dismissal of Postconviction Petition for Failure to State Claim — Differentiation of Standards Applicable to Civil Cases — No Error in Failure to Hold Evidentiary Hearing on Postconviction Petition: Herman asserted that an evidentiary hearing should have been held regarding his petition for postconviction relief because the standard in 46-21-201 is nearly identical to the provision in Rule 12(b)(6), M.R.Civ.P. (Title 25, ch. 20), so allegations in a petition for postconviction relief must be taken as true and construed in a light most favorable to the petitioner, requiring a hearing on the allegations. The Supreme Court disagreed. The express statutory requirements in this section significantly exceed and are inconsistent with the mere notice pleading requirements for an ordinary complaint in a civil action. Thus, the civil standards do not apply to dismissals of petitions for postconviction relief for failure to state a claim because the civil standards are inconsistent with the more specific requirements of 46-21-201 and this section, and the District Court did not err in failing to hold an evidentiary hearing on Herman's petition and in dismissing Herman's claim for failure to meet the procedural threshold in this section. Herman v. St., 2006 MT 7, 330 M 267, 127 P3d 422 (2006), following Ellenburg v. Chase, 2004 MT 66, 320 M 315, 87 P3d 473 (2004), and distinguishing St. v. Schaff, 2001 MT 130, 305 M 427, 28 P3d 1073 (2001), and St. v. Lawrence, 2001 MT 299, 307 M 487, 38 P3d 809 (2001).

Waiver of Right to Postconviction Challenge of Matters Occurring Prior to Guilty Plea and Unrelated to Nature of Plea: In a petition for postconviction relief, Herman raised numerous issues related to ineffective assistance of counsel that allegedly led to a guilty plea. However, by pleading guilty, Herman waived the right to challenge matters that occurred prior to the plea and that were unrelated to the voluntary or knowing nature of the plea or to the ineffective assistance claim, including: (1) a claim that Herman conducted, sought, or obtained independent legal research; (2) an assertion that Herman met the attachments requirement of subsection (1)(c) of this section; (3) Herman's claim that he pleaded guilty because of the duress of incarceration; (4) counsel's failure to move for a bond reduction or pretrial release; and (5) a claim that counsel was ineffective by asserting a speedy trial violation. Herman v. St., 2006 MT 7, 330 M 267, 127 P3d 422 (2006), following Ellenburg v. Chase, 2004 MT 66, 320 M 315, 87 P3d 473 (2004).

Defense Counsel's Complaint to Media Not Considered Ineffective Assistance of Counsel: While Ford was incarcerated awaiting trial, a family member of Ford's homicide victim visited Ford and caused a disruption. Ford's counsel issued a news release to local media contending that jail officials violated Ford's constitutional rights by allowing the incident to occur, and the local newspaper ran a story that contained counsel's accusation. Ford contended that counsel's conduct prejudiced the case by instigating negative media coverage that reduced Ford's chance of obtaining an impartial jury. However, Ford cited no authority in support of the claim that counsel's complaint to the media amounted to ineffective assistance of counsel. Absent support by legal authority and evidence of prejudice, Ford's postconviction claim for relief was properly denied. Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Failure of Counsel to Present Evidence of Purported Negligent Rescue Efforts Not Considered Ineffective Assistance of Counsel: In a petition for postconviction relief, Ford contended that his counsel was ineffective in failing to present evidence that Ford's beating victim may have been injured through the negligent rescue efforts of emergency personnel who responded at the scene. However, the trial record contained no evidence to support the claim, and Ford's arguments were based on mere allegations. Counsel could not be found to be ineffective for failing to raise a defense that was unsupported in the record, and Ford's claim for postconviction relief was properly denied. Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Failure of Counsel to Suppress Unintroduced Evidence Not Considered Ineffective Assistance of Counsel: In a petition for postconviction relief, Ford contended that his counsel was ineffective in failing to move to suppress evidence of a blood sample taken from Ford's hands before a search warrant was obtained. However, the state introduced no blood evidence at trial, so there was no evidence for Ford's counsel to move to suppress. Ford's ineffective assistance of counsel claim failed. Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Speculative Postconviction Claim Properly Denied: In a petition for postconviction relief, Ford contended that his counsel was ineffective in failing to move to suppress testimony from Ford's neighbors regarding statements by the neighbors that were allegedly coerced by police. However, the claim was based on nothing more than Ford's allegation that officers coerced

statements from the neighbors. Because Ford produced no evidence to support the allegation and the claim was not grounded on facts in the record, the claim for relief was properly denied. Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Unfounded and Unpleaded Speculative Argument Not Considered for First Time on Appeal: Kallowat contended for the first time on appeal that if the jury in his DUI case had known that the arresting officer had been convicted of a felony and was employed under questionable status, the case would in all probability have had a different outcome. However, Kallowat failed to properly plead the issue as required in this section, nor was this speculative contention supported by the record. Therefore, the Supreme Court declined to address Kallowat's unsupported argument raised for the first time on appeal. Kallowat v. St., 2004 MT 152, 321 M 501, 92 P3d 1176 (2004).

Failure to Provide Proof of Entitlement to Postconviction Relief — Petition Properly Denied: Ellenburg raised several issues on appeal, some of which were raised in District Court and some of which were not. The Supreme Court declined to address all issues that were not preserved for appeal. Several other issues were procedurally barred because Ellenburg either raised them on direct appeal or reasonably could have raised them on direct appeal. Postconviction relief was denied on the remaining issues because Ellenburg waived the right to appeal those issues by failing to provide any evidentiary support for the allegations. The petition for postconviction relief was properly denied. Ellenburg v. Chase, 2004 MT 66, 320 M 315, 87 P3d 473 (2004), following St. v. Schmalz, 1998 MT 210, 290 M 420, 964 P2d 763 (1998), St. v. Niederklopfer, 2000 MT 187, 300 M 397, 6 P3d 448 (2000), and St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001), and followed in Herman v. St., 2006 MT 7, 330 M 267, 127 P3d 422 (2006).

Failure to State Claim or Present Facts Justifying Postconviction Relief — Petition Properly Denied: Griffin petitioned for postconviction relief, asserting claims of prosecutorial misconduct, double jeopardy, judicial bias, and ineffective assistance of counsel. However, a petitioner has the burden of showing, by a preponderance of the evidence, that facts justify the relief. Here, Griffin failed to bolster the claims with supporting evidence, such as affidavits, records, or other evidence. Thus, the petition failed to meet the statutory requirements or state a claim for relief and was properly dismissed as a matter of law. Griffin v. St., 2003 MT 267, 317 M 457, 77 P3d 545 (2003).

Dismissal of Procedurally Deficient Petition Proper: Finley filed a pro se petition for postconviction relief, claiming ineffective assistance of counsel because the attorney failed to mention that Finley could challenge the validity of three prior unspecified DUI convictions during a trial for felony DUI. The petition was dismissed for failure to state a claim for relief. Finley appealed, but the Supreme Court affirmed. Mere allegations do not constitute the evidence contemplated by this section, nor are unsupported allegations sufficient to entitle a petitioner to an evidentiary hearing. Claims of ineffective assistance of counsel must be grounded on facts in the record and not merely on conclusory allegations. Finley did not provide evidence in any form that would establish the facts underlying the assertions in the petition or provide an explanation for why the supporting evidence was not provided, which in this case would have included identification of the prior DUI convictions by court or cause number and other particulars. The petition was therefore procedurally deficient and was properly dismissed. St. v. Finley, 2002 MT 288, 312 M 493, 59 P3d 1132 (2002), following St. v. Kills On Top, 279 M 384, 928 P2d 182 (1996), and St. v. Hanson, 1999 MT 226, 296 M 82, 988 P2d 299 (1999), and distinguishing Fitzpatrick v. St., 194 M 310, 638 P2d 1002 (1981), St. v. Schaff, 2001 MT 130, 305 M 427, 28 P3d 1073 (2001), St. v. Lawrence, 2001 MT 299, 307 M 487, 38 P3d 809 (2001), and Soraich v. St., 2002 MT 187, 311 M 90, 53 P3d 878 (2002).

Alleged Ineffective Assistance of Counsel in Failure to Appeal Sentence and Withholding Exculpatory Evidence — No Showing of Deficient Performance of Counsel: Wright contended in a petition for postconviction relief that he received ineffective assistance of counsel when his attorney failed to appeal the sentence after indicating to Wright that the sentence would be appealed and when counsel withheld exculpatory evidence from Wright prior to a change of plea hearing. Wright contended that counsel failed to mention that two of Wright's sexual assault victims made second statements that contradicted their original statements, which would have cleared Wright of 2 of the 11 charges against him. The Supreme Court applied the Strickland test for ineffective assistance, which required Wright to first show that counsel's performance was deficient. By deposition, counsel in this case swore that he was never asked to appeal, and never indicated to Wright that the sentence would be appealed. The only evidence suggesting counsel's refusal to appeal was Wright's own affidavit. The District Court accepted counsel's statements, and that decision was not disturbed by the Supreme Court absent a showing of clear error. Further, the only support for Wright's contention that counsel withheld exculpatory evidence

was Wright's own affidavit. Wright failed to produce the alleged revised statements or any records indicating that the victims even gave second statements; thus, Wright's affidavit was no more than a mere conclusory allegation unsupported by any evidence. The Supreme Court held that Wright failed to show that counsel's performance was deficient and declined to grant postconviction relief on the issue. St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001), followed in Ellenburg v. Chase, 2004 MT 66, 320 M 315, 87 P3d 473 (2004), and St. v. Godfrey, 2009 MT 60, 349 M 335, 203 P3d 834 (2009).

Postconviction Relief Barred Upon Failure to Raise Issue of Alleged Unlawful Sentences on Direct Appeal: In a petition for postconviction relief, Wright alleged three erroneous sentencing issues: (1) oral pronouncement of the sentence varied from the written sentence; (2) the District Court's nunc pro tunc order was improper; and (3) a sentencing condition ordering Wright to stay out of Custer County was illegal. However, Wright could have reasonably raised the sentencing issues before the District Court and on direct appeal, but chose not to do so. Thus, Wright was procedurally barred under 46-21-105(2) from raising the issues in postconviction relief. St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

Record Indicating Voluntary Nature of Guilty Plea — Postconviction Relief Barred When Ineffective Counsel Claim Could Have Been Raised on Direct Appeal: At a change of plea hearing, Wright pleaded guilty to 11 counts of sexual assault and was sentenced to 55 years in prison. The District Court suspended sentence on six counts. Wright did not file a direct appeal on any issue, but more than 1 year after sentencing, he filed a petition for postconviction relief on grounds of ineffective assistance of counsel, asserting that he was coerced into pleading guilty by his attorney. On the issue of the voluntariness of the guilty pleas, the Supreme Court looked to the record to determine whether this question of fact was documented in the District Court. In this case, there was ample indication in the record to determine that the issue of the voluntary nature of Wright's pleas and the propriety of counsel's representation were raised in District Court and documented. Wright could thus have raised the issue on direct appeal, but failing to do so, he was barred from raising the issue in a petition for postconviction relief pursuant to 46-21-105. St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

Denial of Unsupported Petition for Postconviction Relief Not Abuse of Discretion: Although Hanson's verified petition satisfied the requirements of 46-21-103 for commencing a proceeding for postconviction relief, it did not satisfy the separate requirement in this section that evidence establishing the facts alleged to provide a basis for relief be attached to the petition. The unsupported petition was insufficient to entitle Hanson to an evidentiary hearing, and the District Court did not abuse its discretion in denying the petition. St. v. Hanson, 1999 MT 226, 296 M 82, 988 P2d 299, 56 St. Rep. 891 (1999).

Petition for Postconviction Relief Denied — No Due Process Violation — No Abuse of Discretion in Refusing New Trial Because All Factors Not Fulfilled — No New Trial: Sullivan, the director of the Parks and Recreation Department for the city of Great Falls, was convicted of three counts of felony theft of various city recreational fees and one count of tampering with public records. Later, the employee who replaced him found in a budget file an envelope containing $1,300 of city recreation funds. Sullivan brought a petition for postconviction relief, arguing that his constitutional rights under Brady v. Md., 373 US 83 (1963) (granting postconviction relief on the basis of evidence suppressed by the prosecution), had been violated and that the newly discovered evidence entitled him to a new trial. The Supreme Court held Brady inapplicable because the new evidence was not known to the prosecution at the time of the trial and therefore could not have been wrongfully withheld. In connection with the Brady claim, the Supreme Court also noted that Sullivan had not attached an affidavit or other evidence in support of his allegations, as required by this section, and concluded that Sullivan's assertions were not sufficient under 46-21-201 to allow him to conduct discovery or to entitle him to an evidentiary hearing. Because theft is not an element of tampering under 45-7-208 and 45-2-302, the Supreme Court concluded that Sullivan's conviction for tampering by making another employee alter official city records would not have been changed had the newly discovered evidence been available at trial. The Supreme Court also concluded that Sullivan had not fulfilled all of the six factors discussed in St. v. Cline, 275 M 46, 909 P2d 1171 (1996), required for grant of a new trial based upon newly discovered evidence because he had not shown that the new evidence would probably produce a different result at trial and that the new evidence was not merely cumulative evidence. Concerning Sullivan's final claim, the Supreme Court noted that in St. v. Perry, 232 M 455, 758 P2d 268 (1988), the defendant obtained newly discovered evidence but that neither a motion for a new trial nor postconviction relief was available to the defendant, so the Supreme Court created a "window" for review of the claim that otherwise would have been procedurally barred. The Supreme Court contrasted Perry and pointed out that

in Sullivan's case, he was not barred from bringing a petition for postconviction relief. For all of these reasons, the Supreme Court affirmed the District Court's denial for postconviction relief and denial of Sullivan's motion for a new trial. St. v. Sullivan, 280 M 25, 948 P2d 215, 54 St. Rep. 1128 (1997).

Failure to Supply Supporting Materials: Petitioner failed to present any affidavits, records, or other evidence to establish the testimony of a proposed witness, to establish the availability of the witness, and to present any statement as to why affidavits, records, or other evidence was not attached. Lack of the presentation of supporting evidence was a factor in the denial of a petition for postconviction relief. Eiler v. St., 254 M 39, 833 P2d 1124, 49 St. Rep. 611 (1992).

46-21-105. Amendment of petition — waiver of grounds for relief.

Commission Comments

Uniform State Law — Note on Commission Comments: The following states have enacted the Uniform Post-Conviction Procedure Act: Arkansas, Idaho, Iowa, Maryland, Minnesota, Nevada, North Dakota, Oregon, South Carolina, and South Dakota.

The commission comments summarize the Uniform Commission Comments and distinguish Montana changes to the U.P.C.A., thus the Uniform Commission Comments are not set forth.

Source: Uniform Post-Conviction Procedure Act, section 8.

The object of this section is to eliminate the unnecessary burden placed upon the courts by repetitious or specious petitions. It is highly desirable that a petitioner be required to assert all his claims in one petition. Unless good cause is shown why he did not assert all his claims in the original petition, his failure to so assert them constitutes a waiver. The way is left open, however, for a subsequent petition if the court finds grounds for relief that could not reasonably have been raised in the original petition.

Compiler's Comments

1997 Amendments — Coordination: Chapter 302 in (2), near beginning of first sentence, inserted "the opportunity for", near middle inserted "were or", and at end substituted "considered, or decided in a proceeding brought under this chapter" for "in the original or amended petition"; and inserted (3) stating what grounds for relief include for purposes of this section. Amendment effective April 17, 1997.

Chapter 378 in (1)(a), in first and third sentences after "amended", inserted "original"; in (1)(b), at beginning, substituted "The court shall dismiss a second or subsequent petition by a person who has filed an original petition unless the second or subsequent petition raises" for "Those grounds for relief not raised in the original or amended petition are waived unless the court on hearing a subsequent petition finds" and near end, after "amended", inserted "original"; in (2) inserted second sentence disallowing ineffectiveness or incompetence of counsel as an issue that can be raised in a second or subsequent petition; and made minor changes in style. Amendment effective April 24, 1997.

Pursuant to sec. 4, Ch. 302, L. 1997, a coordination section, the amendments to the first sentence of (2) made by sec. 5, Ch. 378, L. 1997, were rendered void.

Preamble: The preamble attached to Ch. 302, L. 1997, provided: "WHEREAS, it is the public policy of the State of Montana to provide persons accused of crimes with a fair and speedy trial and direct appellate review of legal issues fairly presented to the trial court; and

WHEREAS, the privilege of the writ of habeas corpus is preserved by Article II, section 19, of the Montana Constitution; and

WHEREAS, the Legislature has set forth in Title 46, chapter 21, MCA, procedures for protecting an offender's right to postconviction review of the judgment; and

WHEREAS, there is no federal constitutional right to a specific statutorily prescribed postconviction procedure; and

WHEREAS, it is the Legislature's intent that decisions of Montana juries and judgments of Montana trial courts in criminal cases, including death penalty cases, be respected and given finality by other reviewing courts unless errors affecting an offender's substantial rights have occurred; and

WHEREAS, amendments to Montana's postconviction relief and death penalty statutes will further the goal of finality by codifying certain interpretations of those statutes by the Montana Supreme Court and clarifying legislative intent with respect to other provisions.

THEREFORE, it is the policy of the State of Montana to prescribe and limit, consistent with constitutional safeguards of the criminal justice process, the authority of an appellate or other reviewing court to consider legal and factual issues determined by the trial or sentencing court."

Severability: Section 5, Ch. 302, L. 1997, was a severability clause.

Section 8, Ch. 378, L. 1997, was a severability clause.

Applicability: Section 9(1), Ch. 378, L. 1997, provided: "Except as provided in subsection (2), [sections 3 through 6] [amending 46-21-101, 46-21-102, 46-21-105, and 46-21-201] apply to proceedings in which the conviction becomes final:

(a) after [the effective date of this section] [effective April 24, 1997]; or

(b) during the 12 months prior to the [effective date of this section] [effective April 24, 1997] if a petition under Title 46, chapter 21, is filed within the 12 months after [the effective date of this section] [effective April 24, 1997]."

1995 Amendment: Chapter 96 in (1) inserted second sentence allowing original petition to be amended only once, inserted third sentence concerning the court deadline for the filing of the amended petition, inserted fourth sentence requiring deadline to be reasonably in advance of the hearing, and in last sentence, after "raised", inserted "in the original or amended petition".

1991 Amendment: In (1), in first sentence, substituted "46-21-101" for "this chapter"; and made minor changes in style.

1981 Amendment: Deleted "other than constitutional grounds" following "Any grounds" in the second sentence; added the last sentence referring to direct appeal grounds.

Case Notes

Generally 1192
Claims Raised or That Could Have Been Raised on Direct Appeal 1196
Claims Allowed in Postconviction Relief Proceeding 1203
Amended Petition 1205
Second or Subsequent Petition 1206
Decision on Particular Claims 1207

GENERALLY

Death of Attorney Prior to Filing Response to Petition for Postconviction Relief — Unique Circumstance Warranting Evidentiary Hearing: Heath filed a timely petition for postconviction relief alleging ineffective assistance of counsel. The District Court ordered the attorney to respond to the charges, but before a response was filed, the attorney died. Heath then requested an evidentiary hearing, but the request for a hearing was denied on grounds that the court failed to see the benefit of a hearing without the attorney in attendance, and the petition was denied without holding a hearing. Heath appealed and the Supreme Court reversed. Although not all circumstances require the District Court to hold an evidentiary hearing on a petition for postconviction relief, a hearing may be appropriate in certain settings with unique circumstances. The attorney's death prior to filing a court-ordered response constituted one of those unique circumstances. The record failed to set forth the attorney's reasons for pretrial and trial actions, and denial of a hearing left Heath without any alternative means of inquiry into the attorney's actions and whether those decisions supported Heath's ineffective assistance claims. Therefore, under these unique circumstances the Supreme Court remanded for an evidentiary hearing to provide Heath a reasonable alternative means to inquire into the attorney's reasons for the pretrial and trial actions and to allow the District Court to evaluate Heath's claims. Heath v. St., 2009 MT 7, 348 M 361, 202 P3d 118 (2009). See also Williams v. St., 2002 MT 189, 311 M 108, 53 P3d 864 (2002), and Herman v. St., 2006 MT 7, 330 M 267, 127 P3d 422 (2006).

Failure to Show Defense Counsel's Allegedly Deficient Performance Caused Sufficient Prejudice to Undermine Confidence in Jury's Verdict: The District Court's denial of a postconviction relief petition was affirmed when neither defense counsel's failure to object to the judge's comment on a defense witness's qualifications nor defense counsel's failure to object after the witness's disqualification as an expert amounted to ineffective assistance of counsel. Hammer v. St., 2008 MT 342, 346 M 279, 194 P3d 699, (2008).

No Evidence of Prejudicial State Involvement in Parole Proceedings — Postconviction Petition Properly Denied: As part of a plea agreement, the state agreed to not involve itself in Maldonado's parole proceedings. Maldonado contended that the state breached the plea agreement when the County Attorney sent a letter to the Board of Pardons and Parole recommending against Maldonado's parole. The District Court concluded that the state's action was harmless, and on appeal the Supreme Court agreed. Although the Board did receive the County Attorney's letter and one Board member met with a Deputy County Attorney, the state withdrew the letter of opposition, and the Board member who met with the Deputy County Attorney recused herself. Maldonado failed to present any evidence that the state's actions figured into the decision of the Board of Pardons and Parole or that Maldonado was prejudiced in any way, and the District Court did not err in denying Maldonado's request for postconviction relief on this issue. Maldonado v. St., 2008 MT 253, 345 M 69, 190 P3d 1043 (2008).

Issue With Trial Court Evidentiary Ruling to Be Raised on Direct Appeal: Alleged errors committed by a District Court during trial that ostensibly affect the outcome of a case, including a trial court's allegedly erroneous evidentiary ruling regarding the admission of evidence of other crimes or acts, must be raised on direct appeal rather than through a postconviction relief proceeding. Adgerson v. St., 2007 MT 336, 340 M 242, 174 P3d 475 (2007).

No Record as to Why Counsel Took Particular Actions in Providing Defense — Effective Assistance Claim Not Appropriate for Direct Appeal: Hamilton claimed that he received ineffective assistance of counsel at a trial on incest charges, asserting that counsel: (1) failed to deliver on the promise that Hamilton would testify; (2) allowed a detective to testify regarding the veracity of Hamilton and the alleged victim; and (3) demeaned Hamilton and defense counsel in closing statements. The Supreme Court examined each claim but was unable to determine from the record why counsel took that particular strategy. Because the claims were not record-based, the effective assistance issue was not appropriate for direct appeal, and Hamilton's claim was dismissed without prejudice to raising the claim in postconviction relief proceedings. St. v. Hamilton, 2007 MT 223, 339 M 92, 167 P3d 906 (2007), following St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001).

Petition for Postconviction Relief Alleging Ineffective Assistance of Counsel Filed in District Court — Immunity of Attorney Assisting in Proceedings — Gillham Clarified: At the time of the decision in In re Gillham, 218 M 187, 707 P2d 1100 (1985), petitions for postconviction relief were addressed to the Supreme Court. Because the postconviction procedure has changed, pursuant to this section, petitions for postconviction relief are now initially filed in District Court. Thus, the Supreme Court clarified that petitions for postconviction relief alleging ineffective assistance of counsel may now be filed in the District Court where the postconviction proceeding is pending. The court affirmed that an attorney ordered to respond to a Gillham order issued by a District Court is not subject to a disciplinary proceeding before the Commission on Practice or subject to charges of malpractice. The immunity extends to all information, testimony, or documents necessarily provided in response to the allegations of ineffective assistance of counsel. Marble v. St., 2007 MT 98, 337 M 99, 169 P3d 1148 (2007).

Section Procedural Bar — Foreclosure of Federal Habeas: This section is a state procedural bar that, under the federal procedural default doctrine, bars a federal habeas action. The section was clear, consistently applied, and well established at the time of the petitioner's purported default in raising grounds for relief on direct appeal that could have raised at that time. Hanson v. Mahoney, 433 F3d 1107 (9th Cir. 2006).

Failure to Raise Ineffective Assistance of Appellate Counsel in Petition for Postconviction Relief — Petition Barred: In a petition for postconviction relief, Swan claimed ineffective assistance of trial counsel. The District Court determined that the petition was barred under this section. On appeal, Swan claimed that under Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), unpreserved appellate issues could be raised in the context of a postconviction relief petition that alleges ineffective assistance of counsel. The Supreme Court disagreed. In Hagen, the petitioner set forth an ineffective assistance claim related to appellate counsel, not trial counsel. Swan's argument was without merit, and the petition for postconviction relief was properly denied. Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006).

Right to Substitute Judge Not Considered Structural Issue of Constitutional Dimension — No Ineffective Assistance of Trial Counsel for Failure to Move for Automatic Substitution of Trial Judge: In a petition for postconviction relief, Swan contended that trial counsel rendered ineffective assistance by failing to move for an automatic substitution of the trial judge and that this structural error entitled Swan to a new trial. However, structural error is typically of constitutional dimensions, precedes the trial, and undermines the fairness of the entire trial proceeding. Although lack of an impartial judge would be considered a structural error, failure to exercise the statutory right to substitute a trial judge is not of constitutional dimension and is not presumed prejudicial. Having failed to establish that counsel's failure to timely move for an automatic substitution of the trial judge was an error of constitutional dimension, Swan's postconviction argument failed. Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006), following St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

Claim That Prior Convictions Could Not Serve as Basis for Charging Current Crime as Felony Considered Nonjurisdictional — Guilty Plea as Waiver of Nonjurisdictional Claims — Postconviction Relief Denied for Failure to Raise Legality of Sentence on Direct Appeal: Slavin was convicted of partner or family member assault in 1992 and 1993. In 2001, Slavin pleaded guilty to a third charge of the same crime, which was considered a felony because of the two prior convictions, and was sentenced. Slavin did not appeal, but later filed a pro se petition for postconviction relief on grounds that the two prior convictions were constitutionally infirm. The

District Court denied the petition because Slavin failed to provide direct evidence overcoming the presumption of regularity attached to the prior convictions. On appeal, the Supreme Court held that Slavin's claim was a nonjurisdictional claim involving whether the District Court had statutory authority to impose the sentence, not whether the court had the power or capacity to impose the sentence. Slavin's knowing and voluntary guilty plea constituted a waiver of all nonjurisdictional defects and defenses that arose prior to the plea. Additionally, because Slavin failed to appeal the legality of the sentence, postconviction consideration of the sentence-related claim was precluded. The District Court was affirmed. Slavin v. St., 2005 MT 306, 329 M 424, 127 P3d 350 (2005), following Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2005), and overruling St. v. LaPier, 1998 MT 174, 289 M 392, 961 P2d 1274 (1998).

Record Devoid of Reasons for Counsel's Conduct During Voir Dire — Ineffective Assistance Claim Improperly Raised on Direct Appeal: Defendant's claims of ineffective assistance of counsel during voir dire could not be addressed without considering matters outside the record and were therefore inappropriate for direct appeal. The claims were thus dismissed without prejudice to defendant's pursuit of the claims in postconviction proceedings. St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003), following St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003).

Counsel Decision to Forego Certain Defense Considered Trial Strategy — Insufficient Record to Determine Effective Assistance of Counsel on Direct Appeal: On direct appeal, Hendricks contended that he was provided ineffective assistance of counsel in his assault trial because his attorney failed to raise the affirmative defense of justifiable use of force. However, in a disclosure statement filed prior to the omnibus hearing, Hendricks's counsel specifically noted that the defense of justifiable use of force would not be asserted. On the morning of trial, counsel stated that no jury instructions on the defense of justifiable use of force would be offered. Thus, the decision not to raise the defense was made consciously and was not the result of ignorance or neglect and was presumed to be sound trial strategy falling within the realm of reasonable professional conduct absent evidence to the contrary. Absent a sufficient record to address the issue of ineffective assistance, the direct appeal was dismissed, requiring Hendricks to raise the issue by a postconviction relief proceeding, if at all. The Supreme Court clarified that it will no longer use the approach in St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001), to determine effective assistance of counsel, but rather the procedure set out in St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003). St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003), followed in St. v. Webster, 2005 MT 38, 326 M 112, 107 P3d 500 (2005).

One-Year Limitation on All Postconviction Proceedings, Including Second or Subsequent Petitions — Exception: Defendant contended that the 1-year period of limitation in 46-21-102 applies only to an initial or original petition for postconviction relief, not to a second or subsequent petition. The Supreme Court disagreed. The 1-year period of limitation applies to the initiation of all postconviction proceedings, including those initiated by a second or subsequent petition. Further, under this section, in order to avoid dismissal, a second or subsequent petition must also demonstrate good cause why its claims were not asserted in the original petition. A narrow exception to the 1-year limitation period is allowed under 46-21-102(2), which provides that a petition that alleges newly discovered evidence may be filed 1 year after the evidence was discovered or reasonably should have been discovered. St. v. Root, 2003 MT 28, 314 M 186, 64 P3d 1035 (2003).

Failure of District Court to Review Entire Record on Petition for Postconviction Relief Not Violative of Due Process When Same Judge Presided at Trial: When considering Hagen's petition for postconviction relief, the District Court did not review the entire trial proceedings before making its conclusions of law. Hagen contended that failure to review the entire record deprived him of due process and resulted in erroneous findings and conclusions. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner; however, due process is a flexible concept that calls for such procedural protections as a particular situation demands. There is nothing in the postconviction relief statutes that explicitly requires that a District Court review the entire record, and the Supreme Court declined to impose a duty on District Courts to review the entire record in every situation. Rather, the scope of the duty is determined on a case-by-case basis. In this case, the District Court Judge who presided over the postconviction hearing was the same judge who presided at trial, so the duty to review relevant portions of the record at issue in the postconviction proceedings did not extend to the entire record because the same judge heard the trial testimony when it was presented. St. v. Hagen, 2002 MT 190, 311 M 117, 53 P3d 885 (2002).

Alleged Ineffective Assistance of Counsel in Failure to Appeal Sentence and Withholding Exculpatory Evidence — No Showing of Deficient Performance of Counsel: Wright contended in a petition for postconviction relief that he received ineffective assistance of counsel when his attorney failed to appeal the sentence after indicating to Wright that the sentence would be appealed and when counsel withheld exculpatory evidence from Wright prior to a change of plea hearing. Wright contended that counsel failed to mention that two of Wright's sexual assault victims made second statements that contradicted their original statements, which would have cleared Wright of 2 of the 11 charges against him. The Supreme Court applied the Strickland test for ineffective assistance, which required Wright to first show that counsel's performance was deficient. By deposition, counsel in this case swore that he was never asked to appeal, and never indicated to Wright that the sentence would be appealed. The only evidence suggesting counsel's refusal to appeal was Wright's own affidavit. The District Court accepted counsel's statements, and that decision was not disturbed by the Supreme Court absent a showing of clear error. Further, the only support for Wright's contention that counsel withheld exculpatory evidence was Wright's own affidavit. Wright failed to produce the alleged revised statements or any records indicating that the victims even gave second statements; thus, Wright's affidavit was no more than a mere conclusory allegation unsupported by any evidence. The Supreme Court held that Wright failed to show that counsel's performance was deficient and declined to grant postconviction relief on the issue. St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001), followed in Ellenburg v. Chase, 2004 MT 66, 320 M 315, 87 P3d 473 (2004).

Record Indicating Voluntary Nature of Guilty Plea — Postconviction Relief Barred When Ineffective Counsel Claim Could Have Been Raised on Direct Appeal: At a change of plea hearing, Wright pleaded guilty to 11 counts of sexual assault and was sentenced to 55 years in prison. The District Court suspended sentence on six counts. Wright did not file a direct appeal on any issue, but more than 1 year after sentencing, he filed a petition for postconviction relief on grounds of ineffective assistance of counsel, asserting that he was coerced into pleading guilty by his attorney. On the issue of the voluntariness of the guilty pleas, the Supreme Court looked to the record to determine whether this question of fact was documented in the District Court. In this case, there was ample indication in the record to determine that the issue of the voluntary nature of Wright's pleas and the propriety of counsel's representation were raised in District Court and documented. Wright could thus have raised the issue on direct appeal, but failing to do so, he was barred from raising the issue in a petition for postconviction relief pursuant to this section. St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

Failure of Trial Counsel to Request Ruling on Use of Suppressed Confession for Impeachment Purposes — Absence in Record of Understanding of Counsel's Course of Action — Remand for Determination of Reasonableness of Counsel's Actions: Harris claimed ineffective assistance of counsel because his attorney at trial never requested a ruling from the trial court on the prosecution's use of Harris's suppressed confession for impeachment purposes. The trial court's deferral of the ruling initially preserved the issue for appeal should the prosecution have referred to the confession at trial, but Harris's counsel decided to raise the issue of the suppressed confession on direct examination, which created an opening for the prosecution to further question Harris on cross-examination and made the appealable issue moot. The record did not reveal whether counsel's acts and omissions sprang from tactical decisions based on articulable trial strategies or reflected misunderstandings of the law and trial procedures. Because information outside the record was necessary to determine the merits of Harris's assistance of counsel claim, this section did not bar a postconviction assertion of ineffective assistance of counsel at trial (see St. v. Whitlow, 2001 MT 208, 306 M 339, 33 P3d 877 (2001)). The Supreme Court refused to speculate on whether the alleged errors reflected a coherent trial strategy or whether they were reasonable and deserved deference, so the case was remanded for an evidentiary hearing to determine whether counsel's actions fell below an objective standard of reasonableness pursuant to the first prong of the Strickland test for ineffective assistance of counsel. St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001), followed in St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006).

Inability to Document Claim of Ineffective Counsel From Record — Dismissal of Petition for Postconviction Relief Improper: Following conviction on numerous felony charges, Whitlow appealed his conviction and sentence, but did not raise concerns about ineffective assistance of counsel in the appeal. The conviction and sentence were upheld by the Montana Supreme Court, and Whitlow subsequently petitioned for postconviction relief, claiming that he was denied the right to effective assistance of counsel when his trial counsel failed to ask followup questions during voir dire. The District Court held that Whitlow's petition was barred under subsection (2) of this section because the claim of ineffective assistance should have been raised on direct

appeal and that Whitlow's sole claim of ineffective assistance was to be found within the trial record. As set out in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), when ineffective assistance of counsel claims are based on facts of record in the underlying case, they must be raised on direct appeal, but when those claims cannot be documented from the record, they must be raised by petition for postconviction relief. The state insisted that St. v. Chastain, 285 M 61, 947 P2d 57 (1997), established that ineffective assistance claims, such as Whitlow's, can reasonably be raised on direct appeal and that in order to conclude that Whitlow's ineffective assistance claim was not record-based, Chastain must be overruled. The Supreme Court disagreed, distinguishing Chastain instead. In contrast to the jurors' clear expressions for potential bias in Chastain, in Whitlow's case, the jurors all indicated that they could reserve judgment until the facts had been presented. It was possible that Whitlow's counsel could have known other facts that would lead to the reasonable belief that, despite their possible prejudices, placing those jurors on the panel would be favorable to Whitlow. As stated in U.S. v. Taglia, 922 F2d 413 (7th Cir. 1991), when the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight. Thus, in order to establish that his counsel's decision not to question or challenge the prospective jurors was not the product of sound trial strategy, Whitlow would have to go beyond the trial record. Because the ineffective assistance claims could not be documented from the record, they could not have been raised on direct appeal. The District Court erred in dismissing the petition for postconviction relief based on the bar in subsection (2) of this section. Without commenting on the merits of Whitlow's claim, the Supreme Court reversed. St. v. Whitlow, 2001 MT 208, 306 M 339, 33 P3d 877 (2001).

Petition for Postconviction Relief Both Procedurally and Time Barred: Wells pleaded guilty to felony assault, and the District Court entered its written judgment and sentence on January 2, 1998. Wells did not appeal, and the time for filing an appeal expired 60 days later, on March 3, 1998, which became the date of final conviction. In order to come within the 1-year period for a petition for postconviction relief, Wells needed to file by March 3, 1999, but the petition was not filed until December 22, 1999, when Wells asserted a double jeopardy claim for weapons enhancement based on St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999). The District Court dismissed the petition as untimely. Wells argued on appeal that the 1-year limitation is not a jurisdictional limitation, but rather a statute of limitations subject to equitable tolling, and contended that a tolling should be applied to the time period that Wells was incarcerated in New Mexico without adequate legal assistance. The Supreme Court recalled the holding in St. v. Rosales, 2000 MT 89, 299 M 226, 999 P2d 313 (2000), when it was held that the postconviction statute of limitations is indeed a jurisdictional limit on litigation to be waived only if there is a clear miscarriage of justice and defendant alleges newly discovered evidence that defendant did not commit the offense. Wells presented no new evidence of innocence. Further, Wells could have raised the Guillaume claim on direct appeal, but did not. Wells' petition was thus both procedurally and time-barred. St. v. Wells, 2001 MT 55, 304 M 329, 21 P3d 610 (2001), overruled in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), to the extent that Wells was barred from raising a double jeopardy claim in a petition for postconviction relief pursuant to this section for failing to raise the issue on direct appeal, and overruled in Davis v. St., 2008 MT 226, 344 M 300, 187 P3d 654 (2008), to the extent that Wells held that the Legislature limited District Courts' subject matter jurisdiction by codifying a 1-year time bar on postconviction relief pursuant to 46-21-102.

Application for Sentence Review Not Considered Direct Appeal — Plain Error Doctrine Inapplicable: Postconviction relief provides a defendant with a procedure to address claims that would have been raised by means of a petition for writ of habeas corpus or a writ of error coram nobis, while the Sentence Review Division reviews the equity of a sentence. The plain language of this section makes it clear that an application for review of a sentence, as contained in 46-18-903, is not a direct appeal within the context of this section. Further, the common-law rule of plain error does not extend to cases in which a defendant had the opportunity to challenge a dangerous offender designation on direct appeal but chose not to. St. v. Moorman, 279 M 330, 928 P2d 145, 53 St. Rep. 1173 (1996).

CLAIMS RAISED OR THAT COULD HAVE BEEN RAISED ON DIRECT APPEAL

Record-Based Claims of Involuntary Plea, Breach of Plea Agreement, and Impermissibility of Polygraph Results Barred From Postconviction Consideration: In a petition for postconviction relief, Evert raised issues regarding the voluntariness of his guilty plea, an alleged breach of the

plea agreement by the County Attorney, and the potential of flawed sentencing because evidence of a polygraph test was admitted and considered by the sentencing court. The Supreme Court analyzed each claim and determined that each was record-based and could have been raised on direct appeal and was therefore procedurally barred from postconviction consideration. St. v. Evert, 2007 MT 30, 336 M 36, 152 P3d 713 (2007).

No Challenge to Legality of Sentence on Direct Appeal — Postconviction Relief Barred: Hardin claimed in a petition for postconviction relief that the District Court lacked jurisdiction to accept a nolo contendere plea to a sexual offense because such a plea is prohibited under 46-12-204. The petition was denied, and on appeal, the Supreme Court affirmed. Hardin failed to challenge the legality of the sentence on direct appeal, so the claim was procedurally barred by this section from postconviction relief. Hardin v. St., 2006 MT 272, 334 M 204, 146 P3d 746 (2006).

Failure to Raise Legality of Sentence on Direct Appeal — Postconviction Consideration Barred: Osborne was convicted of a fourth DUI in 1999, and when charged with felony DUI in 2003, the state sought to have Osborne declared a persistent felony offender. The District Court obliged, and Osborne was declared a persistent felony offender and sentenced to 10 years in prison with 5 years suspended. Osborne did not appeal the sentence directly, but filed a petition for postconviction relief, asserting that the sentence was not legal. The petition was denied, and Osborne appealed. The state argued that the Supreme Court was procedurally barred under this section from considering the petition because the legal challenge to the sentence could have been raised on direct appeal. Osborne asserted that because the state did not raise the procedural bar issue in District Court, that argument was waived. Although the Supreme Court as a rule does not consider issues raised for the first time on appeal, this general rule does not preclude consideration of jurisdictional questions raised for the first time on appeal. The procedural bar is jurisdictional, so the court considered the state's argument, concluding that lack of subject matter jurisdiction may not be waived and that this section represents a jurisdictional limit on courts' ability to entertain and decide petitions for postconviction relief and effectively prohibits courts from exercising jurisdiction over grounds for relief that could have been raised on direct appeal. Thus, Osborne's failure to challenge the legality of the sentence on direct appeal precluded consideration in a postconviction petition. St. v. Osborne, 2005 MT 264, 329 M 95, 124 P3d 1085 (2005).

Claim of Illegal Sentence Based on Lack of Jurisdiction to Be Raised on Direct Appeal, Not Postconviction Petition — Pena Applied: Camarillo was a minor when he was convicted in 1999 of deliberate homicide, robbery, and aggravated burglary and sentenced as an adult offender to 70 years in the state prison. The case was filed directly in District Court rather than Youth Court, as allowed under 41-5-206. Camarillo filed a petition for postconviction relief in 2003, claiming that the District Court lacked subject matter jurisdiction. The state responded that the claims could have been raised on direct appeal, and the District Court agreed and dismissed the petition. On appeal, the Supreme Court noted that the District Court properly exercised jurisdiction under Art. VII, sec. 4, Mont. Const., so Camarillo's jurisdiction argument failed. The court then applied Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004), and held that the issues that Camarillo attempted to raise in the petition for postconviction relief could have been but were not raised on direct appeal and, pursuant to this section, could not be brought in the petition for postconviction relief. In addition, under 46-21-102, petitions for postconviction relief must be filed within 1 year of final judgment. Camarillo's petition was not filed until more than 3 years after judgment and thus was untimely. The District Court was affirmed. Camarillo v. St., 2005 MT 29, 326 M 35, 107 P3d 1265 (2005).

Untimely Hearing on Alleged Probation Violation — Not Considered in Postconviction Relief Proceeding When It Could Have Been Raised on Direct Appeal: Appellant's claim that the District Court lacked subject matter jurisdiction to revoke a suspended sentence following his arrest for another offense because he was not given a probation revocation hearing within 72 hours of his detention, as required by 46-23-1012, did not raise a true jurisdictional question. The claim was more properly characterized as a claim that his sentence was illegal, which was a nonjurisdictional claim for purposes of postconviction relief statutes. This section precludes postconviction relief on such a claim because appellant could have raised the claim on direct appeal. Sanders v. St., 2004 MT 374, 325 M 59, 103 P3d 1053 (2004).

Sentence Under Plea Bargain Within Statutory Maximum Not Cruel and Unusual Punishment — Cruel and Unusual Punishment Claim Not Raised on Direct Appeal Barred in Postconviction Proceedings: In exchange for dismissal of a charge of assault with a bodily fluid, Basto entered a plea agreement to plead guilty of possession of a deadly weapon by a prisoner. Basto was sentenced to 5 years in prison and subsequently filed a timely petition for

postconviction relief on grounds that the sentence was disproportionately severe when compared to the sentences of other defendants in the case, constituting cruel and unusual punishment. The state responded that there is no guarantee of proportionality under the constitutional prohibition against cruel and unusual punishment and that even if there were, Basto's sentence was still within statutory parameters. The Supreme Court agreed with the state. A sentence that is within maximum statutory guidelines does not violate the constitutional prohibition against cruel and unusual punishment. Basto received the sentence that he bargained for, and there was nothing in the plea agreement that indicated that Basto would receive the same sentence as the other defendants. Further, Basto failed to raise any cruel and unusual punishment argument on direct appeal, so the argument was barred in postconviction proceedings under this section. Basto v. St., 2004 MT 257, 323 M 80, 97 P3d 1113 (2004). See also St. v. DeSalvo, 273 M 343, 903 P2d 202 (1995), and St. v. Mingus, 2004 MT 24, 319 M 349, 84 P3d 658 (2004).

Issues Subsumed in First Appeal Res Judicata on Second Appeal: In a noncite opinion (St. v. Kallowat, 2000 MT 354N), the Supreme Court affirmed defendant's Sanders County convictions for felony DUI, driving with a suspended or revoked license, and felony bail-jumping. Kallowat's petition for postconviction relief was denied, and Kallowat appealed. The issue decided in the first appeal was whether the arresting officer had probable cause, given that the officer was a prior felon. The Supreme Court held that even if the officer's employment status was questionable, he still had probable cause to make the arrest as a private citizen. Kallowat devoted most of the motion for postconviction relief reiterating the same arguments, and because the postconviction arguments were subsumed in the issues considered in the first appeal, the issue was res judicata and the Supreme Court declined further consideration. Kallowat v. St., 2004 MT 152, 321 M 501, 92 P3d 1176 (2004).

Failure to Raise Question of District Court's Sentencing Authority on Direct Appeal — Issue Precluded in Postconviction Hearing: In a petition for postconviction relief, Thurston alleged that the District Court erred by imposing a prison sentence without considering the statutory nonviolent offender criteria. The claim was denied by the District Court on grounds that the issue should have been raised on direct appeal. The Supreme Court affirmed. Contrary to Thurston's contention, the issue was not a subject matter jurisdiction issue that could be raised at any time. The failure to consider nonviolent offender sentencing alternatives should have been raised on direct appeal, and failure to do so precluded consideration of the issue in postconviction proceedings. Thurston v. St., 2004 MT 142, 321 M 411, 91 P3d 1259 (2004), distinguishing St. v. Moorman, 279 M 330, 928 P2d 145 (1996).

Failure to Provide Proof of Entitlement to Postconviction Relief — Petition Properly Denied: Ellenburg raised several issues on appeal, some of which were raised in District Court and some of which were not. The Supreme Court declined to address all issues that were not preserved for appeal. Several other issues were procedurally barred because Ellenburg either raised them on direct appeal or reasonably could have raised them on direct appeal. Postconviction relief was denied on the remaining issues because Ellenburg waived the right to appeal those issues by failing to provide any evidentiary support for the allegations. The petition for postconviction relief was properly denied. Ellenburg v. Chase, 2004 MT 66, 320 M 315, 87 P3d 473 (2004), following St. v. Schmalz, 1998 MT 210, 290 M 420, 964 P2d 763 (1998), St. v. Niederklopfer, 2000 MT 187, 300 M 397, 6 P3d 448 (2000), and St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001), and followed in Herman v. St., 2006 MT 7, 330 M 267, 127 P3d 422 (2006).

Failure of Counsel to Properly Withdraw or Preserve Direct Appeal — Denial of Postconviction Petition Erroneous: Adams filed a pro se petition for postconviction relief, alleging ineffective assistance of counsel because his original court-appointed attorney failed to move to dismiss for lack of a speedy trial and because his subsequently appointed trial counsel offered a lesser included instruction on aggravated assault to the jury and failed to appeal to the Supreme Court following Adams' conviction, despite Adams' request to do so. The petition was denied on grounds that Adams failed to file an appeal within 60 days of judgment as required by former Rule 5, M.R.App.P. (now superseded), and Adams appealed. The Supreme Court reversed. Under 46-8-103, appointed counsel is required to continue representation until final judgment, including appellate review, unless counsel is relieved by court order. Adams' counsel failed to comply with the requirements of 46-8-103 and effect a valid withdrawal, so the right to appeal was not preserved. When a defendant would have appealed but for counsel's deficient performance, the error is prejudicial. Thus, denial of Adams' petition for postconviction relief on procedural grounds was reversible error, and on remand, Adams was allowed to raise the issues that would have been raised on direct appeal but for counsel's abandonment of the appeal, as well as the issues raised in the petition for postconviction relief that were not previously raised. St. v. Adams, 2002 MT 202, 311 M 202, 54 P3d 50 (2002), following In re Petition of Hans, 1998

MT 7, 288 M 168, 958 P2d 1175 (1998), and St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Postconviction Relief Barred Upon Failure to Raise Issue of Alleged Unlawful Sentences on Direct Appeal: In a petition for postconviction relief, Wright alleged three erroneous sentencing issues: (1) oral pronouncement of the sentence varied from the written sentence; (2) the District Court's nunc pro tunc order was improper; and (3) a sentencing condition ordering Wright to stay out of Custer County was illegal. However, Wright could have reasonably raised the sentencing issues before the District Court and on direct appeal, but chose not to do so. Thus, Wright was procedurally barred under subsection (2) of this section from raising the issues in postconviction relief. St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

Claims Raised on Direct Appeal Barred by Statute or Res Judicata on Petition for Postconviction Relief: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were summarily dismissed. Although res judicata prevents claims raised on appeal from being raised again in a petition for postconviction relief, Dawson argued that three of his claims for postconviction relief could not have been raised on direct appeal because they required evidence not found in the record and thus should not have been subject to summary judgment. The District Court concluded that the issues could have been raised on direct appeal and were not preserved through objection at trial and so were barred by res judicata and this section. The Supreme Court examined all three of Dawson's claims before affirming that this section was properly applied to two of the claims and that no prejudice resulted from the application of res judicata to the third. Lastly, Dawson raised Kills On Top v. St., 279 M 384, 928 P2d 182 (1996), as grounds for reconsideration of several other claims based on serving the "ends of justice". The Supreme Court felt no compulsion to reconsider any of Dawson's claims to serve those ends because the claims were barred by res judicata. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

Authority to Defer Imposition of Sentence When Financial Condition Imposed — Failure to File Timely Appeal: Ingersoll filed for postconviction relief, arguing that the District Court lacked statutory authority to either impose consecutive deferred sentences or to defer imposition of his sentence in excess of 3 years. The Supreme Court found that the District Court had statutory authority at the time of sentencing under 46-18-201 to impose a deferred sentence for up to 6 years for Ingersoll's felony conviction for criminal mischief. Therefore, pursuant to former Rule 5(b), M.R.App.P. (now superseded), Ingersoll had 60 days after sentencing to appeal the court's authority to impose the sentence. Failure to file a timely appeal rendered Ingersoll's claim procedurally barred in a postconviction hearing. Ingersoll v. St., 1999 MT 215, 295 M 520, 986 P2d 403, 56 St. Rep. 843 (1999).

Failure to Raise Claims on Direct Appeal — Postconviction Relief Unavailable: In his petition for postconviction relief, Gollehon requested that the Supreme Court reconsider its rulings on certain issues that were decided on direct appeal. The court declined to address the issues again. Postconviction relief is not available on claims that a petitioner could have raised on direct appeal. Here, if Gollehon failed to adequately raise issues in his direct appeal, he was procedurally barred from doing so under a petition for postconviction relief. If the issues were adequately raised, relitigation of the issues was barred by res judicata. Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395, 56 St. Rep. 811 (1999).

Issue of Whether Postconviction Claims Barred Raised Sua Sponte — Statutory Bar Not Primary Basis for Denial of Postconviction Relief: Wilson asserted that the District Court should not have raised sua sponte the issue of whether Wilson's postconviction claims were barred because of his failure to directly appeal a sentencing order to the Supreme Court. Although the District Court did suggest that the procedural bar in this section could be applied to Wilson's claims, the court fully discussed those claims on their merits. Therefore, the procedural bar was not the primary or alternative basis for denial of Wilson's postconviction relief and the court did not err. St. v. Wilson, 1999 MT 52, 293 M 429, 976 P2d 962, 56 St. Rep. 220 (1999).

Petition for Postconviction Relief — Only Record-Based Claims Barred by Statute or Res Judicata: In 1993, Hagen was convicted of deliberate homicide and aggravated assault and appealed to the Montana Supreme Court, raising the issue of ineffective assistance of counsel. The Supreme Court affirmed the District Court. Hagen then filed a petition for postconviction relief, raising nine claims of ineffective assistance of counsel and argued that: (1) none of the claims could have been raised in his earlier direct appeal; (2) all claims were appropriate for his

petition because an evidentiary hearing was required for all nine issues; (3) appellate counsel was ineffective in raising a particular issue in his previous direct appeal; and (4) if some or all of the claims relating to ineffective assistance of trial counsel should have been raised in his direct appeal but were not and were therefore barred, his appellate counsel provided ineffective assistance in failing to present those issues in his direct appeal. The state responded that six of Hagen's claims were procedurally barred by this section because they could have been raised in his previous appeal, that one claim was barred by res judicata because it had been raised and decided in his previous appeal, and that three of Hagen's claims were not supported by the record or by the law and could therefore be decided on their merits without an evidentiary hearing. The District Court refused Hagen's request for an evidentiary hearing on his petition for postconviction relief and dismissed the petition, holding that the issue of ineffective assistance of counsel was raised in Hagen's direct appeal and had been decided by the Supreme Court, that Hagen's adequate remedy of appeal had been pursued, and that the petition for postconviction relief failed to state a claim for relief. Hagen appealed the dismissal of the petition to the Supreme Court. As an initial observation, the Supreme Court pointed out that although all of the issues raised by Hagen in his appeal of the District Court's denial of his petition for postconviction relief concerned ineffective assistance of counsel, not all of those claims were raised in the previous direct appeal and only those claims that were raised or that could have been raised in that previous direct appeal based upon the trial record were barred by the doctrine of res judicata or subsection (2) of this section. Citing In re Petition of Evans, 250 M 172, 819 P2d 156 (1991), and St. v. Bromgard, 273 M 20, 901 P2d 611 (1995), the Supreme Court further pointed out that those issues that are not record-based are properly brought to the Supreme Court by a petition for postconviction relief and that the District Court erred in failing to make that distinction and dismissing all of Hagen's ineffective assistance claims just because some of those claims may have been legitimately barred. The Supreme Court then individually reviewed each of Hagen's ineffective assistance claims and held that: (1) the manner in which mental evaluations of Hagen were disseminated during the trial was a matter of record and was therefore barred; (2) failure of Hagen's trial counsel to object to evidence introduced at trial was a matter of record and was therefore barred; (3) eliciting certain cross-examination testimony was based upon record evidence and was barred; (4) shifting the burden of proof during counsel's closing argument was a matter of record and barred by res judicata and this section; (5) failure to investigate facts that could have provided a defense was properly raised in the postconviction relief petition because there could be no record evidence on this issue; (6) failure of trial counsel to present impeachment testimony was in part resolved during the appeal and was therefore res judicata and, with regard to one potential witness, was a matter of failure of trial counsel to investigate, could not be a matter of record, and therefore was not barred; (7) failure of trial counsel to properly prepare witnesses for trial was not and could not be reflected in the trial record and therefore was not barred; and (8) failure of appellate counsel to raise the ineffective assistance of trial counsel could not have been a matter of record evidence by its very nature and was therefore not barred from consideration in the postconviction relief petition. Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999), distinguished in Smith v. St., 2000 MT 327, 303 M 47, 15 P3d 395, 57 St. Rep. 1387 (2000), and followed in St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001), and St. v. Upshaw, 2006 MT 341, 335 M 162, 153 P3d 579 (2006). See also St. v. Schaff, 2001 MT 130, 305 M 427, 28 P3d 1073 (2001), in which the question of voluntariness of a plea because of ineffective assistance of counsel was remanded for a hearing, despite the previous disposition of other voluntariness claims on direct appeal, because discussions between defendant and counsel were not record-based and thus could be presented only through postconviction proceedings.

Failure to Raise Double Jeopardy Issue at Trial or on Direct Appeal — Petition for Postconviction Relief Properly Denied: Mothka was charged with conspiracy to sell dangerous drugs and entered a plea agreement under which he pleaded guilty, agreed to forfeiture of a majority of his business assets, and agreed not to contest any alleged violation of his constitutional rights. Following conviction and sentencing, Mothka claimed a double jeopardy violation in that he had already been punished by the civil forfeiture of his property. However, the claim could have been raised in District Court and on direct appeal but was not. Therefore, the District Court properly denied the petition as procedurally barred pursuant to this section. Mothka v. St., 281 M 175, 931 P2d 1331, 54 St. Rep. 122 (1997).

Procedural Bar Applicable to Jurisdictional Issues: The purpose of the waiver provision in subsection (2) of this section is to preserve the integrity of the trial and direct appeal and to prevent abuse of the postconviction relief process. The procedural bar rule in subsection (2) of this section does not apply in a petition for postconviction relief when the sentencing court lacked

subject matter jurisdiction to impose the particular sentence. Because Moorman's claims contained in his petition for postconviction relief could have been raised on direct appeal, those claims were procedurally barred from consideration in a postconviction proceeding. St. v. Moorman, 279 M 330, 928 P2d 145, 53 St. Rep. 1173 (1996), following St. v. Ohnmacht, 342 NW 2d 838 (Iowa 1983), and Maxfield v. St., 700 P2d 115 (Idaho App. 1985), distinguishing St. v. Akers, 106 M 43, 74 P2d 1138 (1938), and Smith v. St., 186 M 52, 606 P2d 153 (1980), and overruled, to the extent that a sentencing issue was treated as jurisdictional, in Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004).

Issues Not Raised on Appeal Barred by Statute — Scope of Bar: Brown was convicted of felony assault (now assault with a weapon), and the conviction was affirmed on appeal. Brown then filed a petition for postconviction relief, claiming ineffective assistance of his appellate counsel and that the introduction of certain evidence at trial violated his fourth and fifth amendment rights. In his petition for postconviction relief, Brown acknowledged that the constitutional issues were not raised on appeal but argued that the statutory bar should not apply because he tried to raise the issues, but neither his trial nor appellate counsels did so. Citing St. v. Baker, 272 M 273, 901 P2d 54 (1995), the Supreme Court held that because Brown's appellate counsel properly applied that law (concluding that issues not raised at trial could not be raised on appeal) and because the statutory language barring issues that "could reasonably have been raised on direct appeal" included issues not properly preserved at trial, Brown was precluded from raising those issues in a petition for postconviction relief. Brown v. St., 277 M 430, 922 P2d 1146, 53 St. Rep. 692 (1996).

Confession-Related Claims Barred on Appeal — Res Judicata: Beach raised claims regarding the voluntariness and legality of his confession. The Supreme Court compared the confession-related claims quoted in the petition for postconviction relief and found that either they were identical in substance to those raised on direct appeal or that they could have been raised on direct appeal but were not. The claims are barred by res judicata and this section because a procedural bar exists to postconviction claims that could have been raised on direct appeal. Beach v. Day, 275 M 370, 913 P2d 622, 53 St. Rep. 184 (1996).

Failure to Raise Issue of Waiver of Jury Trial on Direct Appeal — Postconviction Relief Procedurally Barred: Despite Christensen's allegation that he did not timely appeal the issue of whether he waived a jury trial because he was informed by both his attorney and the City Court Judge that an appeal could not be taken from a City Court bench trial, the District Court properly found that Christensen knew of the right to appeal but declined to do so. The procedural bar in this section serves to prevent abuses of the postconviction process and to preserve the integrity of the trial and the direct appeal process. Because Christensen could have raised the issue on direct appeal, he was statutorily barred from raising the issue in a postconviction petition. St. v. Christensen, 274 M 326, 907 P2d 970, 52 St. Rep. 1254 (1995).

Procedural Bar on Postconviction Claims That Could Have Been Raised on Appeal: As set out in Harris v. Reed, 489 US 255, 103 L Ed 2d 308, 109 S Ct 1038 (1989), the application of a state procedural bar is generally considered an independent and adequate state ground precluding federal habeas review. Further, a lack of absolute consistency in the application of a state's procedural bar is not necessarily fatal. Therefore, claims that could reasonably have been raised on appeal are procedurally barred from consideration in postconviction proceedings regardless of whether or not the failure to raise the claim was an intentional strategic decision of counsel to cause delay. In this case, those claims included denial of the right to a fair trial and to a fair and impartial jury, assertion of prosecutor misconduct, failure by the state to corroborate testimony of an accomplice witness, prejudice caused by the presence of armed officers in the courtroom during trial, failure to convict by a unanimous jury, jury instructions regarding voluntary intoxication and the inference of a criminal mental state, constitutionality of Montana's death penalty, double jeopardy, and failure by the trial court to disclose a psychological report to the prosecution. Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995), overruling St. v. Henricks, 206 M 469, 672 P2d 20 (1983), and followed in Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996).

Petition for Postconviction Relief Barred by Waiver of Right to Appeal: Manula was arrested for rape and kidnapping and released on bond. While awaiting trial, he was arrested for rape, incest, and kidnapping. He stood trial and was convicted for the second series of crimes. As part of a plea agreement, Manula voluntarily signed a waiver of rights to not appeal his conviction in the trial for the second set of crimes and to enter an "Alford" guilty plea to the first set of crimes in return for the prosecution recommending specific sentences in both causes of action. Manula subsequently petitioned for postconviction relief on the basis of denial of his right to appeal, ineffective assistance of counsel, lack of evidence, and other claims. The Supreme Court held

that a voluntary waiver of the right to appeal barred the defendant from raising other claims for postconviction relief. In re Petition of Manula, 263 M 166, 866 P2d 1127, 50 St. Rep. 1758 (1993), followed in St. v. Hanson, 1999 MT 226, 296 M 82, 988 P2d 299, 56 St. Rep. 891 (1999).

Reserving for Postconviction Relief — Ineffective Assistance Claim That May Be Made on Appeal: On appeal, a claim of ineffective assistance of counsel with respect to any matters in the record may not be reserved and later made in a petition for postconviction relief. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992).

Postconviction Relief Barred When Allegations Appealable on Direct Appeal: The District Court properly denied defendant's petition for postconviction relief when it was determined that defendant's allegations could have been, should have been, or were raised on direct appeal and that petitioner's allegations of ineffective assistance of counsel were merely conclusory rather than based on facts in the record. Eiler v. St., 254 M 39, 833 P2d 1124, 49 St. Rep. 611 (1992), followed in St. v. Baker, 272 M 273, 901 P2d 54, 52 St. Rep. 735 (1995). St. v. Baker was followed in Brown v. St., 277 M 430, 922 P2d 1146, 53 St. Rep. 692 (1996), Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), and Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999).

Ineffective Counsel Claims Not Raised on Direct Appeal: After his convictions for aggravated burglary, felony assault (now assault with a weapon), and felony theft, petitioner obtained new counsel and appealed his convictions to the Supreme Court. When the convictions were affirmed on appeal, petitioner filed for postconviction relief, alleging that he was denied effective assistance of counsel. The Supreme Court denied the petition, ruling that because petitioner failed to raise claims concerning ineffective assistance of counsel on direct appeal, his assertions were procedurally barred. In re Petition of Evans, 250 M 172, 819 P2d 156, 48 St. Rep. 702 (1991), followed in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999).

Allegation of Newly Discovered Evidence — Failure to Timely Appeal — Writ of Habeas Corpus Denied: The Supreme Court denied a petition for writ of habeas corpus based on allegations of newly discovered medical evidence, noting that there was no showing as to what constituted the new evidence and that petitioner was afforded the right of appeal but did not take it. Tecca v. McCormick, 246 M 317, 806 P2d 11, 47 St. Rep. 2068 (1990), followed in Blaney v. Gamble, 266 M 51, 879 P2d 51, 51 St. Rep. 466 (1994). Tecca was distinguished in Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Raising Issue in Postconviction Relief That Could Have Been Preserved for Appeal — Abuse of Process: Defendant sought to challenge jury instructions in a petition for postconviction relief after failing to object to the disputed instructions at trial. He offered no excuse for failing to object and did not argue that he could not have reasonably complied with the procedural requirements of 46-16-401 and 46-20-104. Because objections to the instructions could have been raised at trial, those grounds for relief could have reasonably been available for direct appeal. To allow defendant to raise an issue in postconviction relief that he could reasonably have preserved for direct appeal would constitute an abuse of process. St. v. Gorder, 243 M 333, 792 P2d 370, 47 St. Rep. 958 (1990), followed in St. v. Baker, 272 M 273, 901 P2d 54, 52 St. Rep. 735 (1995). Baker was followed in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999).

Evidentiary Issues Not Raised on Direct Appeal: The defendant refused to cooperate with his appointed appellate attorney. The attorney was relieved, and the defendant was ordered to proceed pro se and was given an extension of time to file his appellate brief. Two weeks after the time period expired, the Supreme Court dismissed his appeal. The defendant then filed a petition for postconviction relief that included claims of failure to suppress evidence and the presentation of false testimony by the state. The Supreme Court ruled that the defendant was procedurally barred from raising issues in a petition for postconviction relief that could have been raised on direct appeal. Duncan v. St., 243 M 232, 794 P2d 331, 47 St. Rep. 738 (1990), followed in St. v. McColley, 247 M 524, 807 P2d 1358, 48 St. Rep. 290 (1991), and St. v. Baker, 272 M 273, 901 P2d 54, 52 St. Rep. 735 (1995). Baker was followed in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999).

Judicial and Prosecutorial Misconduct Not Raised on Direct Appeal: The defendant argued that several comments made at trial by the judge and prosecuting attorney amounted to misconduct. The Supreme Court referred to the direct language of the statute and held that the argument of prosecutorial and judicial misconduct was not raised on direct appeal and therefore was procedurally barred on petition. In re Petition of Martin, 240 M 419, 787 P2d 746, 46 St. Rep. 2213 (1989).

CLAIMS ALLOWED IN POSTCONVICTION RELIEF PROCEEDING

Defendant's Failure to Discover Alleged Error in Sentencing Process Until Time for Appeal Expired — Postconviction Proceeding Not Barred: Phillips sought postconviction relief on grounds that his tribal court juvenile record had been illegally requested by the state and incorporated into the presentence investigation report and sentencing proceedings in violation of due process. The state asserted that the matter could have been raised on direct appeal and was thus inappropriate for postconviction relief. However, by the time that Phillips discovered the alleged error, the time for appeal of his conviction had passed, so the Supreme Court held that the claim was not procedurally barred from postconviction consideration. St. v. Phillips, 2007 MT 117, 337 M 248, 159 P3d 1078 (2007).

Only Record-Based Ineffective Assistance of Counsel Claim on Appeal: Frasure claimed on appeal that her attorney provided ineffective assistance at trial by failing to object to the introduction of certain evidence. However, the Supreme Court will determine that there was ineffective assistance of counsel only if that conclusion can be based on the record on appeal or if there is no plausible justification for counsel's actions or inactions. Frasure failed to establish that her ineffective assistance claim was record-based, so the claim was dismissed without prejudice to the filing of a petition for postconviction relief. St. v. Frasure, 2004 MT 305, 323 M 479, 100 P3d 1013 (2004). See also St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003).

Proper Consideration in Postconviction Relief Proceedings of Ineffective Assistance of Counsel Claims Based on Conversations off Record: In postconviction relief proceedings, Thurston contended that he was provided ineffective assistance of counsel because: (1) he had given counsel information needed to support at least seven criteria for designating Thurston as a nondangerous offender, but counsel failed to raise the mitigating information at the sentencing hearing; (2) counsel did not discuss with Thurston how to refute testimony by the state's witnesses until they were walking to the sentencing hearing and it was too late; and (3) counsel failed to provide Thurston with an accurate portrayal of the sentence contained in a plea agreement. The District Court dismissed the claims on grounds that they would have been reflected in the record and should have been raised on direct appeal. The Supreme Court disagreed. The basis for the claims rested on conversations that Thurston had with counsel outside the courtroom and thus by their very nature could not have been reflected in transcripts or the record. The Supreme Court therefore reversed and ordered the District Court to consider the issues on their merits in accordance with the ineffective assistance test in Strickland v. Wash., 466 US 668 (1984). Thurston v. St., 2004 MT 142, 321 M 411, 91 P3d 1259 (2004).

Failure of Defense Counsel to Question Defendant's Mental Condition During Sentencing — Alleged Errors in Attorney Performance Properly Resolved in Postconviction Relief Proceeding: Watson petitioned for postconviction relief and claimed that defense counsel provided inadequate assistance at sentencing by not questioning whether Watson suffered from a mental disease or defect. The District Court denied the petition, determining that the ineffective assistance claim was record-based and should have been raised on direct appeal. In St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001), the Supreme Court outlined a two-step process for determining whether ineffective assistance claims should have been raised on appeal or in a postconviction hearing. First, the trial record must adequately document a challenged act or omission of defense counsel for a defendant to raise an ineffective assistance claim on direct appeal. Second, the record on appeal must afford sufficient understanding of the reasons for counsel's act or omission to answer the threshold question of whether the alleged error expressed a trial strategy or tactical decision, and if the record does not supply the reason for counsel's act or omission, the claim must be raised by petition for postconviction relief. Here, the record was devoid of any evidence as to why counsel did not question Watson's mental condition, so Watson could not have properly raised an ineffective assistance claim on direct appeal. Therefore, the Supreme Court reversed and remanded for an evidentiary postconviction hearing to determine whether counsel's act or omission was a trial strategy or tactical decision. Watson v. St., 2002 MT 329, 313 M 209, 61 P3d 759 (2002), following Strickland v. Wash., 466 US 668 (1984). See also Soraich v. St., 2002 MT 187, 311 M 90, 53 P3d 878 (2002).

Summary Denial of Petition for Postconviction Relief — Defendant Entitled to Hearing to Present Nonrecord-Based Ineffective Assistance of Counsel Claims: Schaff was convicted of deliberate homicide and filed a petition for postconviction relief, contending that he received ineffective assistance of counsel when forced to decide whether to accept a plea agreement after considering the matter for less than 2 hours. He claimed that with the assistance of different counsel at the hearing to withdraw the guilty plea, he could have established that the plea was not voluntary. Schaff further argued that he could not have raised the precise issue of ineffective assistance because discussions between his attorney and him were not record-based and thus

could be presented only through a petition for postconviction relief. The state argued that the petition was defective because Schaff did not sufficiently specify the claim of ineffective assistance, offered no supporting information, and did not identify precisely why counsel was ineffective. The state also pointed out that Schaff had previously raised the issue of voluntariness in St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682 (1998), and that the issue had been decided and was barred from being raised again by the doctrine of res judicata. The Supreme Court disagreed that the voluntariness of Schaff's plea was not a proper subject for a postconviction proceeding. Although the issue of voluntariness was previously raised, Schaff did not raise the precise question of whether he had received competent advice prior to entering a plea or the question of whether he was misled to believe that he was required to proceed with the change of plea hearing with trial counsel when he was legally entitled to be represented by other counsel. The question of whether Schaff was properly advised necessarily touched on the voluntariness of the plea but was separate from it and was not part of the record in the direct appeal, nor was it the type of evidence that Schaff would be likely to present at a change of plea hearing. Rather than summarily dismiss Schaff's petition, the better course would have been for the District Court to appoint Schaff counsel and provide an opportunity for a hearing to present the ineffective assistance claims. Thus, the Supreme Court affirmed the part of the District Court's order with regard to any record-based voluntariness claims that had already been addressed by direct appeal, but reversed that part of the order that held that Schaff was procedurally barred from raising the issue of ineffective assistance of counsel in the nonrecord-based postconviction proceeding. St. v. Schaff, 2001 MT 130, 305 M 427, 28 P3d 1073 (2001). Following hearing on remand, the District Court again denied Schaff's petition for postconviction relief, and Schaff appealed on grounds of ineffective assistance of counsel, but the Supreme Court affirmed. Applying the Strickland test, the Supreme Court found that Schaff proved neither that counsel's assistance was deficient nor that counsel's performance was prejudicial to Schaff's case. An ineffective assistance claim must be grounded on facts in the record rather than on mere conclusory allegations. Schaff's claim was not supported by the record, so the petition for postconviction relief was properly denied. Schaff v. St., 2003 MT 187, 316 M 453, 73 P3d 806 (2003). See also Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999).

Allegation of Ineffective Assistance of Counsel That Is Not Record-Based Must Be Submitted as Petition for Postconviction Relief: Dyfort appealed his burglary conviction, claiming ineffective assistance of counsel because his attorney stipulated to the admission as evidence of an accomplice's Alford plea of guilty. The Supreme Court stated that before it could reach the merits of Dyfort's claim, it had to determine if the claim was properly before it. The Supreme Court pointed out that when ineffective assistance of counsel claims are based on facts of record in the underlying case, they must be raised in the direct appeal and when the claims cannot be documented from the record, they must be raised by petition for postconviction relief. Dyfort had argued that his attorney had originally planned to not object to admission of the accomplice's plea because the attorney intended to introduce evidence to show that, as a condition of the accomplice's plea bargain, the accomplice could avoid deportation. The trial court ruled, prior to the admission of the Alford plea, that the defense counsel could not mention that the plea bargain negated the possibility of deportation. However, subsequent to the plea's admission, Dyfort's attorney failed to request a cautionary instruction to the jury concerning the limitations on the permissible use of the evidence. The Supreme Court held that the trial record did not contain facts indicating what specific tactical intentions Dyfort's attorney may have had relating to the admission of the accomplice's plea bargain, and therefore Dyfort's allegations of ineffective assistance of counsel were not record-based and had to be submitted in a petition for postconviction relief. The Supreme Court dismissed Dyfort's appeal without prejudice. St. v. Dyfort, 2000 MT 338, 303 M 153, 15 P3d 464, 57 St. Rep. 1438 (2000).

Petition for Postconviction Relief — Only Record-Based Claims Barred by Statute or Res Judicata: In 1993, Hagen was convicted of deliberate homicide and aggravated assault and appealed to the Montana Supreme Court, raising the issue of ineffective assistance of counsel. The Supreme Court affirmed the District Court. Hagen then filed a petition for postconviction relief, raising nine claims of ineffective assistance of counsel and argued that: (1) none of the claims could have been raised in his earlier direct appeal; (2) all claims were appropriate for his petition because an evidentiary hearing was required for all nine issues; (3) appellate counsel was ineffective in raising a particular issue in his previous direct appeal; and (4) if some or all of the claims relating to ineffective assistance of trial counsel should have been raised in his direct appeal but were not and were therefore barred, his appellate counsel provided ineffective assistance in failing to present those issues in his direct appeal. The state responded that six of Hagen's claims were procedurally barred by this section because they could have been raised in

his previous appeal, that one claim was barred by res judicata because it had been raised and decided in his previous appeal, and that three of Hagen's claims were not supported by the record or by the law and could therefore be decided on their merits without an evidentiary hearing. The District Court refused Hagen's request for an evidentiary hearing on his petition for postconviction relief and dismissed the petition, holding that the issue of ineffective assistance of counsel was raised in Hagen's direct appeal and had been decided by the Supreme Court, that Hagen's adequate remedy of appeal had been pursued, and that the petition for postconviction relief failed to state a claim for relief. Hagen appealed the dismissal of the petition to the Supreme Court. As an initial observation, the Supreme Court pointed out that although all of the issues raised by Hagen in his appeal of the District Court's denial of his petition for postconviction relief concerned ineffective assistance of counsel, not all of those claims were raised in the previous direct appeal and only those claims that were raised or that could have been raised in that previous direct appeal based upon the trial record were barred by the doctrine of res judicata or subsection (2) of this section. Citing In re Petition of Evans, 250 M 172, 819 P2d 156 (1991), and St. v. Bromgard, 273 M 20, 901 P2d 611 (1995), the Supreme Court further pointed out that those issues that are not record-based are properly brought to the Supreme Court by a petition for postconviction relief and that the District Court erred in failing to make that distinction and dismissing all of Hagen's ineffective assistance claims just because some of those claims may have been legitimately barred. The Supreme Court then individually reviewed each of Hagen's ineffective assistance claims and held that: (1) the manner in which mental evaluations of Hagen were disseminated during the trial was a matter of record and was therefore barred; (2) failure of Hagen's trial counsel to object to evidence introduced at trial was a matter of record and was therefore barred; (3) eliciting certain cross-examination testimony was based upon record evidence and was barred; (4) shifting the burden of proof during counsel's closing argument was a matter of record and barred by res judicata and this section; (5) failure to investigate facts that could have provided a defense was properly raised in the postconviction relief petition because there could be no record evidence on this issue; (6) failure of trial counsel to present impeachment testimony was in part resolved during the appeal and was therefore res judicata and, with regard to one potential witness, was a matter of failure of trial counsel to investigate, could not be a matter of record, and therefore was not barred; (7) failure of trial counsel to properly prepare witnesses for trial was not and could not be reflected in the trial record and therefore was not barred; and (8) failure of appellate counsel to raise the ineffective assistance of trial counsel could not have been a matter of record evidence by its very nature and was therefore not barred from consideration in the postconviction relief petition. Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999), distinguished in Smith v. St., 2000 MT 327, 303 M 47, 15 P3d 395, 57 St. Rep. 1387 (2000). See also St. v. Schaff, 2001 MT 130, 305 M 427, 28 P3d 1073 (2001), in which the question of voluntariness of a plea because of ineffective assistance of counsel was remanded for a hearing, despite the previous disposition of other voluntariness claims on direct appeal, because discussions between defendant and counsel were not record-based and thus could be presented only through postconviction proceedings.

AMENDED PETITION

Discretion of District Court to Set Time for Filing Amended Petition for Postconviction Relief: Sellner timely filed a petition for postconviction relief and subsequently filed an amended petition more than 2 years after the original petition was filed. The state contended that under Maier v. St., 2003 MT 144, 316 M 181, 69 P3d 1194 (2003), the amended petition was untimely because it was not filed within 1 year after final conviction. The Supreme Court declined to apply Maier because Maier involved the time limit applicable to the discovery of new evidence, which did not apply here. Instead, the court applied the third sentence of subsection (1)(a) of this section, which allows the District Court discretion to set deadlines as it sees fit as long as that discretion is not abused or is not subject to the new evidence deadline. Thus, Sellner's amended petition was not procedurally barred. Sellner v. St., 2004 MT 205, 322 M 310, 95 P3d 708 (2004).

No Ineffective Assistance Based on Defense Counsel's Personal Problems — Remand for Consideration of Issues in Amended Petition for Postconviction Relief: In an original petition for postconviction relief, Williams raised five issues of ineffective assistance of counsel, asserting that counsel: (1) failed to conduct proper discovery; (2) failed to obtain and call necessary witnesses at trial; (3) failed to properly question witnesses; (4) conducted inadequate trial preparation; and (5) allowed his personal problems to detract from his representation. The District Court allowed Williams to amend the petition to add two additional claims, contending that counsel failed to substitute the trial judge when requested to do so and failed to call necessary and beneficial witnesses at the sentencing hearing. The Supreme Court's review of the

record revealed that the District Court did not erroneously address any of the original five claims, including the assertion that defense counsel's overall emotional state adversely affected Williams's representation. However, the record showed that the two issues added by Williams in the amended petition were never addressed, so the District Court's findings regarding those two material issues were insufficient. The case was remanded to allow further consideration of the additional claims. Williams v. St., 2002 MT 189, 311 M 108, 53 P3d 864 (2002).

Dismissal of Amended Petition for Postconviction Relief — Failure to Address New Claims in Order Harmless Error — Postconviction Relief Claims Civil in Nature: On remand, petitioner amended the petition for postconviction relief, adding claims 16-18. By remanding to the District Court to allow petitioner to add proposed claims 16-18, the Supreme Court necessarily required the District Court to address the merits of those claims. However, the District Court's failure to address the new claims in its Findings of Fact, Conclusions of Law and Order was harmless error. Petitioner's newly discovered evidence claims, Brady claim, and cumulative error claims were without merit. Postconviction relief proceedings are collateral attacks that are civil in nature and independent of the underlying criminal cause. If there is no showing of substantial injustice the error is harmless. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Petition for Postconviction Relief Filed With Supreme Court — No District Court Jurisdiction to Amend Pleadings on Remand: Boucher filed with the Supreme Court for postconviction relief. The Supreme Court remanded to District Court for an evidentiary hearing on whether Boucher was denied effective assistance of counsel because of counsel's failure to investigate and formulate a defense based on the victim's history of making false accusations of sexual assault. On remand, Boucher sought to offer additional evidence of ineffective counsel unrelated to the issue remanded. Although a District Court has the discretion to grant or deny a motion to amend a postconviction petition when the petition is filed with that court, in cases like this when the petition is originally filed with the Supreme Court and remanded, the District Court does not have authority to grant leave to amend the pleadings to include allegations not included in the original petition. St. v. Boucher, 1999 MT 102, 294 M 296, 980 P2d 1058, 56 St. Rep. 431 (1999), distinguishing Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997), and Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997).

SECOND OR SUBSEQUENT PETITION

Second Petition for Postconviction Relief Not Procedurally or Time Barred: After a 1995 petition for postconviction relief was denied, Beach filed in 2008 for postconviction relief on grounds of newly discovered evidence, but the District Court, without a hearing, denied the petition on grounds that it was procedurally and time barred. On appeal, the Supreme Court disagreed. The 2008 petition claimed that the newly discovered evidence was only recently available and thus could not have been raised in the 1995 petition. Since nothing indicated a lack of diligence on Beach's part in locating the new evidence, the Supreme Court granted Beach the benefit of the doubt as to whether he acted with sufficient alacrity in locating the new evidence, so the 2008 petition was not procedurally barred. To determine whether Beach would be entitled to a new trial based on newly discovered evidence, the court applied the criteria in St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), regarding a trial court's consideration of what impact new evidence might have when looking prospectively at a new trial with a new jury. The court concluded that the District Court abused its discretion by denying the petition without holding an evidentiary hearing on the new evidence. The case was remanded to allow a hearing to evaluate whether the evidence was actually newly discovered and whether a reasonable jury would have found Beach guilty beyond a reasonable doubt. The newly discovered evidence must be material to the issues at trial and neither cumulative nor merely impeaching, and in order to prevail on a substantive innocence claim, Beach was required to show by clear and convincing evidence that but for a procedural error, no reasonable juror would have found him guilty. Beach v. St., 2009 MT 398, 353 M 411, 220 P3d 667 (2009). See also Schlup v. Delo, 513 US 298 (1995), St. v. Redcrow, 1999 MT 95, 294 M 252, 980 P2d 622 (1999), and St. v. Pope, 2003 MT 330, 318 M 383, 80 P3d 1232 (2003).

Only One Amendment Allowed to Petition for Postconviction Relief: A petitioner may amend a petition for postconviction relief only once. A second or subsequent petition must be dismissed unless the second or subsequent petition raises grounds for relief that could not reasonably have been raised in the original or amended petition. St. v. Evert, 2007 MT 30, 336 M 36, 152 P3d 713 (2007).

Third Petition for Postconviction Relief Barred as Successive Petition: Hawkins filed a petition for postconviction relief in District Court in 1983, alleging ineffective assistance of counsel. Hawkins filed a similar petition in 1997. In 1998, Hawkins petitioned the Supreme Court for postconviction relief in an original proceeding, which the court allowed, ordering the state to file a supplemental response addressing the merits of Hawkins' petition. The state responded that the petition should be barred as a successive petition. The Supreme Court noted that the 1998 petition was, in effect, Hawkins' third petition alleging ineffective assistance of counsel. Nothing in Montana statutory law allows a petitioner three chances to present a claim for collateral relief. Hawkins' claims could reasonably have been raised in the original petition, so pursuant to this section, the 1998 claim was barred as a successive petition. Hawkins v. Mahoney, 1999 MT 82, 294 M 124, 979 P2d 697, 56 St. Rep. 345 (1999).

Issue Known but Not Appreciated and Thus Not Raised in First Petition — Pro Se Petitioner Held to Same Standard as Attorney: Bromgard knew of the jury experiment when, acting pro se, he filed his first petition for postconviction relief but failed to include the experiment as a ground for relief. He claimed that the issue of jury misconduct could not reasonably have been raised in the first petition because at the time of the first petition, he was unaware of the legal significance of the experiment. He also claimed that his failure to include the experiment in the first petition should be excused because he was not represented by counsel in filing the first petition. The lower court did not err in barring the experiment claim from a second petition on the grounds that it could reasonably have been raised in the first petition. In addition, Bromgard knew when he filed his first petition that his trial lawyer did not challenge the experiment in any posttrial motion. Therefore, Bromgard could not, in his second petition, raise the failure to challenge as ineffective assistance of counsel because he could reasonably have raised the issue in the first petition. A person appearing pro se in appealing the denial of a petition for postconviction relief is held to the same standards as an attorney. St. v. Bromgard, 285 M 170, 948 P2d 182, 54 St. Rep. 1096 (1997).

Error to Fail to Hold Hearing on Good Cause for Not Raising Grounds in First Petition: Whether grounds for relief raised in a second petition of postconviction relief could reasonably have been raised in the first petition and whether good cause could be shown why those grounds were not raised in the first petition were questions of fact best left to the District Court. (See 1995 amendment.) The District Court, without a hearing on the matter, erroneously denied the second petition on the grounds that the issue sought to be raised could have been raised on direct appeal. A further error, requiring a vacation of the denial and a remand, occurred because lack of a hearing prevented a determination of whether the grounds raised in the second petition could have been raised in the first petition. If the grounds could have been raised initially, the second petition should be denied, and if they could not have been raised, the merits of the second petition should be decided. St. v. Bromgard, 273 M 20, 901 P2d 611, 52 St. Rep. 947 (1995), followed in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999).

DECISION ON PARTICULAR CLAIMS

No Showing of Ineffective Counsel — Postconviction Relief Properly Denied: In a petition for postconviction relief, DuBray asserted ineffective assistance of trial and appellate counsel based on: (1) trial counsel's introduction of prejudicial issues during trial; (2) trial counsel's conflict of interest; (3) failure of trial counsel to ensure DuBray's presence at all critical stages of the trial; and (4) appellate counsel's failure to raise issues 2 and 3 on appeal. The District Court found no ineffective assistance and denied DuBray's petition, and on appeal, the Supreme Court considered each claim and affirmed. Counsel's actions regarding the introduction of allegedly prejudicial issues were made for tactical reasons and stemmed from informed professional deliberation, and DuBray could not demonstrate that counsel's actions were deficient. Defense counsel clearly revealed the potential conflict of interest within the trial record, so that claim was procedurally barred by this section. The claim that counsel erred by not ensuring DuBray's presence at all critical trial stages could have been raised on direct appeal and thus was procedurally barred from consideration in postconviction proceedings. DuBray's contention of error by appellate counsel for failure to raise the conflict of interest claim failed because DuBray did not establish that trial counsel actively represented conflicting interests and because DuBray himself stated that he did not wish to discharge trial counsel merely because counsel had a previous attorney-client relationship with a potentially adverse party. Last, Dubray's assertion that he might have demanded that trial counsel act differently had DuBray been present during interactions between the trial court and the jury foreman was pure speculation, particularly given that DuBray deferred to counsel on such matters. DuBray's postconviction petition was properly denied. DuBray v. St., 2008 MT 121, 342 M 520, 182 P3d 753 (2008).

Claims of Ineffective Assistance of Counsel Properly Denied Absent Showing of Prejudice: Hartinger filed a petition for postconviction relief on grounds that he received ineffective assistance because his counsel: (1) failed to file a notice of appeal; (2) failed to move to suppress Hartinger's incriminating statements; (3) failed to move to suppress newly discovered evidence; and (4) incorrectly conducted voir dire. The petition was denied, and Hartinger appealed. The Supreme Court considered each claim and affirmed, noting that ineffective assistance claims must stem from counsel's neglect or ignorance rather than from informed, professional deliberation. First, Hartinger understood the right to file an out-of-time appeal but knowingly and intentionally waived that right, instead choosing to file for postconviction relief, so Hartinger could claim no prejudice from counsel's failure to file an appeal. Second, even if Hartinger's incriminating statements should have been suppressed, there was more than enough evidence to support the conviction, so no prejudice accrued. Third, counsel's decision to not suppress newly discovered evidence was an informed, tactical decision that did not constitute deficient performance. Fourth, counsel's tactic of using a peremptory challenge to remove a prospective juror who voiced pro-police views during voir dire was a reasonable trial tactic, reaffirmed the essence of voir dire, and could not be viewed as deficient performance. Hartinger v. St., 2007 MT 141, 337 M 432, 162 P3d 95 (2007).

No Prejudice Shown in Incorporation of Tribal Court Juvenile Record Into Sentencing Procedure — Due Process Not Violated: Phillips sought postconviction relief on grounds that his tribal court juvenile record had been illegally requested by the state and incorporated into the presentence investigation report and sentencing proceedings in violation of due process. The petition was denied, and on appeal, the Supreme Court affirmed without addressing the issue of release of the record under tribal law. Phillips did not present any evidence that the juvenile record or any information in the presentence investigation report was materially inaccurate, that the tribal court record influenced placement with the Department of Corrections, or that he was prejudiced by the tribal court record in violation of due process, so dismissal of the petition for postconviction relief was not erroneous. St. v. Phillips, 2007 MT 117, 337 M 248, 159 P3d 1078 (2007).

Defense Counsel's Trial Tactics Not Basis for Ineffective Assistance Claim — Postconviction Relief Properly Denied: Garrett filed a petition for postconviction relief, asserting that trial counsel rendered ineffective assistance by lack of preparation and deficient presentation, failure to make timely hearsay objections, failure to obtain a defense expert and call witnesses, and failure to offer adequate jury instructions and to assert affirmative defenses. The District Court denied the petition, and on appeal, the Supreme Court considered each assertion and affirmed. The decision whether and when to make an opening statement is a matter of trial tactics that do not form the basis for an ineffective assistance claim, and decisions regarding the timing and number of objections also lie within trial counsel's tactical discretion. The decision not to call a handwriting expert for the defense was not ineffective assistance because Garrett admitted altering the documents on which the expert would have testified. The 10 jury instructions offered by defense counsel were consciously and tactically chosen to further the chosen defense theory. Counsel's decisions regarding the calling of potential witnesses and other tactical decisions at trial, did not fall below an objective standard of reasonableness required to find ineffective assistance of counsel, and the petition for postconviction relief was properly denied. Garrett v. St., 2005 MT 197, 328 M 165, 119 P3d 55 (2005).

Failure to Meet Strickland Burden Demonstrating Ineffective Assistance of Counsel — Petition for Postconviction Relief Properly Denied: Following conviction for deliberate homicide and a failed direct appeal, Elliott filed a pro se petition for postconviction relief alleging 12 separate instances of ineffective assistance of counsel at trial and on direct appeal. The District Court held a hearing at which counsel testified and then denied the petition. On appeal, the Supreme Court applied the Strickland test for ineffective assistance of counsel, examined the alleged instances of counsel ineffectiveness, and concluded that Elliott failed to overcome the strong presumption that counsels' defense strategies and trial tactics fell within the wide range of sound professional decisions. Elliott also failed to demonstrate prejudice or a reasonable probability that the result of the proceedings would have been different had counsel not performed ineffectively. Failing the Strickland test, denial of Elliott's petition for postconviction relief was affirmed. Elliott v. St., 2005 MT 10, 325 M 345, 106 P3d 517 (2005). See also St. v. Kougl, 2004 MT 243, 323 M 6, 97 P3d 2095 (2004).

Evidence Provided at Trial Not Considered Newly Discovered Evidence — Postconviction Claim Time-Barred: Oatman failed to bring a claim for postconviction relief within the 5-year statute of limitations under the 1993 version of 46-21-102 that was in effect at the time of conviction, so the claim was time-barred. Nevertheless, Oatman contended that the claim should

be considered based on newly discovered evidence that a victim had contradicted the allegation of robbery. However, the jury heard the testimony at trial, so the evidence could not be considered to be newly discovered. The alleged new evidence did not extend the statute of limitations, so denial of Oatman's claim was proper. Oatman v. St., 2004 MT 360, 324 M 472, 104 P3d 1048 (2004).

Increased Sentence Imposed on Resentencing After Original Sentence Vacated Not Due Process Violation: After Redfern's petition for postconviction relief was granted, Redfern's original sentence was vacated and the District Court resentenced him to a greater period of potential imprisonment and supervision than the original sentence. Redfern appealed the new sentence, contending that the greater sentence on resentencing violated the right to due process. The Supreme Court affirmed. Under N.C. v. Pearce 395 US 711 (1969), neither double jeopardy nor equal protection bars imposition of a more severe sentence upon resentencing after an original conviction is set aside unless a heavier sentence is imposed to punish a defendant for successfully having the original conviction set aside. However, in order to meet due process requirements and allow full appellate review of the constitutional legitimacy of the sentence, a longer sentence on resentencing after a new trial must be based on objective information concerning identifiable conduct of the defendant after the original sentencing and reasons for the longer sentence must affirmatively appear on the record. Both conditions were met here, there was no showing that the more severe sentence was imposed as retaliatory motivation by the sentencing judge, and the new sentence was within statutory sentencing parameters. St. v. Redfern, 2004 MT 277, 323 M 225, 99 P3d 223 (2004), following St. v. Forsyth, 233 M 389, 761 P2d 363 (1988), and St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001), and distinguishing St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001).

Miscarriage of Justice Exception to Statute of Limitations for Postconviction Relief Applicable Only to Claim of Discovery of New Evidence — Recanted Victim Testimony Not Considered New Evidence: Maier cited 12 grounds for postconviction relief, including a claim alleging that newly discovered evidence in the form of the victim's recantation established that Maier did not commit attempted deliberate homicide. The District Court held that 10 of the claims were procedurally barred by this section, that 1 claim was improper under the facts of the case, and that the final claim of newly discovered evidence merited a response by the state. The state contended that the final claim was barred by 46-21-102 because it was not raised within 1 year of final judgment. The District Court rejected the state's argument, but denied the claim anyway, and Maier appealed. The Supreme Court considered the nexus between 46-21-102 and this section, which address amendments to petitions for postconviction relief and require that amended claims alleging the existence of newly discovered evidence be filed within 1 year of final conviction or within 1 year of the time that the petitioner discovered or reasonably should have discovered the existence of the evidence, whichever is later. In this case, Maier discovered the evidence when the victim of the attempted deliberate homicide recanted testimony given at trial, but Maier's amended petition was not filed until more than 2 years after the recantation. Under St. v. Abe, 2001 MT 260, 307 M 233, 37 P3d 77 (2001), the 1-year statute of limitation may be waived only if justified by a clear miscarriage of justice that renders the judgment a complete nullity, and under St. v. Rosales, 2000 MT 89, 299 M 226, 999 P2d 313 (2000), the newly discovered evidence must establish that the defendant did not commit the offense for the miscarriage of justice exception to apply. Here, the victim never actually stated that Maier was not the person who shot him, but only mentioned that he could not see the shooter because he was hiding. However, two other persons testified that Maier was the shooter, so the recanted testimony did not in itself establish that Maier did not commit attempted deliberate homicide. Thus, the miscarriage of justice exception did not apply, Maier's petition was not timely, and the District Court erred by not denying the claim on procedural grounds. Nevertheless, the proper result was reached, if for the wrong reason, so the District Court was sustained. Maier v. St., 2003 MT 144, 316 M 181, 69 P3d 1194 (2003).

Partially Deficient Performance of Trial Counsel — Not Sufficient Prejudice to Warrant New Trial: The District Court found that Hagen's trial counsel could have done a better job of investigating and presenting testimony regarding an alleged reputation for violence and prior criminal record on the part of the victim of Hagen's aggravated assault and that counsel could have done a more thorough job of interviewing and preparing witnesses, but held that even though Hagen may have suffered some prejudice as a result of trial counsel's deficiencies, Hagen did not show that but for the deficiencies, the results of the trial would have been different. The District Court concluded that Hagen was provided reasonably effective assistance of counsel and received a fair trial. The court also concluded that Hagen failed to meet the heavy burden of showing that appellate counsel was ineffective. Hagen appealed on grounds of ineffective

assistance, but the Supreme Court affirmed. Under the framework of Strickland v. Wash., 466 US 668 (1984), it is entirely possible to find attorney error that possibly prejudiced defendant, yet conclude that the error did not rise to a level serious enough to result in a verdict unworthy of confidence. After examining all the alleged shortcomings of Hagen's trial and appellate counsel's representations, the Supreme Court agreed that counsel's performance was reasonably effective and that the combined effect of all the acts and omissions was not sufficient to undermine confidence in the trial outcome. St. v. Hagen, 2002 MT 190, 311 M 117, 53 P3d 885 (2002), followed in St. v. Kearney, 2005 MT 171, 327 M 485, 115 P3d 214 (2005). See also St. v. Daniels, 210 M 1, 682 P2d 173 (1984).

Record Devoid of Pretrial Tactical Decisions — Evidentiary Hearing Required on Ineffective Assistance Claim: In St. v. Soraich, 1999 MT 87, 294 M 175, 979 P2d 206 (1999), the Supreme Court held that the prosecutor in Soraich's murder trial was entitled to comment on a theory suggested by defense counsel because the theory lacked evidentiary support and because the comments were plainly in response to defense counsel's opening statements. Soraich then filed a petition for postconviction relief, claiming that defense counsel rendered ineffective assistance by stating that counsel would prove that the state's key witness gave inconsistent statements, without first determining whether an investigator's statement could be introduced as impeachment evidence. The District Court denied the petition, holding that Soraich should have raised the ineffective assistance claim on direct appeal because the claim was based on facts of record in the underlying case, so the claim was procedurally barred from postconviction review. To determine whether the ineffective assistance claim should have been raised on direct appeal or in a postconviction hearing, the Supreme Court cited the two-part process in Strickland v. Wash., 466 US 668 (1984). First, the trial record must adequately document a challenged act or omission of defense counsel for the defendant to raise an ineffective assistance claim on direct appeal. Second, the record on appeal must afford sufficient understanding of the reason for counsel's act or omission to answer the threshold question of whether the alleged error expresses a trial strategy or tactical decision, and if the record does not supply the reason for counsel's act or omission, the claim must be raised by postconviction relief. The record here did not contain any information about why defense counsel promised the jury that the investigator's testimony would prove Soraich's defense, but then failed to call the investigator as a witness. Without an evidentiary hearing and direct questioning of defense counsel, any guesses on what led to the failure to call the investigator as a witness were purely speculative. Because the record was devoid of counsel's pretrial tactical decisions, Soraich could not satisfy the second prong of the Strickland test, so this section did not bar Soraich's postconviction assertion of ineffective assistance at trial. An evidentiary hearing was necessary to address the second prong of the Strickland test, and the District Court improperly dismissed Soraich's petition for postconviction relief. Therefore, the case was remanded for an evidentiary hearing on the ineffective assistance claim. Soraich v. St., 2002 MT 187, 311 M 90, 53 P3d 878 (2002). On remand, the District Court again denied relief, holding that under the second prong of the Strickland test, any allegedly deficient performance of counsel did not prejudice Soraich. Soraich appealed again, asserting that counsel's failure to call a witness to impeach a state witness resulted in prejudice. The Supreme Court disagreed. The witness had already been impeached through the testimony of another defense witness and by cross-examination concerning all of the inconsistencies in the questionable testimony. Failure to call another witness to establish the same point did not create a reasonable probability that the trial result would have been different and did not constitute ineffective assistance of counsel. The District Court was affirmed. Soraich v. St., 2004 MT 215, 322 M 375, 97 P3d 529 (2004). See also St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001).

Failure to Present Medical Records and Failure to Move to Withdraw Guilty Plea — No Denial of Effective Assistance of Counsel: The appellant pleaded guilty to a possession of dangerous drugs charge. Sentencing was postponed so that the appellant could undergo drug and alcohol counseling and a hernia operation. At the time of sentencing, the appellant's partial medical records from Fort Harrison dealt only with the appellant's substance abuse issues and hernia problem and did not mention any psychiatric problems. Later reports received by the counsel would have indicated a need to request a psychiatric examination. The counsel's performance in allowing the District Court to sentence the appellant without presenting his medical records from Fort Harrison was not deficient. When the counsel testified that the first time that an issue of schizophrenia or other mental illness arose was in the petition for postconviction relief and the District Court found that the trial counsel had not been informed of any psychiatric issues, it was not error for the counsel to not move to withdraw the guilty plea immediately after the plea hearing. The Supreme Court refused to disturb the District Court findings that were supported

by substantial evidence and were not otherwise clearly erroneous. St. v. Cady, 2000 MT 353, 303 M 258, 15 P3d 479, 57 St. Rep. 1491 (2000).

Claims of Abuse of Process and Outrageous Governmental Conduct — No Basis for Postconviction Relief: In a petition for postconviction relief, defendant claimed abuse of process and outrageous governmental conduct that could have been addressed or remedied at the trial level, including: (1) manipulation of jurisdiction and witnesses to ensure the possible application of the death penalty; (2) use of an out-of-state crime lab; (3) mishandling of evidence; and (4) use of facially invalid witness testimony. The Supreme Court addressed each allegation as follows and found no abuse or outrageous conduct: (1) As long as the state has jurisdiction over a crime, the decision to bring charges in state court rather than federal court or in one state's court rather than another's properly rests with the discretion of the prosecutor. The prosecution of other defendants in the case in federal court and the offering of plea bargains and use of other witnesses' testimony against defendant suited the degree of culpability of the witnesses. (2) Use of the crime lab of the state in which the crime was discovered and the sharing of resources between the states were proper. (3) The prosecution properly established the chain of evidence regarding the evidence allegedly mishandled and satisfactorily explained that the change in certain evidence between the time of the crime and the time of trial was due to laboratory testing. (4) There was no indication that the prosecutor knew that one witness's testimony was false, and the use of the testimony at trial was insufficient to warrant reversal of the conviction. Four other theories of abuse of process or outrageous governmental conduct were not properly raised and thus were not addressed by the Supreme Court. Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Ineffective Assistance of Counsel at Trial and on Appeal — Not Established: The defendant argued that his trial and appeal attorneys did not argue his case fully. The Supreme Court reviewed the record and held that the attorneys had presented the strongest arguments in the defendant's favor and had performed in a competent manner. In re Petition of Martin, 240 M 419, 787 P2d 746, 46 St. Rep. 2213 (1989).

46-21-110. Petition for DNA testing.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

46-21-111. Preservation and disposal of biological evidence obtained in criminal proceeding.

Compiler's Comments

2009 Amendment: Chapter 221 throughout section in eight places substituted reference to a law enforcement agency for reference to the state; in (1)(a) near beginning of first sentence, in (1)(b) near beginning of first and second sentences, and in (1)(c) near beginning before "evidence" substituted "biological" for "scientific identification"; in (1)(b) at end of first sentence after "person" inserted "and the Montana chief public defender"; inserted (2) requiring permanent preservation of remaining biological evidence following completion of laboratory analysis; inserted (3) defining biological evidence and DNA; and made minor changes in style. Amendment effective October 1, 2009.

Effective Date: This section is effective October 1, 2003.

Part 2
Action of Court

46-21-201. Proceedings on petition.

Commission Comments

1991 Comment: Subsection (1) is similar to 1987 MCA 46-21-201(1). With regard to subsection (2), the Commission determined that if the allegations of the petition were serious enough to warrant hearing, counsel should be appointed if the petitioner is indigent. Subsection (3) provides the option of using civil discovery procedures. This will give the court and counsel the opportunity to streamline the proceedings with depositions and other civil-type discovery if necessary. Subsection (4) is similar to 1987 MCA 46-21-201(2). Subsection (5) is similar to 1987 MCA 46-21-201(3), except that the reference to writ is eliminated and the result is simply that the petition is dismissed.

Uniform State Law — Note on Commission Comments: The following states have enacted the Uniform Post-Conviction Procedure Act: Arkansas, Idaho, Iowa, Maryland, Minnesota, Nevada, North Dakota, Oregon, South Carolina, and South Dakota.

The commission comments summarize the Uniform Commission Comments and distinguish Montana changes to the U.P.C.A., thus the Uniform Commission Comments are not set forth.

Source: 22 U.S.C., 2255; U.P.C.A., Section 7.

This section merely establishes the method of procedure. It allows the court discretion as to whether the petitioner need be present. This is substantially the same as the present law in Montana on habeas corpus.

This section provides that proceedings may be heard in the court in which the conviction took place, serving to facilitate the flow of post-conviction hearings. The court is authorized to receive proof by affidavits, depositions, oral testimony or other evidence. The language is broad and general in order not to cast a heavy burden on the petitioner. The prisoner need not be brought before the court. This provision is designed to make possible the rapid disposal of petitions which have no real merit and which may be filed merely to give the petitioner a free trip and a few days outside the penitentiary. The court, if it deems it necessary, may order the petitioner to be brought before it. This section was drafted to give the court broad powers in disposal of the petition. Therefore, error in the original proceedings need not cause the release of a guilty party. The court may order the correction of judgment or sentence.

Compiler's Comments

2009 Amendment: Chapter 51 in (1)(a) inserted second sentence regarding the attorney general's response to the petition; and made minor changes in style. Amendment effective October 1, 2009.

Applicability: Section 2, Ch. 51, L. 2009, provided: "[This act] applies to a petition for postconviction relief filed on or after October 1, 2009."

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (2) after "shall" deleted "appoint" and inserted reference to ordering office of state public defender to assign counsel, after "qualifies for the" deleted "appointment" and inserted "assignment", and after "part 1" inserted reference to Montana Public Defender Act; in (3)(a) after "indigent" inserted reference to 47-1-103, after "will" deleted "appoint" and inserted reference to ordering office of state public defender to assign counsel, after "court's standards" inserted reference to office of state public defender's standards, and after "competency of" deleted "appointed" and inserted "assigned"; in (3)(b)(i) at beginning before "counsel" deleted "appoint" and inserted reference to ordering office of state public defender to assign counsel, after first "person" substituted "pending a determination by the office of state public defender" for "if the court finds", after "indigent" inserted reference to 47-1-103, after "offer of" deleted "appointment" and inserted "assigned counsel", and near end before "counsel" deleted "appointed" and inserted "assigned"; in (3)(b)(ii) after first "offer" inserted "of assigned counsel"; in (3)(b)(iii) before "petitioner" deleted "court finds that the", after "is" inserted "determined", after "not" inserted "to be", and after "deny" deleted "appointment" and inserted reference to rescinding order requiring assignment of counsel; in (3)(c) at beginning deleted "The court may not appoint counsel" and inserted reference to office of state public defender assigning counsel and at end deleted "appointment" and inserted "assignment"; in (3)(d) before "not" inserted "determined", after "not" inserted "to be", after "indigent" deleted "at the time that the court's determination is made under subsection (3)(b)", and after "shall" deleted "appoint" and inserted "order the assignment of"; in (3)(e) after "counsel" deleted "appointed" and inserted "assigned" and after "paid" deleted "as provided in 46-8-201" and inserted reference to office of state public defender; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

Contingent Effective Date — Standards Effective January 1, 2000: Section 10(2), Ch. 378, L. 1997, provided: "The provision in [section 6] [enacting 46-21-201(3)(a)] that the notification must state that counsel to be appointed will meet supreme court standards for counsel is effective on [the effective date of standards adopted under section 7]." On June 29, 1999, the Montana supreme court issued an order adopting standards for competency of counsel in capital cases. The standards are effective January 1, 2000. The standards govern the trial, appeal, and postconviction relief phases. The standards are set forth in the Montana Supreme Court rules contained in the annotations to Art. VII, sec. 2, Mont. Const.

1997 Amendment: Chapter 378 in (1)(a), near end of second sentence after "may", substituted "proceed to" for "grant a prompt hearing on the petition" and at end, after "issue", deleted "and make findings of fact and conclusions with respect to the petition"; inserted (1)(b) regarding issuance of a decision in a death sentence case; inserted (1)(c) regarding applicability of the Rules of Civil Procedure; in (2), at beginning after "If", inserted "the death sentence has not been imposed and"; inserted (3) regarding appointment of counsel in a death sentence appeal; and made minor changes in style. Amendment effective April 24, 1997.

Attorney General Petition to Supreme Court for Competency Standards: Section 7, Ch. 378, L. 1997, provided: "Within 60 days after [the effective date of this section] [effective April 24, 1997], the attorney general shall, in compliance with 28 U.S.C. 2261, petition the supreme court for a court order establishing standards for competency of counsel appointed to represent indigent persons in proceedings under Title 46, chapter 21, who are sentenced to death. The court may hold appropriate proceedings on the petition, appoint a commission to advise it on competency standards, and adopt standards."

Severability: Section 8, Ch. 378, L. 1997, was a severability clause.

Applicability: Section 9(1), Ch. 378, L. 1997, provided: "Except as provided in subsection (2), [sections 3 through 6] [amending 46-21-101, 46-21-102, 46-21-105, and 46-21-201] apply to proceedings in which the conviction becomes final:

(a) after [the effective date of this section] [effective April 24, 1997]; or

(b) during the 12 months prior to the [effective date of this section] [effective April 24, 1997] if a petition under Title 46, chapter 21, is filed within the 12 months after [the effective date of this section] [effective April 24, 1997]."

Section 9(2), Ch. 378, L. 1997, provided: "The provision in [section 6] [enacting 46-21-201(3)(a)] that the notification must state that counsel to be appointed will meet supreme court standards for counsel applies to petitions for postconviction relief filed after [the effective date of standards adopted under section 7]."

1991 Amendment: Inserted (2) concerning appointed counsel for a hearing; inserted (3) concerning discovery; in (5) substituted "prosecution" for "state" and at end substituted "petition must be dismissed" for "petitioner shall be returned to the custody of the person to whom the writ was directed"; and made minor changes in style.

1981 Amendment: In (1), following "conviction took place", inserted "and the attorney general and order them to file a responsive pleading to the petition. Following its review of the responsive pleading, the court may dismiss the petition as a matter of law for failure to state a claim for relief or it may".

Case Notes

Death of Attorney Prior to Filing Response to Petition for Postconviction Relief — Unique Circumstance Warranting Evidentiary Hearing: Heath filed a timely petition for postconviction relief alleging ineffective assistance of counsel. The District Court ordered the attorney to respond to the charges, but before a response was filed, the attorney died. Heath then requested an evidentiary hearing, but the request for a hearing was denied on grounds that the court failed to see the benefit of a hearing without the attorney in attendance, and the petition was denied without holding a hearing. Heath appealed and the Supreme Court reversed. Although not all circumstances require the District Court to hold an evidentiary hearing on a petition for postconviction relief, a hearing may be appropriate in certain settings with unique circumstances. The attorney's death prior to filing a court-ordered response constituted one of those unique circumstances. The record failed to set forth the attorney's reasons for pretrial and trial actions, and denial of a hearing left Heath without any alternative means of inquiry into the attorney's actions and whether those decisions supported Heath's ineffective assistance claims. Therefore, under these unique circumstances the Supreme Court remanded for an evidentiary hearing to provide Heath a reasonable alternative means to inquire into the attorney's reasons for the pretrial and trial actions and to allow the District Court to evaluate Heath's claims. Heath v. St., 2009 MT 7, 348 M 361, 202 P3d 118 (2009). See also Williams v. St., 2002 MT 189, 311 M 108, 53 P3d 864 (2002), and Herman v. St., 2006 MT 7, 330 M 267, 127 P3d 422 (2006).

Charge That Defense Counsel Failed to Adequately Investigate and Rehabilitate Witness With Prior Consistent Statement — Objective Standard of Reasonableness Applied: Postconviction relief was denied after DeSchon contended that he received ineffective assistance of counsel at trial because his court-appointed attorneys failed to investigate the violent history of DeSchon's stabbing victim and did not attempt to rehabilitate a witness with a prior consistent statement. The Supreme Court found that investigation of the victim's history would have produced no admissible evidence because there was nothing indicating that DeSchon stabbed the victim based on alleged incidents of the victim's violent past. Further, counsel believed that the witness was credible and that calling another witness to rehabilitate the witness with a prior consistent statement was not significant because the point that the victim was drunk was otherwise established. Counsel's actions fell within the wide range of reasonable professional assistance and sound trial strategy. DeSchon failed to show that counsel's conduct was unreasonable, and having failed the first prong of the Strickland test for ineffective assistance, DeSchon's petition for postconviction relief was properly denied. DeSchon v. St., 2008 MT 380, 347 M 30, 197 P3d 476 (2008).

No Evidence of Prejudicial State Involvement in Parole Proceedings — Postconviction Petition Properly Denied: As part of a plea agreement, the state agreed to not involve itself in Maldonado's parole proceedings. Maldonado contended that the state breached the plea agreement when the County Attorney sent a letter to the Board of Pardons and Parole recommending against Maldonado's parole. The District Court concluded that the state's action was harmless, and on appeal the Supreme Court agreed. Although the Board did receive the County Attorney's letter and one Board member met with a Deputy County Attorney, the state withdrew the letter of opposition, and the Board member who met with the Deputy County Attorney recused herself. Maldonado failed to present any evidence that the state's actions figured into the decision of the Board of Pardons and Parole or that Maldonado was prejudiced in any way, and the District Court did not err in denying Maldonado's request for postconviction relief on this issue. Maldonado v. St., 2008 MT 253, 345 M 69, 190 P3d 1043 (2008).

Appointment of Public Defender Prior to Filing of Petition for Postconviction Relief Prohibited: Section 46-8-104 provides that a District Court may order that counsel from the Office of State Public Defender represent an eligible person who has filed a postconviction action or proceeding under certain circumstances, but nothing in that section allows appointment of a public defender in advance of the filing of a petition for postconviction relief. Further, 47-1-104 does not give a District Court authority to appoint counsel employed by the public defender system to represent a person who may desire to file a petition for postconviction relief but who has not done so. Office of St. Pub. Defender v. District Court, 2007 MT 333, 340 M 234, 178 P3d 693 (2007).

Sentencing Judge to Preside Over Postconviction Proceedings: A District Court judge was substituted for the original judge early in Jordan's criminal proceedings and ultimately sentenced Jordan. When Jordan petitioned for postconviction relief, the original judge handled the proceedings and dismissed Jordan's petition. The Supreme Court held that the sentencing judge should preside over postconviction proceedings. Substitution of a trial judge does not suddenly evaporate in subsequent postconviction proceedings involving the same parties, witnesses, and factual background as the underlying case from which a judge was previously removed. In this case, the original judge's substitution in Jordan's criminal action also prevented the original judge from presiding over Jordan's postconviction proceedings. The postconviction claim was remanded for consideration by the sentencing judge. Jordan v. St., 2007 MT 165, 338 M 113, 162 P3d 863 (2007), following Coleman v. St., 194 M 428, 633 P2d 624 (1981).

Dismissal of Postconviction Petition for Failure to State Claim — Differentiation of Standards Applicable to Civil Cases — No Error in Failure to Hold Evidentiary Hearing on Postconviction Petition: Herman asserted that an evidentiary hearing should have been held regarding his petition for postconviction relief because the standard in this section is nearly identical to the provision in Rule 12(b)(6), M.R.Civ.P. (Title 25, ch. 20), so allegations in a petition for postconviction relief must be taken as true and construed in a light most favorable to the petitioner, requiring a hearing on the allegations. The Supreme Court disagreed. The express statutory requirements in 46-21-104 significantly exceed and are inconsistent with the mere notice pleading requirements for an ordinary complaint in a civil action. Thus, the civil standards do not apply to dismissals of petitions for postconviction relief for failure to state a claim because the civil standards are inconsistent with the more specific requirements of 46-21-104 and this section, and the District Court did not err in failing to hold an evidentiary hearing on Herman's petition and in dismissing Herman's claim for failure to meet the procedural threshold in 46-21-104. Herman v. St., 2006 MT 7, 330 M 267, 127 P3d 422 (2006), following Ellenburg v. Chase, 2004 MT 66, 320 M 315, 87 P3d 473 (2004), and distinguishing St. v. Schaff, 2001 MT 130, 305 M 427, 28 P3d 1073 (2001), and St. v. Lawrence, 2001 MT 299, 307 M 487, 38 P3d 809 (2001).

Waiver of Right to Postconviction Challenge of Matters Occurring Prior to Guilty Plea and Unrelated to Nature of Plea: In a petition for postconviction relief, Herman raised numerous issues related to ineffective assistance of counsel that allegedly led to a guilty plea. However, by pleading guilty, Herman waived the right to challenge matters that occurred prior to the plea and that were unrelated to the voluntary or knowing nature of the plea or to the ineffective assistance claim, including: (1) a claim that Herman conducted, sought, or obtained independent legal research; (2) an assertion that Herman met the attachments requirement of 46-21-104(1)(c); (3) Herman's claim that he pleaded guilty because of the duress of incarceration; (4) counsel's failure to move for a bond reduction or pretrial release; and (5) a claim that counsel was ineffective by asserting a speedy trial violation. Herman v. St., 2006 MT 7, 330 M 267, 127 P3d 422 (2006), following Ellenburg v. Chase, 2004 MT 66, 320 M 315, 87 P3d 473 (2004).

Counsel's Failure to Interview and Call Witnesses Within Range of Reasonable and Sound Professional Decisions — Failure to Prove Ineffective Assistance of Counsel: Weaver contended that his defense counsel was ineffective in failing to interview and call certain witnesses and in not introducing an entomologist's report that might have created a reasonable doubt as to Weaver's role in a homicide. Under the first prong of the Strickland test, Weaver needed to overcome the strong presumption that counsel's defense strategies and trial tactics fell within a wide range of reasonable and sound professional decisions. The Supreme Court examined each of Weaver's contentions and determined that: (1) counsel's decision not to investigate potential witnesses did not fall below an objective standard of reasonableness; (2) Weaver failed to meet the burden of showing that counsel's failure to interview potential witnesses constituted ineffective assistance to the extent that it resulted in prejudice raising a reasonable probability that the trial outcome would have been different; (3) counsel's decision not to call every witness that Weaver identified actually carried fewer risks and promoted Weaver's best interest at trial; and (4) failure to introduce the entomologist's report was tactical and the result of a conscientious, weighed decision made after consultation with Weaver and thus was not erroneous. Weaver's ineffective assistance claim failed. Weaver v. St., 2005 MT 158, 327 M 441, 114 P3d 1039 (2005), following Clausell v. St., 2005 MT 33, 326 M 63, 106 P3d 1175 (2005).

No Continuing District Court Jurisdiction to Review Original Sentence and Resentence on Original Charge: Evert was sentenced to 65 years in prison with 15 years suspended for sexual assault. About 5 years into the sentence, Evert petitioned pro se for postconviction relief, alleging numerous claims related to his guilty plea and sentencing, but no hearing was held. Following appointment of two different public defenders, the District Court was notified that the parties had reached an agreement on Evert's petition. In exchange for a new sentence, Evert agreed to withdraw the petition, waive the right to appeal the amended sentence, and waive the right to file any further postconviction petitions based on the new sentence. The District Court agreed to the stipulation, noted Evert's criminal history and progress in prison, and resentenced Evert to 60 years with 20 years suspended, with credit for time served. Evert then appealed the new sentence on grounds that the District Court mistakenly described Evert's eligibility for parole and that because the court did not correctly advise him, he did not fully understand the consequences of waiving his postconviction claims. The Supreme Court reversed because the District Court did not have continuing jurisdiction to resentence Evert after final judgment. Under 46-18-117, the District Court could modify or correct an erroneous sentence but had no authority to resentence Evert on the original charge. Therefore, Evert's original sentence was reinstated, the postconviction claims that Evert waived were also reinstated, and the case was remanded for consideration of the postconviction claims. St. v. Evert, 2004 MT 178, 322 M 105, 93 P3d 1254 (2004), following Gilbert v. St., 2002 MT 258, 312 M 189, 59 P3d 24 (2002), and Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003).

No Prejudice From Counsel's Failure to Notify Defendant of Minimum Sentence — Claim of Ineffective Assistance of Counsel Not Justifying Postconviction Relief — Petition Properly Denied as Matter of Law: In a petition for postconviction relief, Cobell asserted that he received ineffective assistance of counsel because his attorney did not inform him of the minimum 5-year imprisonment penalty for possession of a deadly weapon by a prisoner when Cobell entered a plea agreement wherein the state would recommend the minimum sentence in exchange for Cobell's guilty plea. The District Court summarily dismissed the petition, and the Supreme Court affirmed. The information charging Cobell informed him of the penalty, and Cobell accepted the plea agreement understanding that the sentencing court was free to reject the agreement and impose any appropriate sentence. Given the uncertainty in the agreement and the fact that Cobell received the benefit of the plea bargain, Cobell failed to show that he was prejudiced by counsel's alleged error. Absent a showing of prejudice, the District Court did not err in dismissing Cobell's petition for postconviction relief as a matter of law. St. v. Cobell, 2004 MT 46, 320 M 122, 86 P3d 20 (2004), followed in Lout v. St., 2005 MT 93, 326 M 485, 111 P3d 199 (2005).

Evidentiary Hearing on Petition for Postconviction Relief Not Required: A District Court may dismiss a petition for postconviction relief based solely on the files and records of the case. An evidentiary hearing is not required, nor are unsupported allegations sufficient to entitle a petitioner to a postconviction evidentiary hearing. Griffin v. St., 2003 MT 267, 317 M 457, 77 P3d 545 (2003). See also Notti v. St., 2008 MT 20, 341 M 183, 176 P3d 1040 (2008).

Failure to State Claim or Present Facts Justifying Postconviction Relief — Petition Properly Denied: Griffin petitioned for postconviction relief, asserting claims of prosecutorial misconduct, double jeopardy, judicial bias, and ineffective assistance of counsel. However, a petitioner has the burden of showing, by a preponderance of the evidence, that facts justify the relief. Here,

Griffin failed to bolster the claims with supporting evidence, such as affidavits, records, or other evidence. Thus, the petition failed to meet the statutory requirements or state a claim for relief and was properly dismissed as a matter of law. Griffin v. St., 2003 MT 267, 317 M 457, 77 P3d 545 (2003).

Standard of Review of Denial of Petition for Postconviction Relief: The correct standard of review of a District Court's denial of a petition for postconviction relief is whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. A different standard of review, namely whether substantial evidence supports the findings and conclusions of the District Court, as set out in St. v. Coates, 241 M 331, 786 P2d 1182 (1990), Walker v. St., 261 M 1, 862 P2d 1 (1993), St. v. Moorman, 279 M 330, 928 P2d 145 (1996), and similar cases, is overruled. Porter v. St., 2002 MT 319, 313 M 149, 60 P3d 951 (2002), following St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

Failure of District Court to Review Entire Record on Petition for Postconviction Relief Not Violative of Due Process When Same Judge Presided at Trial: When considering Hagen's petition for postconviction relief, the District Court did not review the entire trial proceedings before making its conclusions of law. Hagen contended that failure to review the entire record deprived him of due process and resulted in erroneous findings and conclusions. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner; however, due process is a flexible concept that calls for such procedural protections as a particular situation demands. There is nothing in the postconviction relief statutes that explicitly requires that a District Court review the entire record, and the Supreme Court declined to impose a duty on District Courts to review the entire record in every situation. Rather, the scope of the duty is determined on a case-by-case basis. In this case, the District Court Judge who presided over the postconviction hearing was the same judge who presided at trial, so the duty to review relevant portions of the record at issue in the postconviction proceedings did not extend to the entire record because the same judge heard the trial testimony when it was presented. St. v. Hagen, 2002 MT 190, 311 M 117, 53 P3d 885 (2002).

Claim That Guilty Plea to Deliberate Homicide Influenced by Alleged Ineffective Assistance of Counsel — Conviction Affirmed: Thee was convicted of deliberate homicide and sentenced to 100 years in prison. In a petition for postconviction relief, Thee contended that he was denied effective assistance of counsel prior to and during a change of plea hearing when defense counsel: (1) induced Thee to plead guilty by threatening Thee that he was going to die unless he pleaded guilty; (2) failed to address the alleged violent treatment that Thee received from inmates and guards during Thee's incarceration in the county jail; (3) failed to seek suppression of statements that Thee made during police interrogation that allegedly violated Thee's Miranda rights; (4) failed to have Thee's mental or emotional stress at the time of the homicide evaluated by a qualified mental health examiner to prove circumstances that could be used to mitigate the deliberate homicide charge; and (5) failed to inform Thee of a possibility of seeking conviction on a lesser included offense. The Supreme Court examined each claim in light of the Strickland test for ineffective assistance of counsel. First, defense counsel has a duty to inform a client of the elements of an offense, the possible punishment, and the advisability of a plea agreement. Discussion of a death penalty between an attorney and client in a capital case may well invoke extreme anxiety, but nevertheless relates directly, albeit painfully, to the genuine circumstances of the client. Counsel's reported statements to Thee regarding the possibility of a death sentence were within the wide range of reasonable and sound professional assistance of a competent attorney counseling a client facing capital punishment. Second, counsel investigated Thee's allegations of violence in the county jail, prepared a report of the findings, discussed the findings with Thee, and brought the matter to the attention of the appropriate authorities. Counsel's actions stemmed from informed professional deliberation rather than neglect or ignorance, and precluded a finding of deficient performance for failure to investigate Thee's allegations of physical assault. Third, counsel investigated all statements made by Thee to police investigators, conferred with Thee, and researched the legal bases for possible suppression of certain statements. Counsel's strategic choices made after thorough investigation of the law and facts relevant to plausible options were virtually unchallengable, and the fact that counsel reached a legal conclusion on an evidentiary challenge contrary to Thee's hopes provided no ground for finding deficient attorney performance. Fourth, despite Thee's claim to the contrary, counsel did seek and obtain a court-ordered mental health evaluation for Thee, and took the unequivocal findings from the evaluation into account when advising Thee to accept the plea agreement. Finally, counsel had no duty to inform Thee about the possibility of a lesser included offense, because neither mitigated deliberate homicide nor negligent homicide is an included offense of deliberate homicide, so the possibility of conviction on a lesser included offense did not

legally exist. The trial court's denial of Thee's petition for postconviction relief was affirmed. St. v. Thee, 2001 MT 294, 307 M 450, 37 P3d 741 (2001).

Issue of Counsel's Effective Use of Peremptory Juror Challenges More Appropriate When Raised as Petition for Postconviction Relief Rather Than on Direct Appeal When Record Silent: Russell was convicted of attempted deliberate homicide and appealed claiming ineffective assistance of counsel during jury selection. Russell contended that counsel failed to challenge for cause a relative of the victim and used two peremptory challenges to strike jurors who were outside the jury pool. Under the Strickland test for ineffective assistance of counsel, challenged actions of counsel are presumed to be matters of trial strategy and a silent record cannot rebut the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Pursuant to St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001), when the record does not illuminate the basis for the challenged acts or omissions of counsel, a claim of ineffective assistance is more appropriately raised in a petition for postconviction relief so that a supplemental record may be made. Here, the record was silent as to why Russell's counsel acted or failed to act regarding the juror challenges. Thus, the Supreme Court declined to discuss the issue on direct appeal. St. v. Russell, 2001 MT 278, 307 M 322, 37 P3d 678 (2001).

Record-Based or Nonrecord-Based Information Determinative of Appropriateness of Direct Appeal or Petition for Postconviction Relief — Direct Appeal Dismissed When Record Insufficient to Substantiate Effectiveness of Counsel: In 1999, White moved for an evidentiary hearing to allow the development of facts that were not part of the record but that were necessary to sustain a claim of ineffective assistance of counsel. The Supreme Court declared by order that a petition for postconviction relief would be the proper avenue for White's nonrecord-based ineffective assistance of counsel claim. Nevertheless, in late 2000, White appealed, contending that the claim of prejudicial error resulting from her trial counsel's various failures to provide representation, such as the failure to call witnesses, make an opening statement, or offer a theory of the case at any stage of the proceedings, was supported by the record and proper for direct appeal. The general rule set out in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), is that when ineffective assistance claims are based on facts of record, they must be raised on direct appeal, while claims based on allegations not documented in the record must be raised by petition for postconviction relief. The underlying principle of the rule is that a silent record cannot rebut the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The two distinct classifications of on-record and off-record actions tend to overlap at times, and though not easily distilled into a formula, the definitive question that decides whether actions are on-record or off-record is whether the record fully explains why counsel took the particular course of action. Generally, an alleged failure to object to the introduction of evidence, to the testimony of a witness, or to prosecutorial misconduct at trial is considered record-based and appropriate for direct appeal. Likewise, counsel's own conduct in presenting the case, such as improperly eliciting damaging testimony from a witness or rendering an improper opening statement or closing argument, may be pointed to as record-based. Decisions regarding the timing and number of objections and whether to offer no opening statement at all lie within counsel's tactical discretion, indicating that nonrecord-based information explaining the tactic may be involved. Similarly, counsel's failure to adequately investigate, to prepare a defense, to become familiar with critical areas of the applicable law, to offer a particular jury instruction, to object to the trial court's failure to consider sentencing alternatives, to object to the admission of evidence that is evidenced by the record, or to fully inform defendant of the consequences of various options and rights, even though the prejudicial results of the ineffectiveness appear on the record, may constitute a nonrecord-based claim. In White's case, the record supplied some indicia of why a certain objection was raised at a particular time, but was still insufficient to determine to what extent counsel's actions were purely tactical or resulted from deficient representation. Thus, the information was considered nonrecord-based and should have been raised by petition for postconviction relief, so White's direct appeal was dismissed without prejudice. St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001), followed in St. v. Earl, 2003 MT 158, 316 M 263, 71 P3d 1201 (2003), St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), St. v. Notti, 2003 MT 296, 318 M 146, 79 P3d 289 (2003), St. v. Rinkenbach, 2003 MT 348, 318 M 499, 82 P3d 8 (2003), St. v. Bowser, 2005 MT 279, 329 M 218, 123 P3d 230 (2005), St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005), Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006), St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006), St. v. Upshaw, 2006 MT 341, 335 M 162, 153 P3d 579 (2006), St. v. Fender, 2007 MT 268, 339 M 395, 170 P3d 971 (2007), and St. v. Herman, 2008 MT 187, 343 M 494, 188 P3d 978 (2008). See also St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003), St. v. Adgerson,

2003 MT 284, 318 M 22, 78 P3d 850 (2003), and St. v. Davis, 2003 MT 341, 318 M 459, 81 P3d 484 (2003). See also St. v. St. Germain, 2007 MT 28, 336 M 17, 153 P3d 591 (2007), in which the Supreme Court declined to address a direct appeal of defense counsel's nonrecord-based reasons for making a double jeopardy argument and for failing to call a witness to testify in an incest case because the issues were appropriate for postconviction proceedings. See also St. v. Green, 2009 MT 114, 350 M 141, 205 P3d 798 (2009), in which an ineffective counsel appeal based on counsel's failure to request an accomplice instruction in a homicide trial was dismissed in favor of postconviction relief proceedings because plausible justifications existed for counsel's conduct that could not be addressed on appeal since the record did not resolve the factual questions surrounding counsel's actions.

Summary Denial of Petition for Postconviction Relief — Defendant Entitled to Hearing to Present Nonrecord-Based Ineffective Assistance of Counsel Claims: Schaff was convicted of deliberate homicide and filed a petition for postconviction relief, contending that he received ineffective assistance of counsel when forced to decide whether to accept a plea agreement after considering the matter for less than 2 hours. He claimed that with the assistance of different counsel at the hearing to withdraw the guilty plea, he could have established that the plea was not voluntary. Schaff further argued that he could not have raised the precise issue of ineffective assistance because discussions between his attorney and him were not record-based and thus could be presented only through a petition for postconviction relief. The state argued that the petition was defective because Schaff did not sufficiently specify the claim of ineffective assistance, offered no supporting information, and did not identify precisely why counsel was ineffective. The state also pointed out that Schaff had previously raised the issue of voluntariness in St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682 (1998), and that the issue had been decided and was barred from being raised again by the doctrine of res judicata. The Supreme Court disagreed that the voluntariness of Schaff's plea was not a proper subject for a postconviction proceeding. Although the issue of voluntariness was previously raised, Schaff did not raise the precise question of whether he had received competent advice prior to entering a plea or the question of whether he was misled to believe that he was required to proceed with the change of plea hearing with trial counsel when he was legally entitled to be represented by other counsel. The question of whether Schaff was properly advised necessarily touched on the voluntariness of the plea but was separate from it and was not part of the record in the direct appeal, nor was it the type of evidence that Schaff would be likely to present at a change of plea hearing. Rather than summarily dismiss Schaff's petition, the better course would have been for the District Court to appoint Schaff counsel and provide an opportunity for a hearing to present the ineffective assistance claims. Thus, the Supreme Court affirmed the part of the District Court's order with regard to any record-based voluntariness claims that had already been addressed by direct appeal, but reversed that part of the order that held that Schaff was procedurally barred from raising the issue of ineffective assistance of counsel in the nonrecord-based postconviction proceeding. St. v. Schaff, 2001 MT 130, 305 M 427, 28 P3d 1073 (2001). Following hearing on remand, the District Court again denied Schaff's petition for postconviction relief, and Schaff appealed on grounds of ineffective assistance of counsel, but the Supreme Court affirmed. Applying the Strickland test, the Supreme Court found that Schaff proved neither that counsel's assistance was deficient nor that counsel's performance was prejudicial to Schaff's case. An ineffective assistance claim must be grounded on facts in the record rather than on mere conclusory allegations. Schaff's claim was not supported by the record, so the petition for postconviction relief was properly denied. Schaff v. St., 2003 MT 187, 316 M 453, 73 P3d 806 (2003). See also Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999).

Appointment of Counsel for Indigent Defendant in Postconviction Proceeding Required — No Duty on Defendant to Notify Court of "Desire" for Counsel: Notwithstanding the apparent conflict between 46-8-104, which grants the court discretion to assign counsel if an indigent defendant "desires" counsel, and this section, which makes assignment of counsel mandatory if a postconviction hearing is required and the defendant is indigent, neither statute requires that a defendant give the court notice of the defendant's desire for counsel. Under this section, the court must inquire into the indigence status of the defendant and determine if the defendant is indigent and qualifies for appointed counsel under Title 46, ch. 8, part 1. If the defendant qualifies, the court must appoint counsel to represent the defendant on the postconviction petition. Swearingen v. St., 2001 MT 10, 304 M 97, 18 P3d 998 (2001).

Admission of Victim Impact Evidence at Resentencing Hearing — No Error: The District Court did not err in admitting victim impact evidence during the resentencing hearing when petitioner was informed of the information that the state planned to present and was provided

with ample opportunity to respond to that information. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Presence of Victim's Family and Media at Resentencing Hearing Not Grounds for Change of Venue: The presence of the victim's family and supporters and local media is not reasonable grounds for believing that prejudice in the form of an air of hostility actually existed at the resentencing hearing. The District Court did not err in denying a motion for a change of venue. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Civil Procedure Rule That Notice of Entry of Order Be Served by Prevailing Party Inapplicable in Postconviction Relief Proceeding: In a case of first impression, the Supreme Court addressed whether the notice of entry of judgment requirement under Rule 77(d), M.R.Civ.P. (Title 25, ch. 20), applied to postconviction relief proceedings governed by Title 46, ch. 21. The court previously held in cases unrelated to postconviction proceedings that only when the notice is served does a prospective appellant's time for filing a notice of appeal begin to run. (See In re Marriage of Robertson, 237 M 406, 773 P2d 1213 (1989), Buckley v. Wordal, 262 M 306, 865 P2d 240, 50 St. Rep. 1570 (1993), and Troglia v. Bartoletti, 266 M 240, 879 P2d 1169, 51 St. Rep. 783 (1994).) Here, Garner was convicted of forgery and felony theft and contended that because the state was the "prevailing party", notice should have been provided to him of the entry of the District Court's order and that because notice was not provided, the 60 days within which to appeal could not have expired because it never commenced to run. However, the Montana Rules of Civil Procedure apply in a postconviction relief proceeding only when they are applicable and not inconsistent with postconviction statutes. Section 46-21-203 specifically requires that an appeal in postconviction proceedings be taken within 60 days of the entry of the order, which is inconsistent with the general notice rule in Rule 77(d). The Supreme Court applied the particular provision over the general provision and concluded that Rule 77(d) has no application in postconviction relief proceedings, so the 60-day filing deadline in 46-21-203 commences in all instances and without more upon entry of the court's order granting or denying postconviction relief. St. v. Garner, 1999 MT 295, 297 M 89, 990 P2d 175, 56 St. Rep. 1180 (1999).

Standard of Review of Denial of Petition for Postconviction Relief: The Supreme Court reviews the denial of a petition for postconviction relief to determine whether the District Court's findings are clearly erroneous and whether its conclusions of law are correct. Bauer v. St., 1999 MT 185, 295 M 306, 983 P2d 955, 56 St. Rep. 715 (1999), citing Bone v. St., 284 M 293, 944 P2d 734 (1997).

Petition for Postconviction Relief Denied — No Due Process Violation — No Abuse of Discretion in Refusing New Trial Because All Factors Not Fulfilled — No New Trial: Sullivan, the director of the Parks and Recreation Department for the city of Great Falls, was convicted of three counts of felony theft of various city recreational fees and one count of tampering with public records. Later, the employee who replaced him found in a budget file an envelope containing $1,300 of city recreation funds. Sullivan brought a petition for postconviction relief, arguing that his constitutional rights under Brady v. Md., 373 US 83 (1963) (granting postconviction relief on the basis of evidence suppressed by the prosecution), had been violated and that the newly discovered evidence entitled him to a new trial. The Supreme Court held Brady inapplicable because the new evidence was not known to the prosecution at the time of the trial and therefore could not have been wrongfully withheld. In connection with the Brady claim, the Supreme Court also noted that Sullivan had not attached an affidavit or other evidence in support of his allegations, as required by 46-21-104, and concluded that Sullivan's assertions were not sufficient under this section to allow him to conduct discovery or to entitle him to an evidentiary hearing. Because theft is not an element of tampering under 45-7-208 and 45-2-302, the Supreme Court concluded that Sullivan's conviction for tampering by making another employee alter official city records would not have been changed had the newly discovered evidence been available at trial. The Supreme Court also concluded that Sullivan had not fulfilled all of the six factors discussed in St. v. Cline, 275 M 46, 909 P2d 1171 (1996), required for grant of a new trial based upon newly discovered evidence because he had not shown that the new evidence would probably produce a different result at trial and that the new evidence was not merely cumulative evidence. Concerning Sullivan's final claim, the Supreme Court noted that in St. v. Perry, 232 M 455, 758 P2d 268 (1988), the defendant obtained newly discovered evidence but that neither a motion for a new trial nor postconviction relief was available to the defendant, so the Supreme Court created a "window" for review of the claim that otherwise would have been procedurally barred. The Supreme Court contrasted Perry and pointed out that in Sullivan's case, he was not barred from bringing a petition for postconviction relief. For all of these reasons, the Supreme Court affirmed the District Court's denial for postconviction relief

and denial of Sullivan's motion for a new trial. St. v. Sullivan, 280 M 25, 948 P2d 215, 54 St. Rep. 1128 (1997).

Stiffening of Sentence by Sentence Review Division That Found Original Sentence Not Inadequate: Offender pleaded guilty to aggravated assault and was sentenced to 20 years in the state prison. The Sentence Review Division found that the sentence was not inadequate or excessive, but modified the sentence to provide for no parole until 7 years had been served and to require completion of the prison's anger management program and other counseling considered appropriate by the staff. The Division stated that the modification was made because during the sentence review hearing, offender showed no remorse or concern for the victim, showed disdain for the victim, and accepted no responsibility for his actions. On petition for postconviction relief, the court held that having found that the original sentence was not inadequate, the Sentence Review Division lacked jurisdiction to alter the sentence. The court struck the modification from the sentence. St. v. Torres, 277 M 514, 922 P2d 1180, 53 St. Rep. 826 (1996).

Failure to Appoint New Counsel During Posttrial Hearing on Counsel's Effectiveness: Finley contended that the District Court denied him his right to counsel's undivided loyalty under this section by failing to appoint new counsel to represent him at a posttrial hearing regarding his counsel's effectiveness, at which his counsel confronted him concerning the sufficiency of his allegations of ineffectiveness and then took the stand to rebut those allegations. This section was not in effect at the time of the hearing and thus did not apply; however, under 46-21-101, a postconviction hearing is a separate proceeding that is available after sentencing and applies when there is no adequate remedy of appeal. Further, under Art. II, sec. 24, Mont. Const., the right to counsel is composed of two correlative rights—the right to counsel of reasonable competence and the right to counsel's undivided loyalty. The Supreme Court applied St. v. Zackuse, 250 M 385, 833 P2d 142 (1991), in holding that when a defendant and counsel have a conflict so great that it results in a total lack of communication or that if counsel fails to render effective assistance, new counsel should be appointed. The potential for substantial prejudice to Finley existed at the posttrial hearing, qualifying the hearing as a critical stage in the proceedings. It was error for the trial court to fail to appoint new counsel, at least for purposes of the competency hearing. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996).

Petitioner Not Entitled to Relief — Responsive Pleading and Evidentiary Hearing Not Required: Unless a petitioner is entitled to relief, a responsive pleading and evidentiary hearing are not required under this section. Bishop v. St., 254 M 100, 835 P2d 732, 49 St. Rep. 650 (1992), following Coleman v. St., 194 M 428, 633 P2d 624 (1981), and followed in St. v. Cobell, 2004 MT 46, 320 M 122, 86 P3d 20 (2004).

Defendant Granted Evidentiary Hearing — Ineffective Assistance of Counsel: The District Court granted defendant a hearing as outlined in this section and received evidence in the form of oral testimony and exhibits in which defendant presented proof regarding his allegations of ineffective assistance of counsel. Nothing in the record supports defendant's contention that such an evidentiary hearing was not held. St. v. Coates, 241 M 331, 786 P2d 1182, 47 St. Rep. 328 (1990).

Affidavit Procedure Not Violative of Fair Hearing: Defendant contended the District Court procedure for accepting or not accepting affidavits and sworn statements constituted reversible error. The Supreme Court decided defendant had a full and fair hearing in light of the fact that he: (1) was adequately represented; (2) was provided a court reporter at no expense; (3) was given proper notice; (4) was allowed to present and confront witnesses; (5) personally appeared, testified, and had his exhibits admitted into evidence; (6) sought no continuance and presented no evidence following notice of affidavit; and (7) had prior statements properly considered. St. v. Perry, 232 M 455, 758 P2d 268, 45 St. Rep. 1192 (1988).

Impartial Jury — Prejudice Not Presumed: Petitioner alleged that he was denied his right to a trial by a fair and impartial jury in that much publicity surrounded his case, and his first conviction was overturned. The District Judge reviewed the transcript of voir dire and determined that the publicity had no prejudicial effect. The jurors were questioned as a whole, and many individually, as to their attitudes resulting from the trial's publicity. The apparent result of the questioning was that nearly all jurors had heard of the case, but all agreed that they could decide the case on the evidence presented. No specific instance of a prejudiced juror was shown. The court will not presume prejudice. It is incumbent on the petitioner to present specific evidence of prejudice to the court. Judges will not "pierce the veil of jury deliberations" to try to find whether the decision was based on bias and prejudice. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Omissions of Counsel — Evidentiary Hearing Required: In his petition for postconviction relief, petitioner asserted that he was denied effective assistance of counsel. Many of the errors

complained of involved failure to act and omissions rather than commissions. A mere review of the record cannot show that petitioner was entitled to no relief. He is entitled to an evidentiary hearing on this issue. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981), followed in Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), and distinguished in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999).

Two-Judge Disqualification Unavailable to Postconviction Petitioner: Although a postconviction petition filed under the provisions of Title 46, ch. 21, is civil in nature, the petitioner is not entitled to two substitutions of presiding judges as allowed in 3-1-801 (now replaced by 3-1-802). An applicant for postconviction relief is directed by the more specific provisions of the postconviction statute to bring the petition in the Supreme Court or in the court that sentenced him. A specific statute controls over a general statute. Coleman v. St., 194 M 428, 633 P2d 624, 38 St. Rep. 1352 (1981).

Burden of Petitioner: The burden of the petitioner when requesting postconviction relief is to show by a preponderance of evidence that the facts justify the relief. Yother v. St., 182 M 351, 597 P2d 79 (1979), following In re Jones, 176 M 412, 578 P2d 1150 (1978). See also St. v. Peck, 263 M 1, 865 P2d 304, 50 St. Rep. 1692 (1993).

Sufficiency of Factual Evidence to Justify Sentence: It was not an abuse of the trial court's discretion to sentence the defendant within the statutory limits when the court relied on an accumulation of different reports as to the condition of the assault victim. St. v. Mann, 169 M 306, 546 P2d 515 (1976).

Mistrial — Claim of Double Jeopardy: After a motion for a mistrial was granted, the defendant's petition to the Supreme Court for dismissal of the subsequent trial on the ground of double jeopardy was dismissed, since the defendant had not yet been adjudged guilty of any offense. State ex rel. LaFlesch v. District Court, 165 M 302, 529 P2d 1403 (1974).

46-21-202. Record of proceedings.

Commission Comments

Source: Townsend v. Sain, 372 U.S. 293.

This section is essential so that a federal court is able to readily determine if it should accept and make an independent determination in case a petitioner files a claim for relief in that court. A sufficient state court record is referred to by the U.S. Supreme Court as "indispensable in determining whether the habeas applicant received a full and fair state court evidentiary hearing resulting in reliable findings." Townsend v. Sain, 372 U.S. 293.

Without adequate recordation of a state court proceeding the federal courts will assume that the applicant did not receive a fair and adequate proceeding, or that its findings were not reliable and the federal court will accept the claim for relief and make an independent determination. As a result, it is suggested that a court reporter be present, so that if a full record is needed it will be available.

Compiler's Comments

1991 Amendment: Made minor changes in style.

46-21-203. Review.

Commission Comments

Source: New.

The purpose of this section is threefold: first, it is desirable to provide a method of review of alleged errors in the lower court; second, a method of review appears to be necessary because of the finality of the judgment in the lower court; and third, the interests of justice require that both petitioner and the state be given the rights of review.

This section specifies the period within which, after a final order is rendered, an appeal must be brought. This section sets out a special procedure as to time of review (60 days) which is different from the normal appeal. The reason for this is that in most instances a person who may seek review under this Act will be incarcerated at the time he enters his petition. Individuals so situated often have difficulties in getting their papers in order and in inducing clerks to act promptly on their petitions. For these reasons a longer period of review is provided for under this Act. Other than the time element, an appeal taken under this chapter shall be in conformance with chapter [20] of this code.

Compiler's Comments

1991 Amendment: Substituted "prosecution" for "state"; and made minor changes in style.

1981 Amendment: Substituted "60 days of" for "6 months from".

Case Notes

Only Record-Based Ineffective Assistance of Counsel Claim on Appeal: Frasure claimed on appeal that her attorney provided ineffective assistance at trial by failing to object to the introduction of certain evidence. However, the Supreme Court will determine that there was ineffective assistance of counsel only if that conclusion can be based on the record on appeal or if there is no plausible justification for counsel's actions or inactions. Frasure failed to establish that her ineffective assistance claim was record-based, so the claim was dismissed without prejudice to the filing of a petition for postconviction relief. St. v. Frasure, 2004 MT 305, 323 M 479, 100 P3d 1013 (2004). See also St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003).

Standard of Review of Denial of Petition for Postconviction Relief: The correct standard of review of a District Court's denial of a petition for postconviction relief is whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. A different standard of review, namely whether substantial evidence supports the findings and conclusions of the District Court, as set out in St. v. Coates, 241 M 331, 786 P2d 1182 (1990), Walker v. St., 261 M 1, 862 P2d 1 (1993), St. v. Moorman, 279 M 330, 928 P2d 145 (1996), and similar cases, is overruled. Porter v. St., 2002 MT 319, 313 M 149, 60 P3d 951 (2002), following St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

No Ineffective Assistance Based on Defense Counsel's Personal Problems — Remand for Consideration of Issues in Amended Petition for Postconviction Relief: In an original petition for postconviction relief, Williams raised five issues of ineffective assistance of counsel, asserting that counsel: (1) failed to conduct proper discovery; (2) failed to obtain and call necessary witnesses at trial; (3) failed to properly question witnesses; (4) conducted inadequate trial preparation; and (5) allowed his personal problems to detract from his representation. The District Court allowed Williams to amend the petition to add two additional claims, contending that counsel failed to substitute the trial judge when requested to do so and failed to call necessary and beneficial witnesses at the sentencing hearing. The Supreme Court's review of the record revealed that the District Court did not erroneously address any of the original five claims, including the assertion that defense counsel's overall emotional state adversely affected Williams's representation. However, the record showed that the two issues added by Williams in the amended petition were never addressed, so the District Court's findings regarding those two material issues were insufficient. The case was remanded to allow further consideration of the additional claims. Williams v. St., 2002 MT 189, 311 M 108, 53 P3d 864 (2002).

Record Devoid of Pretrial Tactical Decisions — Evidentiary Hearing Required on Ineffective Assistance Claim: In St. v. Soraich, 1999 MT 87, 294 M 175, 979 P2d 206 (1999), the Supreme Court held that the prosecutor in Soraich's murder trial was entitled to comment on a theory suggested by defense counsel because the theory lacked evidentiary support and because the comments were plainly in response to defense counsel's opening statements. Soraich then filed a petition for postconviction relief, claiming that defense counsel rendered ineffective assistance by stating that counsel would prove that the state's key witness gave inconsistent statements, without first determining whether an investigator's statement could be introduced as impeachment evidence. The District Court denied the petition, holding that Soraich should have raised the ineffective assistance claim on direct appeal because the claim was based on facts of record in the underlying case, so the claim was procedurally barred from postconviction review. To determine whether the ineffective assistance claim should have been raised on direct appeal or in a postconviction hearing, the Supreme Court cited the two-part process in Strickland v. Wash., 466 US 668 (1984). First, the trial record must adequately document a challenged act or omission of defense counsel for the defendant to raise an ineffective assistance claim on direct appeal. Second, the record on appeal must afford sufficient understanding of the reason for counsel's act or omission to answer the threshold question of whether the alleged error expresses a trial strategy or tactical decision, and if the record does not supply the reason for counsel's act or omission, the claim must be raised by postconviction relief. The record here did not contain any information about why defense counsel promised the jury that the investigator's testimony would prove Soraich's defense, but then failed to call the investigator as a witness. Without an evidentiary hearing and direct questioning of defense counsel, any guesses on what led to the failure to call the investigator as a witness were purely speculative. Because the record was devoid of counsel's pretrial tactical decisions, Soraich could not satisfy the second prong of the Strickland test, so 46-21-105 did not bar Soraich's postconviction assertion of ineffective assistance at trial. An evidentiary hearing was necessary to address the second prong of the Strickland test, and the District Court improperly dismissed Soraich's petition for postconviction relief. Therefore, the case was remanded for an evidentiary hearing on the ineffective assistance claim. Soraich v. St., 2002 MT 187, 311 M 90, 53 P3d 878 (2002). On remand, the District Court

again denied relief, holding that under the second prong of the Strickland test, any allegedly deficient performance of counsel did not prejudice Soraich. Soraich appealed again, asserting that counsel's failure to call a witness to impeach a state witness resulted in prejudice. The Supreme Court disagreed. The witness had already been impeached through the testimony of another defense witness and by cross-examination concerning all of the inconsistencies in the questionable testimony. Failure to call another witness to establish the same point did not create a reasonable probability that the trial result would have been different and did not constitute ineffective assistance of counsel. The District Court was affirmed. Soraich v. St., 2004 MT 215, 322 M 375, 97 P3d 529 (2004). See also St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001).

Civil Procedure Rule That Notice of Entry of Order Be Served by Prevailing Party Inapplicable in Postconviction Relief Proceeding: In a case of first impression, the Supreme Court addressed whether the notice of entry of judgment requirement under Rule 77(d), M.R.Civ.P. (Title 25, ch. 20), applied to postconviction relief proceedings governed by Title 46, ch. 21. The court previously held in cases unrelated to postconviction proceedings that only when the notice is served does a prospective appellant's time for filing a notice of appeal begin to run. (See In re Marriage of Robertson, 237 M 406, 773 P2d 1213 (1989), Buckley v. Wordal, 262 M 306, 865 P2d 240, 50 St. Rep. 1570 (1993), and Troglia v. Bartoletti, 266 M 240, 879 P2d 1169, 51 St. Rep. 783 (1994).) Here, Garner was convicted of forgery and felony theft and contended that because the state was the "prevailing party", notice should have been provided to him of the entry of the District Court's order and that because notice was not provided, the 60 days within which to appeal could not have expired because it never commenced to run. However, the Montana Rules of Civil Procedure apply in a postconviction relief proceeding only when they are applicable and not inconsistent with postconviction statutes. This section specifically requires that an appeal in postconviction proceedings be taken within 60 days of the entry of the order, which is inconsistent with the general notice rule in Rule 77(d). The Supreme Court applied the particular provision over the general provision and concluded that Rule 77(d) has no application in postconviction relief proceedings, so the 60-day filing deadline in this section commences in all instances and without more upon entry of the court's order granting or denying postconviction relief. St. v. Garner, 1999 MT 295, 297 M 89, 990 P2d 175, 56 St. Rep. 1180 (1999).

Out-of-Time Appeal Based on Claim of Ineffective Counsel Denied: An out-of-time appeal is a remedy that may be available to a defendant involved in a criminal proceeding who, through no fault of the defendant, misses a deadline for filing an appeal. Here, Garner moved for an out-of-time appeal on grounds of ineffective counsel. The trial court denied the motion after finding substantial factual evidence that Garner was fully advised of his right to appeal the postconviction relief order, as well as of the 60-day deadline for filing notice of appeal. The ineffective assistance argument was without merit, and the trial court was affirmed. St. v. Garner, 1999 MT 295, 297 M 89, 990 P2d 175, 56 St. Rep. 1180 (1999).

No Legal Duty to Provide Party Copies of Transcripts in Pending Matter: Walker petitioned the Supreme Court for a writ of mandamus ordering the District Court to provide him with copies of the transcripts, minutes, and documents in his pending criminal case. The Supreme Court refused to issue the order on the basis that there was no clear legal duty requiring the District Court to provide the requested information and that Walker could appeal any final decision by the District Court. Walker v. Colberg, 250 M 382, 822 P2d 82, 48 St. Rep. 971 (1991).

CHAPTER 22
HABEAS CORPUS

Chapter Commission Comments

Source of 1991 Commission Comments: The 1991 comments to this chapter were prepared by the Commission on Criminal Procedure appointed by the Supreme Court. The Commission's work extended over nearly a decade. The comments were prepared for proposed rules of criminal procedure. The Supreme Court determined that the proposed rules would be better suited to adoption by the Legislature. The Commission received assistance from the State Bar of Montana and the Montana County Attorneys' Association. The following were members of the Commission at various times: Robert L. Deschamps III, Chairman; Honorable Thomas A. Olson; Honorable Henry Loble; Honorable Leif B. Erickson; Professor James T. Ranney; John P. Connor; Daniel V. Donovan; Gary G. Doran; Harold Hanser; Joe L. Hegel; Ted O. Lympus; Marc F. Racicot; and Michael J. Sherwood. The Commission also received valuable assistance from its intern, Peter Carroll, and from Leslie Halligan, who compiled the Commission's work.

The Commission's work ultimately resulted in the enactment of Chapter 800, Laws of 1991. The commission comments were substantially rewritten by the Code Commissioner and his staff

to reflect changes from the time the rules were initially proposed and to reflect the change from a rules format to a statute format. The Code Commissioner has substituted references to "statute" for "rule" when appropriate and has substituted MCA citations for references to proposed rules. The Code Commissioner has inserted "1987" in MCA references that originated with the Commission because that is the version of the MCA the Commission originally used. The annotator has also deleted references to "proposed" material that has been adopted. Bracketed material has been inserted to indicate changes made by the 1991 Legislature that were not based on the Commission's proposal. The Code Commissioner extends his thanks to John P. Connor and Michael J. Sherwood for their review of the revised comments.

Source: See commission comments to 46-22-101.

Chapter Case Notes

Denial of Bond Pending Appeal — Method of Supreme Court Review — Jurisdiction: After conviction for negligent homicide and on related charges, Ingraham moved the District Court to continue bond pending appeal. The District Court denied the motion, finding that Ingraham was a danger to the community and therefore did not meet the requirements of 46-9-107. Ingraham then moved the Supreme Court, pursuant to former Rule 22, M.R.App.P. (now superseded), to continue bond pending appeal or, in the alternative, to accept appeal of the District Court's order denying bond, pursuant to former Rule 1, M.R.App.P. (now superseded), and 46-20-104. The Attorney General moved to dismiss, contending that there was no provision in law for appeal from a District Court order denying bond pending appeal and that Ingraham should have brought an original habeas corpus proceeding. The Supreme Court agreed with the Attorney General and dismissed Ingraham's motion or appeal, holding that Ingraham should have brought a petition for a writ of habeas corpus pursuant to 46-22-103. Ingraham then filed a petition for a writ of habeas corpus, which was filed with Justice Trieweiler pursuant to 3-2-212. Justice Trieweiler granted the petition to the extent necessary for the District Court to hold an evidentiary hearing as provided by statute, under the theory that the District Court was the more appropriate court for the hearing than was the Supreme Court. The Attorney General opposed the order by applying to the full Supreme Court for a writ of supervisory control, arguing, contrary to the state's previous position, that 46-22-103 does not really apply to persons convicted in a criminal case and that the more appropriate procedure was an original proceeding "in the nature of habeas corpus" before the full Supreme Court. The application for a writ of supervisory control was denied, was treated by the Supreme Court as a late-filed response to Ingraham's petition for a writ of habeas corpus, and was referred to Justice Trieweiler. Justice Trieweiler determined that it was inappropriate for him alone to determine the form of review of the District Court's denial of bond. Justice Trieweiler also determined that: (1) Ingraham had no constitutional right to bond pending appeal; (2) Ingraham did have a right to the proper exercise of the District Court's discretion in the application of 46-9-107; and (3) that right was a substantial right for the purposes of 46-20-104. For these reasons, Justice Trieweiler vacated his previous order granting Ingraham's petition for a writ of habeas corpus and referred the matter to the full Supreme Court for review of the District Court's order denying bond pending appeal. St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Federal Habeas Corpus — New Evidence: The mere existence of newly discovered evidence does not constitute grounds for federal habeas corpus relief unless the evidence bears upon the constitutionality of the petitioner's detention. In finding that the evidence submitted did not warrant habeas corpus relief, the District Judge properly applied a standard of whether the new evidence would probably produce an acquittal. Quigg v. Crist, 616 F2d 1107 (9th Cir. 1980).

Dual Nature of Habeas Corpus — Appealability: Habeas corpus is a civil proceeding when involved in child custody and related cases. Decisions made by the courts in those actions are appealable and res judicata as to certain matters heard at the District Court level. Habeas corpus is a criminal proceeding when the action in which it is originally brought is criminal in nature, such as an extradition proceeding. In criminal actions, denial of the writ is not appealable but successive applications for the writ may be brought directly to the Supreme Court until the judicial power of the state has been exhausted. In re Hart, 178 M 235, 583 P2d 411 (1978).

Chapter Law Review Articles

Bowles v. Russell: They Got Me on a Technicality, Pavlish, 70 Mont. L. Rev. 147 (2009).

The Writ of Habeas Corpus, Swanberg, 26 Mont. L. Rev. 57 (1964).

Criminal Jurisdiction Over Indians and Post-Conviction Remedies: This note discusses, in part, habeas corpus. Dowling, 22 Mont. L. Rev. 172 (1961).

Part 1
Availability of Writ

Part Case Notes

General 1225
Federal Habeas Corpus Standards 1225
Federal Habeas Corpus Denied 1226

GENERAL

Likelihood of Success on Appeal Not Factor in Determining Release of Defendant Pending Appeal: Ingraham argued that because at least one issue in his pending appeal created a strong likelihood that the Supreme Court would reverse his conviction, equity and fairness required that he be released on bond pending appeal. The Supreme Court held that the statute governing the availability of release on bond pending appeal does not refer to the likelihood of a successful appeal, and therefore such likelihood is not grounds for release on bond. Ingraham v. St., 284 M 481, 945 P2d 19, 54 St. Rep. 782 (1997).

Weighing Evidence to Determine Continuation of Bond Pending Appeal Within Trial Court's Discretion: Ingraham argued that the trial court abused its discretion in denying his motion that he be released on bond pending appeal. The Supreme Court held that it was not an abuse of discretion for the trial court to give greater weight to evidence indicating that the defendant would pose a threat to the community if released pending appeal than to evidence presented by the defendant indicating that he would not pose a threat. Ingraham v. St., 284 M 481, 945 P2d 19, 54 St. Rep. 782 (1997).

Sequence of Consecutive Sentences: When the petitioner was sentenced to serve consecutive sentences for escape and using an automobile without the consent of the owner and the warden executed the sentences in a sequence reverse to that indicated by the court, there was no infringement on his rights and his petition for a Writ of Habeas Corpus was denied. Petition of Cheadle, 143 M 327, 389 P2d 579 (1964).

Waiver of Certain Irregularities:

The result of an appeal from a judgment of a Justice of the Peace, in a prosecution for a misdemeanor, is to abrogate that judgment and to hold the defendant under the original warrant of arrest for a trial de novo in the District Court, and the defendant cannot complain, on habeas corpus, of any irregularity committed by the Justice in rendering the judgment. Hosoda v. Neville, 45 M 310, 123 P 20 (1912).

Since the District Court does not, on appeal from a Justice's Court, sit as a court of review but tries the case de novo, any irregularities attending the rendition of the judgment in a case in which the Justice had jurisdiction of the offense charged and of the defendant are waived by taking the appeal. St. v. O'Brien, 35 M 482, 90 P 514 (1907).

FEDERAL HABEAS CORPUS STANDARDS

Cognizable Claims — Review of Factfinding Below — Required Record: Where habeas corpus petitioner raised cognizable claims, the Federal District Court was required to review state factfinding proceedings before accepting the findings against petitioner, and the material before the District Court was insufficient to permit it to determine whether petitioner was accorded a full and fair hearing on his constitutional claims where the District Court had before it only excerpts of brief portions of the various state trial proceedings. Dismissal of the petition would be vacated and the cause remanded. Little Light v. Crist, 649 F2d 682 (9th Cir. 1981).

Required Considerations — When Evidentiary Hearing Mandatory: When considering a federal habeas corpus petition a federal district court must: (1) consider whether the allegations would establish a right to be released if proved; (2) decide whether any cognizable issues raised by the petition were accorded a full and fair hearing in the state trial court (if not, the District Court must hold an evidentiary hearing on them); and (3) independently apply federal law principles to the state factual findings. An evidentiary hearing is mandatory in any of the following instances: (1) the merits of the factual dispute were not resolved at the state hearing; (2) the state factual determination was not fairly supported by the record; (3) the state factfinding procedure did not afford a full and fair hearing; (4) there were substantial allegations of newly discovered evidence; (5) material facts were not adequately developed at the state hearing; and (6) it appears for any other reason that the state trier did not afford petitioner a full and fair fact hearing. Little Light v. Crist, 649 F2d 682 (9th Cir. 1981).

Unexhausted Issues Existing — Exhausted Issues Heard When Fairness Dictates: When considerations of fairness so dictate, a federal court may, in a habeas corpus proceeding, hear

issues exhausted in the state courts even though unexhausted issues exist. Little Light v. Crist, 649 F2d 682 (9th Cir. 1981).

Failure to Give Advice and Explanation Prior to Guilty Plea — Hearing Required: When a state prisoner makes specific and detailed factual assertions which are improbable but cannot be called incredible, and the record shows that no preguilty plea explanation of the elements of the charge, and of possible defenses which his attorney or the court is aware of, was made to the prisoner, a hearing must be held on the question whether the guilty plea was voluntary in the sense of being intelligently made. If the State contends but cannot prove that an explanation of the plea was made in private, and the prisoner denies it, a hearing must be held. And a hearing must be held in federal courts if the state courts do not hold a hearing. Federal habeas corpus is appropriate in such instances. Sober v. Crist, 644 F2d 807 (9th Cir. 1981).

Incompetent Attorney Claim — Hearing Required: State prisoner who had pleaded guilty and was seeking federal habeas corpus should have been given a hearing in the District Court on his claim that his attorney was incompetent. Sober v. Crist, 644 F2d 807 (9th Cir. 1981).

FEDERAL HABEAS CORPUS DENIED

State Remedies for Prosecutor's Acts Exhausted — Comity and Judicial Restraint as Grounds for Denying Relief: Comity and judicial restraint required that, absent special circumstances warranting federal court intervention, District Court grant of pretrial petition for federal habeas corpus, brought by petitioners who had exhausted their state remedies, be reversed. Delay caused by prosecution's disqualification of judge for tactical purposes did not constitute special circumstances. Nor did a 19-count charge when six counts were sufficient, where any unfairness resulting therefrom was avoided by state courts' dismissal of the unnecessary counts. Carden v. Mont., 626 F2d 82 (9th Cir. 1980), certiorari denied, 449 US 1014, 66 L Ed 2d 473, 101 S Ct 573 (1980).

Exhaustion of State Remedies: Federal habeas corpus relief was denied where petitioner claiming constitutional violations failed to exhaust state remedies in accordance with 28 U.S.C. §2254(b). Since a lack of state jurisdiction over the petitioner could also have been tested by state habeas corpus proceedings but was not, the habeas corpus complaint for lack of state jurisdiction was also denied. Campbell v. Crist, 36 St. Rep. 1690 (D.C. Mont. 1979) (apparently not reported in Federal Supplement), affirmed in 647 F2d 956 (9th Cir. 1981).

Failure to Give Defendant's Offered Self-Defense Instruction: Failure of the court to give defendant's offered instruction on self-defense, when viewed with the instructions as a whole, did not render the trial so fundamentally unfair as to amount to a fundamental deprivation of due process that would support federal habeas corpus relief. United States ex rel. Collins v. Crist, 473 F. Supp. 1354 (D.C. Mont. 1979).

"Plain Error" Rule Not Invoked by Invalid Instruction: The instruction by the court that a person intends the ordinary consequences of his voluntary act, which was declared improper in Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979), was not objected to by the defendant, thus invoking the plain error test. The instruction did not go to the essence of the case, and it is not highly probable that the error materially affected the verdict. United States ex rel. Collins v. Crist, 473 F. Supp. 1354 (D.C. Mont. 1979).

Speedy Trial Claim: There was no fundamental deprivation of the federal constitutional right to a speedy trial that would support federal habeas corpus relief where a delay of 330 days, although substantial, was granted for the benefit of the defendant. United States ex rel. Collins v. Crist, 473 F. Supp. 1354 (D.C. Mont. 1979).

46-22-101. Applicability of writ of habeas corpus.

Commission Comments

Source: Oregon Revised Statutes 34.310 and 94-101-1, R.C.M. 1947.

This chapter has been narrowed in an attempt to limit the scope of habeas corpus to its historical position in Montana. It is intended that most post conviction remedies will be provided by the post conviction hearing section. In any event it must be noted that the scope of the writ is broader than it once was due to the federal decisions. Further habeas corpus is not controlled by statutory law, but rather by case development, thus making it necessary to have only a general outline available in the code.

Compiler's Comments

1991 Amendment: At beginning of (2) substituted "The writ of habeas corpus" for "Relief under this chapter" and deleted last sentence that read: "Relief for such purposes is limited to the provisions of Title 46, chapter 21"; and made minor changes in style.

1985 Amendment: In (2) near beginning of first sentence, after "conviction", inserted "or sentence" and at end of first sentence inserted "nor is relief under this chapter available to attack the legality of an order revoking a suspended or deferred sentence".

1981 Amendment: Inserted "Except as provided in subsection (2)" in (1); and inserted (2) denying relief if appeal remedy is exhausted and denying relief as to an order revoking a suspended or deferred sentence and stating that relief for those purposes is limited to chapter 21 of this title.

Case Notes

General 1227
Procedure 1229
Writ Granted 1230
Writ Denied 1231

GENERAL

Facially Invalid Sentence — Statutory Bar Against Appeal Unconstitutional — Habeas Corpus Relief Granted: Lott was sentenced in 1992 for aggravated kidnapping, sexual intercourse without consent, aggravated burglary, and felony assault, and each sentence was enhanced by 10 years for use of a dangerous weapon. The 5-year limit on appealing the sentences that was in effect at sentencing (now a 1-year limit) expired, so Lott was procedurally barred from challenging the sentences. The Supreme Court subsequently decided in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), that application of the weapons enhancement to a felony offense that itself required proving use of a weapon constituted a double jeopardy violation. Guillaume was held to apply retroactively in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), so Lott's sentence was unconstitutionally enhanced with regard to the aggravated burglary and felony assault convictions. The state asserted that Lott was procedurally barred from raising the issue in a habeas corpus petition because Lott did not raise the issue on direct appeal or in a petition for postconviction relief. After analyzing habeas corpus and postconviction relief in Montana, the Supreme Court noted the constitutional guarantee that the writ of habeas corpus may never be suspended and concluded that as applied to a facially invalid sentence, the procedural bar in this section unconstitutionally suspends the writ. Even if Lott had filed a direct appeal or petition for postconviction relief, the double jeopardy argument would have been unavailing because Guillaume and Whitehorn were not decided until well after both filing dates had expired. In order to avoid a grievous wrong and a miscarriage of justice, the Supreme Court granted Lott's petition for habeas corpus and remanded for resentencing pursuant to Guillaume and Whitehorn. Lott v. St., 2006 MT 279, 334 M 270, 150 P3d 337 (2006), followed in St. v. Jackson, 2007 MT 186, 338 M 344, 165 P3d 321 (2007), and St. v. Andersen-Conway, 2007 MT 281, 339 M 439, 171 P3d 678 (2007).

Petition for Postconviction Relief Barred by Seven-Year Lapse: Following remand of St. v. Morrison, 257 M 282, 848 P2d 514 (1993), in 1993, the District Court set forth findings of fact supporting Morrison's 3-year dangerous offender sentence that had been added to Morrison's 20-year prison sentence for sexual intercourse without consent, and Morrison's sentence became final. In 2000, Morrison petitioned the District Court for a writ of habeas corpus, arguing that the 3-year sentence enhancement should be vacated because the use of a weapon had not been charged as a separate offense in the information and that the court relied on false or misleading evidence to support the enhancement. The court treated the petition as one for postconviction relief and denied it as untimely. Morrison appealed, and the Supreme Court affirmed. Under the version of 46-21-102 in effect at the time of Morrison's final conviction in 1993, the statute of limitations required that petitions for postconviction relief be filed within 5 years after conviction became final. Morrison's petition was not filed until 7 years after conviction. Notwithstanding Morrison's argument that the statute of limitations should be equitably tolled, the petition was not timely and the District Court properly dismissed it. Morrison v. Mahoney, 2002 MT 21, 308 M 196, 41 P3d 320 (2002).

Defendant Incarcerated Prior to Sentencing Entitled to Ten Days a Month of Good Time Credit: Sebastian argued that the policy of awarding 10 days of good time allowance a month for presentence incarceration served under 53-30-105 (now repealed) constituted a wealth-based classification, in violation of MacPheat v. Mahoney, 2000 MT 62, 299 M 46, 997 P2d 753 (2000). The Supreme Court noted that it had previously addressed the good time issue in Corcoran v. Mahoney, No. 00-346 (July 2000), an unpublished opinion holding that because security levels in county jails are consistent with close custody security classifications at the state prison, defendants who are incarcerated prior to sentencing are entitled to 10 days a month of good time credit under the former good time statute. The court found the policy determination that pretrial

detainees are entitled to no more than 10 days of good time credit to be reasonable and declined to apply the classification system in MacPheat to pretrial detainees. Sebastian v. Mahoney, 2001 MT 88, 305 M 158, 25 P3d 163 (2001).

Minimal Liberty Interest of Prison Inmate: As an inmate at the state prison, Jellison participated in a sitdown demonstration, repeatedly disobeying direct orders from corrections officers. Jellison claimed that his subsequent detention and custody reclassification violated his due process rights and right to be free from cruel and unusual punishment. The Supreme Court disagreed and denied Jellison's petition for relief. Considering that prison disciplinary actions take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and have been lawfully incarcerated for doing so, the liberty interest of an inmate is minimal and is generally limited to freedom from restraint that, although not exceeding the sentence in such an unexpected manner as to give rise to protection by the due process clause by its own force, nevertheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. Discipline in segregated confinement does not generally rise to that level, nor does custody classification generally implicate a liberty interest sufficient to give rise to due process protection for an inmate. Further, Jellison was not subjected to cruel and unusual punishment because prison officials are accorded wide-ranging deference in adopting policies to preserve internal order and discipline among the inmates, including prophylactic and preventative measures intended the reduce the incidence of breaches of prison order. Jellison v. Mahoney, 1999 MT 217, 295 M 540, 986 P2d 1089, 56 St. Rep. 853 (1999).

Consideration of Moot Issue of Right to Reasonable Bail: Although a petition to the Supreme Court for a writ of habeas corpus was moot because petitioner was no longer in custody, the issue was the petitioner's right to reasonable bail, and the court accepted jurisdiction to address the substantive issues by writ of supervisory control in order to address a constitutional issue capable of repetition. Wier v. Lincoln County Sheriff's Dept., 278 M 473, 925 P2d 1172, 53 St. Rep. 1013 (1996).

Writ of Habeas Corpus Treated as Petition for Postconviction Relief and Time-Barred: Petitioner brought a writ of habeas corpus 8 years after having been convicted. The Supreme Court treated the writ as a petition for postconviction relief but held that relief was time-barred under this section because the writ was brought more than 5 years after conviction. Rudolph v. Day, 273 M 309, 902 P2d 1007, 52 St. Rep. 988 (1995), followed in George v. Bd. of Pardons, 2001 MT 163, 306 M 115, 30 P3d 1065 (2001). See also St. v. Howard, 282 M 522, 938 P2d 710, 54 St. Rep. 464 (1997).

Substitution of Postconviction Proceedings for Habeas Corpus Proceedings When Appeals Exhausted — Not Unconstitutional Suspension of Habeas Corpus Writ: The District Court dismissed defendant's habeas corpus petition, relying on this section, which provides that habeas corpus relief is not available to attack the validity of a conviction or sentence of a person adjudged guilty in a court of record who has exhausted the remedy of appeal. Defendant argued that this section was an unconstitutional suspension of the constitutional right to a writ of habeas corpus. However, relying on Swain v. Pressley, 430 US 372, 51 L Ed 2d 411, 97 S Ct 1224 (1977), the Supreme Court held that the substitution of postconviction proceedings for habeas corpus proceedings when a petitioner has exhausted the right of appeal does not amount to a suspension of the writ of habeas corpus. Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Release From Custody: Two days after defendant filed an application for a writ of habeas corpus in the District Court, he was released from custody by a Justice's Court. The District Court did not notice the application for hearing. Because defendant was not in custody, he was not deprived of his liberty and the petition became moot. St. v. Sor-Lokken, 247 M 343, 805 P2d 1367, 48 St. Rep. 142 (1991).

Habeas Corpus Inappropriate Remedy: In an original proceeding before the Supreme Court, petitioners protested the physical conditions under which they were held in a county jail. They alleged a tort cause of action and violation of their constitutional right to be free from cruel and unusual punishment. They sought relief under the habeas corpus and declaratory judgment statutes. Habeas corpus is not an appropriate remedy because it allows a prisoner to challenge the legal sufficiency of the cause for his incarceration, not the physical conditions under which he is held. Gates v. Missoula County Comm'rs, 235 M 261, 766 P2d 884, 45 St. Rep. 2370 (1988).

Application Granted — Incarceration and No Other Pending Action: Application for a Writ of Habeas Corpus is proper when petitioner was incarcerated at the time of petitioning and when no application for a Writ of Certiorari was pending in the District Court. Crane v. St., 200 M 280, 650 P2d 794, 39 St. Rep. 1743 (1982).

Denial of Federal Constitutional Rights: A Writ of Habeas Corpus is not available in the state courts of Montana to correct denials of federal constitutional rights. Brown v. St., 202 F. Supp. 29 (D.C. Mont. 1962).

Purpose: The purpose of a Writ of Habeas Corpus is to determine the legality or illegality of the restraint alleged to be exercised; it is available only to persons unlawfully imprisoned or restrained of their liberty, and is independent of the legal proceeding under which the detention is sought to be justified. August v. Burns, 79 M 198, 255 P 737 (1927).

PROCEDURE

Petition for Writ of Habeas Corpus Not Necessarily Mooted by Release of Petitioner From Physical Custody: Sebastian argued that he was entitled to a writ of habeas corpus because he was being unlawfully imprisoned under the Department of Corrections good time policy. The state contended that the legality of Sebastian's imprisonment was moot because he had been released from incarceration. Sebastian argued that even though he was released from prison, he was still suffering under an unlawful restraint on his liberty because the discharge date of the 10-year suspended sentence that he was serving depended on good time credit to which he was entitled. The Supreme Court noted that release from custody may moot some habeas corpus petitions because the relief requested, i.e., release from unlawful imprisonment, can no longer be granted. However, release from physical custody does not necessarily moot the petition when the court can still grant effective relief. In this case, the completion date of Sebastian's suspended sentence depended on the discharge date of his term of confinement and was thus based on the jail good time credit to which he was entitled. If the good time policy was in fact unlawful and its application to Sebastian's prison term led to an erroneous discharge date, the completion date of the suspended sentence would also be incorrect. Thus, despite the fact that Sebastian was no longer imprisoned, it was still within the power of the court to grant relief to prevent the possible unlawful restraint on Sebastian's liberty, so the petition was not moot, and the court went on to address the merits of the petition. Sebastian v. Mahoney, 2001 MT 88, 305 M 158, 25 P3d 163 (2001).

Personal Appearance Before Parole Board — Subject Matter Jurisdiction to Determine Due Process Violation: Sage maintained that he had a right to due process, based on a liberty interest in parole pursuant to 46-23-201, that was violated by the Board of Pardons (now Board of Pardons and Parole) when it did not allow him to personally appear before the Board at a parole hearing. Further, Sage maintained that the District Court had subject matter jurisdiction to decide by writ of habeas corpus whether his due process rights had been violated. The Board asserted that Sage's alleged due process violations fell outside the parameters of habeas corpus relief and that the District Court did not have subject matter jurisdiction to consider the issue. The Supreme Court held that the alleged deprivation of Sage's right to due process was directly related to whether the cause of his continued incarceration was legal, thus falling within the parameters of this section, and that the District Court therefore did have subject matter jurisdiction to determine whether the right to due process was violated. Pursuant to Greenholtz v. Inmates of Nebr. Penal & Correctional Complex, 442 US 1 (1979), the opportunity of a parole applicant to appear before those entrusted with the subjective responsibility of passing judgment on the application is an important element of the due process to which the applicant is entitled. Based on the plain language of 46-23-202 and ARM 20.25.401, an inmate who is eligible for parole is clearly provided the right to personally appear at an interview "before the parole board" prior to the Board's decision to grant or deny the application for parole. Sage v. Gamble, 279 M 459, 929 P2d 822, 53 St. Rep. 1234 (1996).

Petition for Writ Procedurally Barred: The defendant refused to cooperate with his appointed appellate attorney. The attorney was relieved, and the defendant was ordered to proceed pro se and was given an extension of time to file his appellate brief. Two weeks after the time period expired, the Supreme Court dismissed his appeal. The defendant then petitioned for a writ of habeas corpus, raising, among other issues, the issue of whether there was probable cause for his arrest and the search of his home. The Supreme Court ruled that the defendant is procedurally barred from attacking the validity of his conviction when he has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal. Duncan v. St., 243 M 232, 794 P2d 331, 47 St. Rep. 738 (1990), followed in Rudolph v. Day, 273 M 309, 902 P2d 1007, 52 St. Rep. 988 (1995).

Exhaustion of State Remedies: When a federal claim was never fairly presented to the state court, the federal District Court denied a petition for want of exhaustion of state remedies. Swan v. Crist, 36 St. Rep. 746 (D.C. Mont. 1979) (apparently not reported in Federal Supplement).

Question of Speedy Trial Not Proper Issue in Asylum State: The issue of the lack of a speedy trial is not properly cognizable by a court of the asylum state in a habeas corpus proceeding in that court contesting extradition to another state. In re Hart, 178 M 235, 583 P2d 411 (1978).

Exhaustion of State Remedies: A petition for a Writ of Habeas Corpus was denied a prisoner convicted in Montana but imprisoned in Nevada because his state remedies had not been exhausted. Evans v. Wolff, 427 F. Supp. 400 (D.C. Mont. 1977).

Motives of Prosecution: On a hearing of a habeas corpus sued out for the liberation of one who is sought to be extradited for the violation in another state it is not admissible to hear evidence upon, or to inquire into, the motives or purposes of the prosecution. St. v. Booth, 134 M 235, 328 P2d 1104 (1958).

Trial Court Jurisdiction — Presumption: On application for Writ of Habeas Corpus, which presents the inquiry whether the trial court had jurisdiction of the subject matter of the prosecution and of the defendant and to render such a judgment as the law authorizes in the particular case, the presumption of jurisdiction is conclusive unless want of it appears on the face of the record, and express recitals of jurisdictional facts cannot be rebutted by evidence beyond the record. In re Shaffer, 70 M 609, 227 P 37 (1924).

Objection That Facts Do Not Constitute an Offense — When Taken: Under former law, the objection that the facts stated in an information do not constitute a public offense could be taken by demurrer, at the trial under a plea of not guilty, or after the trial in arrest of judgment. St. v. Smith, 58 M 567, 194 P 131 (1920).

Not of a Criminal Nature: Habeas corpus is not a special proceeding of a criminal nature. State ex rel. Brandegee v. Clements, 52 M 57, 155 P 271 (1916). See also State ex rel. Hepner v. District Court, 40 M 17, 104 P 872 (1909); State ex rel. Jackson v. Kennie, 24 M 45, 60 P 589 (1900); State ex rel. Newell v. Newell, 13 M 302, 34 P 28 (1893).

Petitioner Not Defendant: The term "defendant" is not a proper designation for a petitioner in a habeas corpus proceeding. State ex rel. Jackson v. Kennie, 24 M 45, 60 P 589 (1900).

WRIT GRANTED

Illegal Revocation of Sentence — Habeas Corpus Relief Warranted: The state petitioned to revoke Borgen's suspended sentence, and the District Court granted the petition and resentenced Borgen to incarceration for an additional 14 years. Borgen petitioned for habeas corpus relief. The Supreme Court determined that after an illegal weapon enhancement sentence was subtracted from Borgen's original sentence, the total time remaining on Borgen's suspended sentence was about 9 years, 1 month. However, the petition to revoke the suspended sentence was not filed until 9 years, 8 months after sentencing. Because the legal portion of Borgen's sentence had expired before the petition to revoke was filed, revocation of Borgen's sentence was facially illegal, and Borgen's incarceration constituted a grievous wrong and a miscarriage of justice warranting habeas corpus relief. Therefore, the Supreme Court granted Borgen's petition, vacated the sentence revocation, and ordered that Borgen be released from custody. Borgen v. Sorrell, 2009 MT 143, 350 M 339, 217 P3d 1022 (2009). See also Lott v. St., 2006 MT 279, 334 M 270, 150 P3d 337 (2006).

Good Time Credit for Indigent Defendant Confined to County Detention Facility: The decision in Bearden v. Ga., 461 US 660, 76 L Ed 2d 221, 103 S Ct 2064 (1983), clearly and unambiguously stands for the principle that to deprive a criminal defendant of freedom simply because, through no want of bona fide effort, willful refusal, or fault of the defendant, the defendant lacks the financial resources to buy liberty is contrary to the fundamental fairness required by the 14th amendment to the U.S. Constitution. This is not to say that poverty insulates a defendant from having to post a reasonable bond should the facts and circumstances of the case so require. However, if a criminal defendant is unable to secure presentence freedom by posting bail for no other reason than indigency, that defendant is entitled to good time credit for the presentence time spent in a county detention facility to the same extent that the law allows good time credit to the criminal defendant who is able to post bail and thus serve the entirety of a sentence in the state correctional facility. In the present case, it was not clear from the record whether defendant was offered or denied bail and whether, if offered, the sole reason for defendant's inability to post bail was indigency; nevertheless, the Supreme Court granted defendant's petition for writ of habeas corpus and remanded to the District Court for a determination of whether defendant was entitled to good time credit for time served in the county detention facility. MacPheat v. Mahoney, 2000 MT 62, 299 M 46, 997 P2d 753, 57 St. Rep. 291 (2000), following MacFarlane v. Walter, 179 F3d 1131 (9th Cir. 1999), followed in Eisenman v. St., 2000 MT 170, 300 M 322, 5 P3d 542, 57 St. Rep. 704 (2000), in which the case of an indigent defendant was remanded for a determination of whether defendant was detained presentence in a county detention facility

because he was too poor to post bail and thus entitled to credit for good time under the MacPheat test, and distinguished in Sebastian v. Mahoney, 2001 MT 88, 305 M 158, 25 P3d 163 (2001). Citing MacPheat, see also Reece v. Dept. of Corrections, 2001 MT 7, 304 M 80, 18 P3d 314 (2001). However, see also McGinnis v. Royster, 410 US 263, 35 L Ed 2d 282, 93 S Ct 1055 (1973).

Juvenile Transferred From Correctional Institution to Mental Health Facility: The Supreme Court upheld issuance of a Writ of Habeas Corpus when a juvenile was transferred under 53-21-130 from a juvenile correctional institution to a mental health facility and the record did not indicate that petitioner's transfer was caused by an emergency or that petitioner was afforded any due process protection upon expiration of the 10-day period specified in 53-21-130. In re the Petition of M.C., 211 M 105, 683 P2d 956, 41 St. Rep. 1242 (1984).

Jurisdiction to Revoke Deferred Sentence — Only During Period of Deferral: Petitioner was convicted of felony theft. On May 22, 1978, he was given a 3-year deferred imposition of sentence on the condition that restitution be made. On August 20, 1979, this deferred sentence was continued and petitioner was ordered to complete restitution by November 5, 1980. This was not done, and a petition to revoke the deferred sentence was filed on January 16, 1981. A hearing on the petition was held May 27, 1981, 3 years and 5 days after the initial deferral. The court revoked the deferred sentence and sentenced petitioner to 3 ½ years in prison, over petitioner's objections that the District Court was without jurisdiction to do so. The District Court contended it retained jurisdiction when the petition to revoke was filed within the deferral time. On a petition for a Writ of Habeas Corpus, the Supreme Court held that 46-18-203 grants jurisdiction to revoke suspended sentences or impose sentences following deferral only during the period of the suspended or deferred sentences. This jurisdiction extends only through the running of the suspended or deferred sentence, regardless of whether a petition for revocation has been filed prior to the termination of the suspended or deferred sentence. (See 1985 amendment note.) Felix v. Mohler, 195 M 391, 636 P2d 830, 38 St. Rep. 1881 (1981).

Child Custody: While the welfare of a child in the matter of its custody is of paramount interest in a habeas corpus proceeding involving custody, neither such interest nor the child's wish will justify a court in denying its custody to the surviving parent, in the absence of a showing of unfitness or inability to support the child, and turning it over to a stranger. August v. Burns, 79 M 198, 255 P 737 (1927).

WRIT DENIED

Defendant Unable to Complete Residential Treatment Program Not Yet Established — Writ of Habeas Corpus Denied: In 1996, Johnson was sentenced to 10 years for felony aggravated kidnapping and 40 years for felony sexual intercourse without consent, with the terms to run concurrently. In 2007, 46-18-207 was enacted, which provided in part for the suspension of sentences for inmates who successfully completed the residential sexual offender treatment program established by the legislation. Johnson filed a writ of habeas corpus, asserting that his sentence for sexual intercourse without consent should be suspended because he had completed sex offender treatment programs in Arizona and Montana and further arguing that he was eligible for sexual offender treatment under 46-18-207. The District Court denied the writ and Johnson appealed, but the Supreme Court denied and dismissed the writ. The residential treatment program authorized in 46-18-207 was not yet established as of the date of the writ, so Johnson could not avail himself of the statutorily authorized program or of the benefits of 46-18-207. Additionally, even if Johnson was eligible for the program, placement is within the discretion of the Department of Corrections, and Johnson was ineligible in any case because of his conviction for aggravated kidnapping, which is one of the exceptions to the operation of 46-18-207. Johnson v. Mahoney, 2009 MT 275, 352 M 136, 217 P3d 1025 (2009).

Showing of Good Cause Required Prior to Appointment of State Public Defender in Habeas Corpus Proceedings: More than a simple motion is required before the Supreme Court will appoint the Office of State Public Defender (OSPD) to represent a person seeking habeas corpus relief. In such case, OSPD counsel will be appointed only upon a demonstration of good cause. A showing of likelihood of the illegality of the sentence of the person seeking relief, and that the sentence will be shortened or terminated if habeas corpus relief is granted, is required before OSPD counsel will be appointed. A statement that an applicant is untrained or unskilled in the law is insufficient, without more, to establish good cause. Dyer v. Mahoney, 2008 MT 117, 342 M 495, 182 P3d 737 (2008).

No Showing That Defendant's Rights Violated by Failure to Make Bail or to Be Released on Own Recognizance — Writ of Habeas Corpus Denied: Following Miller's arrest on charges of negligent homicide and failure to remain at the scene of an accident, the District Court set bail at $30,000. When Miller could not make bail, the amount was reduced to $10,000. Indigent, Miller

could not pay the reduced bail and remained incarcerated. Miller petitioned the Supreme Court for a writ of habeas corpus, arguing that his continued incarceration was a violation of 46-9-106 and 46-9-111 and the constitutional guarantees of bail and against excessive sanctions. The Supreme Court noted that a defendant has a presumptive right to be released on a reasonable bail or on the defendant's own recognizance on conditions that will protect the community. However, the burden in a habeas corpus proceeding is on the petitioner to present a record that is sufficient to make a prima facie showing that the District Court's order constituted a violation, deprivation, infringement, or denial of the petitioner's constitutional, statutory, or legal rights. After considering the meager record and the seriousness of the allegations, the Supreme Court was not convinced that Miller had no ability to provide any bail or that the District Court could have released Miller on conditions that could be enforced and that could ensure the protection of the community. Thus, Miller failed to show that his rights were violated, and his petition for a writ of habeas corpus was denied. Miller v. District Court, 2007 MT 58, 336 M 207, 154 P3d 1186 (2007).

Federal Prohibition Against Penalty Beyond Statutory Maximum Not Retroactively Applicable: Following Gratzer's 1982 conviction for deliberate homicide, the District Court sentenced Gratzer to a consecutive 10-year term for using a weapon in committing the crime. The U.S. Supreme Court subsequently decided Apprendi v. N.J., 530 US 466 (2000) (followed in Ring v. Ariz., 536 US 584 (2002), and Blakely v. Wash., 542 US 296 (2004)), holding that other than the fact of a prior conviction, any fact that increases a penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Gratzer later petitioned for a writ of habeas corpus on grounds that the consecutive sentence for use of a weapon was a violation of Gratzer's constitutional rights. Gratzer's sentence enhancement was not submitted to the jury, so Apprendi was potentially applicable. Notwithstanding that Gratzer's conviction became final in 1984, long before Apprendi and its progeny were decided, the Supreme Court nevertheless considered Gratzer's claim pursuant to Teague v. Lane, 498 US 288 (1989), on grounds of whether Apprendi and its progeny applied retroactively. Under Teague, a new constitutional rule of criminal procedure does not apply retroactively to cases on collateral review unless the rule: (1) places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe; or (2) qualifies as a watershed rule of criminal procedure. Noting that the U.S. Supreme Court held that Ring (and by implication Apprendi and Blakely) did not apply retroactively in Schriro v. Summerlin, 542 US 348 (2004), the court applied the Schriro rationale to Gratzer's case, holding that Apprendi failed to satisfy the first Teague exception for retroactivity because Apprendi announced a rule that did not inhibit the state's ability to substantively proscribe and punish a defendant for using a weapon in the commission of an offense, but merely established procedures that the state must follow in doing so, nor did the Apprendi rule qualify as a watershed rule of criminal procedure without which the likelihood of an accurate conviction would be seriously diminished. Federal courts of appeals nearly unanimously agree that the Apprendi line of cases do not apply retroactively to cases on collateral review, and the Supreme Court concurred. Gratzer's petition was denied. Gratzer v. Mahoney, 2006 MT 282, 334 M 297, 150 P3d 343 (2006).

Life Sentence Without Parole Not Violative of Constitutional Rights: Gratzer asserted that the sentencing court exceeded its authority and violated the constitutional right to habeas corpus when the court sentenced Gratzer to life without the possibility of parole. Gratzer's argument was that use of the word "term" implied that there was a distinction between sentences imposed for a specific time and indeterminate life sentences and that the statutory sentencing scheme does not authorize a court to remove a prisoner's eligibility for parole if the prisoner is serving a life sentence. The Supreme Court declined to recognize the distinction. "Term" is used throughout the criminal code to refer to the duration of a sentence without any indication that it is meant to refer exclusively to determinate time sentences, and the language in 46-18-202 that allows a court to impose the parole eligibility exception applies equally to time sentences and life sentences. A sentence of imprisonment in the state prison for a term exceeding 1 year refers to all felonies, including those punishable by a life sentence, rather than a cryptic means of limiting a sentencing court's ability to restrict the parole eligibility of prisoners serving life sentences. The District Court did not violate Gratzer's rights, and the sentence of life without parole was affirmed. Gratzer v. Mahoney, 2006 MT 282, 334 M 297, 150 P3d 343 (2006).

Attempt to Use Writ of Habeas Corpus to Demand Physical Presence of Children Removed From Parent in Abuse and Neglect Proceeding — Petition Properly Denied: The mother petitioned the District Court for a writ of habeas corpus demanding that her children be physically present for an abuse and neglect hearing because they were material witnesses and had been removed from her custody unlawfully. The petition was denied. On appeal, the mother

cited In re Bertelson, 189 M 524, 617 P2d 121 (1980), for the proposition that a writ of habeas corpus was the appropriate procedural device to bring the custody matter before a court. The Supreme Court disagreed and distinguished Bertelson because the mother's position ignored the substantial differences between dissolution proceedings and abuse and neglect proceedings, differences that were not at issue in Bertelson. The court also cited its earlier holding in In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982 (2000), in which it was held that the children were properly removed from the mother's home. Because temporary custody of the children with the state was legal, relief pursuant to habeas corpus premised on illegal restraint was not available to the mother under these circumstances. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Denial of Writ of Habeas Corpus to Compel Attendance of Children in Abuse and Neglect Hearing Not Violative of Due Process Rights or Right to Confront Witnesses: The mother petitioned the District Court for a writ of habeas corpus demanding that her children be physically present for an abuse and neglect hearing because they were material witnesses and claiming that the writ was necessary to ensure her due process rights by having the children available to rebut allegations against her at the hearing. The petition was denied. On appeal, the Supreme Court affirmed. Although the mother was entitled to an opportunity for a meaningful hearing, that opportunity need not be provided at the expense of the children whose best interests were the paramount focus of the proceeding, and subjecting the children to direct and cross-examination could exacerbate the abuse that they had already experienced. Denial of the petition did not violate the mother's right to confront witnesses because the children were not her accusers and she had no right to confront them. Rather, the abuse and neglect case was brought by the state, and the mother had ample opportunity to confront and examine the state's witnesses and experts at the hearing, so her due process rights were met. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Allegation of Newly Discovered Evidence — Failure to Timely Appeal — Writ of Habeas Corpus Denied: The Supreme Court denied a petition for writ of habeas corpus based on allegations of newly discovered medical evidence, noting that there was no showing as to what constituted the new evidence and that petitioner was afforded the right of appeal but did not take it. Tecca v. McCormick, 246 M 317, 806 P2d 11, 47 St. Rep. 2068 (1990), followed in Blaney v. Gamble, 266 M 51, 879 P2d 51, 51 St. Rep. 466 (1994). Tecca was distinguished in Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Failure of Sentencing Court to Consider Time Served — Remand — Writ of Habeas Corpus Denied: Petitioner was sentenced to 5 years in the state prison for aggravated assault, with all 5 years suspended upon certain conditions. He served 4 ½ years of the suspended sentence before violating probation. After an appropriate petition, the District Court revoked the suspended sentence and sentenced petitioner to 5 years in the state prison, with 2 years suspended upon certain conditions. Petitioner sought a writ of habeas corpus seeking restoration of his good time but not appealing his sentence or conviction. After review, the Supreme Court held that the District Court had jurisdiction to revoke the suspended sentence and impose the original sentence but remanded for compliance with 46-18-201, requiring the District Court to consider elapsed time and state its reasons for either expressly allowing or rejecting elapsed time as credit against the sentence. The petition for writ of habeas corpus was denied for failure to set forth any basis for granting the writ. Speldrich v. McCormick, 243 M 238, 794 P2d 339, 47 St. Rep. 1186 (1990), followed in St. v. Docken, 274 M 296, 908 P2d 213, 52 St. Rep. 1240 (1995).

Prisoner Alleging Deprivation of Good Time: The Supreme Court denied petitioner's request, under a Writ of Habeas Corpus petition, to be credited for good time for participation in an education program although confined in maximum security. The computations of the state officials were found accurate. It was within their jurisdiction to impose rules under 53-30-105 (now repealed) which properly avoid good time awards in excess of the statutory provisions. Seadin v. Crist, 187 M 112, 608 P2d 1094, 37 St. Rep. 953 (1980).

Indigent Prisoners: Denial of trial transcript to an indigent prisoner does not violate his rights unless there has been some showing of need or a meritorious reason. Petition of Parker, 162 M 330, 511 P2d 973 (1973).

No Effect on Release: The Writ of Habeas Corpus is directed at unlawful imprisonment or restraint of liberty, and when, even if the Writ had been issued, it would not have resulted in the release of the petitioner from confinement since he was confined under a 5-year sentence imposed concurrently with his original 10-year sentence, habeas corpus was denied. In re Wagner's Petition, 145 M 101, 399 P2d 761 (1965).

Insufficient Commitment to Jail: When a Justice of the Peace, upon adjudging one guilty of contempt for disobeying a subpoena, imposed a fine of $100 and, upon refusal of payment,

committed him to jail until payment was made and thereafter accepted a cash bond in lieu of fine and imprisonment pending final disposition of a certiorari proceeding and appeal to the Supreme Court, the objection that the commitment was insufficient under a former statute requiring imprisonment until payment of a fine would not lie since, if the Sheriff presumed to hold the contemner, the proper remedy would be habeas corpus. State ex rel. Mercer v. Woods, 116 M 533, 155 P2d 197 (1945).

Defective Indictment Not Ground for Relief: On an application for habeas corpus under former law, the court would not determine whether the indictment upon which the complainant was convicted was defective since the writ could not be used as a substitute for a demurrer or a motion to quash, its inquiry being confined to a determination of the validity of the process on its face and whether the court had jurisdiction of the offense charged. State ex rel. Boone v. Tullock, 72 M 482, 234 P 277 (1925).

Petit or Grand Larceny: When a person, after a preliminary examination, is committed for grand larceny and, upon his suing out a Writ of Habeas Corpus on the ground that he is guilty of petit larceny only, it appears from the evidence before the Justice that he was guilty at least of petit larceny and that there was a reasonable basis for the belief that he was guilty of grand larceny, it is the imperative duty of the court to remand him. In re Jones, 46 M 122, 126 P 929 (1912).

Trial Court Jurisdiction: When the court imposed a prison sentence for a misdemeanor, its judgment was void as being in excess of its jurisdiction, and the prisoner was entitled to habeas corpus. St. v. District Court, 35 M 321, 89 P 63 (1907).

Legality of Custody: When a petitioner for habeas corpus was convicted of murder and an oral judgment was rendered confining him to prison for 25 years without any record being made, but at a special term, after notice to the petitioner and his counsel, the minutes were corrected to show the judgment as rendered, and on the judgment thus entered a commitment was issued, the petitioner was legally in custody for the purposes of the judgment and not entitled to his discharge. In re Dye, 32 M 132, 79 P 689 (1905).

Law Review Articles

The Writ of Habeas Corpus, Swanberg, 26 Mont. L. Rev. 57 (1964).

Collateral References

Habeas Corpus *key* 201 through 222, 321, 441, 448.1.

39 C.J.S. Habeas Corpus §3.

39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §§1 through 11, 28, 29.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus—modern cases. 26 ALR 4th 455.

Court's power in habeas corpus proceedings relating to custody of child to adjudicate questions as to child's support. 17 ALR 3d 764.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney. 5 ALR 3d 1360.

46-22-102. No release for technical defects.

Commission Comments

Source: [R.C.M. 1947, section] 94-101-16.

Compiler's Comments

1991 Amendment: Made minor change in style.

Case Notes

Misspelling of Petitioner's Name — Extradition Proceedings Not Defective: Slight misspelling of petitioner's name on a criminal complaint and arrest warrant, where "Henrichs" was spelled "Hendricks", constituted a technical defect and did not render extradition proceedings defective in light of the fact that the description accompanying the warrant correctly described the petitioner. Under the doctrine of idem sonans, two names spelled differently are regarded as the same if they sound alike in their pronunciation. In re Henrichs, 237 M 59, 771 P2d 967, 46 St. Rep. 620 (1989).

Technical Defects: When the court intended to vacate sentence to permit representation by counsel but said that it was vacating judgment, this was a mere technical defect and would not form the basis for habeas corpus. In re Petition of Eldiwitw, 153 M 468, 457 P2d 909 (1969).

Curable Defects in Process: When the committing order stated that the defendant was convicted for the crime of burglary, together with a prior conviction of a felony, but the defendant was properly convicted and sentenced for robbery and had a prior conviction of a felony, the erroneous use of the word "burglary", which had been the prior felony for which the defendant

had been convicted, did not constitute such a defect as to allow for a Writ of Habeas Corpus. In re Petition of Erickson, 146 M 456, 409 P2d 447 (1965).

Defective Indictment Not Ground for Relief: On an application for habeas corpus under former law, the court would not determine whether the indictment upon which the complainant was convicted was defective since the writ could not be used as a substitute for a demurrer or a motion to quash, its inquiry being confined to a determination of the validity of the process on its face and whether the court had jurisdiction of the offense charged. State ex rel. Boone v. Tullock, 72 M 482, 234 P 277 (1925).

Legality of Custody: When a petitioner for habeas corpus was convicted of murder and an oral judgment was rendered confining him to prison for 25 years without any record being made, but at a special term, after notice to the petitioner and his counsel, the minutes were corrected to show the judgment as rendered, and on the judgment thus entered a commitment was issued, the petitioner was legally in custody for the purposes of the judgment and not entitled to his discharge. In re Dye, 32 M 132, 79 P 689 (1905).

Collateral References

Habeas Corpus *key* 497, 503.1 through 511, 516.1, 535.

39 C.J.S. Habeas Corpus §§18, 19, 37 through 39.

39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §§36 through 40.

46-22-103. Writ for purpose of bail.

Commission Comments

Source: [R.C.M. 1947, section] 94-101-18.

No change.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Denial of Bond Pending Appeal — Method of Supreme Court Review — Jurisdiction: After conviction for negligent homicide and on related charges, Ingraham moved the District Court to continue bond pending appeal. The District Court denied the motion, finding that Ingraham was a danger to the community and therefore did not meet the requirements of 46-9-107. Ingraham then moved the Supreme Court, pursuant to former Rule 22, M.R.App.P. (now superseded), to continue bond pending appeal or, in the alternative, to accept appeal of the District Court's order denying bond, pursuant to former Rule 1, M.R.App.P. (now superseded), and 46-20-104. The Attorney General moved to dismiss, contending that there was no provision in law for appeal from a District Court order denying bond pending appeal and that Ingraham should have brought an original habeas corpus proceeding. The Supreme Court agreed with the Attorney General and dismissed Ingraham's motion or appeal, holding that Ingraham should have brought a petition for a writ of habeas corpus pursuant to this section. Ingraham then filed a petition for a writ of habeas corpus, which was filed with Justice Trieweiler pursuant to 3-2-212. Justice Trieweiler granted the petition to the extent necessary for the District Court to hold an evidentiary hearing as provided by statute, under the theory that the District Court was the more appropriate court for the hearing than was the Supreme Court. The Attorney General opposed the order by applying to the full Supreme Court for a writ of supervisory control, arguing, contrary to the state's previous position, that this section does not really apply to persons convicted in a criminal case and that the more appropriate procedure was an original proceeding "in the nature of habeas corpus" before the full Supreme Court. The application for a writ of supervisory control was denied, was treated by the Supreme Court as a late-filed response to Ingraham's petition for a writ of habeas corpus, and was referred to Justice Trieweiler. Justice Trieweiler determined that it was inappropriate for him alone to determine the form of review of the District Court's denial of bond. Justice Trieweiler also determined that: (1) Ingraham had no constitutional right to bond pending appeal; (2) Ingraham did have a right to the proper exercise of the District Court's discretion in the application of 46-9-107; and (3) that right was a substantial right for the purposes of 46-20-104. For these reasons, Justice Trieweiler vacated his previous order granting Ingraham's petition for a writ of habeas corpus and referred the matter to the full Supreme Court for review of the District Court's order denying bond pending appeal. St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Consideration of Moot Issue of Right to Reasonable Bail: Although a petition to the Supreme Court for a writ of habeas corpus was moot because petitioner was no longer in custody, the issue was the petitioner's right to reasonable bail, and the court accepted jurisdiction to address the

substantive issues by writ of supervisory control in order to address a constitutional issue capable of repetition. Wier v. Lincoln County Sheriff's Dept., 278 M 473, 925 P2d 1172, 53 St. Rep. 1013 (1996).

Convicted Felon Allowed Preconviction Bail Not Automatically Entitled to Bail Pending Appeal: Prior to his conviction for deliberate homicide, Moore was allowed bail, and following conviction, he was designated a nondangerous offender (see 1995 repeal of 46-18-404) for purposes of parole eligibility. After conviction, Moore was denied bail pending appeal. Moore petitioned for a writ of habeas corpus, claiming that he is entitled to bail pending appeal as a matter of law pursuant to 46-9-107 and 46-20-204. The Supreme Court found that under 46-9-107, the District Court was required to order the detention of Moore unless it found that he was "not likely to flee". Since the District Court made the opposite finding based on evidence presented at the hearing, the Supreme Court found no abuse of discretion in the District Court's order denying bail pending appeal. The Supreme Court also held that the phrase "[i]f an appeal is taken and the defendant is admitted to bail" contained in 46-20-204(2) referred to bail pending appeal and requires that the District Court stay the execution of its sentence if the defendant is admitted to bail pending appeal. Because Moore was not admitted to bail pending appeal, his sentence should not be stayed. Moore v. McCormick, 260 M 305, 858 P2d 1254, 50 St. Rep. 1054 (1993).

When Bail Allowable: It is proper to allow bail in a homicide case in the absence of a showing by the County Attorney that the proof of the defendant's guilt is evident or the presumption thereof great. State ex rel. Murray v. District Court, 35 M 504, 90 P 513 (1907).

Collateral References

Habeas Corpus *key* 223, 469, 800.

39 C.J.S. Habeas Corpus §§50 through 53, 63, 174, 186.

39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §§35, 160.

Part 2
Issuance of Writ

46-22-201. Application for writ of habeas corpus.

Commission Comments

Source: [R.C.M. 1947, section] 94-101-2.

No change.

Compiler's Comments

1991 Amendment: In (1)(a) substituted "petitioner" for "person in whose behalf the writ is applied for"; in (1)(c), before "by whom", deleted "the officer or person"; in (2) substituted "otherwise described so that they may be identified" for "described if they are not known"; and made minor changes in style.

Case Notes

Jurisdiction of District Court to Grant Habeas Corpus: Defendant applied to District Court for Writ of Certiorari, and court decided to treat the application as one for habeas corpus. The Supreme Court held that District Court has no jurisdiction to consider Writ of Habeas Corpus unless defendant properly petitions for habeas corpus. St. v. Crane, 196 M 305, 639 P2d 514, 39 St. Rep. 126 (1982).

Liberal Construction for Jailed Pro Se Defendant: Where defendant was jailed and appeared pro se, court held it would liberally construe defendant's petition for relief and thus directed matter be held in abeyance for 30 days to allow petitioner to prepare and submit proper petition for habeas corpus. St. v. Crane, 196 M 305, 639 P2d 514, 39 St. Rep. 126 (1982).

Denial of Speedy Trial: Petition for Writ of Habeas Corpus by petitioner being held on detainer from another state, alleging that delay by other state in lodging a detainer deprived petitioner of right to a speedy trial, was denied on grounds that petitioner had deprived himself of a speedy trial by fleeing from the other state, and his petition disclosed no factual basis as required by the statute on which to base the issuance of a Writ. Petition of Ferguson, 150 M 178, 432 P2d 773 (1967).

Collateral References

Habeas Corpus *key* 664 through 671, 673, 687.

39 C.J.S. Habeas Corpus §76, et seq.

39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §§28 through 31, 109, 142.

46-22-202. Granting writ of habeas corpus.

Commission Comments

Source: [R.C.M. 1947, section] 94-101-3.

No change.

Compiler's Comments

1991 Amendment: Made minor changes in style.

Case Notes

Petition for Writ of Habeas Corpus Not Necessarily Mooted by Release of Petitioner From Physical Custody: Sebastian argued that he was entitled to a writ of habeas corpus because he was being unlawfully imprisoned under the Department of Corrections good time policy. The state contended that the legality of Sebastian's imprisonment was moot because he had been released from incarceration. Sebastian argued that even though he was released from prison, he was still suffering under an unlawful restraint on his liberty because the discharge date of the 10-year suspended sentence that he was serving depended on good time credit to which he was entitled. The Supreme Court noted that release from custody may moot some habeas corpus petitions because the relief requested, i.e., release from unlawful imprisonment, can no longer be granted. However, release from physical custody does not necessarily moot the petition when the court can still grant effective relief. In this case, the completion date of Sebastian's suspended sentence depended on the discharge date of his term of confinement and was thus based on the jail good time credit to which he was entitled. If the good time policy was in fact unlawful and its application to Sebastian's prison term led to an erroneous discharge date, the completion date of the suspended sentence would also be incorrect. Thus, despite the fact that Sebastian was no longer imprisoned, it was still within the power of the court to grant relief to prevent the possible unlawful restraint on Sebastian's liberty, so the petition was not moot, and the court went on to address the merits of the petition. Sebastian v. Mahoney, 2001 MT 88, 305 M 158, 25 P3d 163 (2001).

Adoption Proceeding in Foreign Jurisdiction — Applicability of Habeas Corpus: A child was born to petitioner in Wyoming in 1980. She relinquished custody to a couple and moved to Montana. Petitioner executed handwritten instruments that were notarized relinquishing custody to the couple and stating she did not know the natural father. The couple began adoption proceedings in Wyoming. Petitioner then executed a written revocation of custody and petitioned for a Writ of Habeas Corpus for the child in Yellowstone County. The District Court deferred jurisdiction to the Wyoming court having jurisdiction of the adoption proceeding. The habeas corpus petition was properly filed in Yellowstone County because the child was currently located there. The District Court properly deferred jurisdiction because although petitioner contended she executed the written instruments under fraud and duress, those issues were equally triable in Wyoming. Under 40-7-108, the District Court could not determine whether Wyoming was an inconvenient forum, only whether the court itself was. The Supreme Court in upholding the District Court's action said in cases of simultaneous proceedings, the provisions of 40-7-107(3) should be followed. In re Peterson, 203 M 305, 661 P2d 40, 40 St. Rep. 465 (1983).

Collateral References

Habeas Corpus *key* 612, et seq.

39 C.J.S. Habeas Corpus §§115 through 119, 125 through 127, 135, 136, 146, 148, 153, 154, 157, 161 through 163.

39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §§101, 151.

46-22-203. Writ granted without delay.

Commission Comments

Source: [R.C.M. 1947, section] 94-101-4.

No change.

Compiler's Comments

1991 Amendment: At beginning substituted "justice" for "court"; and made minor changes in style.

Case Notes

Mandamus to Compel Action by District Court: A Writ of Mandate to compel District Court to take action on a petition for a Writ of Habeas Corpus was denied by the Supreme Court when petitioner did not establish a clear legal right to have the Writ of Habeas Corpus issued. Petition of Tomich, 139 M 624, 365 P2d 950 (1961).

Collateral References
Habeas Corpus *key* 402, 448.1, 674.1, 675, 894.1.
39 C.J.S. Habeas Corpus §151.

46-22-204. Writ and process may issue at any time.

Commission Comments
Source: [R.C.M. 1947, section] 94-101-30.

Compiler's Comments
1991 Amendment: Substituted "any associated process" for "process authorized by this chapter"; and made minor changes in style.

Collateral References
Habeas Corpus *key* 677.
39 C.J.S. Habeas Corpus §§1 through 11.

46-22-205. Form of writ.

Commission Comments
Source: [R.C.M. 1947, section] 94-101-5.

Compiler's Comments
1991 Amendment: In (1) substituted "petitioner" for "body of such person" and before "judge" deleted "court or"; in (2), after "determined", deleted "upon return of the writ"; and made minor changes in style.

Collateral References
Habeas Corpus *key* 676.
39 C.J.S. Habeas Corpus §§148, 157.
39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §2.

46-22-206. Service of writ.

Commission Comments
Source: [R.C.M. 1947, section] 94-101-6.
The provisions in sub-division [(1)] providing for service of a copy of the writ upon the attorney general or the county attorney are new. Sub-division [(2)] is taken from [section] 94-101-6 [repealed] but gives the court greater discretion in directing service of the writ. Sub-division [(3)] gives the court the same discretion it has in directing service of a writ of certiorari, mandamus or prohibition.

Compiler's Comments
1991 Amendment: In (1), in second sentence, substituted "the writ is directed to a county facility" for "such person represents a county institution"; in (2) substituted "person" for "officer"; in (3), before "judge", deleted "court or"; and made minor changes in style.

Collateral References
Habeas Corpus *key* 677.
39 C.J.S. Habeas Corpus §§149 through 152.
39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §§154 through 157.

Part 3
Return of Writ, Hearing, Appeal

Part Case Notes
Effect as Res Judicata — Child Custody: While a proceeding in habeas corpus involving the custody of a child is civil in its nature and the decision of the District Court awarding custody is final, except for abuse of discretion, the decision is res judicata only as to those matters properly determined by the court on the merits. August v. Burns, 79 M 198, 255 P 737 (1927).

46-22-301. Return of service.

Commission Comments
Source: [R.C.M. 1947, section] 94-101-8 and Kentucky 419.070.

Compiler's Comments
1991 Amendment: Throughout section substituted "petitioner" for "party"; at end of (1)(a)(ii) deleted "if the detention is by legal process, a copy thereof must be annexed to the response"; at beginning of (1)(b) deleted "he had the party in his custody or under his power or restraint at any time prior or subsequent to the date of the writ", after "whom" inserted "the party was

transferred", after "place" inserted "of the transfer", and substituted "the reason for the transfer" for "for what cause"; and made minor changes in style.

Collateral References

Habeas Corpus *key* 681.
39 C.J.S. Habeas Corpus §§161, 162.
39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §§102, 154.

46-22-302. Appearance of petitioner.

Commission Comments

Source: Kentucky 419.080.

Compiler's Comments

1991 Amendment: In (1), at beginning, substituted "petitioner before the court as required by" for "detained person according to the command of" and after "before the" substituted "court" for "judge"; in (2) substituted "court" for "judge" and in two places substituted reference to petitioner for reference to party; and made minor changes in style.

Collateral References

Habeas Corpus *key* 685.
39 C.J.S. Habeas Corpus §§82, 157, 170, 172.
39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §§106, 159.

46-22-303. Refusal to obey writ — contempt.

Commission Comments

Source: Kentucky 419.090.

This provision gives the court wider discretion and greater flexibility in seeing that its orders are carried out.

Compiler's Comments

1991 Amendment: Made minor change in style.

Collateral References

Habeas Corpus *key* 804, 805.
39 C.J.S. Habeas Corpus §§173 through 180.
39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §174.

46-22-304. Hearing on return.

Commission Comments

Source: [R.C.M. 1947, section] 94-101-11 and Kentucky 419.110.

Compiler's Comments

1991 Amendment: At beginning, after "court", deleted "or judge"; and made minor changes in style.

Collateral References

Habeas Corpus *key* 661, et seq.
39 C.J.S. Habeas Corpus §§181 through 193.
39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §§106, 124, 158 through 162.

46-22-305. Production of evidence.

Commission Comments

Source: Kentucky 419.100.

Compiler's Comments

1991 Amendment: At end substituted "in preparation of a hearing as provided in Title 46, chapter 22" for "as in civil actions" and deleted last sentence that read: "Depositions taken in accordance with the Montana Rules of Civil Procedure may be read as evidence at the hearing on the writ".

46-22-306. Disposition of petitioner.

Compiler's Comments

1991 Amendment: In (2) substituted "prosecution" for "state"; and made minor changes in style.

Case Notes

Withdrawal of Guilty Plea Inappropriate Remedy: The defendant pleaded guilty to a sexual offense after being told he would be eligible for parole in 1 year. The prosecutor and the judge were unaware that the prison's sexual offender program was a 2-year program. Due to the length

of the program, the defendant was denied parole. The Supreme Court held that granting the writ of habeas corpus was proper because the guilty plea had been based upon a fundamental misunderstanding as to its consequences. The court also held that the lower court was correct in granting the defendant parole rather than allowing him to withdraw his plea, which would lead to further proceedings. Benjamin v. McCormick, 243 M 252, 792 P2d 7, 47 St. Rep. 887 (1990).

Return to Foreign Jurisdiction: Montana courts were not the proper forum for petitioner to obtain release where he had been concurrently sentenced in Wyoming and Montana and by reason of the judgment of the Wyoming court the warden of the Montana prison would not allow him to leave on parole unless he was taken to the Wyoming penitentiary to serve the balance of the term imposed there. Petition of Glover, 166 M 546, 539 P2d 721 (1975).

Credit for Time Served: When habeas corpus was granted to a petitioner who had served a considerable portion of his sentence and whose commitment was set aside and the petitioner was permitted to withdraw his guilty plea, the court held that 46-18-402 should be observed upon any subsequent imposition of a new sentence. Morsette v. Ellsworth, 151 M 319, 443 P2d 28 (1968).

Collateral References

Habeas Corpus *key* 526, 791, 798, 892.1, 893.

39 C.J.S. Habeas Corpus §186.

39 Am. Jur. 2d Habeas Corpus and Postconviction Remedies §§163 through 166.

46-22-307. Appeal by prosecution.

Compiler's Comments

1991 Amendment: In first sentence substituted "prosecution" for "state" and in second sentence, at end, inserted "as provided in 46-9-107"; and made minor changes in style.

Case Notes

Habeas Corpus Denial Unappealable: The Supreme Court dismissed an appeal from a denial of defendant's Writ of Habeas Corpus since under Montana law no appeal lies from such order in a proceeding criminal in nature when the issue to be determined is the freedom of the petitioner or the legality of his detention. State ex rel. Graveley v. District Court, 178 M 1, 582 P2d 775 (1978), following St. v. Booth, 134 M 235, 328 P2d 1104 (1958).

CHAPTER 23
PROBATION, PAROLE, AND CLEMENCY

Chapter Administrative Rules

Title 20, chapter 25, ARM Board of Pardons and Parole.

Chapter Case Notes

Supervised Release Program Not Inclusive of Furloughs — Escape Not Chargeable to Furloughed Convict: Roberts was released from the state prison into the parole-related furlough program rather than the supervised release program and did not meet the requirements of the administrative rules governing the supervised release program. A part of Roberts' parole included a 10-day furlough to allow him to find housing and employment. When he failed to meet his parole officer on a specified date, he was charged with felony escape. Roberts moved to dismiss the charge. An escape charge can be maintained only against a person subject to official detention, which is defined in part as supervision under a supervised release program. The term "supervised release program" clearly and unambiguously refers to the program codified in part 4 (now repealed) and not to the furlough associated with parole proceedings under 46-23-215. Because Roberts was not being supervised under a supervised release program, the District Court erred in concluding that Roberts could be prosecuted for escape and in denying his motion to dismiss the escape charge. On appeal, the Supreme Court reversed and remanded with instructions to enter an order of dismissal. St. v. Roberts, 275 M 365, 912 P2d 812, 53 St. Rep. 181 (1996).

Prisoner on Furlough — Federal Search and Seizure Law: Plaintiff was released from prison on an educational furlough to attend the University of Montana (now University of Montana-Missoula). A deputy received a tip that plaintiff had drugs in his dorm room. The deputy called plaintiff's parole officer who determined that plaintiff had not signed a consent to be searched when furloughed. No search warrant was procured, but the search was conducted and drugs were seized. The evidence was suppressed and plaintiff's furlough continued. Plaintiff then brought this action seeking damages for violation of his civil rights. The federal courts have distinguished between a private citizen and a convict who is paroled prior to the expiration of his term, stating that a parolee does not have the expectations of privacy (see Art. II, sec. 10, Mont.

Const.) enjoyed by other citizens. One of these restrictions is that the parolee and his home are subject to search by the parole officer when he reasonably believes that such search is necessary in the performance of his duties. Montana law may differ (see St. v. Fogarty, 187 M 393, 610 P2d 140 (1980)), but this case charged violations of the United States Constitution, and under it the search was not constitutionally infirm. Quigg v. France, 502 F. Supp. 516, 37 St. Rep. 2113 (D.C. Mont. 1980).

Escape From Prison Furlough Program — Misdemeanor: A prisoner furlough program does not fit within the definition of "prison". Where defendants walked away from such programs, no risk of violence was involved and they could be convicted only of misdemeanor escape. St. v. Whiteshield, 185 M 208, 605 P2d 189 (1980).

Chapter Attorney General's Opinions

Application Based Solely on Medical Grounds Acceptable: An eligible inmate may present to the Board of Pardons (now Board of Pardons and Parole) an application for a furlough program that is based solely on medical treatment grounds. Discretion to approve or deny the application is vested in the Board. 42 A.G. Op. 57 (1988).

Prisoner Furlough Program — Short-Term Furlough: A furlough may be granted for a specific limited period of time after which the prisoner may be required to return to prison unless he applies for and is granted a new furlough. 37 A.G. Op. 114 (1978). See 37 A.G. Op. 82 (1977).

Board of Pardons (Now Board of Pardons and Parole): The responsibilities and powers of the Board of Pardons (now Board of Pardons and Parole) are distinguished from those of the Department of Institutions (now Department of Corrections) in administering the prisoner furlough program. 37 A.G. Op. 82 (1977).

Notification Required: The Board of Pardons (now Board of Pardons and Parole) shall solicit information about pertinent case material from officials and individuals in the sentencing community before approving or denying a furlough application. It is the responsibility of the Department of Institutions (now Department of Corrections) to notify and to obtain approval of law enforcement agencies to which the furloughee is released. 37 A.G. Op. 82 (1977).

Prisoner Furlough — Application: Unless the Department of Institutions (now Department of Corrections) has adopted reasonable rules prohibiting application by certain prisoners until a certain state of incarceration, a prisoner may make application for furlough any time during incarceration. No rule may prevent a prisoner from applying for furlough at any time after he has served one-half the time required to be considered for parole [and, by 1981 amendment, not more than 15 months remain before he is eligible for parole]. 37 A.G. Op. 82 (1977).

Review of Furlough Plans: The Department of Institutions (now Department of Corrections), not the Board of Pardons (now Board of Pardons and Parole), may make periodic review and revision of furlough plans a condition of individual furlough agreements. 37 A.G. Op. 82 (1977).

Applicant for Work Furlough Responsible for Locating Supervising Agency: Under former law, the applicant was responsible for locating an agency which would supervise his release on work furlough. 36 A.G. Op. 19 (1975).

Final Authority in Department: Under former law although the Board of Pardons (now Board of Pardons and Parole) had the authority to release prisoners on furlough, the Department of Institutions (now Department of Corrections) had final authority to approve or disapprove applications of prisoners for release on work furlough. 36 A.G. Op. 19 (1975).

When Application May Be Made for Work Furlough: A prisoner may apply for participation in the work furlough program at any time but he is not eligible for release on work furlough until he has completed half of the time required for eligibility for parole. 36 A.G. Op. 19 (1975).

Chapter Law Review Articles

Parole Eligibility and Conditions, Everly & Mullowney, 42 Mont. L. Rev. 403 (1981).

Part 1
General Provisions — Board of Pardons and Parole

46-23-102. Cases of juveniles excluded.

Compiler's Comments

Section Not Codified: Section 95-3309, R.C.M. 1947, was not codified in the MCA because it is redundant with 46-23-102. This section has not been repealed and is still valid law. Citation may be made to sec. 14, Ch. 333, L. 1975.

46-23-103. Definitions.

Compiler's Comments

2003 Amendment: Chapter 559 deleted definition of initial appearance that read: ""Initial appearance" means the prisoner's first appearance before the board during the prisoner's

current term of incarceration"; inserted definitions of hearing panel and victim; in definition of parole in two places substituted "hearing panel" for "board"; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 13, Ch. 559, L. 2003, was a saving clause.

Severability: Section 14, Ch. 559, L. 2003, was a severability clause.

1999 Amendment: Chapter 450 inserted definition of initial appearance; and made minor changes in style. Amendment effective April 22, 1999.

1995 Amendment: Chapter 546 in definition of Board substituted "board of pardons and parole" for "board of pardons"; in definition of Department substituted "department of corrections provided for in 2-15-2301" for "department of corrections and human services provided for in Title 2, chapter 15, part 23"; in definition of parole substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

46-23-104. Board of pardons and parole.

Compiler's Comments

2003 Amendment: Chapter 559 in (2) after "monthly" inserted "at a place determined by the board", after "times" inserted "and places", and at end after "necessary" deleted "at the state prison"; deleted former (4) and (5) that read: "(4) The board may designate one of its members, one of its staff members, or any other adult correctional releasing authority to conduct interviews relative to:

(a) parole eligibility;

(b) plans for release on parole; or

(c) revocation hearings.

(5) If the offense was committed prior to March 20, 1989, the board may not designate one of its staff members or any other adult correctional releasing authority to preside over an initial appearance or hearing under 46-23-202, and the initial appearance and hearing must be before at least one member of the board"; inserted (4) requiring board to appoint hearing panels to conduct parole hearings, requiring presiding officer to convene panel of three members to rehear case if two members of panel are unable to reach unanimous decision, and granting panels authority and power of board to deny, grant, or revoke parole; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 13, Ch. 559, L. 2003, was a saving clause.

Severability: Section 14, Ch. 559, L. 2003, was a severability clause.

2001 Amendment: Chapter 425 inserted (5) requiring initial appearance and hearing before at least one member of board if offense committed prior to March 20, 1989. Amendment effective April 30, 2001.

1995 Amendment: Chapter 546 in (1) substituted "board of pardons and parole" for "board of pardons"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: In (2) substituted "monthly, and at such other times as the board considers necessary" for "at least twice each month".

1981 Amendment: Inserted (4) authorizing interviews on parole eligibility, release plans, and revocation.

Administrative Rules

ARM 20.25.101 Organization of the Board.

Case Notes

Improper Delegation of Hearing Responsibility to Parole Board Member — Right to Hearing Denied Absent Opportunity to Appear in Person Before Board: Haney sought immediate parole and release from the state prison on grounds that he was improperly denied parole after being allowed only a brief appearance before a hearings officer rather than the full Board of Pardons and Parole. The state contended that there is no statutory requirement that Haney be allowed a personal appearance before a majority of the Board and that Haney's procedural rights were satisfied by the interview conducted by the hearings officer. The Supreme Court disagreed with the state's position. The language of 46-23-202 clearly requires that before consideration of a prisoner's application for parole, the Board must conduct a hearing at which statements from

interested persons can be considered, and 46-23-202 clearly requires both a hearing and an interview of the prisoner. This section authorizes only delegation of the interview to a hearings officer, but the fact that the interviews may relate to parole eligibility does not eliminate the separate requirement in 46-23-202 for a hearing conducted by the Board. Thus, Haney was denied his statutory right to a hearing before the Board when the Board denied his parole without an opportunity to personally appear before the Board and when the hearing responsibility was delegated to the hearings officer. Although the Supreme Court declined to grant Haney his immediate freedom, the case was remanded to the Board for reconsideration of Haney's parole application after providing him with an opportunity to appear in person and present witnesses on his behalf. (See also 2001 amendments requiring an initial appearance and hearing before at least one member of the Board if the offense was committed prior to March 20, 1989, and 2003 amendment.) Haney v. Mahoney, 2001 MT 201, 306 M 288, 32 P3d 1254 (2001).

Requirement That Parole Board Member With Knowledge of Native American Affairs Participate in Proceedings Regarding Native Americans: George, a Native American, contended that he was entitled to have the member of the Board of Pardons and Parole with knowledge in Native American affairs participate in his parole review. The state contended otherwise, pursuant to a plain reading of 2-15-2302, and asserted that had the Legislature intended to require participation by the particular Board member with knowledge in Native American affairs, it could have stated so directly or at least have required that the member with that knowledge be appointed as a regular Board member. The Supreme Court agreed with George. Cognizant of the role of the judge to examine the substance of statutes without inserting what has been omitted or omitting what has been inserted, the court agreed with the state that at least at first blush, 2-15-2302 does not appear to require that the member of the Board of Pardons and Parole with knowledge in Native American affairs participate in parole applications by Native Americans. However, the court could think of no other plausible reason for requiring such a member on the Board, so the court ruled that the parole Board member with knowledge in Native American affairs is required to participate in parole applications by Native Americans and remanded George's case for de novo review with the full participation by that Board member. George v. Bd. of Pardons, 2001 MT 163, 306 M 115, 30 P3d 1065 (2001).

Due Process Rights of Inmate Regarding Preparole Interview — Presence of Sufficient Number of Board of Pardons and Parole Members Required: Under 46-23-107 (now repealed), decisions regarding an inmate's parole are to be made by a majority vote of the members of the Board of Pardons and Parole. As stated in Sage v. Gamble, 279 M 459, 929 P2d 822 (1996), to deny an inmate the opportunity to appear before those who will personally decide the merits of the parole application implicates the inmate's due process rights. In this case, only one member of the Board was present at West's parole hearing. West contended that he had a right to appear before the full Board and that a hearing before only one member violated his due process rights. The state argued that pursuant to the unpublished opinion of Radford v. Mahoney, No. 98-150 (July 1998) (unpublished), not all Board members are required to be present for the personal interview and that this section allows the Board to delegate the responsibility for parole eligibility interviews to one of its members. The state contended that having only one Board member present was permissible because the full Board ultimately participated in the decision to deny West' parole. The Supreme Court was unpersuaded by the state's argument, noting that the copy of the case disposition attached to West's habeas corpus petition was signed by only one Board member. The court found its order in Radford inconsistent with the Sage decision, and therefore unpersuasive. West's due process rights were no less implicated because West had the right to appear before one Board member when a majority vote of the Board was required for a decision. The court remanded to the Board with instructions to provide West with an opportunity to appear before a sufficient number of Board members so that those who decide his case will have done so based on a personal interview. (See 2001 and 2003 amendments.) West v. Mahoney, 2001 MT 82, 305 M 117, 22 P3d 201 (2001).

Prehearing Interview Not Substitute for Constitutional Right to Personal Appearance Before Parole Board: The Board of Pardons (now Board of Pardons and Parole) contended that under this section, its personal interview responsibility could be delegated to an appointed hearings officer, precluding the need for a parole applicant to appear personally before the Board. The Supreme Court disagreed, noting a parole applicant's due process right to appear before those entrusted with the subjective responsibility of passing judgment on the application. Therefore, under this section, the Board may designate one of its members, one of its staff members, or any other adult correctional releasing authority to conduct a prehearing interview with an inmate relative to parole eligibility to assist the Board and expedite the hearing process. However, the prehearing interview is not a substitute for the applicant's constitutional right to personally

appear before the Board. (See 2001 amendment.) Sage v. Gamble, 279 M 459, 929 P2d 822, 53 St. Rep. 1234 (1996).

46-23-106. Information from courts to board.

Commission Comments

Source: [R.C.M. 1947, section] 94-7833.

No change.

Compiler's Comments

1995 Amendment: Chapter 546 substituted "board of pardons and parole" for "board of pardons"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

46-23-109. Parole hearings and administrative reviews — telephone — videoconference.

Compiler's Comments

2003 Amendment: Chapter 559 at beginning after "board" inserted "and the board's hearing panel" and after "hearing" deleted "or revocation hearing"; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 13, Ch. 559, L. 2003, was a saving clause.

Severability: Section 14, Ch. 559, L. 2003, was a severability clause.

Effective Date: Section 8, Ch. 450, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 22, 1999.

Case Notes

Requirement That Parole Board Member With Knowledge of Native American Affairs Participate in Proceedings Regarding Native Americans: George, a Native American, contended that he was entitled to have the member of the Board of Pardons and Parole with knowledge in Native American affairs participate in his parole review. The state contended otherwise, pursuant to a plain reading of 2-15-2302, and asserted that had the Legislature intended to require participation by the particular Board member with knowledge in Native American affairs, it could have stated so directly or at least have required that the member with that knowledge be appointed as a regular Board member. The Supreme Court agreed with George. Cognizant of the role of the judge to examine the substance of statutes without inserting what has been omitted or omitting what has been inserted, the court agreed with the state that at least at first blush, 2-15-2302 does not appear to require that the member of the Board of Pardons and Parole with knowledge in Native American affairs participate in parole applications by Native Americans. However, the court could think of no other plausible reason for requiring such a member on the Board, so the court ruled that the parole Board member with knowledge in Native American affairs is required to participate in parole applications by Native Americans and remanded George's case for de novo review with the full participation by that Board member. George v. Bd. of Pardons, 2001 MT 163, 306 M 115, 30 P3d 1065 (2001).

46-23-110. Records — dissemination.

Compiler's Comments

Effective Date: Section 8, Ch. 450, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 22, 1999.

Administrative Rules

ARM 20.25.401 Release hearing.

Part 2
Granting of Parole

46-23-201. Prisoners eligible for nonmedical parole.

Compiler's Comments

2003 Amendment: Chapter 559 in (1) near beginning substituted reference to subsection (5) for reference to subsection (4) and after "prison" substituted "or the state hospital or any person who is sentenced to the state prison and confined in a prerelease center" for "except persons under sentence of death and persons serving sentences imposed under 46-18-202(2) or 46-18-219"; inserted (2) prohibiting the parole of persons under death sentence, persons placed by department in state prison for assessment or sanctioning, and persons serving sentences imposed under 46-18-202(2) or 46-18-219; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 13, Ch. 559, L. 2003, was a saving clause.

Severability: Section 14, Ch. 559, L. 2003, was a severability clause.

1999 Amendment: Chapter 491 in (1) near middle substituted "a state prison" for "the Montana state prison or the women's prison". Amendment effective April 27, 1999.

1997 Amendment: Chapter 189 in (1), after "women's", substituted "prison" for "correctional system".

1995 Amendments — Composite Section: Chapter 372 in (2), near middle after "at least", substituted "one-fourth" for "one-half" and at end deleted "less the good time allowance provided for in 53-30-105. Except as provided in subsection (3), a prisoner designated as a nondangerous offender under 46-18-404 may be paroled after the prisoner has served one-quarter of the prisoner's full term, less the good time allowance provided for in 53-30-105. Any prisoner serving a time sentence may be paroled after the prisoner has served 17 ½ years of the sentence"; deleted former (3) that read: "(3) A prisoner serving a time sentence under 45-9-109 may not be paroled until the prisoner has served at least one-half of the full term, less the good time allowance provided for in 53-30-105"; in (3), at end after "30 years", deleted "less the good time allowance provided for in 53-30-105"; deleted (6) that read: "(6) Whenever the department of corrections and human services certifies to the board that the population at either the male or female correctional facility has exceeded its designed capacity for 30 consecutive days, the board shall consider the respective male or female prisoners under the jurisdiction of the department eligible for parole 120 days prior to the eligibility dates provided for in subsections (2) through (4)"; deleted (7) that read: "(7) Regardless of length of sentence, if the conditions of parole eligibility are met within the initial 12 months of incarceration, the provisions of subsection (6) do not apply"; and adjusted subsection references. Amendment effective April 12, 1995.

Chapter 482 in version effective July 1, 1997, in (1), near middle after "46-18-202(2)", inserted "or 46-18-219".

Chapter 546 in (1) substituted "women's correctional system" for "women's correctional center"; and in (6) substituted "department of corrections" for "department of corrections and human services". Amendment effective July 1, 1995. The amendment in subsection (6) was rendered void by the amendment in Ch. 372.

Coordination Instruction — Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 46-23-201, enacted as sec. 17 of Senate Bill No. 66, are effective July 1, 1997.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 10 in (1) substituted reference to the Women's Correctional Center for reference to the Women's Correction Center; in (7), after "incarceration", deleted "at Montana state prison"; and made minor changes in style.

1991 Amendments — Instructions to Code Commissioner: Chapter 248 in (1), near beginning before "parole", inserted "nonmedical"; and in (2), (4), and (5), near beginning, inserted "under this section".

The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 315 in (6), near beginning, substituted "either the male or female correctional facility has exceeded" for "the Montana state prison exceeds", near middle, after "capacity", deleted "of 744 by 96 inmates or that the population at the women's correction center exceeds its design capacity of 35 inmates and that the prison or the center has exceeded its capacity for a period of more than", after "30" inserted "consecutive", and near end, after "consider", substituted "the respective male or female inmates under the jurisdiction of the department" for "convicts in the institution in which the design capacity has been exceeded"; and made minor changes in style.

Chapter 519 in (2), after "except", substituted "as provided in subsection (3)" for "that"; inserted (3) requiring a person convicted of criminal sale of dangerous drugs on or near school

property to serve at least one-half of full sentence less good time allowance prior to parole; in (6) and (7) changed internal reference; and made minor changes in style.

1989 Amendment: In (1), near beginning, substituted "Subject to the restrictions contained in subsections (2) through (4), the board may" for "Subject to the following restrictions, the board shall"; in (4), in two places, substituted "may" for "shall"; changed internal references; and made minor changes in outline form, style, and grammar. Amendment effective March 20, 1989.

1985 Amendment — Effective Date: In (3) increased design capacity of prison from 545 to 744 and reduced inmates in excess of capacity from 215 to 96.

Section 3(2), Ch. 451, L. 1985, provided that sec. 1 (1985 amendment to this section) is effective 30 days after the Governor declares by executive order that the prison housing units funded in HB 833 of the 48th Legislature are occupied.

1983 Amendment: In first paragraph of (1), inserted "or the women's correction center" and substituted "the prisoner" for "himself" near the end; and inserted (3), making convicts eligible for parole 120 days prior to the date in subsection (1) if the institution's inmate numbers exceed design capacity, and (4), providing that subsection (3) does not apply if an inmate is eligible for parole during the first 12 months at the prison, which were scheduled to terminate July 1, 1985, under sec. 2, Ch. 235, L. 1983. Section 2, Ch. 451, L. 1985, effective on passage and approval [approved April 12, 1985], repealed sec. 2, Ch. 235, L. 1983, which would have terminated (3) and (4).

Administrative Rules

ARM 20.25.301 Minimum time — periodic evaluation.

Case Notes

Dangerous Offender Designation as Part of Life Sentence Without Parole — No Error: Gratzer was sentenced to life without parole and contended that the sentencing court erred by also designating him a dangerous offender for all purposes. Gratzer argued that the designation cannot be applied to a life sentence because the only purpose for a dangerous offender designation is to affect a prisoner's parole eligibility. The Supreme Court held that the designation in this case had no effect on the time that Gratzer had to serve before becoming parole eligible because Gratzer's life sentence and ineligibility for parole precluded Gratzer from ever becoming eligible for parole, so no rights were violated by designating Gratzer as a dangerous offender for all purposes. Gratzer v. Mahoney, 2006 MT 282, 334 M 297, 150 P3d 343 (2006).

Life Sentence Without Parole Not Violative of Constitutional Rights: Gratzer asserted that the sentencing court exceeded its authority and violated the constitutional right to habeas corpus when the court sentenced Gratzer to life without the possibility of parole. Gratzer's argument was that use of the word "term" implied that there was a distinction between sentences imposed for a specific time and indeterminate life sentences and that the statutory sentencing scheme does not authorize a court to remove a prisoner's eligibility for parole if the prisoner is serving a life sentence. The Supreme Court declined to recognize the distinction. "Term" is used throughout the criminal code to refer to the duration of a sentence without any indication that it is meant to refer exclusively to determinate time sentences, and the language in 46-18-202 that allows a court to impose the parole eligibility exception applies equally to time sentences and life sentences. A sentence of imprisonment in the state prison for a term exceeding 1 year refers to all felonies, including those punishable by a life sentence, rather than a cryptic means of limiting a sentencing court's ability to restrict the parole eligibility of prisoners serving life sentences. The District Court did not violate Gratzer's rights, and the sentence of life without parole was affirmed. Gratzer v. Mahoney, 2006 MT 282, 334 M 297, 150 P3d 343 (2006).

Repeal of Dangerous Offender Statute Retroactively Applied: In 1995, the Legislature repealed 46-18-404, which required sentencing judges to determine whether an offender was dangerous or nondangerous for parole eligibility purposes. Parker was designated a dangerous offender for parole eligibility when initially sentenced in 1986, and when the District Court resentenced Parker in 1999 after his suspended sentence was revoked, he was again designated a dangerous offender, even though 46-18-404 had been repealed. The state conceded that the District Court had no authority to impose a dangerous offender designation in 1999 when the designation was repealed in 1995, but contended that the error was harmless because the District Court had the authority to provide the same result by restricting parole eligibility pursuant to 46-18-202. The Supreme Court disagreed. The proper remedy was to strike the portion of the sentence that was illegal and amend the judgment to that limited extent. Thus, the portion of the sentence designating Parker as a dangerous offender was vacated. St. v. Parker, 2002 MT 162, 310 M 418, 51 P3d 484 (2002).

Requirement That Parole Board Member With Knowledge of Native American Affairs Participate in Proceedings Regarding Native Americans: George, a Native American, contended that he was entitled to have the member of the Board of Pardons and Parole with knowledge in Native American affairs participate in his parole review. The state contended otherwise, pursuant to a plain reading of 2-15-2302, and asserted that had the Legislature intended to require participation by the particular Board member with knowledge in Native American affairs, it could have stated so directly or at least have required that the member with that knowledge be appointed as a regular Board member. The Supreme Court agreed with George. Cognizant of the role of the judge to examine the substance of statutes without inserting what has been omitted or omitting what has been inserted, the court agreed with the state that at least at first blush, 2-15-2302 does not appear to require that the member of the Board of Pardons and Parole with knowledge in Native American affairs participate in parole applications by Native Americans. However, the court could think of no other plausible reason for requiring such a member on the Board, so the court ruled that the parole Board member with knowledge in Native American affairs is required to participate in parole applications by Native Americans and remanded George's case for de novo review with the full participation by that Board member. George v. Bd. of Pardons, 2001 MT 163, 306 M 115, 30 P3d 1065 (2001).

No Liberty Interest in Good Time Credits for Probationers — Credit for Time Served on Probation Properly Denied: McDermott pleaded guilty in early 1995 to issuing a bad check, felony common scheme, and received a 6-year deferred sentence and was placed on probation. After nearly 4 years on probation, McDermott had failed to comply with the conditions of probation, so the District Court revoked the deferred sentence and sentenced McDermott to 5 years at the state prison, specifying that no credit was allowed for time served while on probation or for good time. McDermott contended that he was improperly denied good time credit while on probation and that 53-30-105 (repealed 1995) violated equal protection guarantees because it granted good time credit for parolees but not probationers. The Supreme Court disagreed. Although it was held in Orozco v. Day, 281 M 341, 934 P2d 1009 (1997), that 53-30-105 created a liberty interest in good time credit for inmates, the court concluded that a similar liberty interest is not created for probationers. Because probationers are not statutorily entitled to good time credits and because the terms of probation are part of the sentence, the state's decision not to award good time credits during probation did not create an atypical and significant hardship or inevitably affect the duration of McDermott's sentence. McDermott had no protected liberty interest and was denied no process to which he was constitutionally entitled. Further, McDermott's argument that 53-30-105 violated equal protection by treating probationers differently than parolees also failed. Applying the rational basis test, the court concluded that the state has a legitimate interest in the disparate treatment of parolees and probationers regarding eligibility for sentence-reducing credits, including jurisdictional differences as well as penological interests. McDermott was properly credited with good time for the time that he was incarcerated and was properly denied credit for time spent on probation against his subsequent sentence. Thus, McDermott showed no constitutional basis for the claim that he was being illegally restrained, so his petitions for writs of habeas corpus and mandate were denied. McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001), followed in George v. Bd. of Pardons, 2001 MT 163, 306 M 115, 30 P3d 1065 (2001). See also St. v. Bruns, 213 M 372, 691 P2d 817 (1984), and St. v. Nelson, 275 M 86, 910 P2d 247 (1996).

Authority to Condition Parole on Participation in Sexual Offender Program — Parole Considered Privilege, Not Right: McDermott pleaded guilty to four counts of assault and one count of bail-jumping in exchange for dismissal of four counts of incest and was sentenced to 30 years in prison. Because of the violent nature of the assaults and the fact that they were committed against young victims, the sentencing court found that McDermott was a substantial danger to society and designated him a dangerous offender for purposes of parole. When he began serving his sentence, an initial needs assessment concluded that he suffered from severe sexual problems and recommended participation in the prison sexual offender program (SOP). McDermott chose not to participate in the SOP, and the Board of Pardons and Parole later considered that fact during evaluations for placement in a prerelease center and for purposes of parole and inmate classification. The Board recommended that McDermott participate in the SOP to enhance success on parole. McDermott again declined to participate and, as a result, four points were added to his classification status for noncompliance with the Board's recommendation. McDermott then petitioned the Supreme Court for a writ of habeas corpus ordering his immediate release and rescinding the four points. McDermott argued that the Board did not have the authority to consider his lack of participation in the SOP as a basis for denying his early release on parole, citing St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d

620 (1999), and St. v. Field, 2000 MT 268, 302 M 62, 11 P3d 1203 (2000). The Supreme Court distinguished both Ommundson and Field, noting that under Montana and federal precedents, parole is a privilege, not a right. Because parole is granted as a matter of grace rather than right, the state may offer that grace under and subject to conditions that are considered most conducive to accomplish the desired purpose. Rather than restricting the Board's authority to set conditions precedent to parole, this section obligates the Board to ensure that no prisoner is released on parole who cannot meet the statutory criteria, and the Board may also consider factors that may not be considered by the District Court at trial and sentencing and evidence of offenses that were charged in dismissed counts. Even though McDermott was not a convicted sex offender, he did have four counts of incest dismissed and was identified as having severe sexual problems. Thus, his completion or lack of completion of the SOP was pertinent to his ability to be released without detriment to the community and to fulfill the obligations of a law-abiding citizen. The Board was well within its authority to consider McDermott's failure to enroll in the SOP when his petition for early release was denied. McDermott's petition for a writ of habeas corpus was denied. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001). See also Christopher v. U.S. Bd. of Pardons, 589 F2d 924 (7th Cir. 1978), and Robinson v. Hadden, 723 F2d 59 (10th Cir. 1983).

Due Process Standard Applicable to Parole Release Determination: Having determined that McDermott had a protected liberty interest in parole, the Supreme Court set out to determine whether McDermott's due process rights were protected when his application for parole was denied. There is no absolute standard for what constitutes due process. The requirements are flexible so that they may be adapted to meet the procedural protections demanded by a particular situation. The process due in any given case varies according to the factual circumstances, the nature of the interests at stake, and the risk of making an erroneous decision. A parole release determination is not subject to all the due process protections required to convict or confine, nor must a parole release determination provide the same protections that are required in a parole revocation hearing, which presents a much greater risk of error than a parole release determination because incarceration, whether as a result of conviction or parole revocation, involves a loss of liberty. On the other hand, denial of parole involves the loss of the mere anticipation of freedom to which a lawfully convicted inmate is not otherwise entitled. Thus, in the case of a prisoner seeking parole, due process is satisfied when the prisoner is, at a minimum, provided with an opportunity to be heard and a written statement explaining why parole was denied. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001), following Greenholtz v. Inmates of Nebr. Penal & Correction Complex, 442 US 1 (1979), and Sage v. Gamble, 279 M 459, 929 P2d 822 (1996).

Liberty Interest in Parole by Inmates Who Committed Offenses Prior to 1989 — Due Process Consideration: As a general rule, inmates have no liberty interest in parole. However, prior to amendment in 1989, this section required the Board of Pardons (now Board of Pardons and Parole) to release on parole any prison inmate when the Board determined that there was a reasonable probability that the prisoner could be released without detriment to the prisoner or the community. The U.S. Supreme Court subsequently held in Bd. of Pardons v. Allen, 482 US 369 (1987), that this mandatory statutory language created a liberty interest in parole that was protected by the federal constitutional due process clause. Although the mandatory language was removed in 1989, the Montana Supreme Court later held in Worden v. Bd. of Pardons & Parole, 1998 MT 168, 289 M 459, 962 P2d 1157 (1998), that inmates who committed offenses prior to 1989 continue to enjoy a federally protected liberty interest in parole. In the present case, McDermott committed his offenses in 1985 and 1986, so pursuant to Allen and Worden, his liberty interest in parole could not be denied without due process. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001).

Due Process Rights of Inmate Regarding Preparole Interview — Presence of Sufficient Number of Board of Pardons and Parole Members Required: Under 46-23-107 (now repealed), decisions regarding an inmate's parole are to be made by a majority vote of the members of the Board of Pardons and Parole. As stated in Sage v. Gamble, 279 M 459, 929 P2d 822 (1996), to deny an inmate the opportunity to appear before those who will personally decide the merits of the parole application implicates the inmate's due process rights. In this case, only one member of the Board was present at West's parole hearing. West contended that he had a right to appear before the full Board and that a hearing before only one member violated his due process rights. The state argued that pursuant to the unpublished opinion of Radford v. Mahoney, No. 98-150 (July 1998) (unpublished), not all Board members are required to be present for the personal interview and that 46-23-104 allows the Board to delegate the responsibility for parole eligibility interviews to one of its members. The state contended that having only one Board member

present was permissible because the full Board ultimately participated in the decision to deny West' parole. The Supreme Court was unpersuaded by the state's argument, noting that the copy of the case disposition attached to West's habeas corpus petition was signed by only one Board member. The court found its order in Radford inconsistent with the Sage decision, and therefore unpersuasive. West's due process rights were no less implicated because West had the right to appear before one Board member when a majority vote of the Board was required for a decision. The court remanded to the Board with instructions to provide West with an opportunity to appear before a sufficient number of Board members so that those who decide his case will have done so based on a personal interview. West v. Mahoney, 2001 MT 82, 305 M 117, 22 P3d 201 (2001).

One-Quarter Time Provision Subject to Seventeen and One-Half-Year Provision: Under the 1978 version of this section, which provided that a nondangerous offender was eligible for parole after serving either one-quarter of the full term less good time or after serving 17 ½ years of the offender's full term, the Supreme Court held that the two conflicting conditions in the section must be read as establishing a general one-quarter less good time rule that is subject to the 17 ½-year outer limit on parole eligibility. Under that interpretation, an offender, who had already served over 20 years, became eligible for parole after serving 17 ½ years of his sentence. Case v. Mahoney, 2000 MT 324, 303 M 8, 15 P3d 884, 57 St. Rep. 1367 (2000).

Personal Appearance Before Parole Board — Subject Matter Jurisdiction to Determine Due Process Violation: Sage maintained that he had a right to due process, based on a liberty interest in parole pursuant to this section, that was violated by the Board of Pardons (now Board of Pardons and Parole) when it did not allow him to personally appear before the Board at a parole hearing. Further, Sage maintained that the District Court had subject matter jurisdiction to decide by writ of habeas corpus whether his due process rights had been violated. The Board asserted that Sage's alleged due process violations fell outside the parameters of habeas corpus relief and that the District Court did not have subject matter jurisdiction to consider the issue. The Supreme Court held that the alleged deprivation of Sage's right to due process was directly related to whether the cause of his continued incarceration was legal, thus falling within the parameters of 46-22-101, and that the District Court therefore did have subject matter jurisdiction to determine whether the right to due process was violated. Pursuant to Greenholtz v. Inmates of Nebr. Penal & Correctional Complex, 442 US 1 (1979), the opportunity of a parole applicant to appear before those entrusted with the subjective responsibility of passing judgment on the application is an important element of the due process to which the applicant is entitled. Based on the plain language of 46-23-202 and ARM 20.25.401, an inmate who is eligible for parole is clearly provided the right to personally appear at an interview "before the parole board" prior to the Board's decision to grant or deny the application for parole. Sage v. Gamble, 279 M 459, 929 P2d 822, 53 St. Rep. 1234 (1996).

Serving of One-Half Sentence Required Under 1978 Conviction: Burglary defendant argued that the District Court erred in 1978 when it failed to designate him as a nondangerous offender (see 1995 repeal of 46-18-404) for parole purposes, requiring him to serve one-half of his sentence, because he was never charged or sentenced as a dangerous offender. However, section 95-2206.16, R.C.M. 1947, the statute in effect at the time of sentencing, when read together with 38 A.G. Op. 13 (1979), an Attorney General opinion interpreting that section, clearly requires defendant to serve one-half of his sentence before he is eligible for parole because he was not expressly designated a nondangerous offender, subsequent recodification and amendment of the section notwithstanding. Rose v. McCormick, 253 M 347, 834 P2d 1377, 49 St. Rep. 427 (1992).

Standing to Challenge Constitutionality of Weapon Enhancement and Dangerous Offender Statutes: To challenge the constitutionality of a criminal statute or procedure, the defendant must show a direct personal injury resulting from application of the law in question. The Supreme Court held that a defendant had standing to challenge both Montana's weapon enhancement statute and dangerous offender statute (see 1995 repeal of 46-18-404) because he faced direct injury to his liberty interests through application of those laws. St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990), followed, with regard to standing to challenge criminal restitution statutes, in St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004).

Right of One Serving Consecutive Sentences to Annual Parole Review: This section clearly indicates that a person serving consecutive or concurrent multiple sentences is still eligible for parole and that if a second offense is committed while he is incarcerated, he is, under administrative rule, still entitled to annual review of eligibility for parole. Kelly v. Risley, 865 F2d 201 (9th Cir. 1989).

Liberty Interest in Parole: This section creates a protected liberty interest in parole because it uses the mandatory language that the Board "shall" parole a person under certain

circumstances. Kelly v. Risley, 865 F2d 201 (9th Cir. 1989); Bd. of Pardons v. Allen, 107 S Ct 2415 (1987), affirming Allen v. Bd. of Pardons, 792 F2d 1404 (9th Cir. 1986).

Discretion to Grant Parole — Due Process: In Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 47 U.S.L.W. 4581 (U.S. May 29, 1979) (No. 78-201), the U.S. Supreme Court held that unless a parole statute creates a legitimate entitlement to parole there is no requirement of due process protection. A mere hope is insufficient. In Montana, under 46-23-201, whether or not parole is granted is dependent entirely on the discretion of the parole board (now Board of Pardons and Parole). Campbell v. Bd. of Pardons, 470 F. Supp. 1301 (D.C. Mont. 1979).

Erroneous Parole Revocation: Given the issue of whether a parolee who, after a full revocation hearing, had been found by the Board of Pardons (now Board of Pardons and Parole) not to have violated his parole could nevertheless be confined pending submission of an acceptable new parole plan, the Supreme Court held that the parolee must be released within 30 days from the decision and that the board was under a duty to develop and approve a parole plan within that period. Lopez v. Crist, 176 M 352, 578 P2d 312 (1978).

Credit for Time Served: Section 46-18-402 allows the sentencing authority to deny credit for good time earned while serving a prior modified or invalid sentence but does not authorize the sentencing authority to provide that credit for time previously served should not be considered in determining eligibility for parole. St. v. Zachmeier, 153 M 64, 453 P2d 783 (1969).

Attorney General's Opinions

Eligibility for Accelerated Parole-Release — Institutional Residence During Certification Required: A convict is entitled to accelerated parole-release eligibility under subsection (3) of this section only if he or she is actually residing within the Montana State Prison or the Women's Correction Center (now women's prison) during the effective period of certification. 42 A.G. Op. 72 (1988).

Prisoner Receives New Sentence: If a prisoner who has received a new consecutive sentence under 46-18-401(5) is paroled, the remaining time of his new and original sentences thereafter run concurrently. 38 A.G. Op. 13 (1979).

Section 46-23-217 Impliedly Repealed: Section 46-23-217 was impliedly repealed by the enactment of 46-18-401(5). A sentence imposed regarding a crime committed after July 1, 1977, by a prisoner at the state prison or on parole or furlough runs consecutively with the remainder of the prisoner's original sentence. Any crime committed on or before July 1, 1977, by a prisoner while on parole or conditional release runs concurrently with the prisoner's original sentence unless otherwise specified by the sentencing court. 38 A.G. Op. 13 (1979).

Persistent Felony Offenders: Designation of a prisoner as a "persistent felony offender" has no significance for parole eligibility with respect to sentences imposed for crimes occurring on or after July 1, 1977. However, for crimes committed between July 1, 1975, and June 30, 1977, inclusive, designated persistent felony offenders must serve one-third of their sentences before they are eligible for parole. 38 A.G. Op. 10 (1979).

Parole Eligibility: Subject to the exceptions set forth in 46-23-201, a prisoner who is sentenced to a time sentence for a crime committed on or after July 1, 1977, is ineligible for parole until he has served one-half of his full sentence, less good time, unless he has been expressly designated as a nondangerous offender (see 1995 repeal of 46-18-404) by the sentencing court. 38 A.G. Op. 10 (1979).

Nondangerous Offender: A prisoner who has been expressly designated as a nondangerous offender (see 1995 repeal of 46-18-404) is ineligible for parole until he has served one-quarter of his full sentence, less good time. 38 A.G. Op. 10 (1979).

Elimination or Delay of Parole Eligibility: A law that eliminates or delays a defendant's parole eligibility after the criminal offense has been committed is ex post facto as applied to that defendant. 38 A.G. Op. 10 (1979).

Law Review Articles

The Expectancy of Parole in Montana: A Right Entitled to Some Due Process, Trueb, 48 Mont. L. Rev. 379 (1987).

46-23-202. Initial parole hearing — conduct of hearing.

Compiler's Comments

2003 Amendment: Chapter 559 in first sentence after "possible" substituted "the department shall make the prisoner available for a hearing before a hearing panel" for "the prisoner shall make an initial appearance before the board or the board's designee as provided for in 46-23-104(4), except that if the offense was committed prior to March 20, 1989, the initial appearance must be before at least one member of the board"; in second sentence at beginning substituted "The hearing panel" for "The board" and after "all" inserted "available and"; inserted

(5) requiring hearing panel to consider written and oral statements from interested person or interested person's legal representative, allowing statement to include circumstances surrounding crime, manner of crime, and victim's opinion on parole, and allowing victim's statement to be confidential; deleted former (2) that read: "(2) Before a prisoner may be paroled, the board or its designee shall:

(a) conduct a hearing and interview the prisoner, except that if the offense was committed prior to March 20, 1989, the hearing must be before at least one member of the board. At the time of the hearing, the board or its designee must receive relevant statements from interested persons and any person may be represented by counsel. The board has the power to regulate procedures at all hearings.

(b) permit a victim to present a statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion regarding whether the prisoner should be paroled. In the board's discretion, the victim's statement may be kept confidential. The board shall consider the victim's statement, along with the information provided under subsection (1), in determining whether to grant parole"; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 13, Ch. 559, L. 2003, was a saving clause.

Severability: Section 14, Ch. 559, L. 2003, was a severability clause.

2001 Amendment: Chapter 425 in (1) at end of first sentence inserted reference to board's designee and exception clause; in (2) inserted reference to board's designee; in (2)(a) at end of first sentence inserted exception clause and near middle of second sentence inserted reference to board's designee; and made minor changes in style. Amendment effective April 30, 2001.

1999 Amendment: Chapter 450 in (1) at end of first sentence inserted "or as soon thereafter as possible, the prisoner shall make an initial appearance before the board"; and made minor changes in style. Amendment effective April 22, 1999.

1995 Amendments: Chapter 125 in (2) substituted current (2)(a) requiring Board to conduct hearing and receive relevant statements from interested persons for "interview the prisoner"; inserted (2)(b) requiring Board to receive and consider victim's statement; and made minor changes in style.

Chapter 372 in (1), near beginning after "date", deleted "or within 2 months following the date a prisoner becomes eligible pursuant to 53-30-105(5)"; and made minor changes in style. Amendment effective April 12, 1995.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

1993 Amendment: Chapter 579 in (1), new beginning, inserted "or within the 2 months following the date a prisoner becomes eligible pursuant to 53-30-105(5)"; and made minor changes in style. Amendment effective April 28, 1993.

1983 Amendment: In (1), changed Board of Pardons (now Board of Pardons and Parole) consideration from 2 months after admission and at such intervals thereafter as the board determined to 2 months prior to official parole eligibility date.

Administrative Rules

ARM 20.25.502 Form and delivery.

ARM 20.25.504 Investigation.

Case Notes

Right to Counsel at Parole Hearing — Writ of Habeas Corpus Proper Vehicle for Review of Parole Board's Denial of Legal Representation: By writ of habeas corpus, Carson contended that the Department of Corrections unconstitutionally denied him the right to legal representation at a hearing before the Board of Pardons and Parole. The state maintained that Carson was required to exhaust administrative appeals before the District Court could review the Board's denial of Carson's request for representation. The District Court concurred and denied the petition, but on appeal the Supreme Court disagreed. To require exhaustion of administrative appeals with regard to the right of representation at parole hearings would defeat the purpose for which habeas corpus exists by requiring an unlawfully held inmate to first seek relief from the very institution by which he alleges that he is being unlawfully held—a course of action not contemplated by constitutional or statutory law. Therefore, a writ of habeas corpus was the appropriate vehicle for Carson to seek review. Under this section, a person appearing before the Board has a right to counsel, and the state was unable to cite any qualifying regulation to the contrary. Thus, the Supreme Court granted Carson's petition for a writ of habeas corpus and remanded to the Department of Corrections for a new parole hearing, expeditiously scheduled, with Carson's attorney in attendance. St. v. Carson, 2002 MT 234, 311 M 485, 56 P3d 844 (2002).

Improper Delegation of Hearing Responsibility to Parole Board Member — Right to Hearing Denied Absent Opportunity to Appear in Person Before Board: Haney sought immediate parole

and release from the state prison on grounds that he was improperly denied parole after being allowed only a brief appearance before a hearings officer rather than the full Board of Pardons and Parole. The state contended that there is no statutory requirement that Haney be allowed a personal appearance before a majority of the Board and that Haney's procedural rights were satisfied by the interview conducted by the hearings officer. The Supreme Court disagreed with the state's position. The language of this section clearly requires that before consideration of a prisoner's application for parole, the Board must conduct a hearing at which statements from interested persons can be considered, and this section clearly requires both a hearing and an interview of the prisoner. Section 46-23-104 authorizes only delegation of the interview to a hearings officer, but the fact that the interviews may relate to parole eligibility does not eliminate the separate requirement in this section for a hearing conducted by the Board. Thus, Haney was denied his statutory right to a hearing before the Board when the Board denied his parole without an opportunity to personally appear before the Board and when the hearing responsibility was delegated to the hearings officer. Although the Supreme Court declined to grant Haney his immediate freedom, the case was remanded to the Board for reconsideration of Haney's parole application after providing him with an opportunity to appear in person and present witnesses on his behalf. (See 2001 amendments requiring an initial appearance and hearing before at least one member of the Board if the offense was committed prior to March 20, 1989, and 2003 amendment.) Haney v. Mahoney, 2001 MT 201, 306 M 288, 32 P3d 1254 (2001).

Authority to Condition Parole on Participation in Sexual Offender Program — Parole Considered Privilege, Not Right: McDermott pleaded guilty to four counts of assault and one count of bail-jumping in exchange for dismissal of four counts of incest and was sentenced to 30 years in prison. Because of the violent nature of the assaults and the fact that they were committed against young victims, the sentencing court found that McDermott was a substantial danger to society and designated him a dangerous offender for purposes of parole. When he began serving his sentence, an initial needs assessment concluded that he suffered from severe sexual problems and recommended participation in the prison sexual offender program (SOP). McDermott chose not to participate in the SOP, and the Board of Pardons and Parole later considered that fact during evaluations for placement in a prerelease center and for purposes of parole and inmate classification. The Board recommended that McDermott participate in the SOP to enhance success on parole. McDermott again declined to participate and, as a result, four points were added to his classification status for noncompliance with the Board's recommendation. McDermott then petitioned the Supreme Court for a writ of habeas corpus ordering his immediate release and rescinding the four points. McDermott argued that the Board did not have the authority to consider his lack of participation in the SOP as a basis for denying his early release on parole, citing St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), and St. v. Field, 2000 MT 268, 302 M 62, 11 P3d 1203 (2000). The Supreme Court distinguished both Ommundson and Field, noting that under Montana and federal precedents, parole is a privilege, not a right. Because parole is granted as a matter of grace rather than right, the state may offer that grace under and subject to conditions that are considered most conducive to accomplish the desired purpose. Rather than restricting the Board's authority to set conditions precedent to parole, 46-23-201 obligates the Board to ensure that no prisoner is released on parole who cannot meet the statutory criteria, and the Board may also consider factors that may not be considered by the District Court at trial and sentencing and evidence of offenses that were charged in dismissed counts. Even though McDermott was not a convicted sex offender, he did have four counts of incest dismissed and was identified as having severe sexual problems. Thus, his completion or lack of completion of the SOP was pertinent to his ability to be released without detriment to the community and to fulfill the obligations of a law-abiding citizen. The Board was well within its authority to consider McDermott's failure to enroll in the SOP when his petition for early release was denied. McDermott's petition for a writ of habeas corpus was denied. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001). See also Christopher v. U.S. Bd. of Pardons, 589 F2d 924 (7th Cir. 1978), and Robinson v. Hadden, 723 F2d 59 (10th Cir. 1983).

Due Process Rights of Inmate Regarding Preparole Interview — Presence of Sufficient Number of Board of Pardons and Parole Members Required: Under 46-23-107 (now repealed), decisions regarding an inmate's parole are to be made by a majority vote of the members of the Board of Pardons and Parole. As stated in Sage v. Gamble, 279 M 459, 929 P2d 822 (1996), to deny an inmate the opportunity to appear before those who will personally decide the merits of the parole application implicates the inmate's due process rights. In this case, only one member of the Board was present at West's parole hearing. West contended that he had a right to appear before the full Board and that a hearing before only one member violated his due process rights. The

state argued that pursuant to the unpublished opinion of Radford v. Mahoney, No. 98-150 (July 1998) (unpublished), not all Board members are required to be present for the personal interview and that 46-23-104 allows the Board to delegate the responsibility for parole eligibility interviews to one of its members. The state contended that having only one Board member present was permissible because the full Board ultimately participated in the decision to deny West' parole. The Supreme Court was unpersuaded by the state's argument, noting that the copy of the case disposition attached to West's habeas corpus petition was signed by only one Board member. The court found its order in Radford inconsistent with the Sage decision, and therefore unpersuasive. West's due process rights were no less implicated because West had the right to appear before one Board member when a majority vote of the Board was required for a decision. The court remanded to the Board with instructions to provide West with an opportunity to appear before a sufficient number of Board members so that those who decide his case will have done so based on a personal interview. West v. Mahoney, 2001 MT 82, 305 M 117, 22 P3d 201 (2001).

Prehearing Interview Not Substitute for Constitutional Right to Personal Appearance Before Parole Board: The Board of Pardons (now Board of Pardons and Parole) contended that under 46-23-104, its personal interview responsibility could be delegated to an appointed hearings officer, precluding the need for a parole applicant to appear personally before the Board. The Supreme Court disagreed, noting a parole applicant's due process right to appear before those entrusted with the subjective responsibility of passing judgment on the application. Therefore, under 46-23-104, the Board may designate one of its members, one of its staff members, or any other adult correctional releasing authority to conduct a prehearing interview with an inmate relative to parole eligibility to assist the Board and expedite the hearing process. However, the prehearing interview is not a substitute for the applicant's constitutional right to personally appear before the Board. (See 2001 and 2003 amendments.) Sage v. Gamble, 279 M 459, 929 P2d 822, 53 St. Rep. 1234 (1996).

46-23-203. Information from prison officials.

Case Notes

No Duty of Department to Inform Board of Prisoner's Marijuana Violation: The Parole Board (now Board of Pardons and Parole) released a prisoner who subsequently shot the plaintiff. The plaintiff argued that the Department of Institutions (now Department of Corrections) should have informed the Board of the prisoner's use of marijuana because then the Board would not have paroled him at that time and the shooting would never have occurred. The Supreme Court held that the Department had no statutory duty to inform the Board of the marijuana infraction. Kiger v. St., 245 M 457, 802 P2d 1248, 47 St. Rep. 2206 (1990).

46-23-207. Penalty for disobedience.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-23-210. Medical parole.

Compiler's Comments

2007 Amendment: Chapter 250 in (1) after "appropriate order" substituted "any person confined in a state prison or any person sentenced to a state prison and confined in a prerelease center who" for "a person placed in a correctional institution or program, except a person under sentence of death. To be eligible for a medical parole, a person must have an examination and written diagnosis by a physician licensed under Title 37 to practice medicine. The diagnosis must include"; deleted former (1)(a) and (1)(b) that read: "(a) a determination that the person suffers from an incapacitating physical condition, disease, or syndrome;

(b) a description of the physical condition, disease, or syndrome and a detailed description of the person's physical incapacity"; inserted (1)(a), (1)(b), and (1)(c) providing that the board may release on medical parole any person not under sentence of death or life imprisonment without possibility of parole who is unlikely to pose a detriment to the person, victim, or community and who has a medical condition requiring extensive medical attention or that will likely cause death within 6 months or less; inserted (2) providing that a person ineligible for parole under 46-18-202(2) must have the approval of the sentencing judge before being eligible for medical parole; inserted (3) establishing who may request medical parole, that the parole application must include a description of the person's proposed placement, medical care, and financing of the medical care, and that the application include an examination report and written diagnosis by a physician and inserted introductory clause to (3)(a), (3)(b), and (3)(c) regarding physician's

report; inserted (3)(a) providing that the physician's report include a description of the medical attention required; inserted (3)(b) providing that the physician's report include a description of the person's medical condition, any diagnosis, and any physical incapacity; in (3)(c) in first sentence after "recovery from" substituted "the medical condition or diagnosis" for "the physical condition, disease, or syndrome" and inserted second sentence providing that the prognosis may include whether the person has a medical condition causing the likelihood of death within 6 months; in (4) at beginning substituted "The application" for "The diagnosis" and deleted former second sentence that read: "The board may not grant a medical parole unless the incapacitating physical condition, disease, or syndrome renders the person highly unlikely to present a clear and present danger to public safety"; inserted (5) requiring the board to hold a hearing upon receipt of an application, providing that any interested person or interested person's representative may submit written or oral statements, and providing that a victim's statement may be kept confidential; in (6) in first sentence near middle after "environment" substituted "approved" for "chosen" and near end after "nursing home" inserted "hospice facility, or prerelease center, to intensive supervision, to some other appropriate community corrections facility or program" and in fourth sentence near middle after "person's" substituted "medical condition" for "physical capacity", after "extent that the person" inserted "no longer requires extensive medical attention or", and after "pose" substituted "a detriment to the person, victim, or community" for "a possible detriment to society"; deleted former (4) that read: "(4) Medical parole may be requested by the board, the department, an incarcerated person, or an incarcerated person's parent, grandparent, child, or sibling by submitting the request in writing to the administrator of the correctional institution in which the person is incarcerated"; in (8) near end substituted "medical" for "nonmedical"; inserted (9) providing that the board report before July 1 of each even-numbered year to the children, families, health, and human services interim committee and the law and justice interim committee regarding the outcome related to any person released on medical parole; and made minor changes in style. Amendment effective July 1, 2007.

Applicability: Section 3, Ch. 250, L. 2007, provided: "[This act] applies to applications for medical parole received on or after [the effective date of this act]." Effective July 1, 2007.

1997 Amendment: Chapter 420 in (1)(a), at end, deleted "that renders the person highly unlikely to present a clear and present danger to public safety"; and in (2) inserted second sentence limiting the grant of a medical parole. Amendment effective April 29, 1997.

1995 Amendment: Chapter 125 in (6) deleted reference to 46-23-204.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

1993 Amendment: Chapter 381 at end of (1)(a) substituted "person highly unlikely to present a clear and present danger to public safety" for "person incapable of presenting a danger to society"; and near end of (3), after "person", substituted "is likely to pose" for "poses".

Administrative Rules

ARM 20.25.302A Medical parole.

46-23-215. Conditions of parole.

Compiler's Comments

2003 Amendment: Chapter 559 in (2) after "When" inserted "a hearing panel issues" and after "parole" deleted "is issued"; in (3) in first sentence after "Whenever" inserted "a hearing panel grants a parole to", after "prisoner" deleted "in a state prison has been approved for parole", before "may grant" substituted "the hearing panel" for "the department", and after "furlough" substituted "not to exceed two 10-day periods" for "not to exceed 10 days" and in second sentence at end substituted "the hearing panel" for "the board"; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 13, Ch. 559, L. 2003, was a saving clause.

Severability: Section 14, Ch. 559, L. 2003, was a severability clause.

1999 Amendments — Composite Section: Chapter 147 in (2) inserted third sentence concerning providing biological sample as condition for parole. Amendment effective March 23, 1999.

Chapter 491 in (1) substituted "department" for "correctional facility from which the prisoner was released"; and in (3) in first sentence near beginning substituted "a state prison" for "the Montana state prison or the women's prison" and after "while incarcerated, the" substituted "department" for "warden" and in second sentence substituted "department" for "prison". Amendment effective April 27, 1999.

Retroactive Applicability: Section 7, Ch. 147, L. 1999, provided: "[Section 6] [46-23-215] applies retroactively, within the meaning of 1-2-109, to persons sentenced or in the custody or

under the supervision of the department of corrections on or after March 27, 1995, the effective date of the original DNA testing and identification law."

1997 Amendment: Chapter 189 in (1) substituted "correctional facility" for "institution"; and in (3), near beginning of first sentence after "state prison", inserted "or the Montana women's prison".

1995 Amendment: Chapter 125 in (2) inserted second sentence relating to restitution; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

1987 Amendment: At end of (2) inserted last sentence referring to waiver of extradition.

1982 Special Session Amendment: Inserted (3) relating to a furlough to fulfill a parole condition that is difficult to fulfill while incarcerated.

Administrative Rules

ARM 20.25.302 Parole plan.
ARM 20.25.701 Release.
ARM 20.25.702 Conditions on supervision.
ARM 20.25.703 Special conditions.
ARM 20.25.704 Conditional discharge from supervision.
ARM 20.25.705 Final discharge.
ARM 20.25.801 Revocation hearings.

Case Notes

Failure to Complete Prison Sex Offender Program Not Because of Defendant's Willful Conduct — Consideration of Incarceration Alternatives Constitutionally Required: Lee was sentenced to two concurrent 40-year terms in prison for sexual intercourse without consent and attempted sexual intercourse without consent and was ineligible for parole during the first 10 years of the sentence unless a sex offender treatment plan was successfully completed. Lee entered prison in 1995 and immediately requested enrollment in Phase I of the two-phase program. Lee was finally enrolled in Phase I after a 3-year wait, successfully completed that phase, and was placed on a waiting list for enrollment in Phase II. Because of a sitdown strike, Lee was unable to complete Phase II by his scheduled release date. The state petitioned to revoke Lee's suspended sentence because the program was not completed, and Lee moved to dismiss on grounds that the failure to complete treatment was not his fault. The District Court found that Lee's failure to complete the program was not due to any volitional conduct on Lee's part, but the court nevertheless determined that the failure constituted a violation of the terms of the suspended sentence and ordered Lee to serve the remaining 30 years on each count, declaring Lee ineligible for parole until both phases of treatment were completed. Lee appealed on grounds that the court violated his right to due process because it was impossible to complete the program during incarceration because of prison waiting periods and the length of the program. The Supreme Court agreed. In St. v. Williams, 1999 MT 240, 296 M 258, 993 P2d 1 (1999), it was held that a court could revoke a suspended sentence even though a probationer's failure to comply with the terms of the sentence was not willful, and the court in this case affirmed Williams to the extent that violations of nonfinancial probationary conditions need not necessarily be willful in order to justify revocation. However, the probationer in Williams was unable to gain acceptance into sex offender programs because of a lack of social skills, immaturity, and "acting out" behavior, whereas Lee was unable to access the programs because of actions of the state. Due process required the trial court to consider whether there were alternatives to incarceration that would further the purpose of Lee's suspended sentence. The Supreme Court remanded for a determination of whether there were any reasonable alternative measures other than continued incarceration because to do otherwise would deprive Lee of his conditional freedom simply because the state prevented him from completing the sex offender program while imprisoned. St. v. Lee, 2001 MT 176, 306 M 173, 31 P3d 998 (2001), distinguished in St. v. Price, 2008 MT 319, 346 M 106, 193 P3d 921 (2008).

Authority to Condition Parole on Participation in Sexual Offender Program — Parole Considered Privilege, Not Right: McDermott pleaded guilty to four counts of assault and one count of bail-jumping in exchange for dismissal of four counts of incest and was sentenced to 30 years in prison. Because of the violent nature of the assaults and the fact that they were committed against young victims, the sentencing court found that McDermott was a substantial danger to society and designated him a dangerous offender for purposes of parole. When he began serving his sentence, an initial needs assessment concluded that he suffered from severe sexual problems and recommended participation in the prison sexual offender program (SOP). McDermott chose not to participate in the SOP, and the Board of Pardons and Parole later

considered that fact during evaluations for placement in a prerelease center and for purposes of parole and inmate classification. The Board recommended that McDermott participate in the SOP to enhance success on parole. McDermott again declined to participate and, as a result, four points were added to his classification status for noncompliance with the Board's recommendation. McDermott then petitioned the Supreme Court for a writ of habeas corpus ordering his immediate release and rescinding the four points. McDermott argued that the Board did not have the authority to consider his lack of participation in the SOP as a basis for denying his early release on parole, citing St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), and St. v. Field, 2000 MT 268, 302 M 62, 11 P3d 1203 (2000). The Supreme Court distinguished both Ommundson and Field, noting that under Montana and federal precedents, parole is a privilege, not a right. Because parole is granted as a matter of grace rather than right, the state may offer that grace under and subject to conditions that are considered most conducive to accomplish the desired purpose. Rather than restricting the Board's authority to set conditions precedent to parole, 46-23-201 obligates the Board to ensure that no prisoner is released on parole who cannot meet the statutory criteria, and the Board may also consider factors that may not be considered by the District Court at trial and sentencing and evidence of offenses that were charged in dismissed counts. Even though McDermott was not a convicted sex offender, he did have four counts of incest dismissed and was identified as having severe sexual problems. Thus, his completion or lack of completion of the SOP was pertinent to his ability to be released without detriment to the community and to fulfill the obligations of a law-abiding citizen. The Board was well within its authority to consider McDermott's failure to enroll in the SOP when his petition for early release was denied. McDermott's petition for a writ of habeas corpus was denied. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001). See also Christopher v. U.S. Bd. of Pardons, 589 F2d 924 (7th Cir. 1978), and Robinson v. Hadden, 723 F2d 59 (10th Cir. 1983).

Due Process Standard Applicable to Parole Release Determination: Having determined that McDermott had a protected liberty interest in parole, the Supreme Court set out to determine whether McDermott's due process rights were protected when his application for parole was denied. There is no absolute standard for what constitutes due process. The requirements are flexible so that they may be adapted to meet the procedural protections demanded by a particular situation. The process due in any given case varies according to the factual circumstances, the nature of the interests at stake, and the risk of making an erroneous decision. A parole release determination is not subject to all the due process protections required to convict or confine, nor must a parole release determination provide the same protections that are required in a parole revocation hearing, which presents a much greater risk of error than a parole release determination because incarceration, whether as a result of conviction or parole revocation, involves a loss of liberty. On the other hand, denial of parole involves the loss of the mere anticipation of freedom to which a lawfully convicted inmate is not otherwise entitled. Thus, in the case of a prisoner seeking parole, due process is satisfied when the prisoner is, at a minimum, provided with an opportunity to be heard and a written statement explaining why parole was denied. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001), following Greenholtz v. Inmates of Nebr. Penal & Correction Complex, 442 US 1 (1979), and Sage v. Gamble, 279 M 459, 929 P2d 822 (1996).

Parole Officer Duty of Care to Supervise Parolees — Jury Instruction Properly Given: Corliss was paroled, after serving time for an execution-style slaying with a handgun, under the condition that he not possess a firearm. While on a visit, with the approval of his parole officer, to Washington state to look for work, Corliss failed to return to Montana within the established time, failed to see a parole officer in Washington, had a temporary restraining order obtained against him by a girlfriend because of threats made to her and her family, and had an altercation with his wife involving a handgun. In neither instance of violence did Corliss's parole officer investigate the circumstances of the violence. Later, Corliss shot and killed one friend of his girlfriend and injured another. Both the estates of the deceased woman and the wounded woman brought actions against the state for negligent supervision of Corliss's parole. The state objected to an instruction given by the District Court concerning a parole officer's duty of care, claiming that there must be some special relationship between the parole officer and the person injured by a parolee in order for a duty of care to arise. The Supreme Court reviewed statutes defining negligence, statutes describing the general duty of one individual toward another, and statutes concerning parole and concluded that Robbins had a general duty to exercise reasonable care in the supervision of Corliss and had a duty to the killed and injured women in particular. Starkenburg v. St., 282 M 1, 934 P2d 1018, 54 St. Rep. 214 (1997). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Racial Bias of Judge Who Illegally Made Deportation Condition of Parole Not Shown by Mere Unsupported Speculation: Upon an aggravated kidnapping and assault conviction of a native of Bangladesh, the court ordered deportation as a condition of parole. This was an illegal condition but did not alone show the judge was racially biased against defendant. A claim of bias was not upheld when it was supported by mere speculation or conjecture by defendant. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Supervised Release Program Not Inclusive of Furloughs — Escape Not Chargeable to Furloughed Convict: Roberts was released from the state prison into the parole-related furlough program rather than the supervised release program and did not meet the requirements of the administrative rules governing the supervised release program. A part of Roberts' parole included a 10-day furlough to allow him to find housing and employment. When he failed to meet his parole officer on a specified date, he was charged with felony escape. Roberts moved to dismiss the charge. An escape charge can be maintained only against a person subject to official detention, which is defined in part as supervision under a supervised release program. The term "supervised release program" clearly and unambiguously refers to the program codified in Title 46, ch. 23, part 4 (now repealed), and not to the furlough associated with parole proceedings under this section. Because Roberts was not being supervised under a supervised release program, the District Court erred in concluding that Roberts could be prosecuted for escape and in denying his motion to dismiss the escape charge. On appeal, the Supreme Court reversed and remanded with instructions to enter an order of dismissal. St. v. Roberts, 275 M 365, 912 P2d 812, 53 St. Rep. 181 (1996).

Alcoholics — Refraining as Valid Condition of Parole: One who, because of addiction or character disorder, is unable to control his excessive drinking of alcoholic beverages has no constitutional or statutory right to release free from limitations on his use of alcohol, either on parole or pursuant to a suspended sentence. There was no merit to appellant's contention that it was vindictive and unreasonable or illegal to require him, an acknowledged alcoholic, to refrain from drinking as a condition of his probation or parole. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982), followed, with regard to the requirement for nexus between the sentencing limitation or condition and the underlying offense, in St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620, 56 St. Rep. 70 (1999).

Parole Conditions — Application to Suspended Portion of Sentence: Parole conditions set by Board of Pardons (now Board of Pardons and Parole) also applied to period of suspended sentence where court passing sentence did not set conditions upon suspended portion of sentence, particularly where that court expressly directed that when defendant was not in prison he was to be under the supervision of the Board and court could revoke the suspended sentence for violation of those conditions. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Erroneous Parole Revocation: Given the issue of whether a parolee who, after a full revocation hearing, had been found by the Board of Pardons (now Board of Pardons and Parole) not to have violated his parole could nevertheless be confined pending submission of an acceptable new parole plan, the Supreme Court held that the parolee must be released within 30 days from the decision and that the Board was under a duty to develop and approve a parole plan within that period. Lopez v. Crist, 176 M 352, 578 P2d 312 (1978).

Parole to Out-of-State Prison: Prisoner who had been sentenced concurrently in Wyoming and in Montana could not be released on parole from the Montana prison since the Wyoming sentence provided that if the duration of the Wyoming sentence had not expired at the time of defendant's release from the Montana prison then the prisoner should be returned to Wyoming. Petition of Glover, 166 M 546, 539 P2d 721 (1975).

Collateral References

The propriety of conditioning parole on defendants not entering specific geographical areas. 54 ALR 5th 743.

46-23-216. Duration of parole.

Compiler's Comments

2003 Amendment: Chapter 559 in (2) in first and second sentences after "parole" deleted "or conditional release". Amendment effective July 1, 2003.

Saving Clause: Section 13, Ch. 559, L. 2003, was a saving clause.

Severability: Section 14, Ch. 559, L. 2003, was a severability clause.

1995 Amendment: (Temporary version) Chapter 372 in (1), near beginning after "parole", deleted "who has served one-half of his term or terms, less the good time allowance, or a

nondangerous offender on parole who has served one-quarter of his term or terms, less the good time allowance"; and made minor changes in style. Amendment effective April 12, 1995.

(Version effective January 31, 1997) In (1), near beginning after "parole", deleted "who has served one-half of his term or terms, less the good time allowance, or a nondangerous offender on parole who has served one-quarter of his term or terms, less the good time allowance" and at end, after "sentenced", deleted "less the good time allowance as provided for in 53-30-105"; and made minor changes in style.

Administrative Rules

ARM 20.25.302 Parole plan.

Case Notes

Good Time Held Applicable to Parolees: Where the petitioners sought Writs of Habeas Corpus to release them from prison on the basis of good time earned while on parole, the trial court correctly held that parolees could be credited with good time under 53-30-105 (now repealed) while on parole. Following rules of statutory construction, the court concluded that it was the intention of the Legislature to grant parolees good time for time served on parole and that the language of 53-30-105 (now repealed) did not act as a saving clause to apply that section only to inmates convicted prior to April 1, 1955. Crist v. Segna, 191 M 210, 622 P2d 1028, 38 St. Rep. 150 (1981).

46-23-217. Service of term for additional crime.

Compiler's Comments

1999 Amendment: Chapter 491 in first sentence near beginning substituted "a state prison" for "the state prison". Amendment effective April 27, 1999.

1995 Amendment: Chapter 372 at end of first and second sentences, after "sentence", deleted "as provided in 46-18-401". Amendment effective April 12, 1995.

1989 Amendment: In first sentence substituted "while imprisoned in the state prison or while released on parole or under the supervised release program" for "while at large on parole or conditional release"; inserted last two sentences relating to parole for original sentence; and made minor changes in phraseology. Amendment effective March 20, 1989.

Administrative Rules

ARM 20.25.304 Additional consecutive sentences.

Case Notes

Good Time Earned While Serving One Sentence Not Applicable to Later Sentence: In 1970, petitioner was convicted of burglary and sentenced to 10 years in the Montana State Prison. He was released on parole in 1971. In 1976, he was returned to the Montana State Prison after being convicted on another burglary charge. Subsequently his parole was revoked. During the time petitioner was on parole, good time could be earned under 53-30-105 (now repealed) by a parolee. Under a 1981 amendment to that section, this is no longer possible. In 1982, petitioner filed a petition for a Writ of Habeas Corpus, claiming that the good time he earned while on parole should be applied to reduce the discharge date of his second sentence, as the second sentence had been merged (under 46-23-217, prior to amendment) with the first sentence. The Supreme Court ruled that the sentences ran concurrently but were not merged and that therefore any good time petitioner earned while on parole on his first sentence may be applied only to the first sentence. Bagley v. Risley, 207 M 121, 672 P2d 1126, 40 St. Rep. 1937 (1983).

Attorney General's Opinions

Inconsistent Statutes: When two statutes are wholly inconsistent, incompatible, and incapable of being reconciled, the later statute impliedly repeals the earlier one if it does not expressly do so. 38 A.G. Op. 13 (1979).

Prisoner Receives New Sentence: If a prisoner who has received a new consecutive sentence under 46-18-401(5) is paroled, the remaining time of his new and original sentences thereafter run concurrently. 38 A.G. Op. 13 (1979).

Section 46-23-217 Impliedly Repealed: Section 46-23-217 was impliedly repealed by the enactment of 46-18-401(5). A sentence imposed regarding a crime committed after July 1, 1977, by a prisoner at the state prison or on parole or furlough runs consecutively with the remainder of the prisoner's original sentence. Any crime committed on or before July 1, 1977, by a prisoner while on parole or conditional release runs concurrently with the prisoner's original sentence unless otherwise specified by the sentencing court. 38 A.G. Op. 13 (1979).

46-23-218. Authority of board to adopt rules — purpose for training.

Compiler's Comments

2003 Amendment: Chapter 559 in (1) near middle before "hearings" inserted "and parole revocation", after "hearings" substituted "videoconference hearings, telephone conference administrative reviews, progress reviews" for "video hearings, progress reviews, the conduct of revocation proceedings", and at end after "parolees" inserted "the training board members and auxiliary members regarding American Indian culture and problems, and other matters pertinent to service on the board"; inserted (2) concerning rationale to provide board members with necessary training in American Indian culture and problems in order to deal appropriately with American Indian inmates appearing before board; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 13, Ch. 559, L. 2003, was a saving clause.

Severability: Section 14, Ch. 559, L. 2003, was a severability clause.

1999 Amendment: Chapter 450 near middle after "parole hearings" inserted "video hearings, progress reviews, the conduct of revocation proceedings, clemency proceedings"; and made minor changes in style. Amendment effective April 22, 1999.

Administrative Rules

ARM 20.25.101 Organization of Board.
ARM 20.25.102 Board training.
Title 20, chapter 25, subchapter 2, ARM Objectives of release.
Title 20, chapter 25, subchapter 3, ARM Eligibility for parole consideration.
ARM 20.25.303 Further eligibility.
Title 20, chapter 25, subchapter 4, ARM Release hearings.
ARM 20.25.401 Hearing procedure.
Title 20, chapter 25, subchapter 5, ARM Decisions of Board.
ARM 20.25.505 Criteria for release grant decisions.
Title 20, chapter 25, subchapter 6, ARM Rescission of parole.
ARM 20.25.601 Rescission hearing.
Title 20, chapter 25, subchapter 7, ARM Release on supervision.
Title 20, chapter 25, subchapter 8, ARM Revocation of parole.
Title 20, chapter 25, subchapter 9, ARM Executive clemency.

Case Notes

No General or Inherent Authority of Sentencing Court to Generally Impose Parole Conditions — Parole Condition Related to Sexual Offense Authorized: There is no general or inherent authority for a sentencing court to impose parole conditions. A sentencing court may impose conditions on parole that are authorized by statute only. In this case, all conditions on Burch's suspended sentence for sexual offenses were proper, but only one parole condition, prohibiting Burch from possessing pornography or accessing the Internet, was authorized under 46-18-255. Burch's admission that he used the Internet at work to access pornography while on parole established that Burch violated a condition of his suspended sentence by a preponderance of the evidence. Thus, the sentencing court did not err in revoking Burch's suspended sentence. St. v. Burch, 2008 MT 118, 342 M 499, 182 P3d 66 (2008), followed in St. v. Dennison, 2008 MT 344, 346 M 295, 194 P3d 704, (2008), and St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009), regarding authority of sentencing court.

Part 3
Executive Clemency

46-23-301. Cases of executive clemency — application for clemency — definitions.

Compiler's Comments

1997 Amendment: Chapter 92 in (2), in first sentence after "clemency", inserted exception clause prohibiting filing of application for clemency while automatic review proceeding is pending before the Montana Supreme Court and inserted third sentence requiring the filing of an executive clemency application with the Board no later than 10 days after set date of execution; inserted last sentence in (3) prohibiting the appeal of Governor's decision to grant or deny clemency; and made minor changes in style. Amendment effective March 19, 1997.

Applicability: Section 4, Ch. 92, L. 1997, provided: "[This act] [46-19-103 and 46-23-301] applies to death warrants issued by a court on or after [the effective date of this act]." Effective March 19, 1997.

1989 Amendment: Inserted (1)(a) defining clemency; inserted (1)(b) defining pardon; and substituted (2) and (3) relating to procedure for applying for clemency for former language that read: "The board shall investigate and report to the governor with respect to all cases of executive clemency. A majority of the board shall advise, investigate, and approve each such case before the action of the governor shall be final. All applications for executive clemency shall be made to the board, which shall cause an investigation to be made of all the circumstances surrounding the crime for which the applicant was convicted and as to the individual circumstances relating to social conditions of the applicant. If the board or a majority thereof approves such application for executive clemency, it shall advise the governor and recommend action to be taken." Amendment effective April 15, 1989.

Administrative Rules

ARM 20.25.901 Applications.
ARM 20.25.901A Executive clemency policy.
ARM 20.25.902 Investigations.

Attorney General's Opinions

Consecutive Sentences Commuted: Consecutive sentences may be commuted either individually or aggregately. 37 A.G. Op. 43 (1977).

Executive Clemency Not to Be Postponed Until Exhaustion of Other Remedies: Under its present rules, the Board of Pardons (now Board of Pardons and Parole) may not postpone consideration of an application for executive clemency until the applicant has exhausted the appeal and sentence review processes. 37 A.G. Op. 43 (1977).

Collateral References

Revocation of order commuting state criminal sentence. 88 ALR 5th 463.

46-23-302. Order for hearing on application for executive clemency.

Compiler's Comments

1999 Amendment: Chapter 51 near end of second paragraph and near beginning of third paragraph after "day of ...." substituted "20..." for "19...", and near end of third paragraph after "beginning ...." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

1995 Amendment: Chapter 546 in Whereas clause substituted "Board of Pardons and Parole" for "Board of Pardons"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1989 Amendment: Near beginning substituted "hearing" for "recommendation of executive clemency to the governor"; in third paragraph, after "pardon", deleted "or reprieve"; and made minor change in phraseology. Amendment effective April 15, 1989.

46-23-303. Publication of order.

Compiler's Comments

1989 Amendment: At end substituted "applicant" for "petitioner and the convict". Amendment effective April 15, 1989.

46-23-306. Record of hearing.

Administrative Rules

ARM 20.25.903 Hearing procedure.

46-23-307. Decision of board.

Compiler's Comments

1989 Amendment: Near beginning substituted "capital case or in noncapital cases where the decision is made to recommend clemency be granted" for "case". Amendment effective April 15, 1989.

46-23-315. Authority of governor to grant respite — application.

Compiler's Comments

1995 Amendment: Chapter 546 at end of second sentence substituted "board of pardons and parole" for "board of pardons"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1989 Amendment: Inserted second, third, fourth, and fifth sentences relating to the procedure for granting respites. Amendment effective April 15, 1989.

Administrative Rules
ARM 20.25.904 Decision.

46-23-316. Governor's report to legislature.

Compiler's Comments
2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.
1991 Amendment: Near beginning, after "governor", substituted "shall, as provided in 5-11-210, report" for "must communicate" and after "legislature" deleted "at each regular session". Amendment effective March 20, 1991.
1989 Amendment: In two places substituted "respite" for "reprieve". Amendment effective April 15, 1989.

Part 5
Registration of Sexual and Violent Offenders

Part Compiler's Comments
Retroactive Applicability: Section 1, Ch. 152, L. 2001, amended sec. 18, Ch. 375, L. 1997, to read: "Section 18. Retroactive applicability. The provisions of Title 46, chapter 23, part 5, and of [this act] relating to registration apply retroactively, within the meaning of 1-2-109, to:
(1) sexual offenders who are sentenced by a state or federal court in any state on or after July 1, 1989, or who as a result of a sentence are under the supervision of a county, state, or federal agency in any state on or after July 1, 1989; and
(2) violent offenders who are sentenced by a state or federal court in any state on or after October 1, 1995, or who as a result of a sentence are under the supervision of a county, state, or federal agency in any state on or after October 1, 1995." Amendment effective March 29, 2001.
Preamble: The preamble attached to Ch. 375, L. 1997, provided: "WHEREAS, the Legislature finds that the danger of recidivism posed by sexual and violent offenders and the protection of the public from these offenders is of paramount concern to government and the people; and
WHEREAS, the Legislature further finds that law enforcement agencies' efforts to protect their communities, conduct investigations, and apprehend sexual and violent offenders is impaired by the lack of information about offenders who live within their jurisdictions; and
WHEREAS, the system of registering sexual and violent offenders provides law enforcement with information critical to preventing victimization and to resolving incidents of sexual or violent offenses promptly, including notification of the public when necessary to the continued protection of the community; and
WHEREAS, persons who have committed a sexual or violent offense have a reduced expectation of privacy because of the public's interest in safety; and
WHEREAS, the Legislature finds that releasing information about sexual or violent offenders to law enforcement agencies and, under certain circumstances, providing access to limited information about certain sexual offenders to the general public will further the primary governmental interest of protecting specific vulnerable groups and the public in general from potential harm.
THEREFORE, it is the policy of the State of Montana to assist local law enforcement agencies' efforts in protecting their communities by requiring that sexual or violent offenders register and to authorize the release of necessary and relevant information about sex offenders to the public."
1997 Statement of Intent: The statement of intent attached to Ch. 375, L. 1997, provided: "A statement of intent is required for this bill in order to provide guidance for rules adopted under [section 12] [46-23-509] concerning the qualifications of sexual offender evaluators and concerning evaluations of sexual offenders. The legislature intends that sexual offender evaluators possess education and experience similar to the education and experience requirements of therapists certified by the Montana sex offender treatment association. The legislature further intends that rules for evaluating the risk of repeat offenses by sexual offenders include the following factors:
(1) whether the sexual offender has a mental abnormality;
(2) whether the sexual offender's conduct is repetitive and compulsive;
(3) whether drugs or alcohol played a part in the offense or offenses;
(4) whether the sexual offender served the maximum term for the offense or offenses;
(5) whether the offense or offenses involved a child;
(6) the age of the sexual offender at the commission of the offense or offenses;

(7) the relationship between the sexual offender and the victim or victims;
(8) whether the offense or offenses involved use of a weapon;
(9) the number, date, and nature of prior offenses;
(10) conditions of release that minimize risk of another offense, including whether the sexual offender is under supervision or receiving counseling and treatment;
(11) physical conditions that minimize the risk of another offense, such as advanced age or debilitating illness of the sexual offender;
(12) whether psychological or psychiatric profiles of the sexual offender indicate a risk of recidivism;
(13) the sexual offender's response to and participation in treatment;
(14) recent behavior of the sexual offender;
(15) recent threats or gestures by the sexual offender against persons; and
(16) a review of any victim impact statements."

Effective Date: Section 13, Ch. 293, L. 1989, provided: "[This act] is effective July 1, 1989."

Part Administrative Rules

Title 20, chapter 7, subchapter 3, ARM Qualifications of sex offender evaluators.

Part Case Notes

Failure of Trial Court to Address Issues Raised in Defendant's Pro Se Petition — Reversible Error: After being charged with failure to register as a sexual offender, Samples was granted the opportunity to file a pretrial pro se petition addressing the ex post facto application of Title 46, ch. 23, part 5, as well as a variety of other constitutional challenges to the sexual offender registration law. The District Court substantively discussed and rejected Samples' ex post facto argument, refused to discuss the other constitutional concerns, and denied the petition. Following denial of the petition, Samples pleaded guilty, but reserved the right to appeal the ruling on the petition. On appeal, the Supreme Court held that, even though the District Court could have refused to allow the pro se motion, once the District Court expressly authorized Samples to file a pro se motion challenging the constitutionality of the sexual offender registration law, the court was obligated to address the constitutional issues raised in the petition. Failure of the District Court to consider all of the constitutional issues raised in the petition was reversible error, and the case was remanded for consideration of all issues raised by Samples in the petition. St. v. Samples, 2005 MT 210, 328 M 242, 119 P3d 1191 (2005).

Sexual and Violent Offender Registration Requirements Not Part of Criminal Sentencing — Registration Violation Separate Offense: White Bear was convicted of failing to register as a sexual or violent offender. On appeal, White Bear contended that offender registration violated due process, but the argument was based on an incorrect premise that registration was a condition of sentencing and punishment for the original offense. In fact, the registration requirements are not part of criminal sentencing for a sexual or violent offense, and violation of registration requirements is a separate offense. White Bear's conviction for failing to register as a sexual or violent offender was affirmed. St. v. White Bear, 2005 MT 7, 325 M 337, 106 P3d 516 (2005). See also St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003).

Sexual or Violent Offender Registration Act Nonpunitive — Not Considered Ex Post Facto Legislation: Defendant was convicted of failing to update registration as a violent sexual offender. The District Court found that the Sexual or Violent Offender Registration Act, Title 46, ch. 23, part 5, was ex post facto because 46-23-504 subjected defendant to enhanced punishment based on a prior conviction. The state appealed. Applying Smith v. Doe, 538 US 84, 123 S Ct 1140 (2003), which dealt with an Alaskan registration act similar to the Montana Act, the Supreme Court noted that if both the declared purpose and the structure of a sexual violent offender registration law are nonpunitive, then the intent is to enact a civil regulatory scheme. The court then conducted an indepth analysis of the intent and effects of Montana's law, finding that the legislative intent was clearly nonpunitive, noting that codification of the law in the Montana code of criminal procedure did not in itself transform the law from a nonpunitive civil regulatory scheme into a criminal one. As to effects, the court applied the factors in Kennedy v. Mendoza-Martinez, 372 US 144 (1963), finding the regulatory scheme to be a reasonable effort on the part of the Legislature to tailor what information may and may not be disclosed, and held that the registration requirements were not excessive. As a nonpunitive act designed for public protection, the Sexual or Violent Offender Registration Act does not violate the ex post facto clauses of the state or federal constitution. The District Court was reversed, and the charges against defendant were reinstated. St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), followed in St. v. Murphy, 2003 MT 276, 317 M 500, 78 P3d 843 (2003).

Part Attorney General's Opinions

Exemption of Juvenile Delinquents From Sexual Offender Registration: A juvenile who is adjudicated delinquent under the Montana Youth Court Act and whose case has not been transferred to District Court under 41-5-206 is exempt from the registration requirements of the Sexual Offender Registration Act, 46-18-254 (now repealed); 46-18-255; and Title 46, ch. 23, part 5. 43 A.G. Op. 45 (1989).

Part Collateral References

State statutes or ordinances requiring persons previously convicted of crime to register with authorities as applied to juvenile offenders — duty to register, requirements for registration, and procedural matters, 38 ALR 6th 1.

46-23-501. Short title.

Compiler's Comments

1997 Amendment: Chapter 375 at beginning deleted reference to 46-18-254; and made minor changes in style.

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

1995 Amendment: Chapter 407 after ""Sexual" inserted "or Violent".

46-23-502. Definitions.

Compiler's Comments

2007 Amendment: Chapter 483 inserted definitions of municipality, registration agency, residence, and transient; in definition of sexual offense in (a) near beginning after "45-5-302" inserted "(if the victim is less than 18 years of age and the offender is not a parent of the victim)", after "45-5-303" inserted "(if the victim is less than 18 years of age and the offender is not a parent of the victim)", after "45-5-502(3)" inserted "(if the victim is less than 16 years of age and the offender is 3 or more years older than the victim)", in parenthetical clause following "45-5-507" after second "victim" inserted "or if the victim is 12 years of age or younger and the offender is 18 years of age or older at the time of the offense", near end inserted references to 45-5-601(3) and 45-5-602(3), and after "45-5-603(1)(b)" inserted "or (2)(c)" and in (b) near beginning after "state" inserted "a tribal government" and near end after "after" inserted "an adjudication"; in definition of sexual or violent offender after "convicted of" inserted "or, in youth court, found to have committed or been adjudicated for"; in definition of sexually violent predator in (a) after "convicted of" inserted "or, in youth court, found to have committed or been adjudicated for" and inserted (b) including in the definition a person who has been convicted of a sexual offense against a victim 12 years of age or younger and the offender is 18 years of age or older; in definition of violent offense in (a) after "45-5-213" inserted "45-5-302 (if the victim is not a minor), 45-5-303 (if the victim is not a minor)" and in (b) after "state" inserted "a tribal government"; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

Retroactive Applicability: Section 31, Ch. 483, L. 2007, provided: "[Sections 2, 3, and 19 through 24] [amending 41-5-216, 41-5-1513, 46-23-502, 46-23-504, 46-23-505, 46-23-506, 46-23-508, and 46-23-509] apply retroactively, within the meaning of 1-2-109, to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

2005 Amendment: Chapter 313 in definition of sexual offense in (b) at end after "(6)(a)" inserted "or for which the offender was required to register as a sex offender after conviction"; and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendment: Chapter 146 in definition of violent offense in (a) at end inserted "or 45-9-132"; and made minor changes in style. Amendment effective October 1, 2003.

2002 Amendment: Chapter 22 in definition of sexual offense in (a) near beginning inserted "45-5-301 (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-302, 45-5-303" and near end inserted "45-5-603(1)(b)"; and in definition of violent offense deleted from the listed offenses "45-5-301 (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-302, 45-5-303" and "45-5-603(1)(b)". Amendment effective August 21, 2002.

Applicability: Section 9, Ch. 22, Sp. L. August 2002, provided: "[This act] applies to convictions on or after [the effective date of this act]." Effective August 21, 2002.

1999 Amendments — Composite Section: Chapter 227 in definition of sexual offense in (a) after "45-5-503" inserted "45-5-504(1) (if the victim is under 18 years of age and the offender is 18 years of age or older)" and after "45-5-507" substituted "(if the victim is under 18 years of age and the offender is 3 or more years older than the victim)" for "(unless the act occurred between two consenting persons 16 years of age or older)"; in definition of violent offense in (a) inserted reference to 45-5-210(1)(b), (1)(c), or (1)(d); and made minor changes in style. Amendment effective October 1, 1999.

Chapter 432 in definition of violent offense inserted "45-5-212, 45-5-213". Amendment effective October 1, 1999.

1997 Amendment: Chapter 375 inserted definitions of mental abnormality, personality disorder, predatory sexual offense, sexual offender evaluator, and sexually violent predator; in definition of sexual offense, in (a) after "violation of", inserted "or attempt, solicitation, or conspiracy to commit a violation of"; in definition of violent offense, in (a) after "violation of", inserted "or attempt, solicitation, or conspiracy to commit a violation of", after "45-5-202" inserted "45-5-206 (third or subsequent offense), 45-5-301 (when the victim is less than 18 years of age and the offender is not a parent of the victim)", and after "45-5-401" inserted "45-5-603(1)(b)"; and adjusted subsection references.

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989;and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

1995 Amendments: Chapter 407 in (2)(a) inserted reference to 45-5-504(2)(c) and after "45-5-505" inserted parenthetical referring to deviate sexual conduct with an animal; in (3), in two places, inserted "or violent"; and inserted definition of violent offense. The amendment in (2)(a) was rendered void pursuant to sec. 12, Ch. 550, L. 1995, a coordination section.

Chapter 546 in definition of Department substituted "department of corrections provided for in 2-15-2301" for "department of corrections and human services provided for in Title 2, chapter 15, part 23". Amendment effective July 1, 1995.

Chapter 550 in (2)(a), after "45-5-503", substituted "45-5-504(2)(c)" for "45-5-505".

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Coordination: Section 12, Ch. 550, L. 1995, provided: "If [this act] and House Bill No. 214 are both passed and approved, then the amendment to 46-23-502(3)(a) [now 46-23-502(2)(a)] in House Bill No. 214 is void." House Bill No. 214 was approved as Ch. 407, L. 1995, on April 13, 1995. Although the amendment to 46-23-502(2)(a) in House Bill No. 214 is void, a similar amendment was made by Ch. 550.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Case Notes

Erroneous Reference to Offense in Charging Document — No Grounds for Reversal Absent Surprise or Prejudice: As a condition of sentencing, Bahr was required to maintain registration as a violent offender. Bahr was subsequently charged with failure to provide notice of a change of address, and the charge was later amended to failing to provide notice of a change of residence. At trial, Bahr asserted that the charge should be dismissed because the initial charging document cited an offense of failure to provide notice of a change of address that was not a crime. The District Court concluded that the charging document properly charged an offense under 46-23-507 and dismissed Bahr's argument. On appeal the Supreme Court affirmed. The original information and the supporting affidavit clearly set out that Bahr was required to register as a violent offender, that the last registration was completed in Glacier County in 2002, and that Bahr had acknowledged the requirement to provide notice of any change but had failed to provide notice after moving from Glacier County and residing in Cascade County for over a month without updating the registration information. This was enough as a matter of law to apprise Bahr of the charges and to prevent any surprise. Even if there were errors in wording in the charging document, there was no ground for reversal unless Bahr demonstrated prejudice. Additionally, amendment of the information from "change of address" to "change of residence"

was not substantive. Therefore, absent surprise or prejudice, the District Court properly declined to dismiss the charge. St. v. Bahr, 2009 MT 378, 353 M 294, 224 P3d 610 (2009).

Criminal Endangerment Not Requiring Registration as Violent Offender: Upon conviction for felony criminal endangerment, Perkins was required to register as a violent offender. On appeal, the Supreme Court noted that criminal endangerment is not an offense that requires registration as a violent offender. The court ordered that the registration condition be stricken from Perkins' sentence. St. v. Perkins, 2009 MT 150, 350 M 387, 208 P3d 386 (2009).

Youth Court Adjudication Not Considered Conviction — No Authority to Require Adjudicated Youth to Register as Sexual or Violent Offender Under Pre-2007 Law: In 1998, 16-year-old Hastings was adjudicated a delinquent youth in Youth Court, admitting one offense of sexual intercourse without consent, and was committed to the Department of Corrections (DOC). When Hastings turned 18 in 2000, his case was transferred to District Court until age 25 based on the parties' stipulation that Hastings had not completed sex offender treatment or paid restitution and was at high risk to reoffend. The District Court then determined that Hastings had violated the conditions of the Youth Court order and committed Hastings to the DOC and also required that Hastings register as a level 2 sex offender. Hastings initially registered as a sex offender, but failed to update registration after moving and was subsequently charged with failure to maintain registration. Hastings moved to dismiss the charge, asserting that he had not been convicted of a sexual offense and that neither the commitment order nor statutes required him to register after discharging his sentence. The motion was denied, and Hastings appealed. The Supreme Court reversed. Although the Youth Court had the authority to require sex offender registration pursuant to 41-5-1513, no requirement was made in this case. Because the Youth Court adjudication did not constitute a conviction, the District Court could not impose registration requirements under 46-18-201. (Note that the 2007 Legislature amended this section to include an adjudicated youth in the definition of a sexual or violent offender.) The District Court's opinion that 41-5-1513 suggests a wholesale incorporation of sexual offender registry into the Montana Youth Court Act was erroneous, and absent statutory authority, a court may not impose a registration requirement. Failure to grant Hastings' motion to dismiss was error, and the case was remanded for dismissal. St. v. Hastings, 2007 MT 294, 340 M 1, 171 P3d 726 (2007), distinguishing St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), and St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

Retroactivity of Requirement That Out-of-State Sexual Offenders Convicted in State That Requires Registration Also Register in Montana: The 2005 Legislature amended this section to provide that, as a matter of public safety, a sexual offender convicted in another jurisdiction that requires registration of sexual offenders must register in Montana upon taking up residence in this state, regardless of the specific sexual crime committed in the other state. However, the 2005 amendments were not applied retroactively from their October 1, 2005, effective date. Examining the legislative history, the Supreme Court noted that the amendments were enacted for administrative efficiency rather than as a punitive measure. If the amendments were applied only to offenses committed after the effective date, the result would be administrative chaos rather than efficiency. Therefore, the Legislature intended the 2005 amendments to apply retroactively, and Hamilton, who was convicted of a sexual crime in Washington in 1996 and was required to register there, was also required to register in Montana after moving here in 2000. St. v. Hamilton, 2007 MT 167, 338 M 142, 164 P3d 884 (2007), following St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003).

Washington Youth Sexual Offender Required to Register as Sexual or Violent Offender if Residing in Montana: At age 15, Villanueva was adjudicated guilty of first degree rape in Washington state and was later required to register for life in that state as a sexual offender. Villanueva subsequently moved to Montana where he resided for 6 weeks. After being arrested for a domestic disturbance, it was discovered that Villanueva had not registered as a sexual or violent offender in Montana, and he was charged with failure to register. Villanueva contended that Montana law did not apply to his Washington registration requirement because he did not meet the definition of sexual or violent offender under this section and because a 1989 Attorney General's opinion held that juveniles adjudicated delinquent under the Montana Youth Court Act whose cases have not been transferred to District Court are not required to register. Villanueva moved to dismiss the charge, but the District Court denied the motion. On appeal, the Supreme Court affirmed. Although the Washington definition of sexual offender may not have been identical to the Montana definition, Villanueva was nevertheless a sexual offender under Washington law and was therefore required to register in Montana under 46-23-504. Further, Villanueva could not rely on the Attorney General's opinion because he was not adjudicated under the Montana Youth Court Act. The Supreme Court noted that the Washington sexual

offender registration law also required Villanueva to register in another state if he changed state residency, so under both Washington and Montana law, Villanueva was required to register as a sexual offender. Villanueva's motion to dismiss was properly denied. St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

Attorney General Opinions

Registration of Out-of-State Sexual and Violent Offenders: A sexual or violent offender who is convicted of a violation of any law of another state or the federal government that is reasonably equivalent to a violation of subsection (6) or (9) of this section and who is sentenced on or after July 1, 1989, must register with the local law enforcement agency within 10 days of entering a Montana county for the purpose of taking up permanent or temporary residence. The registration requirement applies whether or not the state in which the offender was convicted has a registration program. 47 A.G. Op. 15 (1998).

46-23-503. Release of sexual or violent offender from place of confinement — duties of official in charge.

Compiler's Comments

1997 Amendment: Chapter 375 in (1), after "writing", inserted "not less than 10 days" and after "under" deleted "46-18-254, 46-18-255, and"; in (2), at beginning of introductory clause, inserted "Prior to the offender's release from custody" and after "obtain" substituted "and give to the department of justice and to the sheriff of the county in which the offender intends to reside or, if the offender intends to reside in a municipality, to the chief of police of the municipality" for "the address at which the person expects to reside upon the person's release and report"; in (2)(a), after "address", substituted "at which the offender intends to reside upon release from the department's custody" for "to the department of corrections. The department shall inform the appropriate law enforcement agency having local jurisdiction where the person expects to reside"; inserted (2)(b) regarding the offender's fingerprints and photo; inserted (2)(c) regarding the registration form; and made minor changes in style.

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989;and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

1995 Amendments: Chapter 407 near beginning, after "sexual", inserted "or violent"; and made minor changes in style.

Chapter 546 in first sentence, after "department of corrections", deleted "and human services or the department of family services" and in second sentence substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Case Notes

Release From Confinement, Not Supervision, Trigger for Registration as Sexual or Violent Offender: Azure asserted that because he was still under direct supervision of the Department of Corrections under the intensive supervision program following his release from prison, he was not required to register as a sexual or violent offender. The Supreme Court disagreed. The trigger for registration is the release from confinement, not release from confinement and supervision. Thus, Azure was required to register within 10 days of release from confinement, notwithstanding continued Department supervision during Azure's conditional release. St. v. Azure, 2008 MT 211, 344 M 188, 186 P3d 1269 (2008), overruling Wagner v. St., 2004 MT 31, 319 M 413, 85 P3d 750 (2004), to the extent that Wagner provided that registration is required upon release from confinement and supervision.

Public Warning of Release of Violent Offender Futile: The plaintiffs sued the state in tort on the basis that the state should have issued a public warning announcing the release of a violent offender who subsequently murdered their child. The Supreme Court ruled that the Legislature had considered the issue of warning the public in its last regular session, had recognized the futility of a warning requirement, and had not made issuing warnings of the release of violent

offenders a statutory obligation of the state. VanLuchene v. St., 244 M 397, 797 P2d 932, 47 St. Rep. 1609 (1990).

46-23-504. Persons required to register — procedure.

Compiler's Comments

2007 Amendments — Composite Section — Coordination: Section 4, Ch. 254, L. 2007, a coordination section, in (3) inserted fourth sentence requiring yearly photographs for level 2 or 3 offenders. Amendment effective October 1, 2007.

Chapter 483 in (1) at beginning of introductory clause inserted exception clause; in (1)(c) near beginning after "within" substituted "3 business days" for "10 days" and near middle after "temporary" substituted "residence" for "domicile"; inserted (1)(d) requiring an offender who is a transient to register within 3 business days of entering a county of this state; in (2) near beginning of first sentence after "(1)(c)" inserted "or (1)(d)" and after "with the" substituted "appropriate registration agency" for "chief of police of the municipality or the sheriff of the county if the offender resides in an area other than a municipality", at beginning of second sentence substituted "If an offender registers with a police department, the department" for "Whichever law enforcement official the offender registers with" and after "notify the" substituted "sheriff's office of the county in which the municipality is located" for "other official", and near end of third sentence after "appropriate" substituted "registration" for "law enforcement"; in (3) near middle of first sentence after "required by" inserted "subsections (3)(a) through (3)(g) and any other information required by", at beginning of second sentence and near beginning of third sentence substituted "registration agency" for "chief of police or sheriff", and inserted fifth sentence and (3)(a) through (3)(g) outlining information required to be collected from the offender at the time of registration; inserted (4) requiring registration in each county or municipality if an offender regularly resides in more than one county or municipality at the time of registration; inserted (5) requiring monthly reporting by a transient; inserted (6)(a)(ii) requiring the mailing of a registration form each 180 days to a level 2 offender; in (6)(a)(iii) after "level 1" deleted "or level 2"; inserted (6)(b) regarding mailing of forms to transients; in (6)(c) in first sentence after "offender's" deleted "current address and", at end of second sentence substituted "registration agency where the offender last registered or, if the offender was initially registered pursuant to subsection (1)(b), to the registration agency in the county or municipality in which the offender is located" for "department", and inserted third sentence requiring the offender to return the form to the appropriate registration agency in person and requiring the registration agency to take a photograph of the offender at the time that the sexual offender returns the registration verification form; inserted (7) requiring the registration agency to provide a copy of the form and the photograph to the department of justice within 3 days; and made minor changes in style. Amendment effective May 11, 2007.

The amendments to this section made by sec. 1, Ch. 254, L. 2007, were rendered void by sec. 4, Ch. 254, L. 2007, a coordination section.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

Retroactive Applicability: Section 31, Ch. 483, L. 2007, provided: "[Sections 2, 3, and 19 through 24] [amending 41-5-216, 41-5-1513, 46-23-502, 46-23-504, 46-23-505, 46-23-506, 46-23-508, and 46-23-509] apply retroactively, within the meaning of 1-2-109, to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

2005 Amendment: Chapter 313 in (2) near beginning of first sentence after "(1)(a)" inserted "or (1)(c)" and after "with the" deleted "probation office having supervision over the offender. Registration under subsection (1)(c) must be with the", in second sentence at beginning after "Whichever" substituted "law enforcement official" for "person", after "registers with" deleted "under subsection (1)(c)", and after "other" substituted "official" for "person", and inserted third sentence requiring a supervising probation officer to verify the offender's registration status with the appropriate law enforcement agency; and made minor changes in style. Amendment effective October 1, 2005.

2002 Amendment: Chapter 22 in (1)(c) at end substituted "or for an aggregate period exceeding 30 days in a calendar year" for "if the offender was sentenced in another state". Amendment effective August 21, 2002.

Applicability: Section 9, Ch. 22, Sp. L. August 2002, provided: "[This act] applies to convictions on or after [the effective date of this act]." Effective August 21, 2002.

1997 Amendment: Chapter 375 in (1), near beginning after "offender", substituted (1)(a) regarding registration upon conclusion of the sentencing hearing and (1)(b) regarding registration 10 days prior to release for "shall, within 14 days of conviction or release from prison or"; in (1)(c), at beginning, inserted "shall register", after "within" substituted "10 days" for "14 days", after "domicile for" substituted "10 days" for "14 days", and at end inserted "if the offender was sentenced in another state"; in (2), at beginning of first sentence, substituted "Registration under subsection (1)(a) must be with the probation office having supervision over the offender. Registration under subsection (1)(c) must be" for "register, as required under 46-18-254, 46-18-255, and this part" and inserted third sentence requiring notice to the other person; in (3), in four places, substituted reference to offender for reference to person, at end of first sentence, after "department", inserted "of justice", and in third sentence, after "photographs to the", deleted "department and the" and after "justice" deleted "and to the sheriff of the county where the person resides, if registration is with the chief of police"; inserted (4) regarding the registration verification form; in (5), at beginning of first sentence after "The", substituted "offender" for "person registered under this section" and inserted third and fourth sentences regarding fees to cover registration costs; in (6), after "within", substituted "10 days" for "14 days"; and made minor changes in style.

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989;and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

1995 Amendment: Chapter 407 in (1), near beginning after "sexual", inserted "or violent" and substituted "conviction or release from prison or within 14 days of entering a county of this state for the purpose of residing or setting up a temporary domicile for 14 days or more" for "coming into a county in which he resides or is temporarily domiciled"; inserted (2) relating to signing an information statement, to fingerprints, to photos, and to sending the statement, fingerprints, and photos to certain agencies; inserted (3) relating to the person's payment of registration costs; inserted (4) requiring notice to the Sheriff after entry of judgment; and made minor changes in style.

Case Notes

Defendant's Agreement in Plea Bargain That Included Possibility of Sex Offender Registration — Authority of Sentencing Court to Include Registration as Sentencing Condition: Grana was convicted of multiple burglaries, which would not otherwise require registration as a sexual offender. However, Grana acknowledged that he entered the homes to commit "sexually offensive acts against the occupants", and Grana's original plea agreement provided that the District Court could require sex offender registration, subject to Grana's right to argue that registration was not appropriate. Grana agreed to and obtained the full benefit of the plea bargain, which was sufficient to bring the case within the authority of 46-23-512 and to authorize the District Court to require registration as a sentencing condition as a matter of law. St. v. Grana, 2009 MT 250, 351 M 499, 213 P3d 783 (2009).

Violent Offender Registration Not Required for Criminal Endangerment: Rowe was convicted of felony criminal endangerment and misdemeanor negligent endangerment after assaulting a 2-year-old child whom Rowe was babysitting. As a sentencing condition, the District Court required Rowe to register as a violent offender. Rowe appealed, and the Supreme Court reversed. Criminal endangerment is not a statutorily listed violent offense for which registration is required. St. v. Rowe, 2009 MT 225, 351 M 334, 217 P3d 471 (2009).

Criminal Endangerment Not Requiring Registration as Violent Offender: Upon conviction for felony criminal endangerment, Perkins was required to register as a violent offender. On appeal, the Supreme Court noted that criminal endangerment is not an offense that requires registration as a violent offender. The court ordered that the registration condition be stricken from Perkins' sentence. St. v. Perkins, 2009 MT 150, 350 M 387, 208 P3d 386 (2009).

Release From Confinement, Not Supervision, Trigger for Registration as Sexual or Violent Offender: Azure asserted that because he was still under direct supervision of the Department of Corrections under the intensive supervision program following his release from prison, he was not required to register as a sexual or violent offender. The Supreme Court disagreed. The trigger for registration is the release from confinement, not release from confinement and supervision. Thus, Azure was required to register within 10 days of release from confinement, notwithstanding continued Department supervision during Azure's conditional release. St. v. Azure, 2008 MT 211, 344 M 188, 186 P3d 1269 (2008), overruling Wagner v. St., 2004 MT 31, 319

M 413, 85 P3d 750 (2004), to the extent that Wagner provided that registration is required upon release from confinement and supervision.

Washington Youth Sexual Offender Required to Register as Sexual or Violent Offender if Residing in Montana: At age 15, Villanueva was adjudicated guilty of first degree rape in Washington state and was later required to register for life in that state as a sexual offender. Villanueva subsequently moved to Montana where he resided for 6 weeks. After being arrested for a domestic disturbance, it was discovered that Villanueva had not registered as a sexual or violent offender in Montana, and he was charged with failure to register. Villanueva contended that Montana law did not apply to his Washington registration requirement because he did not meet the definition of sexual or violent offender under 46-23-502 and because a 1989 Attorney General's opinion held that juveniles adjudicated delinquent under the Montana Youth Court Act whose cases have not been transferred to District Court are not required to register. Villanueva moved to dismiss the charge, but the District Court denied the motion. On appeal, the Supreme Court affirmed. Although the Washington definition of sexual offender may not have been identical to the Montana definition, Villanueva was nevertheless a sexual offender under Washington law and was therefore required to register in Montana under this section. Further, Villanueva could not rely on the Attorney General's opinion because he was not adjudicated under the Montana Youth Court Act. The Supreme Court noted that the Washington sexual offender registration law also required Villanueva to register in another state if he changed state residency, so under both Washington and Montana law, Villanueva was required to register as a sexual offender. Villanueva's motion to dismiss was properly denied. St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

Sexual and Violent Offender Registration Requirements Not Part of Criminal Sentencing — Registration Violation Separate Offense: White Bear was convicted of failing to register as a sexual or violent offender. On appeal, White Bear contended that offender registration violated due process, but the argument was based on an incorrect premise that registration was a condition of sentencing and punishment for the original offense. In fact, the registration requirements are not part of criminal sentencing for a sexual or violent offense, and violation of registration requirements is a separate offense. White Bear's conviction for failing to register as a sexual or violent offender was affirmed. St. v. White Bear, 2005 MT 7, 325 M 337, 106 P3d 516 (2005). See also St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003).

Instructions for Self-Destructive Activity Given From Afar — Elements of Aggravated Assault Satisfied Given Foreseeability of Injury: Posing as a doctor, Sherer made numerous telephone calls from Florida to Montana women, asking the women to do destructive things to their bodies under the guise of performing self-tests to diagnose possible infection. Three women harmed themselves at Sherer's suggestion, for which Sherer was convicted of two counts of criminal endangerment and one count of aggravated assault and ordered to register as a violent offender. Sherer appealed the aggravated assault charge, arguing that encouraging "someone to injure themselves does not constitute aggravated assault" and that the causation element was too remote to form the basis of an aggravated assault charge. The Supreme Court disagreed. Sherer's instructions to the victims were intended to produce the precise injuries suffered, and by admitting to the facts in the information, Sherer could not credibly claim that he did not intend the injuries because the injuries flowed directly from Sherer's instructions. Statutes defining aggravated assault, cause, act, and conduct gave fair warning that the nature of Sherer's conduct constituted the offense of aggravated assault if that conduct resulted in the intended injuries. The definition of aggravated assault does not require a defined parameter of proximity between defendant and victim or require that a defendant personally direct force toward the victim, but specifically contemplates that any form of communication may itself be sufficient conduct. Sherer was successful in causing the intended injury, and his attempts to blame the victim for falling for the deceptive, illegal activity were meritless. The aggravated assault conviction was affirmed. St. v. Sherer, 2002 MT 337, 313 M 299, 60 P3d 1010 (2002).

Violent Offender Registration Not Violative of Due Process: After being convicted of mitigated deliberate homicide, Miller contended that the District Court's order requiring him to register as a violent offender infringed his right to due process because the court made no specific findings regarding his violent offender status and failed to hold a hearing to allow the introduction of contradictory evidence regarding his status. However, violent offender status is determined purely by this section. The registration statute does not vest a District Court with the discretion to designate defendants as violent offenders, does not prescribe a notice and hearing procedure for determining violent offender status, and does not require a District Court to issue findings based on evidence regarding a defendant's violent offender status. Rather, a defendant's designation as a violent offender is triggered merely by conviction of a violent offense. The

process due to a defendant for designation as a violent offender is reasonable notice and an opportunity to be heard during sentencing. St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721, 55 St. Rep. 719 (1998), following St. v. Krantz, 241 M 501, 788 P2d 298 (1990).

Violent Offender Registration Requirement Not Retroactive: Prior to July 1993, Whitmer was sentenced for felony assault (now assault with a weapon). Upon his release in January 1996, Whitmer was notified of his obligation to register as a violent offender. Whitmer did not register and was charged with and convicted of failure to register as a violent offender. On appeal, he claimed that the 1995 amendments to this section, which added individuals convicted of a violent offense to the list of those required to register, did not apply retroactively. Although the original bill adding the amendments did contain a retroactive applicability clause, the clause was removed during the legislative process when the issue arose that applying the law retroactively might violate the ban on ex post facto legislation. The Legislature did not express its intent to apply the amendments retroactively in the final version of the bill. Therefore, Whitmer had no obligation to register after his release from prison because the amendments did not apply to crimes committed before October 1, 1995. Whitmer's conviction on failure to register was reversed. St. v. Whitmer, 285 M 100, 946 P2d 137, 54 St. Rep. 1063 (1997).

Attorney General's Opinions

Registration of Out-of-State Sexual and Violent Offenders: A sexual or violent offender who is convicted of a violation of any law of another state or the federal government that is reasonably equivalent to a violation of 46-23-502(6) or (9) and who is sentenced on or after July 1, 1989, must register with the local law enforcement agency within 10 days of entering a Montana county for the purpose of taking up permanent or temporary residence. The registration requirement applies whether or not the state in which the offender was convicted has a registration program. 47 A.G. Op. 15 (1998).

46-23-505. Notice of change of name or residence or student, employment, or transient status — duty to inform — forwarding of information.

Compiler's Comments

2007 Amendments — Composite Section — Coordination: Section 5, Ch. 254, L. 2007, in (1) in first sentence near middle after "46-23-504(1)(b)" substituted "to the registration agency for the county or municipality" for "to the department and to the chief of police of the municipality or sheriff of the county" and inserted second sentence requiring offenders to have a new photograph each year. Amendment effective October 1, 2007.

Chapter 483 in (1) near beginning after "change of" substituted "name or residence or a change in student, employment, or transient status" for "address", after "within" substituted "3 business days" for "10 days", after "change" substituted "appear in person and give notification of the change" for "give written notification of the new address", before "agency" inserted "registration", and after "46-23-504(1)(b), to the" substituted "registration agency for the county or municipality" for "department and to the chief of police of the municipality or sheriff of the county" and deleted former second sentence that read: "The agency or department shall, within 3 days after receipt of the new address, forward it to the department of justice, which shall forward a copy of the new address and photograph to the sheriff having jurisdiction over the new address and to the chief of police of the municipality of the new address if the new address is in a municipality"; inserted (2) concerning registration by a transient; inserted (3) regarding forwarding of the information by the registration agency and the department of justice; and made minor changes in style. Amendment effective May 11, 2007.

The amendments to this section made by sec. 2, Ch. 254, L. 2007, were rendered void by sec. 5, Ch. 254, L. 2007, a coordination section.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

Retroactive Applicability: Section 31, Ch. 483, L. 2007, provided: "[Sections 2, 3, and 19 through 24] [amending 41-5-216, 41-5-1513, 46-23-502, 46-23-504, 46-23-505, 46-23-506, 46-23-508, and 46-23-509] apply retroactively, within the meaning of 1-2-109, to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

2005 Amendment: Chapter 313 in first sentence near beginning after "part" substituted "has a change of address" for "changes residence" and at end after "registered" inserted "or, if the offender was initially registered under 46-23-504(1)(b), to the department and to the chief of police of the municipality or sheriff of the county from which the offender is moving" and in second sentence at beginning after "agency" inserted "or department" and near end in three

places after "new" substituted "address" for "place of residence". Amendment effective October 1, 2005.

1997 Amendment: Chapter 375 in first sentence, in three places, substituted "offender" for "person", after "under" deleted "46-18-254, 46-18-255, and", after "10 days" inserted "of the change", and before "agency" deleted "law enforcement" and in second sentence, before "agency" deleted "law enforcement", after "receipt of the" substituted "new address" for "information", after "forward it to the" deleted "department, the", after "justice" deleted "and the local law enforcement agency having jurisdiction over the new place of residence and", after "copy of the" substituted "new address and photograph to the sheriff" for "statement, fingerprints, and photographs of the person to the local law enforcement agency", and at end inserted "and to the chief of police of the municipality of the new place of residence if the new place of residence is in a municipality"; and made minor changes in style.

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989;and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

1995 Amendment: Chapter 407 in second sentence inserted reference to the Department of Justice and at end inserted "and shall forward a copy of the statement, fingerprints, and photographs of the person to the local law enforcement agency having jurisdiction over the new place of residence"; and made minor changes in style.

Case Notes

Erroneous Reference to Offense in Charging Document — No Grounds for Reversal Absent Surprise or Prejudice: As a condition of sentencing, Bahr was required to maintain registration as a violent offender. Bahr was subsequently charged with failure to provide notice of a change of address, and the charge was later amended to failing to provide notice of a change of residence. At trial, Bahr asserted that the charge should be dismissed because the initial charging document cited an offense of failure to provide notice of a change of address that was not a crime. The District Court concluded that the charging document properly charged an offense under 46-23-507 and dismissed Bahr's argument. On appeal the Supreme Court affirmed. The original information and the supporting affidavit clearly set out that Bahr was required to register as a violent offender, that the last registration was completed in Glacier County in 2002, and that Bahr had acknowledged the requirement to provide notice of any change but had failed to provide notice after moving from Glacier County and residing in Cascade County for over a month without updating the registration information. This was enough as a matter of law to apprise Bahr of the charges and to prevent any surprise. Even if there were errors in wording in the charging document, there was no ground for reversal unless Bahr demonstrated prejudice. Additionally, amendment of the information from "change of address" to "change of residence" was not substantive. Therefore, absent surprise or prejudice, the District Court properly declined to dismiss the charge. St. v. Bahr, 2009 MT 378, 353 M 294, 224 P3d 610 (2009).

Offender Registration Statute Not Void for Vagueness: This section uses clear language that gives fair notice to offenders that they are required to update their registration when they change their residence. Thus, the statute is not void for vagueness because it states with sufficient definiteness what offenders must do to maintain registration. St. v. Samples, 2008 MT 416, 347 M 416, 198 P3d 803 (2008).

Violation Upon Registrant's Failure to Notify Upon Move From Homeless Shelter to Streets: Samples was registered as a sexual offender while residing at a Billings homeless shelter. Samples moved out of the shelter but failed to notify authorities. Samples contended that he was not required to provide notice of a change of address because he moved from the shelter to the streets of the city and had no actual address. The Supreme Court disagreed. Under 46-23-505, a registrant is required to provide notification of a change of residence, which Samples failed to do upon moving from the shelter. Because Samples failed to keep his registration current, he was subject to the penalty in 46-23-507. St. v. Samples, 2008 MT 416, 347 M 416, 198 P3d 803 (2008).

Release From Confinement, Not Supervision, Trigger for Registration as Sexual or Violent Offender: Azure asserted that because he was still under direct supervision of the Department of Corrections under the intensive supervision program following his release from prison, he was not required to register as a sexual or violent offender. The Supreme Court disagreed. The trigger for registration is the release from confinement, not release from confinement and supervision. Thus, Azure was required to register within 10 days of release from confinement, notwithstanding continued Department supervision during Azure's conditional release. St. v.

Azure, 2008 MT 211, 344 M 188, 186 P3d 1269 (2008), overruling Wagner v. St., 2004 MT 31, 319 M 413, 85 P3d 750 (2004), to the extent that Wagner provided that registration is required upon release from confinement and supervision.

Sexual Offender Registration Statute Unconstitutionally Vague Regarding Whether Residential or Mailing Address of Offender Required: Knudson was charged in 2005 with failure to reregister as a sexual offender after changing residences in Chouteau County. Knudson contended that the registration statute was unconstitutionally vague because it was unclear whether an offender was required to provide a residential address or a mailing address. Knudson asserted that the charge should be dismissed because the mailing address that he used when originally registering in 2002 did not change. The District Court denied the dismissal motion, but on appeal, the Supreme Court reversed. The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that an ordinary person can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. It was unclear from the face of this section whether an offender should provide a residential or mailing address when registering. The ambiguity in the use of the word "address" failed to provide Knudson with actual notice that a mailing address was insufficient, and the state's action in charging Knudson for failing to reregister was arbitrary and discriminatory because if Knudson violated the statute by providing a mailing address instead of a residential address, the state should have notified Knudson of the violation when he first registered in 2002. The case was remanded for dismissal of the charge. (Note that the 2007 Legislature substituted "name or residence or a change in student, employment, or transient status" for "address" and applied the amendment retroactively to sexual offenders who are sentenced or who are in the custody or under the supervision of the Department of Corrections on or after July 1, 1989, and to violent offenders who are sentenced or who are in the custody or under the supervision of the Department of Corrections on or after October 1, 1995.) St. v. Knudson, 2007 MT 324, 340 M 167, 174 P3d 469 (2007).

Conditioning Suspension of Part of Sentence for Failure to Register as Sex Offender on No Contact With Persons Under 18 and No Possession of Pornographic Material: Malloy, a convicted sex offender, pleaded guilty to failing to report his change of address. He appealed conditions on his suspended sentence that prohibited contact with persons under 18 years of age and access to or possession of pornographic or other material tending to arouse deviant thoughts or fantasies, claiming that the conditions were not reasonably related to the offense, as required by case law interpretation of the 46-18-201 provision allowing "reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society". The Sexual or Violent Offender Registration Act was adopted to protect the public from the recidivism of sex offenders, prevent victimization of vulnerable children, and assist law enforcement in keeping track of sex offenders. Malloy had two prior sex offense convictions and failed to complete two different sex offender programs. He had a history of inability to conform his conduct to the demands of the state's sex offender laws and exhibited behavior placing society in danger because of his recidivism. The conditions were reasonably related to the goal of protecting society, including children. St. v. Malloy, 2004 MT 377, 325 M 86, 103 P3d 1064 (2004).

Suspension of Part of Sentence for Failure to Register as Sex Offender — Conditions in Written but Not Oral Judgment That Full Employment Be Maintained and Offender Not Have Contact With Victims: Malloy, a convicted sex offender, pleaded guilty to failing to report his change of address. The written judgment, but not the oral pronouncement of sentence, required him to maintain full-time employment and to not have contact with the victims of his offense. The court could not say that the conditions would not substantively increase his loss of liberty or sacrifice of property, and accordingly, the court ordered those conditions to be vacated. St. v. Malloy, 2004 MT 377, 325 M 86, 103 P3d 1064 (2004).

46-23-506. Duration of registration.

Compiler's Comments

2007 Amendment: Chapter 483 in (3)(b) near middle of first sentence after "registration" inserted "for a level 1 sexual offender and at any time after 25 years of registration for a level 2 sexual offender" and after "an offender" deleted "required to register for life". Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

Retroactive Applicability: Section 31, Ch. 483, L. 2007, provided: "[Sections 2, 3, and 19 through 24] [amending 41-5-216, 41-5-1513, 46-23-502, 46-23-504, 46-23-505, 46-23-506, 46-23-508, and 46-23-509] apply retroactively, within the meaning of 1-2-109, to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

2005 Amendment: Chapter 313 in (2)(a) at end after "hearing" inserted "but the offender is not relieved of the duty to register until a petition is granted under subsection (3)(a)"; in (2)(b) at end after "(3)" inserted "(b)"; inserted (3)(a) allowing a registered offender to petition for relief from the duty to register after 10 years without a conviction; in (3)(b) near beginning of first sentence after "offender" inserted "required to register for life"; in (4) at beginning of second sentence after "proceeding" inserted "under subsection (3)(b)"; and made minor changes in style. Amendment effective October 1, 2005.

2002 Amendment: Chapter 22 inserted (5)(a)(ii) exempting an offender from subsection (3) if the victim was under 12 years of age when the offense occurred; and made minor changes in style. Amendment effective August 21, 2002.

Applicability: Section 9, Ch. 22, Sp. L. August 2002, provided: "[This act] applies to convictions on or after [the effective date of this act]." Effective August 21, 2002.

1999 Amendment: Chapter 227 at beginning of (3) inserted exception clause; in (3)(b) deleted former second sentence that read: "If the offender was designated as a sexually violent predator under 46-23-509, the court is also required to find that the offender no longer suffers from a mental abnormality or personality disorder that makes the offender likely to engage in a predatory sexual offense"; inserted (5) outlining certain convicted sexual offenders who may not petition, after 10 years of registration, for an order relieving offender from duty to register; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 375 in (1), in three places, substituted reference to sexual offender for reference to person and after "under" substituted "this part shall register" for "46-18-254, 46-18-255, and this part shall comply with 46-18-254, 46-18-255, and this part"; inserted (2) regarding registration time; in (3), in first sentence after "10 years", substituted "of registration" for "since the date of the offender's last conviction of a sexual or violent offense", after "petition" substituted "the sentencing court or the district court for the judicial district in which the offender resides" for "a district court", and at end deleted "under 46-18-254, 46-18-255, and this part"; in (3)(b) inserted second sentence requiring a finding that a designated sexually violent predator no longer suffers from a mental abnormality or personality disorder; adjusted subsection references; and made minor changes in style.

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989;and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

1995 Amendments: Chapter 407 in (1) substituted compliance for the rest of the person's life, except as provided in subsection (2), or during a period of time during which the person is in prison for compliance for 10 years after conviction if not imprisoned during those 10 years and for 10 years after release from prison if imprisoned during the initial 10 years; and substituted (2) relating to a petition for relief from registration and proceeding on the petition for former (2) that provided that the registration duty terminates 10 years after the initial registration if the person commits no act during that time requiring registration.

Chapter 550 in (1), near beginning after "part for", substituted "the remainder of the person's life, except as provided in subsection (2) of this section or during a period of time during which the person is in prison" for "a period of 10 years after conviction, if not imprisoned during that period. If a person required to register under 46-18-254, 46-18-255, and this part is imprisoned during the initial 10-year period, he shall comply with the provisions of 46-18-254, 46-18-255, and this part for a period of 10 years after release from prison"; and substituted (2) and (3) allowing a petition for relief from registration for former language that read: "A convicted sexual offender's duty to register under 46-18-254, 46-18-255, and this part terminates at the expiration of 10 years from the date of initial registration, provided that during the 10-year period the convicted sexual offender does not again become subject to 46-18-254, 46-18-255, and this part."

Code Commissioner Correction: In preparing the 1995 composite for this section, in (2) the words "or violent" were omitted from the first sentence. The omitted words were contained in Chapter 407, Laws of 1995, and should have been included. The Code Commissioner has inserted the erroneously omitted words.

Case Notes

Youth Court Adjudication Not Considered Conviction — No Authority to Require Adjudicated Youth to Register as Sexual or Violent Offender Under Pre-2007 Law: In 1998, 16-year-old

Hastings was adjudicated a delinquent youth in Youth Court, admitting one offense of sexual intercourse without consent, and was committed to the Department of Corrections (DOC). When Hastings turned 18 in 2000, his case was transferred to District Court until age 25 based on the parties' stipulation that Hastings had not completed sex offender treatment or paid restitution and was at high risk to reoffend. The District Court then determined that Hastings had violated the conditions of the Youth Court order and committed Hastings to the DOC and also required that Hastings register as a level 2 sex offender. Hastings initially registered as a sex offender, but failed to update registration after moving and was subsequently charged with failure to maintain registration. Hastings moved to dismiss the charge, asserting that he had not been convicted of a sexual offense and that neither the commitment order nor statutes required him to register after discharging his sentence. The motion was denied, and Hastings appealed. The Supreme Court reversed. Although the Youth Court had the authority to require sex offender registration pursuant to 41-5-1513, no requirement was made in this case. Because the Youth Court adjudication did not constitute a conviction, the District Court could not impose registration requirements under 46-18-201. (Note that the 2007 Legislature amended 46-23-502 to include an adjudicated youth in the definition of a sexual or violent offender.) The District Court's opinion that 41-5-1513 suggests a wholesale incorporation of sexual offender registry into the Montana Youth Court Act was erroneous, and absent statutory authority, a court may not impose a registration requirement. Failure to grant Hastings' motion to dismiss was error, and the case was remanded for dismissal. St. v. Hastings, 2007 MT 294, 340 M 1, 171 P3d 726 (2007), distinguishing St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), and St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

46-23-507. Penalty.

Compiler's Comments

1997 Amendment: Chapter 375 after "register" inserted "verify registration, or keep registration current" and after "under" deleted "46-18-254, 46-18-255, and".

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989;and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

1995 Amendments: Chapter 407 near beginning inserted "or violent" and increased penalty from "not less than 90 days or a fine not to exceed $250, or both" to "not more than 5 years or may be fined not more than $10,000, or both".

Chapter 550 near end substituted "more than 5 years or may be fined not more than $10,000" for "less than 90 days or a fine not to exceed $250".

Case Notes

Erroneous Reference to Offense in Charging Document — No Grounds for Reversal Absent Surprise or Prejudice: As a condition of sentencing, Bahr was required to maintain registration as a violent offender. Bahr was subsequently charged with failure to provide notice of a change of address, and the charge was later amended to failing to provide notice of a change of residence. At trial, Bahr asserted that the charge should be dismissed because the initial charging document cited an offense of failure to provide notice of a change of address that was not a crime. The District Court concluded that the charging document properly charged an offense under 46-23-507 and dismissed Bahr's argument. On appeal the Supreme Court affirmed. The original information and the supporting affidavit clearly set out that Bahr was required to register as a violent offender, that the last registration was completed in Glacier County in 2002, and that Bahr had acknowledged the requirement to provide notice of any change but had failed to provide notice after moving from Glacier County and residing in Cascade County for over a month without updating the registration information. This was enough as a matter of law to apprise Bahr of the charges and to prevent any surprise. Even if there were errors in wording in the charging document, there was no ground for reversal unless Bahr demonstrated prejudice. Additionally, amendment of the information from "change of address" to "change of residence" was not substantive. Therefore, absent surprise or prejudice, the District Court properly declined to dismiss the charge. St. v. Bahr, 2009 MT 378, 353 M 294, 224 P3d 610 (2009).

Violation Upon Registrant's Failure to Notify Upon Move From Homeless Shelter to Streets: Samples was registered as a sexual offender while residing at a Billings homeless shelter. Samples moved out of the shelter but failed to notify authorities. Samples contended that he was not required to provide notice of a change of address because he moved from the shelter to the

streets of the city and had no actual address. The Supreme Court disagreed. Under 46-23-505, a registrant is required to provide notification of a change of residence, which Samples failed to do upon moving from the shelter. Because Samples failed to keep his registration current, he was subject to the penalty in 46-23-507. St. v. Samples, 2008 MT 416, 347 M 416, 198 P3d 803 (2008).

Persistent Felony Offender Statute Not Violative of Double Jeopardy Protections: Wardell was convicted of felony sexual contact with a child in South Dakota and later was charged with numerous sexual crimes in Montana, including failure to register as a sex offender. The District Court sentenced Wardell to 5 years on the failure to register count and designated Wardell as a persistent felony offender, ultimately adding an additional 20-year consecutive sentence. Wardell appealed on grounds that the conviction for failure to register and the sentence for persistent felony offender constituted double jeopardy because each relied on the same underlying conviction. The Supreme Court disagreed. A sentence as a habitual criminal is not to be viewed as a new jeopardy. The sentence enhancement was related to the second crime—failure to register—and thus did not constituted double jeopardy. Under 46-18-501, the dual use of the prior South Dakota conviction for designating Wardell as a persistent felon was authorized. Further, it is not a crime to be a persistent felony offender, and being designated a persistent felony offender cannot constitute double jeopardy. St. v. Wardell, 2005 MT 252, 329 M 9, 122 P3d 443 (2005).

Use of Persistent Felony Offender Statute to Increase Sentence Not Considered Cruel and Unusual Punishment: Wardell was originally sentenced as a persistent felony offender to 45 years in prison with 30 years suspended. Wardell filed a petition for postconviction relief, and that sentence was vacated. Upon resentencing, Wardell's sentence was increased to 20 years suspended plus 5 years for failure to register as a sex offender. Wardell argued on appeal that the sentence constituted cruel and unusual punishment because it was excessive when compared to other sentences for failure to register. The Supreme Court noted that Wardell's sentence was within statutory maximum guidelines and was not so disproportionate to the crime as to shock the conscience or outrage the moral sense of the community or of justice. The sentence was affirmed. St. v. Wardell, 2005 MT 252, 329 M 9, 122 P3d 443 (2005), distinguishing St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003).

Sex Offender Registration and Disclosure Requirements Not Violative of Privacy or Right of Convicted to Restoration of Rights: Mount was convicted of sexual intercourse without consent and served his sentence. Nine days after final discharge from prison in 1996, Mount registered as a sexual offender, but he was convicted in 2000 of failing to update the registration as required in this section. On appeal, Mount asserted that the ongoing registration and disclosure requirements of the Sexual or Violent Offender Registration Act violated the right to privacy under Art. II, sec. 10, Mont. Const., and constitutional and statutory provisions for reinstatement of the rights of a citizen under Art. II, sec. 28, Mont. Const., and 46-18-801. The Supreme Court disagreed. As a fundamental right, the right to individual privacy may be infringed only by a compelling state interest; however, protection of the public from the recidivism of sex offenders, prevention of the victimization of vulnerable children, and assistance in keeping track of sex offenders constitute the requisite compelling interest. Further, Art. II, sec. 28, Mont. Const., and 46-18-801 apply only to the restoration of civil and political rights, and a conviction for sexual intercourse without consent does not fall under this category of protected rights. Thus, Mount was not deprived of any rights by the registration and disclosure requirements of the Sexual or Violent Offender Registration Act. St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), followed in Wagner v. St., 2004 MT 31, 319 M 413, 85 P3d 750 (2004).

46-23-508. Dissemination of information.

Compiler's Comments

2009 Amendment: Chapter 2 in (1)(b)(iii)(E) before "vehicle" inserted "motor". Amendment effective October 1, 2009.

2007 Amendment: Chapter 483 in (1)(b) at beginning of introductory clause substituted "the department of justice or the registration" for "a law enforcement", in two places after "information" inserted "that it possesses", and before "agency" inserted "department of justice or the registration"; inserted (1)(b)(i) regarding dissemination of information if the offender is also a violent offender; in (1)(b)(ii) near beginning after "46-23-509" substituted "the department of justice shall and the registration agency may disseminate to the victim and the public:

(A) the offender's address;

(B) the name, photograph, and physical description of the offender;

(C) the offender's date of birth; and

(D) the offenses for which the offender is required to register under this part" for "the agency with which the offender is registered shall notify the agency in whose jurisdiction the offense occurred of the registration"; in (1)(b)(iii) near beginning after "given a" inserted "level 1 designation and committed an offense against a minor or was given a", after "46-23-509, the" inserted "department of justice shall and the registration", and after "agency" substituted "may disseminate to the victim and the public" for "with which the offender is registered may disseminate the offender's name to the public with the notation that the offender is a sexual or violent offender and may notify a victim of the offense and any agency, organization, or group serving persons who have characteristics similar to those of a previous victim of the offender of"; inserted (1)(b)(iii)(D) including the offender's date of birth; inserted (1)(b)(iii)(E) including the license plate number and a description of any vehicle owned or operated by the offender; in (1)(b)(iv) near beginning of first sentence after "46-23-509, the" inserted "department of justice and the registration" and at beginning of second sentence after "The" substituted "notification must" for "agency shall"; in (1)(c) in first sentence in two places before "agency" substituted "registration" for "law enforcement"; in (2) after "released by a" substituted "registration" for "law enforcement"; in (3) substituted "Dissemination to the public of information allowed or required by this section may be done by newspaper, paper flyers, the internet, or any other media determined by the disseminating entity. In determining the method of dissemination, the disseminating entity should consider the level of risk posed by the offender to the public" for "A state or local law enforcement agency may use the internet to disseminate the information allowed by this section to the public"; inserted (4) requiring development of a model community notification policy; and made minor changes in style. Amendment effective May 11, 2007.

The amendments to this section made by sec. 3, Ch. 254, L. 2007, were rendered void by sec. 6, Ch. 254, L. 2007, a coordination section.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

Retroactive Applicability: Section 31, Ch. 483, L. 2007, provided: "[Sections 2, 3, and 19 through 24] [amending 41-5-216, 41-5-1513, 46-23-502, 46-23-504, 46-23-505, 46-23-506, 46-23-508, and 46-23-509] apply retroactively, within the meaning of 1-2-109, to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

2001 Amendment: Chapter 222 inserted (3) authorizing state or local law enforcement agency to use internet to disseminate information. Amendment effective July 1, 2001.

1999 Amendment: Chapter 219 in (1)(a) after "name" inserted "and address"; in (1)(b)(ii)(A) substituted "the offender's address" for "the offender's approximate, but not exact, address, such as by stating the neighborhood, town, or part of a county"; in (1)(b)(iii) at end of first sentence deleted "except that the offender's exact address must be included"; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 375 in (1), at beginning of introductory clause after "Information", deleted "in the register" and after "under" deleted "46-18-254"; in (1)(a), after "sexual", inserted "or violent"; deleted former (2) that read: "(2) before releasing from a state prison an inmate who is a sexual offender, if the department believes that release of information concerning the inmate is necessary for public protection, the department shall petition the district court for the judicial district in which the prison is located or for the judicial district in which the inmate intends to reside for an order allowing the department to release relevant and necessary register information regarding the inmate to the public. The court shall grant the order if the court finds that the information is necessary for public protection"; inserted (1)(b) and (1)(c) regarding release of registration information; inserted (2) prohibiting release of the identity of a victim without permission; and made minor changes in style.

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

Attorney General's Opinions

Limit of Immunity Regarding Release of Sexual Offender Registration Information: Under 46-23-511, state and local agencies, private entities, and their employees are exempt from liability as a result of good faith decisions regarding the release of information on sexual offenders, but that immunity does not extend to gross negligence or willful or wanton

misconduct. Pursuant to Russell v. Gregoire, 124 F3d 1079 (9th Cir. 1997), release of information is tailored to help the community protect itself from sexual predators under the guidance of law enforcement, not to punish sex offenders. 47 A.G. Op. 15 (1998).

Registration of Out-of-State Sexual Offenders — Information Subject to Disclosure: The general language of subsection (1)(b) of this section governs the dissemination of information regarding out-of-state sexual offenders who are registered in Montana. At a minimum, the name of the registered sexual offender may be disclosed. Additional information may be disclosed if the offender is determined to be a risk to the safety of the community and if disclosure of the additional information promotes public safety. The identity of a victim may not be released without the victim's permission. 47 A.G. Op. 15 (1998).

Collateral References

Validity, construction, and application of state statutes authorizing community notification of release of convicted sex offender. 78 ALR 5th 489.

46-23-509. Sexual offender evaluations and designations — rulemaking authority.

Compiler's Comments

2007 Amendment: Chapter 483 in (4) near end of first sentence after "offender" inserted "treatment"; in (5) near middle after "part" inserted "and who was sentenced prior to October 1, 1997"; in (6) substituted "46-23-502(9)(b)" for "46-23-502(6)(b)"; inserted (7) allowing the lack of a fixed residence to be considered as a factor in determining risk level; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

Retroactive Applicability: Section 31, Ch. 483, L. 2007, provided: "[Sections 2, 3, and 19 through 24] [amending 41-5-216, 41-5-1513, 46-23-502, 46-23-504, 46-23-505, 46-23-506, 46-23-508, and 46-23-509] apply retroactively, within the meaning of 1-2-109, to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

2005 Amendment: Chapter 313 in (4) near beginning of first sentence after second "offender" inserted "or given a level designation by another state, the federal government, or the department under subsection (6) that is determined by the court to be similar to level 2" and near middle after "sentencing court" inserted "or the district court for the judicial district in which the offender resides"; inserted (6) allowing the department of justice to give an offender the risk level designation assigned by another state or by the federal government in certain cases; and made minor changes in style. Amendment effective October 1, 2005.

2002 Amendment: Chapter 22 in (4) near beginning after "level 2" deleted "or level 3". Amendment effective August 21, 2002.

Applicability: Section 9, Ch. 22, Sp. L. August 2002, provided: "[This act] applies to convictions on or after [the effective date of this act]." Effective August 21, 2002.

1999 Amendment: Chapter 358 inserted (5) requiring the department to apply a level designation when the offender is released if the sentencing court did not apply a level designation at the time of sentencing; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989;and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

Case Notes

Plea Not Considered Involuntary Based on Defendant's Belief in Designation as Low-Level Sexual Offender: Brinson entered a plea agreement stating that he would be sentenced to 20 years suspended if he completed a sexual offender evaluation with an evaluator certified by the Montana Sex Offender Treatment Association (MSOTA) and if the evaluator concluded that Brinson was a low risk to reoffend. However, if Brinson was not found to be a low risk, the parties would be free to argue for an appropriate sentence. Brinson received two evaluations. A non-MSOTA evaluator found Brinson to be a level 1 low-risk offender, but an MSOTA evaluator concluded that Brinson was a level 2 moderate-risk offender. The sentencing court held that because Brinson was not found to be a low risk by an MSOTA evaluator, the suspended sentence provisions of the plea agreement did not apply. The court subsequently adopted the

recommendation in the presentence investigation report and sentenced Brinson to 20 years in prison with 10 years suspended. Brinson appealed on grounds that he was misled by the plea bargain, however slightly, so withdrawal of the guilty plea was warranted. The Supreme Court disagreed. The court disapproved the "however slightly" language in the analysis of the voluntariness of a plea. Even though Brinson's expectations were bolstered by the low-level evaluation 3 months after his plea, those subsequent expectations were irrelevant to whether the plea was voluntary when entered. Even though Brinson may have had a good faith belief that he would ultimately be designated a low-risk offender, he presented no objective proof that he was assured of receiving that designation. In fact, the plea agreement was clear that a low-risk designation might not be forthcoming, so Brinson's argument that the plea was involuntary because it was induced by a misrepresentation or an unfulfillable promise was unpersuasive. The sentencing court did not err in denying Brinson's motion to withdraw the plea. St. v. Brinson, 2009 MT 200, 351 M 136, 210 P3d 164 (2009), overruling St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005), and St. v. Deserly, 2008 MT 242, 344 M 468, 188 P3d 1057 (2008), regarding applicability of the "however slightly" language in the analysis of the voluntariness of a plea.

No Error in Level 3 Sex Offender Designation: Hill asserted error in the District Court's designation of Hill as a level 3 sexual offender. A District Court makes a sexual offender designation in the exercise of the court's discretion, and in this case the court did not abuse its discretion given Hill's: (1) history of multiple sexual contacts with young children of both sexes spanning at least 7 years; (2) admission of multiple sexual assaults; (3) failure of two sexual offender treatment programs; (4) commission of a sexual felony following return to the community; (5) high risk to reoffend; (6) danger to the community; and (7) need for lifelong supervision. St. v. Hill, 2009 MT 134, 350 M 296, 207 P3d 307 (2009).

Sentence Not Based on Materially Inaccurate Information Affirmed: Following conviction on a sexual assault charge, Hirt was sentenced as a level 3 sexual offender. Hirt contended that the sentence was erroneous because it was based in part on materially inaccurate information that Hirt had three prior felony convictions, when in fact Hirt had only one prior felony conviction. However, the sentencing judge knew at sentencing that Hirt had one prior felony conviction, not three as stated in the original presentence investigation (PSI) report, because the information had been corrected in a subsequent PSI report. The level 3 designation was based on a number of considerations besides Hirt's prior criminal history, including Hirt's drug and alcohol abuse, mental health history, misuse of prescription medication, credibility, and failure to assume responsibility for his actions. The sentencing judge was not bound by the level 3 recommendation and was required to and did make an independent decision on the issue after considering the range of relevant and material factors presented in the sentencing record. Thus, the sentencing court did not rely on misinformation, and the information in the PSI was true, so there was no error or violation of Hirt's due process rights. Hirt v. St., 2009 MT 116, 350 M 162, 206 P3d 908 (2009).

Parole Restriction Based on Defendant's Danger to Society Warranted: Following conviction for kidnapping and sexual assault, Dunning was sentenced to 10 years in prison and designated as ineligible for parole. Dunning argued on appeal that the parole restriction was unwarranted, but the Supreme Court affirmed. Two psychosexual evaluations confirmed Dunning's high risk to reoffend equivalent to a level 3 offender, and Dunning remained an untreated sexual offender who was considered a danger to society based on a 30-year history of sexually related offenses. The factual evidence presented to the sentencing court provided a sufficient basis to support the court's conclusion that the parole restriction was proper. St. v. Dunning, 2008 MT 427, 347 M 443, 198 P3d 828 (2008).

Offender Entitled to Opportunity to Contest Sex Offender Designation — Liberty Interest at Stake: Samples contended that his due process rights were violated when the Department of Corrections assigned him a level 3 offender designation without notice, a hearing, or an opportunity to contest the designation. The Supreme Court agreed. In the context of a criminal sentence in Montana, it is not the duration or severity of a sentence that might render it unconstitutional, it is the imposition of a sentence based on a foundation that might be extensively and materially false and that a prisoner has no opportunity to correct that can result in a due process violation. There is a liberty interest at stake when a person is designated as a particular risk level for registration purposes because the level of designation places varying requirements on an offender to update the registration or face criminal sanctions. Therefore, Samples was denied due process in this case because he did not have the opportunity to know what information was used to designate the risk level, nor was he given the right to contest that information or the chance to argue for a different designation. The court remanded to allow

Samples an opportunity to explain, argue, and rebut any information used in the designation of his sexual offender risk level. St. v. Samples, 2008 MT 416, 347 M 416, 198 P3d 803 (2008).

Sentence Based on Recommendation of Sexual Offender Evaluator — State Breach of Plea Agreement by Presenting Conflicting Testimony of Different Evaluator: In a plea agreement, the state agreed to recommend one sentence if Rahn was designated by a sexual offender evaluator as a level 2 or lower offender and a harsher sentence if Rahn was designated as a level 3 offender. An evaluator who personally evaluated Rahn opined that Rahn should be designated as a level 2 offender. At the sentencing hearing, the state presented testimony by a different evaluator, who had not evaluated Rahn, attacking the level 2 designation and arguing that Rahn should be designated as a level 3 offender. Rahn objected on grounds that the state witness's testimony breached the plea agreement, but the sentencing court overruled the objection and subsequently designated Rahn as a level 3 offender and imposed the harsher sentence. Rahn appealed, and the Supreme Court reversed. Rahn complied with the plea agreement, but the state's conduct in presenting alternate testimony and recommending a level 3 designation was not what was agreed upon in the plea bargain; therefore, the state breached the plea agreement. The state was obligated to make the recommendation as agreed upon in the plea bargain, and the Supreme Court remanded for resentencing with a different judge pursuant to the terms of the plea agreement. St. v. Rahn, 2008 MT 201, 344 M 110, 187 P3d 622 (2008).

No General or Inherent Authority of Sentencing Court to Generally Impose Parole Conditions — Parole Condition Related to Sexual Offense Authorized: There is no general or inherent authority for a sentencing court to impose parole conditions. A sentencing court may impose conditions on parole that are authorized by statute only. In this case, all conditions on Burch's suspended sentence for sexual offenses were proper, but only one parole condition, prohibiting Burch from possessing pornography or accessing the Internet, was authorized under 46-18-255. Burch's admission that he used the Internet at work to access pornography while on parole established that Burch violated a condition of his suspended sentence by a preponderance of the evidence. Thus, the sentencing court did not err in revoking Burch's suspended sentence. St. v. Burch, 2008 MT 118, 342 M 499, 182 P3d 66 (2008), followed in St. v. Dennison, 2008 MT 344, 346 M 295, 194 P3d 704, (2008), and followed in St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009), regarding authority of sentencing court.

Petition for Redesignation of Level 3 Sexual Offender Status Applicable to Convictions Prior to August 21, 2002: Bullman was sentenced under the 1999 version of this section that allowed a level 2 or level 3 offender to petition for a change in the offender designation upon completion of a sexual offender program. Bullman was designated as a level 3 offender and petitioned for a change in designation in 2006. However, in 2002, the Legislature amended this section to allow only level 2 offenders to petition for a change in designation, so the District Court denied Bullman's petition. The Supreme Court reversed. The 2002 amendment applies only to convictions on or after August 21, 2002, and does not apply retroactively, so Bullman was entitled to petition for redesignation. The case was remanded for the District Court to determine whether Bullman qualified for redesignation. St. v. Bullman, 2007 MT 288, 339 M 461, 171 P3d 681 (2007).

Department of Corrections Assignment of Offender Level if Not Designated by Sentencing Court: Defendant contended that the sentencing court erred in failing to designate a sexual offender risk level at the time of sentencing. The Supreme Court found that the sentencing court erred in failing to designate a level, but the error did not warrant remand because this section provides its own remedy by allowing the Department of Corrections to assign an offender level at the time of an offender's release from confinement if the sentencing court fails to do so. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004).

46-23-510. Expungement of records on reversal of conviction.

Compiler's Comments

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989;and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

46-23-511. Immunity from suit.

Compiler's Comments

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989;and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

Attorney General's Opinions

Limit of Immunity Regarding Release of Sexual Offender Registration Information: Under this section, state and local agencies, private entities, and their employees are exempt from liability as a result of good faith decisions regarding the release of information on sexual offenders, but that immunity does not extend to gross negligence or willful or wanton misconduct. Pursuant to Russell v. Gregoire, 124 F3d 1079 (9th Cir. 1997), release of information is tailored to help the community protect itself from sexual predators under the guidance of law enforcement, not to punish sex offenders. 47 A.G. Op. 15 (1998).

46-23-512. Plea agreement agreeing to compliance with this part.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Case Notes

Defendant's Agreement in Plea Bargain That Included Possibility of Sex Offender Registration — Authority of Sentencing Court to Include Registration as Sentencing Condition: Grana was convicted of multiple burglaries, which would not otherwise require registration as a sexual offender. However, Grana acknowledged that he entered the homes to commit "sexually offensive acts against the occupants", and Grana's original plea agreement provided that the District Court could require sex offender registration, subject to Grana's right to argue that registration was not appropriate. Grana agreed to and obtained the full benefit of the plea bargain, which was sufficient to bring the case within the authority of 46-23-512 and to authorize the District Court to require registration as a sentencing condition as a matter of law. St. v. Grana, 2009 MT 250, 351 M 499, 213 P3d 783 (2009).

46-23-520. Sexual or violent offender community education curriculum.

Compiler's Comments

Effective Date: Section 4, Ch. 222, L. 2001, provided that this section is effective July 1, 2001.

Part 10
Supervision of Probationers and Parolees

Part Compiler's Comments

Study Authorized: Chapter 572, L. 1987, required a study to determine if it is appropriate and necessary for a probation or parole officer to carry a firearm. The act terminated December 1, 1988.

Part Law Review Articles

Revocation of Probation Without Preliminary Hearing (In re Meidinger, 168 M 7, 539 P2d 1185 (1975)), Bishop, 37 Mont. L. Rev. 265 (1976).

46-23-1001. Definitions.

Compiler's Comments

1995 Amendment: Chapter 546 in definition of Board substituted "board of pardons and parole" for "board of pardons"; in definition of Department substituted "department of corrections provided for in 2-15-2301" for "department of corrections and human services provided for in Title 2, chapter 15, part 23"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Applicability: Section 16, Ch. 333, L. 1975, read: "The provisions of sections 82A-116 through 82A-122 are applicable to this act."

46-23-1002. Powers of the department.

Compiler's Comments

1989 Amendment: Inserted (2) relating to authorization for parole and probation officers to carry firearms. Amendment effective July 1, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 639, L. 1989, provided: "A statement of intent is required for this bill because it requires the department of institutions (now department of corrections) to adopt rules establishing firearms training requirements and procedures for authorizing the carrying of firearms by probation and parole officers. The legislature intends that these rules address but not be limited to the following:

(1) required firearms training courses and certification procedures;

(2) types of firearms to be carried by officers;

(3) procedures for requesting the carrying of a firearm for performing a specific duty;

(4) circumstances under which the carrying of a firearm is permitted or prohibited;

(5) control and storage of firearms purchased by the department; and

(6) procedures for monitoring and documenting the use of a firearm in performance of an official duty."

Appropriation: Section 3, Ch. 639, L. 1989, provided an appropriation that was line item vetoed by the Governor.

Administrative Rules

Title 20, chapter 7, subchapter 11, ARM Conditions on parole.

Case Notes

Restriction on Financial Transactions as Condition for Suspended Sentence for Sexual Assault Affirmed: As a condition for a suspended sentence for sexual assault of a child, Hernandez was required to obtain permission from the probation officer before engaging in financial transactions to finance or purchase a vehicle, engage in business, or incur debt. Hernandez appealed on grounds that the condition was unrelated to the crime. The Supreme Court noted that the sentencing condition was authorized by statute and Department of Corrections rule, so the Ashby requirement of a nexus to the offender or the offense did not apply. The financial transaction restriction was considered a standard condition of the Department, and Hernandez offered nothing indicating that the condition would impose a hardship; because Hernandez's priority financial obligations while serving the suspended sentence would be restitution, child support, fines, and fees, the imposition of the condition was appropriate and not an abuse of discretion. The District Court was affirmed. St. v. Hernandez, 2009 MT 341, 353 M 111, 220 P3d 25 (2009).

Entry of Intensive Supervision Program Officer Into Probationer's Home Without Consent Unlawful — Information Gathered Via Search Admissible as Independent Source or Inevitable Discovery Exceptions to Fruit of Poisonous Tree Doctrine: As a condition of suspended sentencing, Therriault was placed in the intensive supervision program (ISP). Near the end of the program, Therriault's supervising officer, McCarty, arrived at Therriault's residence for a routine check. Although Therriault was not there, McCarty entered the residence and found, in plain view, what he thought might be a note for him from Therriault, but which turned out to be a high school registration form for a female student. McCarty then went to Therriault's sister's home next door. Therriault's sister informed McCarty that she had seen a girl at Therriault's home during the prior 2 weeks and inquired about the lawful age of consent. McCarty then reentered Therriault's home and reviewed the form, discovering that the applicant was 14 years old. McCarty left a note for Therriault to contact him and left the residence but returned later that night to discover a 14-year-old girl in Therriault's basement. Upon petition to revoke his probation, Therriault alleged that the discovery directly resulted from an illegal search and seizure and moved to suppress all evidence under the fruit of the poisonous tree doctrine. The District Court denied the motion, revoked Therriault's suspended sentence, and sentenced him to prison for the remainder of the term. Therriault appealed. The state contended that as a participant in ISP, Therriault enjoyed little or no expectation of privacy and that McCarty's conduct did not constitute a search. The Supreme Court disagreed, finding that ISP is merely a rigid condition imposed on certain probationers and that it is the sentencing tribunal, not the ISP officer, that establishes the conditions for any search of the probationer's person or property and that any ISP rules, terms or conditions, or means of supervision that conflict with a court-ordered condition of probation will be superseded by the court's conditions. The state misconstrued Therriault's expectation of privacy under ISP because the court's probationary condition stated that Therriault would submit his residence "to search at any time by lawful authorities upon reasonable request of his Probation Officer", so Therriault could expect that an intrusion into the privacy of his home would not occur unless McCarty had reasonable cause and first posed a reasonable request. Accordingly, McCarty's conduct constituted an illegal search and evidence obtained through the unlawful conduct would not generally be admissible under the fruit of the poisonous tree doctrine. However, under St. v. New, 276 M 529, 917 P2d 919

(1996), such derivative evidence is admissible if it is: (1) attenuated from the constitutional violation so as to remove its primary taint; (2) obtained from an independent source; or (3) determined to be evidence that would have been inevitably discovered apart from the constitutional violation. In this case, the second exception applied. McCarty received independent incriminating evidence from Therriault's sister; thus, it was not the tainted evidence of the girl's name or age or the fact that she was transferring to a different school that led to her discovery, but rather the independent information that a girl of questionable age had been residing with Therriault. This irrefutable evidence, ascertained through a source sufficiently independent of McCarty's unlawful conduct, warranted exclusion from the fruit of the poisonous tree doctrine. The District Court's revocation of Therriault's suspended sentence was affirmed. St. v. Therriault, 2000 MT 286, 302 M 189, 14 P3d 444, 57 St. Rep. 1185 (2000).

46-23-1003. Qualifications of probation and parole officers.

Compiler's Comments

2007 Amendment: Chapter 506 in (2) in first sentence at end substituted reference to Montana public safety officer standards and training council for "board of crime control, as provided in 44-4-301" and in second sentence substituted "council" for "board"; and made minor changes in style. Amendment effective July 1, 2007.

Saving Clause: Section 24, Ch. 506, L. 2007, was a saving clause.

1991 Amendment: Inserted second and third sentences in (2) providing that each probation and parole officer must receive training and that training must be at the law enforcement academy.

1987 Amendment: In (1), near beginning of first sentence after "college degree and", deleted "shall have received at least"; and inserted (2) requiring probation and parole officers to receive 16 hours of approved training a year.

46-23-1004. Duties of department.

Compiler's Comments

2003 Amendment: Chapter 114 in (8) substituted "Interstate Compact for Adult Offender Supervision" for "interstate compact for the supervision of parolees and probationers". Amendment effective October 1, 2003.

2001 Amendment: Chapter 493 at end of first sentence inserted "for felony offenders". Amendment effective May 1, 2001.

Retroactive Applicability: Section 10, Ch. 493, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who are under the custody or supervision of the department of corrections on [the effective date of this act]." Effective May 1, 2001.

1995 Amendment: Chapter 499 inserted (9) requiring notification of an employer if a probationer or parolee has been convicted of theft from an employer; and made minor changes in style.

Case Notes

No Statutory Authority of District Court to Restrict Future Interstate Compact Agreements: Muhammad was convicted of sexual intercourse without consent with a minor. One condition of sentencing was a restriction on Muhammad's ability to enter future interstate compact agreements. The state conceded that the District Court lacked authority to approve interstate compact agreements, but asserted that the court did have the authority to condition Muhammad's sentence in such a way as to require sexual offender treatment if Muhammad's probation supervision was transferred to another state. The Supreme Court disagreed. Under this section, it is the duty of the Department of Corrections to administer interstate compacts for the supervision of probationers. Therefore, the requirement that Montana treatment providers and the District Court approve any interstate compact agreement was vacated. However, the Supreme Court did note that the District Court was not precluded from requiring that Muhammad complete a program that was equivalent to a Montana program if supervision was transferred to another state. The order was remanded to the District Court to allow modification to provide for that condition. St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002).

46-23-1005. Misdemeanor probation offices — officers — costs.

Compiler's Comments

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

46-23-1010. Sexual offenders — electronic monitoring program — contract — rules.

Compiler's Comments

Preamble: The preamble attached to Ch. 360, L. 2005, provided: "WHEREAS, the United States Department of Justice has published confirmed statistics that over 60% of serious and violent offenders in state prisons have a history of prior convictions and that the number of prisoners convicted for violent sexual assault has increased by an annual rate of 15% each year since 1980; and

WHEREAS, criminals who commit sexual and violent crimes have shown unusually high recidivism rates, thereby posing an unacceptable level of risk to the community; and

WHEREAS, intensive supervision of sexual or violent offenders is a crucial element to both the rehabilitation of the released convicts and the safety of the surrounding community; and

WHEREAS, mature technological solutions now exist to provide improved supervision and behavioral control of sexual or violent offenders following their release; and

WHEREAS, these solutions can now also provide law enforcement and correctional professionals with significant new tools for electronic correlation of the constantly updated geographical location of supervised sexual or violent offenders following their release with the geographic location of reported crimes, both to possibly link released offenders to crimes or to possibly exclude released offenders from ongoing criminal investigations; and

WHEREAS, continuous 24-hour-a-day, 7-day-a-week electronic monitoring of those convicted of sexual offenses is a valuable and reasonable requirement for those convicts who are placed on probation, who failed to register as sexual or violent offenders as required by law, or who have been released from incarceration while they remain under the active supervision of the state."

Severability: Section 7, Ch. 360, L. 2005, was a severability clause.

Effective Date: Section 8, Ch. 360, L. 2005, provided that this section is effective July 1, 2005.

46-23-1011. Supervision on probation.

Compiler's Comments

2007 Amendment: Chapter 483 in (1) near beginning of first sentence after "period" inserted "including supervision after release from imprisonment imposed pursuant to 45-5-503(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), 45-5-603(2)(c), or 45-5-625(4)"; in (4)(e) at beginning inserted exception clause; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

2001 Amendment: Chapter 493 in (1) in first sentence near beginning after "shall supervise" substituted "probationers" for "offenders" and inserted second, third, and fourth sentences regarding hearing for purposes of setting conditions of probation; in (2) in first sentence at end after "signed by the probationer" substituted second sentence regarding waiver of extradition for remainder of first sentence and former second sentence that read: "and given to the probationer and the probationer's probation and parole officer, who shall report on the probationer's progress under rules of the sentencing judge. Any probation agreement signed by the probationer may contain a clause waiving extradition"; in (4)(a) in first sentence near middle after "may modify" inserted "or add" and deleted former second sentence that read: "Notice must be given to the probation and parole officer before any condition is modified, and the officer must be given an opportunity to present the officer's ideas or recommendations on any modification"; inserted (4)(b) through (4)(e) regarding modification or addition of conditions of probation; in (4)(f) substituted text regarding conditions of probation and condition of restitution for former text that read: "A copy of a modification of conditions must be delivered to the probation and parole officer and the probationer. Waiver or modification of restitution may be ordered only as provided under the provisions of 46-18-246"; deleted former (5) that read: "(5) The probation and parole officer shall keep records as the department or the sentencing judge may require"; and made minor changes in style. Amendment effective May 1, 2001.

Retroactive Applicability: Section 10, Ch. 493, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who are under the custody or supervision of the department of corrections on [the effective date of this act]." Effective May 1, 2001.

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to sentencing judge for references to court; in (1) substituted "offenders" for "persons"; in (2) inserted second sentence allowing a clause waiving extradition in a probation agreement; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 505 inserted (6)(a)(ii) authorizing court to conditionally discharge probationer from supervision before expiration of sentence if offender has paid restitution and court-ordered financial obligations; and made minor changes in style. Amendment effective April 28, 1999.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

Applicability: Section 13(2), Ch. 505, L. 1999, provided: "[Section 2] [46-23-1011] applies to all persons under probation or parole supervision on or after [the effective date of this act]." Effective April 28, 1999.

1995 Amendment: Chapter 125 at end of (4) inserted sentence relating to waiver or modification of restitution; at end of (6)(a) inserted phrase relating to unreasonable risk of danger to victim; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

1993 Amendment: Chapter 579 inserted (6)(c) providing that if the Department certifies to a court that the probation and parole office workload has exceeded the optimum, the court cannot place an offender on probation unless it grants a conditional discharge to a probationer, that the Department may recommend a conditional discharge, and that the court need not accept the recommendation; and made minor changes in style. Amendment effective April 28, 1993.

1989 Amendment: Inserted (6) regarding conditional discharge; and made minor change in punctuation.

Applicability: Section 4, Ch. 195, L. 1989, provided: "[This act] applies to persons under probation or parole supervision on or after [the effective date of this act]." Effective October 1, 1989.

Administrative Rules

Title 20, chapter 25, subchapter 7, ARM Release on supervision.

Case Notes

Failure to Object to Constitutionality of Probation Condition Constituting Waiver of Issue on Appeal: When LaFreniere was sentenced for sexual intercourse without consent, the sentencing court did not attach any probation conditions. The County Attorney subsequently petitioned the court to add probation conditions pursuant to this section, one of which was that LaFreniere complete sex offender treatment. LaFreniere objected to that condition on grounds that he couldn't afford it, but the District Court nevertheless imposed the treatment requirement along with 14 other probation conditions. LaFreniere later appealed on grounds that imposition of the treatment condition violated the constitutional prohibition against ex post facto laws. Without addressing the constitutional argument, the Supreme Court affirmed. By failing to raise the constitutional argument in District Court, LaFreniere waived the issue for purposes of appeal. St. v. LaFreniere, 2008 MT 99, 342 M 309, 180 P3d 1161 (2008).

Error in Revoking Suspended Sentence for Refusal to Sign Rules of Probation: In 1993, Gillingham, a resident of Canada, was convicted of five felonies and sentenced to 10 years on each count with the sentences suspended on certain conditions, one of which was a requirement that Gillingham sign a copy of the conditions of probation. Before Gillingham could sign, he was deported to Canada. Gillingham's probation officer sent a copy of the conditions to Canada for Gillingham's signature. The document contained the conditions imposed at sentencing, but also included an additional condition not imposed at sentencing, requiring that Gillingham waive extradition from Canada. Gillingham refused to sign the document with the new extradition condition, so in 1996, the state filed a petition to revoke Gillingham's suspended sentence because of his refusal to sign. In 1998, the state submitted a supplemental petition to revoke the sentence based on three additional violations of sentencing conditions. Gillingham was finally extradited to Missoula County in 2004, and the District Court considered the petition to revoke Gillingham's sentence. The court found that Gillingham had violated the condition of his sentence requiring that he sign a document containing the rules of probation, revoked Gillingham's sentence, and sentenced him to 45 years at the state prison. Gillingham appealed the sentence revocation, and the Supreme Court agreed that revocation based on this issue was

error. At the time that the charged offenses occurred and the sentences were imposed, the Department of Corrections had the authority to require that a probationer sign the conditions of probation, but the Department did not have the authority to add to the conditions of probation the requirement that a probationer waive extradition because that authority was not added to this section until the 2001 legislative session. Therefore, the District Court did not have the authority to revoke Gillingham's sentence based on Gillingham's refusal to sign a copy of probation conditions containing a provision that the court did not impose. St. v. Gillingham, 2008 MT 38, 341 M 325, 176 P3d 1075 (2008).

Modification of Probation Conditions to Include Intensive Supervision Program Affirmed — Modification Not Punitive or Change to Original Sentence: Following a conviction for felony incest, Griffin served one-half of his sentence and was released on parole. A probation officer recommended that Griffin complete the intensive supervision program (ISP) to assist in reentering the community. Griffin signed a formal request to modify the conditions of parole to include the ISP, and the District Court approved the modification. Griffin moved to set the order aside 1 day later after consulting an attorney, claiming that the probation officer had coerced Griffin into signing the request for modification. Finding no evidence of coercion and noting that Griffin had consented to the request for modification, the District Court denied the motion to set aside, and Griffin appealed. The Supreme Court affirmed. Although the order modified the conditions of Griffin's supervision, it did not modify Griffin's punishment, so Griffin's due process, double jeopardy, and ex post facto rights were not implicated. Griffin's original sentence contemplated the ISP as one of the conditions of a suspended sentence, so the order to successfully complete the ISP was not a change to the original sentence, but rather ensured Griffin's compliance with the terms of the original sentence. The District Court did not err in denying the motion to set aside the order modifying probation conditions. St. v. Griffin, 2007 MT 289, 339 M 465, 172 P3d 1223 (2007).

Oral and Written Versions of Original Sentence Requiring Outpatient Sexual Offender Treatment — Violation of Suspended Sentence: The District Court revoked Van Haele's suspended sentence on grounds that he failed to qualify for outpatient sexual offender treatment. Van Haele contended that the sentencing condition was improperly added by amendment and that he was entitled to a hearing on the added condition because it was not part of the original sentence. The Supreme Court disagreed. The requirement could not have been added to the original sentence because it was part of the original oral and written sentence, so no hearing was required. The basis for revoking Van Haele's suspended sentence was therefore not invalid, and suspension was affirmed. St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005).

Alleged Inadequate Supervision of Parolee No Excuse for Probation Violation: Senn's parole supervision was transferred to Washington state, and after several years the Missoula County Attorney filed a petition to revoke Senn's suspended sentences based on several alleged probation violations. Senn admitted violating some of the probation conditions, but contended that the violations should be excused because of health problems, poverty, arrests in Washington that precluded contact with Montana, a good faith assumption that matters in Montana could be resolved after the criminal issues in Washington were addressed, and the Montana parole officer's failure to provide adequate supervision. The Supreme Court disagreed. Senn's own conduct resulted in the probation violations, and although there was a period when Senn was unsupervised, even when supervised Senn failed to comply with the probation officer's requests. The District Court did not err in revoking Senn's suspended sentences. St. v. Senn, 2003 MT 52, 314 M 348, 66 P3d 288 (2003).

Reasonable Cause for Search of Probationer — Motion to Suppress Evidence of Search Properly Denied: As a condition of a suspended sentence for conviction of felony sale of drugs, Roper consented to warrantless searches of his person, vehicle, or residence. Roper was subsequently granted a conditional discharge from state supervision of his probation because he was serving a concurrent probation as a result of a federal criminal conviction. However, despite the conditional discharge, the state reserved the right to warrantless searches and drug checks during the term of the state probationary sentence, and Roper was relieved only of the requirement to report to the state probation officer monthly. After a few months, the state probation officer became concerned that Roper was both using and selling drugs when two clients reported Roper's continued involvement with drugs. An informant told investigators that Roper stored drugs in a black leather pouch. Based on the gathered information and the close proximity of Roper's workplace to a school, the probation officer believed that reasonable cause existed to search Roper and, with other police officers, went to Roper's workplace and observed him outside involved in what appeared to be a drug transaction. They searched Roper but found

no drugs in his possession. The officers went into the workplace and conducted a urinalysis on Roper, which tested positive. While there, the officers noticed a black leather pouch next to Roper's work gloves, seized it, and discovered methamphetamine. Roper was arrested, and the officers went to his house where additional drug evidence was discovered and seized. Roper moved to suppress all the evidence found at both his workplace and residence, contending that the probation officer did not have the right to perform any type of warrantless search and that the evidence seized at the residence was the result of the illegal search of the workplace. The motion was denied, and the Supreme Court affirmed. The probation officer's authority to conduct warrantless searches was extended by the waiver of privacy to which Roper agreed as a condition of probation. The officers were lawfully at Roper's workplace because they had authority to request a urinalysis and to search Roper's person, and the seizure of the black pouch was proper based on the plain view doctrine and information that the pouch was where Roper kept drugs. Further, because the evidence at the workplace was lawfully gathered, the District Court did not err when it denied the motion to suppress evidence gathered during the subsequent search of Roper's home. St. v. Roper, 2001 MT 96, 305 M 212, 26 P3d 741 (2001).

Entry of Intensive Supervision Program Officer Into Probationer's Home Without Consent Unlawful — Information Gathered Via Search Admissible as Independent Source or Inevitable Discovery Exceptions to Fruit of Poisonous Tree Doctrine: As a condition of suspended sentencing, Therriault was placed in the intensive supervision program (ISP). Near the end of the program, Therriault's supervising officer, McCarty, arrived at Therriault's residence for a routine check. Although Therriault was not there, McCarty entered the residence and found, in plain view, what he thought might be a note for him from Therriault, but which turned out to be a high school registration form for a female student. McCarty then went to Therriault's sister's home next door. Therriault's sister informed McCarty that she had seen a girl at Therriault's home during the prior 2 weeks and inquired about the lawful age of consent. McCarty then reentered Therriault's home and reviewed the form, discovering that the applicant was 14 years old. McCarty left a note for Therriault to contact him and left the residence but returned later that night to discover a 14-year-old girl in Therriault's basement. Upon petition to revoke his probation, Therriault alleged that the discovery directly resulted from an illegal search and seizure and moved to suppress all evidence under the fruit of the poisonous tree doctrine. The District Court denied the motion, revoked Therriault's suspended sentence, and sentenced him to prison for the remainder of the term. Therriault appealed. The state contended that as a participant in ISP, Therriault enjoyed little or no expectation of privacy and that McCarty's conduct did not constitute a search. The Supreme Court disagreed, finding that ISP is merely a rigid condition imposed on certain probationers and that it is the sentencing tribunal, not the ISP officer, that establishes the conditions for any search of the probationer's person or property and that any ISP rules, terms or conditions, or means of supervision that conflict with a court-ordered condition of probation will be superseded by the court's conditions. The state misconstrued Therriault's expectation of privacy under ISP because the court's probationary condition stated that Therriault would submit his residence "to search at any time by lawful authorities upon reasonable request of his Probation Officer", so Therriault could expect that an intrusion into the privacy of his home would not occur unless McCarty had reasonable cause and first posed a reasonable request. Accordingly, McCarty's conduct constituted an illegal search and evidence obtained through the unlawful conduct would not generally be admissible under the fruit of the poisonous tree doctrine. However, under St. v. New, 276 M 529, 917 P2d 919 (1996), such derivative evidence is admissible if it is: (1) attenuated from the constitutional violation so as to remove its primary taint; (2) obtained from an independent source; or (3) determined to be evidence that would have been inevitably discovered apart from the constitutional violation. In this case, the second exception applied. McCarty received independent incriminating evidence from Therriault's sister; thus, it was not the tainted evidence of the girl's name or age or the fact that she was transferring to a different school that led to her discovery, but rather the independent information that a girl of questionable age had been residing with Therriault. This irrefutable evidence, ascertained through a source sufficiently independent of McCarty's unlawful conduct, warranted exclusion from the fruit of the poisonous tree doctrine. The District Court's revocation of Therriault's suspended sentence was affirmed. St. v. Therriault, 2000 MT 286, 302 M 189, 14 P3d 444, 57 St. Rep. 1185 (2000).

New Sentence Restriction Added Upon Revocation of Suspended Sentence Stricken: If a District Court finds that a defendant has violated the terms or conditions of a suspended sentence, the court may revoke the suspended sentence and require the defendant to serve either the sentence imposed or any lesser sentence, but nothing in 46-18-203 authorizes a court to impose additional restrictions when revoking a suspended sentence. (See 2001 amendment to

this section, which allows it.) In this case, the District Court originally sentenced Richardson to 20 years in prison for felony sexual assault against a child, with all but 70 days suspended, conditioned in part upon completion of a sex offender treatment program. Richardson failed treatment and admitted violating other conditions of the suspended sentence, so the sentence was revoked, and Richardson was sentenced to prison for the remainder of the 20-year sentence. Additionally, the court conditioned Richardson's parole eligibility upon successful completion of the first two phases of sexual offender treatment in prison. The additional restriction on the sentence was error, and the case was remanded for the limited purpose of striking that condition from the sentence. St. v. Richardson, 2000 MT 72, 299 M 102, 997 P2d 786, 57 St. Rep. 320 (2000), following St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997).

"Finding" in Probation Modification Order Not Res Judicata as to Issue of Compliance With Terms of Probation: Lindeman pleaded guilty to charges of sexual abuse and incest and, as a condition of probation, was required to complete a sex offender treatment program and to have no unsupervised contact with minors. After some efforts at treatment, for which the treatment provider issued a letter saying that Lindeman had "graduated" from the program, Lindeman petitioned the District Court for a modification of the previous order in order to allow him to have contact with his minor daughter. In issuing the order, the District Court found that Lindeman had completed the sex offender treatment program. However, Lindeman had not in fact completed a treatment program meeting the standards required in his original probation order, and the treatment provider was not qualified to treat Lindeman because the provider lacked credentials required by the original probation order. Later, when the state sought to revoke Lindeman's probation and impose the suspended sentence based upon Lindeman's failure to complete the treatment program, Lindeman argued that the issue of completion of the program was res judicata under the probation modification order of the District Court. Citing Hollister v. Forsythe, 277 M 23, 918 P2d 665 (1996), the Supreme Court held that the issue of Lindeman's completion of the treatment program was not res judicata because the issues in the probation modification proceeding and the later revocation proceeding were not the same. The Supreme Court pointed out that at the probation modification hearing: (1) the issue of completion of the treatment program was not before the District Court; (2) the hearing was requested by Lindeman to change a condition concerning contact with minors, not completion of the treatment program; (3) the District Court did not remove the condition that Lindeman complete the treatment program; and (4) the "finding" was unnecessary to the District Court's decision to modify the condition of probation. The Supreme Court distinguished St. v. Perry, 232 M 455, 758 P2d 268 (1988), and St. v. Black, 245 M 39, 798 P2d 530 (1990), and noted that the only way that the issue of completion of the treatment program could have been determined by the District Court was through a petition filed pursuant to 46-18-203, which did not occur. For these reasons, the Supreme Court held that the "finding" by the District Court was not a conclusive, litigated finding and therefore was not res judicata as to whether Lindeman had completed treatment as required in his probation order. St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997).

Parole Officer Duty of Care to Supervise Parolees — Jury Instruction Properly Given: Corliss was paroled, after serving time for an execution-style slaying with a handgun, under the condition that he not possess a firearm. While on a visit, with the approval of his parole officer, to Washington state to look for work, Corliss failed to return to Montana within the established time, failed to see a parole officer in Washington, had a temporary restraining order obtained against him by a girlfriend because of threats made to her and her family, and had an altercation with his wife involving a handgun. In neither instance of violence did Corliss's parole officer investigate the circumstances of the violence. Later, Corliss shot and killed one friend of his girlfriend and injured another. Both the estates of the deceased woman and the wounded woman brought actions against the state for negligent supervision of Corliss's parole. The state objected to an instruction given by the District Court concerning a parole officer's duty of care, claiming that there must be some special relationship between the parole officer and the person injured by a parolee in order for a duty of care to arise. The Supreme Court reviewed statutes defining negligence, statutes describing the general duty of one individual toward another, and statutes concerning parole and concluded that Robbins had a general duty to exercise reasonable care in the supervision of Corliss and had a duty to the killed and injured women in particular. Starkenburg v. St., 282 M 1, 934 P2d 1018, 54 St. Rep. 214 (1997). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Failure to Conduct Preliminary Onsite Hearing in Extradition Case — No Due Process Violation: In 1989, Hardy pleaded guilty to four counts of burglary and was sentenced to four concurrent terms of 10 years in prison with 9 years suspended. In 1990, Hardy was released on

probation to serve the suspended portion of his sentence, and pursuant to the Uniform Act for Out-of-State Parolee Supervision, supervision of his parole was transferred to Utah. While in Utah, Hardy committed other crimes, and Utah refused to continue parole supervision. Hardy pleaded no contest to the Utah offenses. After judgment and sentencing in Utah, Hardy was extradited back to Montana where his suspended sentence was revoked, he was sentenced to four concurrent terms of 9 years in prison, and he was not given credit for the 2 years he spent on probation in Utah. Hardy contended that there was a violation of his due process rights in not receiving a preliminary hearing upon his return to Montana, that his Montana probation officer wrongly informed him that his probation would not be revoked for misdemeanor convictions, and that he was improperly denied credit for his street time while on probation in Utah. In this case, a preliminary onsite hearing would have contributed nothing to a determination of whether Hardy had violated his probation. As evidenced by his no contest pleas and admissions, Hardy indisputably violated the conditions of his probation. A preliminary onsite hearing would not have led to any other finding. Failure to provide Hardy with a hearing did not prejudice his substantial rights. St. v. Hardy, 278 M 516, 926 P2d 700, 53 St. Rep. 998 (1996).

Representations of Parole Violations by Parole Officer Not Clearly Erroneous — Revocation Proceeding Not Estopped: In 1989, Hardy pleaded guilty to four counts of burglary and was sentenced to four concurrent terms of 10 years in prison with 9 years suspended. In 1990, Hardy was released on probation to serve the suspended portion of his sentence, and pursuant to the Uniform Act for Out-of-State Parolee Supervision, supervision of his parole was transferred to Utah. While in Utah, Hardy committed other crimes, and Utah refused to continue parole supervision. Hardy pleaded no contest to the Utah offenses. After judgment and sentencing in Utah, Hardy was extradited back to Montana where his suspended sentence was revoked, he was sentenced to four concurrent terms of 9 years in prison, and he was not given credit for the 2 years he spent on probation in Utah. Hardy contended that his Montana probation officer wrongly informed him that his probation would not be revoked for misdemeanor convictions and that his probation should thus not have been revoked. The Supreme Court noted that Montana did not participate in plea negotiations between Hardy and the State of Utah and that Hardy knowingly, voluntarily, and with assistance of counsel entered into a no contest plea agreement. The representations to Hardy by his Montana parole officer were not clearly erroneous. The court's conclusion that Montana was not estopped from proceeding with revocation based on the parole officer's representations was correct. St. v. Hardy, 278 M 516, 926 P2d 700, 53 St. Rep. 998 (1996).

Five-Year Suspension Revoked for Failure to Enter Inpatient Alcohol Program: There was substantial evidence to support the revocation of probation and imposition of the original 5-year sentence since defendant failed to comply with a condition that required immediate entry into an inpatient alcohol counseling program. The probation officer fulfilled his duty to advise probationer of the conditions and consequences of a violation. The District Court revoked the suspension pursuant to the discretion granted in 46-18-203 in accordance with the minimum requirements for invoking such discretion. There was no abuse of discretion in the court's consideration of the factors in the original sentencing, except for the sentencing judge's determination that defendant was a dangerous offender. (See 1995 repeal of 46-18-404.) No findings appeared in support of such designation. St. v. Ford, 218 M 215, 707 P2d 16, 42 St. Rep. 1530 (1985).

46-23-1012. Arrest when violations of probation alleged — probation compliance plan — probation violator intervention.

Compiler's Comments

2001 Amendment: Chapter 493 in (1) substituted text regarding issuance of warrant or notice to appear for former text that read: "At any time during probation or suspension of sentence, a court may issue a warrant for the arrest of the defendant for violation of any of the conditions of release or a notice to appear to answer to a charge of violation. The notice must be personally served upon the defendant. The warrant must authorize all officers named in the warrant to return the defendant to the custody of the court or to any suitable detention facility designated by the court"; in (2) throughout subsection substituted reference to probationer for reference to defendant, in first sentence near beginning after "warrant or may" inserted "orally", near middle after "12 hours delivering to the" substituted "detention center" for "place of detention", and at end after "violated the conditions of" substituted "probation" for "the defendant's release", and in second sentence near middle after "the official in charge of a" substituted "detention center" for "county detention center or other place of detention"; and substituted (3) through (5) regarding detention of probationer and revocation of probation for former (3) through (5) that read: "(3)

Provisions regarding release on bail of a person charged with a crime are applicable to the defendants arrested under these provisions.

(4) Any probation and parole officer may hold a defendant arrested under subsection (1) without bail for 72 hours. After the arrest of the defendant pursuant to this subsection, a hearings officer for the probation and parole bureau shall hold a hearing within 36 hours of the defendant's arrest. The hearings officer shall determine whether there is probable cause to believe that the defendant has violated a condition of probation and, if probable cause exists, notify the sentencing court and determine an appropriate plan to ensure the defendant's compliance with the conditions of probation. An appropriate plan may include:

(a) holding the defendant for a period of time up to 30 days, with credit for any time served from the time of the arrest to the time of the hearing to determine probable cause;

(b) a request to the court pursuant to 46-23-1011 to modify the defendant's terms or conditions of probation; or

(c) a notification to the court with jurisdiction over the defendant pursuant to 46-23-1013.

(5) The department shall adopt policies and procedures to implement a probation violator prison diversion program. If the department is able to sufficiently sanction a defendant with a term in a detention center as provided in subsection (4)(a) for a proven technical violation that could result in the revocation of a suspended or deferred sentence, the department may pay the expense of the detention center costs and pursue payment of costs by the defendant as provided in 7-32-2245. If the action plan developed for the defendant proceeds as provided in subsection (4)(b) or (4)(c), the expenses of the detention must be paid as provided in 7-32-2242." Amendment effective May 1, 2001.

Retroactive Applicability: Section 10, Ch. 493, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who are under the custody or supervision of the department of corrections on [the effective date of this act]." Effective May 1, 2001.

1999 Amendment: Chapter 505 in first sentence in (2) after "giving" inserted "the officer oral authorization and within 12 hours delivering to the place of detention" and in second sentence after "statement" inserted "or oral authorization", after "county" substituted "detention center" for "jail", and after "defendant" inserted "if the probation and parole officer delivers the written statement within 12 hours of the defendant's arrest"; inserted (4) authorizing probation and parole officer to hold arrested defendant without bail for 72 hours, providing for hearing, notification, and determination of appropriate plan, and outlining contents of appropriate plan; inserted (5) requiring department to adopt policies and procedures for probation violation prison diversion program and authorizing payment of detention center expenses; and made minor changes in style. Amendment effective April 28, 1999.

Case Notes

Arrest Limited to One Initiated Pursuant to Statutory Procedures: The Supreme Court construed the meaning of the term "arrest" as used in subsection (4) of this section to refer to one of two specific types of arrests a probation officer initiates pursuant to subsection (2): (1) a probation officer may ask the court to issue a warrant; or (2) the probation officer may arrest the probationer or may authorize a peace officer to arrest the probationer. Thus, in this case the state correctly followed statutory procedures when it filed a report of probation violations within 10 days of the probation officer's issuance of a warrant to arrest and hold the defendant. St. v. Johnston, 2008 MT 318, 346 M 93, 193 P3d 925 (2008).

Due Process in Probation Revocation Process Considered Constitutionally Adequate: The following procedures in 46-23-1012 provide adequate due process to an alleged probation violator: (1) the probation officer must file a report of violation within 10 days of the probationer's arrest; (2) the state must bring the probationer before a judge for a hearing on the charges without unnecessary delay after the report of violation is filed; and (3) the state must notify the probationer at the hearing of the alleged probation violations. St. v. Johnston, 2008 MT 318, 346 M 93, 193 P3d 925 (2008). See also St. v. Swan, 220 M 162, 713 P2d 1003 (1986).

District Court Authority to Revoke Suspended Sentence for Parole Violation for Which Defendant Not Sanctioned or Punished: Martinez was given a 7-year suspended sentence for felony criminal endangerment, subject to 25 conditions, including a requirement that Martinez notify the probation officer upon a change of residence. Following numerous probation violations, three separate intervention hearings were held to address the violations. One of the probation officers subsequently recommended that Martinez be brought before the District Court for revocation of the suspended sentence. The District Court heard testimony from two probation officers regarding the repeated violations and revoked Martinez's suspended sentence. Martinez appealed on grounds that the probation officer lacked the statutory authority to seek

sentence revocation for conduct addressed by the revocation hearings and contended that the revocation violated double jeopardy because it amounted to double punishment for violations addressed by the revocation hearings. The Supreme Court agreed that once a probation officer elects to pursue an intervention hearing under 46-23-1012(3), the officer cannot then also pursue a revocation hearing before the District Court for the same violation. However, Martinez's violation of the requirement to notify the probation officer upon a change of residence occurred after the third intervention hearing, and Martinez was not sanctioned or punished for that violation. That violation in itself was sufficient to support revocation of Martinez's suspended sentence, and even if the District Court considered the history of Martinez's violations in reaching its decision, the court did not abuse its discretion or exceed its statutory authority in revoking the sentence based on that violation alone. Additionally, no double jeopardy violation occurred when the sentence was revoked based on a violation for which Martinez was not previously sanctioned or punished. Thus, revocation of Martinez's suspended sentence was affirmed. St. v. Martinez, 2008 MT 233, 344 M 394, 188 P3d 1034 (2008).

Untimely Hearing on Alleged Probation Violation — Not Considered in Postconviction Relief Proceeding When It Could Have Been Raised on Direct Appeal: Appellant's claim that the District Court lacked subject matter jurisdiction to revoke a suspended sentence following his arrest for another offense because he was not given a probation revocation hearing within 72 hours of his detention, as required by this section, did not raise a true jurisdictional question. The claim was more properly characterized as a claim that his sentence was illegal, which was a nonjurisdictional claim for purposes of postconviction relief statutes. Section 46-21-105 precludes postconviction relief on such a claim because appellant could have raised the claim on direct appeal. Sanders v. St., 2004 MT 374, 325 M 59, 103 P3d 1053 (2004).

Waiver of Constitutional Issues Related to No-Bond Hold by Failure to Object in Trial Court: Hendricks contended that his constitutional right to due process and the right against excessive bail were violated when he was held without bond for more than 72 hours in violation of this section. However, there was no factual record to support the allegations, nor did Hendricks object to the asserted constitutional violations at a revocation hearing or move to dismiss the proceedings. Failure to adequately raise the issue in District Court and to create a factual record constituted a waiver of objection and precluded review of the issue on appeal. Further, Hendricks' assertion of error in the District Court's reliance on hearsay testimony at the revocation hearing failed on the same grounds. St. v. Hendricks, 2003 MT 163, 316 M 296, 71 P3d 1212 (2003), following St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002).

Dual Statutory Revocation Proceedings — Formal Revocation Proceedings Not Subject to Time and Procedural Requirements of Probation Violator Prison Diversion Program: This section authorizes two distinct methods of commencing revocation. One method is the formal proceeding outlined in 46-18-203 and subsection (1) of this section. The other method is an abbreviated proceeding initiated by detention by the probation and parole office, known as the probation violator prison diversion program, set forth in subsections (3) through (5) of this section, and the abbreviated proceeding may be converted to a formal revocation pursuant to subsection (5) of this section. The time and procedural requirements of the probation violator prison diversion program, as provided in subsections (3) through (5) of this section, do not apply to the formal proceeding initiated pursuant to 46-18-203 and subsection (1) of this section, which requires that an offender be brought before the court without unnecessary delay. Gonzales v. Mahoney, 2001 MT 259, 307 M 228, 37 P3d 653 (2001), followed in St. v. Finley, 2003 MT 239, 317 M 268, 77 P3d 193 (2003).

No Entitlement to Probable Cause Hearing Upon Revocation of Parole Rather Than Probation — Goebel Clarified: Gundrum was arrested for a parole violation, and his parole was revoked. Gundrum contended that he was illegally restrained because he was not afforded a probable cause hearing within 36 hours of his arrest as provided in this section and discussed in St. v. Goebel, 2001 MT 73, 305 M 53, 31 P3d 335 (2001), and St. v. Giddings, 2001 MT 76, 305 M 74, 29 P3d 475 (2001). Gundrum cited the language in Goebel that this section applies to individuals whose "probation or parole" was revoked between April 28, 1999, and May 1, 2001. The Supreme Court held that the Goebel decision, as it related to parole revocation, was in error. Although this section applies to probation revocation, a separate statute, 46-23-1023, applies to parole revocation. There is no strict time period for a probable cause hearing related to a parole violation; rather, 46-23-1024 simply requires that a hearing be held within a reasonable time. Further, Goebel and Giddings both dealt with probation violations, and the Supreme Court declined to apply the same hearing requirements to parole violations. Gundrum's incarceration was legal. Gundrum v. Mahoney, 2001 MT 246, 307 M 96, 36 P3d 890 (2001).

No Power of State to Refile Petition to Revoke Suspended or Deferred Sentence Once Original Sentence Expires: Vance claimed that because a probable cause hearing was not held within 36 hours of arrest under a bench warrant for probation revocation, the provisions of St. v. Giddings, 2001 MT 76, 305 M 74, 29 P3d 475 (2001), should apply and the revocation proceedings should be rendered void. The state agreed that Giddings applied, but indicated that a petition for revocation of deferred sentence would be refiled pursuant to this section. Vance pointed out that the original deferred sentence had expired, and argued that the refiling of a petition for revocation of an expired sentence was prohibited under 46-18-203. The state contended that the reasoning in St. v. Goebel, 2001 MT 73, 305 M 53, 31 P3d 335 (2001), implied that the original sentence was tolled during the period of the void proceedings for purposes of refiling a petition to revoke. The Supreme Court agreed with Vance. The fact that the previous revocation proceedings were defective and therefore void ab initio did not mean that time stood still during the defective proceedings, nor do Giddings and Goebel suspend the provisions of 46-18-203, which clearly state that the petition for revocation must be filed with the sentencing court during the period of suspension or deferral. Nothing in law allows the state to refile a revocation petition to relate back to the date of the probation violation, and once the term of the sentence expires, the state has no more power to refile to revoke the suspended or deferred sentence than it would have to file an original proceeding to revoke under those circumstances. Vance v. Acton, 2001 MT 243, 307 M 71, 36 P3d 881 (2001).

Retroactivity of New Judicial Rules and Judicial Interpretation — This Section (1999) Applied Retroactively to Parole Revocations Between April 28, 1999, and May 1, 2001: On April 26, 2001, the Supreme Court held that a probable cause hearing was mandatory only when an offender had been arrested pursuant to a warrant issued by a judge. On May 4, 2001, Goebel petitioned the court to look beyond the plain language of this section and hold that the probable cause hearing was mandatory only when an offender has been arrested by a probation officer rather than pursuant to a warrant issued by a judge. Effective May 1, 2001, the Legislature amended this section to delete the requirement for a probable cause hearing. On May 9, 2001, Giddings filed a petition for rehearing, asking the court to direct the District Court to dismiss the petition to revoke Giddings' suspended sentence on grounds that the District Court lacked jurisdiction to revoke the suspended sentence because of the amendment to this section, contending that application of the new statute would violate the constitutional ban on ex post facto legislation. The Supreme Court declined to modify the decision in either Goebel or Giddings because no material fact or question decisive of the cases themselves was overlooked and the decisions did not conflict with any express statute or controlling decision. However, the court did discuss the retroactive application of judicial rules of criminal procedure and the judicial interpretation of a statute, as well as the claim that the retroactive application of this section was a violation of the ex post facto clause. Citing Rivers v. Roadway Express, 511 US 298 (1994), the court held that a court's interpretation of a statute is never new law because the decision declares what the statute meant from the day of its enactment, not from the date of the decision. In determining whether a statute violates the ex post facto clause, the court referred to the test in St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453 (2000), which provided that to be in violation of the clause, a statute must be retrospective and must disadvantage the offender affected by it. In this case, Giddings was not disadvantaged because the statutory change did not alter the definition of or punishment for the probation violation that Giddings was charged with. Further, the error that was the basis for reversal of Giddings' case was jurisdictional, so all proceedings in the District Court were void ab initio, and the state was entitled to proceed anew, following the procedure outlined in the newly amended version of this section. The Supreme Court's decisions based on the 1999 version of this section were applicable retroactively to persons whose probation or parole was revoked between April 28, 1999, and May 1, 2001. Thus, if a person was arrested during that period pursuant to a warrant issued by a judge and was not afforded a probable cause hearing within 36 hours of arrest, then the District Court did not have jurisdiction to hold a revocation hearing, so the state could refile the petition to revoke the person's probation pursuant to the 2001 version of this section, as long as the probationer was still under the custody or supervision of the Department of Corrections on May 1, 2001. If the person was afforded a probable cause hearing within 36 hours of arrest, then the District Court did have jurisdiction to hold a revocation hearing. St. v. Goebel, 2001 MT 155, 306 M 83, 31 P3d 340 (2001), followed in St. v. Finley, 2003 MT 239, 317 M 268, 77 P3d 193 (2003), and St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005).

Erroneous Dismissal of Petition to Revoke Sentence Based on Failure to Hold Timely Hearing: Under this section, there are two ways that an offender can come into custody for allegations of a probation violation. The first is when a judge issues a warrant for the offender's arrest, and the

second is when the offender is arrested by a probation or parole officer or when a probation or parole officer authorizes a law enforcement officer to make the arrest. In this case, Goebel was arrested by a probation and parole officer. Prior to the 2001 amendments, the second sentence of subsection (4) of this section read: "After the arrest of the defendant *pursuant to this subsection*, a hearings officer for the probation and parole bureau shall hold a hearing within 36 hours of the defendant's arrest" (emphasis added). Goebel contended before the District Court that the petition to revoke his suspended sentence should be dismissed because the state did not hold a hearing within 36 hours of his arrest. The court agreed and dismissed the petition. On appeal, the state argued that the 1999 amendments to subsection (4) of this section mandated a hearing only in the case of violators who are arrested pursuant to a warrant and that the Legislature left to the discretion of the Probation and Parole Bureau the decision of whether to hold a hearing for every other violator, while Goebel maintained that the phrase "pursuant to this subsection" required the Bureau to hold a hearing in every case of alleged parole violation before proceeding under 46-23-1013 (now repealed). The Supreme Court found the statutory language in subsection (4) to be clear and unambiguous and contrary to the assertions of both parties. Because a defendant may be arrested only under the provisions of subsections (1) and (2), the phrase "after the arrest of the defendant pursuant to this subsection" could not refer to the entirety of this section, as Goebel contended, nor could it refer only to subsection (4), as the state contended. Rather, the court held that "this subsection" related back to the reference in the previous sentence to subsection (1), which allows a judge to issue a warrant or notice to appear, so a probable cause hearing by the Probation and Parole Bureau is mandatory only when an offender has been arrested pursuant to a warrant issued by a judge. Because Goebel was not arrested pursuant to a warrant, the 36-hour rule did not apply. Despite the fact that the Supreme Court found the statute clear and unambiguous, it pointed out that this interpretation rendered the statute illogical because probable cause must be shown before a warrant is issued. It makes little sense to require a second probable cause hearing, while common sense would dictate that there should be a reasonably prompt probable cause hearing when an arrest is made without a warrant. Rather than examine the legislative history to discern the Legislature's intent in using the particular language, the court ascribed the confusion to a legislative drafting error and left correction of the language to the Legislature. St. v. Goebel, 2001 MT 73, 305 M 53, 31 P3d 335 (2001), clarified in Gundrum v. Mahoney, 2001 MT 246, 307 M 96, 36 P3d 890 (2001), in which it was held that the 36-hour requirement for a probable cause hearing applies only to probation revocation proceedings under this section and not to parole revocation proceedings under 46-23-1023, and followed in St. v. Johnson, 2001 MT 277, 307 M 317, 37 P3d 701 (2001).

Probable Cause Hearing Required When Offender Arrested Pursuant to Warrant — Lack of Subject Matter Jurisdiction When Timely Hearing Not Held: Giddings was arrested August 1 on a probation violation warrant issued by his probation officer. The next day while he was still detained, the District Court issued a warrant for his arrest based on the earlier petition to revoke his suspended sentence. A hearing on the petition was held on November 10, Giddings' suspended sentence was subsequently revoked, and he was sentenced to the Department of Corrections for 4 years. Giddings argued on appeal that pursuant to this section as it read prior to the 2001 amendments, the Probation and Parole Bureau was required to hold a probable cause hearing within 36 hours of his arrest and that because no such hearing was held, the District Court lacked subject matter jurisdiction to hold a revocation hearing 3 months later regarding the technical violations of probation alleged in the probation violation report. The state contended that a probable cause hearing is required only when the probationer is dealt with administratively through the probation violator prison diversion program described in subsection (4) of this section as it read prior to the 2001 amendments and that an administrative probable cause hearing is not required when a probationer is arrested on a bench warrant and is processed through the judicial system. The Supreme Court reversed, applying St. v. Goebel, 2001 MT 73, 305 M 53, 31 P3d 335 (2001), in holding that a hearing by the Probation and Parole Bureau under subsection (4) of this section as it read prior to the 2001 amendments is mandatory within 36 hours when an offender has been arrested pursuant to a warrant issued by a judge. Because the probable cause hearing was never held, the District Court lacked jurisdiction to hold its revocation hearing later. St. v. Giddings, 2001 MT 76, 305 M 74, 29 P3d 475 (2001), clarified in Gundrum v. Mahoney, 2001 MT 246, 307 M 96, 36 P3d 890 (2001), in which it was held that the 36-hour requirement for a probable cause hearing applies only to probation revocation proceedings under this section and not to parole revocation proceedings under 46-23-1023.

Arrest Without Written Authority — Suppression of Evidence: An arrest by a Montana law enforcement officer for violation of the terms of probation must be in accordance with this section. The police officer arrested the probationer in violation of this section when the arrest

was for a probation violation and the police officer did not have written authority to arrest from the probation officer. Assuming that probation violation is a criminal offense and that the police officer had probable cause to arrest for violation of probation, the arrest was not proper under 46-6-311 because existing circumstances did not require an immediate arrest. The gun seized in defendant's bedroom after the arrest was suppressed as evidence in the federal prosecution for violation of 18 U.S.C. 922(g)(1), which prohibits possession of a firearm by a convicted felon. U.S. v. Shepard, 21 F3d 933 (9th Cir. 1994).

Failure to Appear for Probation Officer-Ordered Urine Sample — Minimal Grounds Required to Order Testing: It was error for the District Court to dismiss a petition for revocation of suspended sentence based on the defendant's failure to appear for purposes of providing a urine sample because the probation officer did not have some articulable reasons for requesting the test. Under the standard established in St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988), the Supreme Court held that a probation officer's opinion that rehabilitation could not begin until the defendant was free of drugs and the fact that the defendant had not passed a drug test since his arrest constituted sufficient evidence to establish reasonable grounds for requiring a urine sample. St. v. Sigler, 236 M 137, 769 P2d 703, 46 St. Rep. 244 (1989).

Admission of Parole Violation — Hospital Detention Not Unlawful: Defendant was admitted to the hospital the day after he confessed to a parole violation. While in the hospital, he was informed that he was not free to leave and would be arrested upon release. Defendant's admission of a parole violation constituted probable cause to detain him, and the hospital detention was not unlawful. Because defendant had already been convicted and was on probation, any presumption of innocence was gone. St. v. Pease, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

Probation Violator Subject to Provisions Regarding Release on Bail: A person who has been convicted, sentenced, and placed on probation and who has violated probation is subject to the provisions regarding release on bail. The provisions of 46-20-204, providing for a stay of execution and relief pending appeal of original conviction, do not apply. St. v. Pease, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

No Preliminary or Probable Cause Hearing — Due Process: Defendant was not denied due process for the state's failure to provide an appearance denominated as a preliminary or probable cause hearing prior to a probation revocation hearing. After a defendant is arrested for violation of probation, he is brought before the court without unnecessary delay for a hearing on the violations charged. No two-stage hearing process is necessary under this statutory system because the reasons for having a preliminary hearing are absent. The revocation hearing is held promptly, before a defendant is returned to prison. The defendant receives notice of the hearing and alleged violations, and the hearing is held before a judge, rather than an administrative body. Section 46-23-1013 (now repealed) sets forth the procedure to follow after the arrest of a probationer for violation of probation. Because the scheme affords due process, the statute is not an unconstitutional violation of due process. St. v. Swan, 220 M 162, 713 P2d 1003, 43 St. Rep. 259 (1986). See also St. v. Kingery, 239 M 160, 779 P2d 495, 46 St. Rep. 1587 (1989).

Preliminary Hearing Not Required to Establish Probable Cause: Where probation was revoked by original sentencing judge, petitioner was not denied minimum standards of due process as petitioner was not arrested until a bench warrant was issued pursuant to the final order of revocation after a hearing at which petitioner was represented at every step by counsel. Where no detention is involved, a preliminary hearing to establish probable cause for filing a petition for imposition of final judgment and sentence is not necessary as no rights of the probationer have been violated. In re Meidinger, 168 M 7, 539 P2d 1185 (1975). See also St. v. Kingery, 239 M 160, 779 P2d 495, 46 St. Rep. 1587 (1989).

Parole Violation: This section does not require parolee to be taken before court for complete hearing on parole violation but provides only for persons on probation or on suspended sentence. Petition of Spurlock, 153 M 475, 458 P2d 80 (1969).

Subsequent Arrest for Violation: When petitioner was placed on probation for 1 year on conditions aimed at rehabilitating him, subsequent imposition of judgment after he violated his probation did not put him in jeopardy in violation of the federal or Montana Constitution. In re Williams' Petition, 145 M 45, 399 P2d 732 (1965).

Commencement of Sentence: When relator was sentenced to 4 years' confinement and the execution of the sentence was then suspended, which suspension was later revoked, the sentence commenced to run for all purposes on the date when judgment of conviction was entered. Any time between the imposition of the suspended sentence and its revocation should have been credited to the relator and failure to do so resulted in his illegal confinement. State ex rel. Wetzel v. Ellsworth, 143 M 54, 387 P2d 442 (1963).

Collateral References

Right and sufficiency of allocution in probation revocation proceeding. 70 ALR 5th 533.

Who may institute proceedings to revoke probation. 21 ALR 5th 275.

46-23-1015. Informal probation violation intervention hearing.

Compiler's Comments

2005 Amendment: Chapter 517 in (3) in two places inserted language relating to participation in the day reporting program. Amendment effective July 1, 2006.

Effective Date: Section 9, Ch. 493, L. 2001, provided that this section is effective on passage and approval. Approved May 1, 2001.

Retroactive Applicability: Section 10, Ch. 493, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to offenders who are under the custody or supervision of the department of corrections on [the effective date of this act]." Effective May 1, 2001.

Case Notes

Breach of Intervention Agreement — Issue Preclusion Applicable: McDaniel was sentenced to 20 years for burglary, with the sentence suspended subject to several conditions. About 4 months after sentencing, McDaniel tested positive for drugs, and the probation officer elected to initiate an intervention hearing, where an agreement was entered into in lieu of a formal violation being filed. Upon learning of the intervention hearing, the County Attorney filed a petition to revoke McDaniel's suspended sentence based on McDaniel's drug use. McDaniel moved for partial summary judgment on grounds that the intervention hearing agreement constituted a final adjudication of the probation violation and a binding contract and that the state was barred from relitigating the issue. The District Court denied the motion, McDaniel appealed, and the Supreme Court reversed. McDaniel and the state, acting through the Department of Corrections, entered a valid binding contract that precluded filing of a formal violation, and the state breached the contract by filing the revocation petition. Additionally, the elements of issue preclusion were satisfied with respect to the state's liability on the breach of contract claim, including the state's opportunity to argue liability, so absent any genuine issue of material fact, McDaniel was entitled to partial summary judgment on the breach of contract claim. McDaniel v. St., 2009 MT 159, 350 M 422, 208 P3d 817 (2009), following Baltrusch v. Baltrusch, 2006 MT 51, 331 M 281, 130 P3d 1267 (2006).

No State Prosecutorial Immunity for Actions of County Attorney: McDaniel was sentenced to 20 years for burglary, with the sentence suspended subject to several conditions. About 4 months after sentencing, McDaniel tested positive for drugs, and the probation officer elected to initiate an intervention hearing, where an agreement was entered into in lieu of a formal violation being filed. Upon learning of the intervention hearing, the County Attorney filed a petition to revoke McDaniel's suspended sentence based on McDaniel's drug use. McDaniel moved to dismiss on grounds that in filing the revocation petition, the state breached the agreement. The District Court granted McDaniel's motions, and the revocation petition was dismissed. McDaniel subsequently filed an action against the state for damages, claiming that the state breached the written agreement and deprived McDaniel of property in violation of due process. The state asserted that because the County Attorney was acting within the scope of his duties as an agent of the state when filing the revocation petition, the state was entitled to prosecutorial immunity. The District Court agreed and granted the state's motion for summary judgment. On appeal, the state contended that prosecutorial immunity should be extended to include county and state governments employing prosecutors who are named as defendants in tort actions. However, for the state to extend the County Attorney's immunity to itself, the state must establish that the County Attorney could raise prosecutorial immunity as a defense if the claims were brought against the County Attorney rather than the state. Here, the County Attorney was not a party to the intervention agreement, so there was no factual or legal basis for McDaniel to bring a contract-based claim against the County Attorney, and absent a basis for the prosecutor to assert prosecutorial immunity, there was no basis for the state to extend immunity to itself. The Legislature intended to waive state immunity as to express contracts, so it was incongruous for the state to assert immunity as a defense to the alleged contract violation. The Supreme Court reversed. McDaniel v. St., 2009 MT 159, 350 M 422, 208 P3d 817 (2009).

District Court Authority to Revoke Suspended Sentence for Parole Violation for Which Defendant Not Sanctioned or Punished: Martinez was given a 7-year suspended sentence for felony criminal endangerment, subject to 25 conditions, including a requirement that Martinez notify the probation officer upon a change of residence. Following numerous probation violations, three separate intervention hearings were held to address the violations. One of the

probation officers subsequently recommended that Martinez be brought before the District Court for revocation of the suspended sentence. The District Court heard testimony from two probation officers regarding the repeated violations and revoked Martinez's suspended sentence. Martinez appealed on grounds that the probation officer lacked the statutory authority to seek sentence revocation for conduct addressed by the revocation hearings and contended that the revocation violated double jeopardy because it amounted to double punishment for violations addressed by the revocation hearings. The Supreme Court agreed that once a probation officer elects to pursue an intervention hearing under 46-23-1012(3), the officer cannot then also pursue a revocation hearing before the District Court for the same violation. However, Martinez's violation of the requirement to notify the probation officer upon a change of residence occurred after the third intervention hearing, and Martinez was not sanctioned or punished for that violation. That violation in itself was sufficient to support revocation of Martinez's suspended sentence, and even if the District Court considered the history of Martinez's violations in reaching its decision, the court did not abuse its discretion or exceed its statutory authority in revoking the sentence based on that violation alone. Additionally, no double jeopardy violation occurred when the sentence was revoked based on a violation for which Martinez was not previously sanctioned or punished. Thus, revocation of Martinez's suspended sentence was affirmed. St. v. Martinez, 2008 MT 233, 344 M 394, 188 P3d 1034 (2008).

46-23-1020. Conditional discharge — definition — revocation.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

46-23-1021. Supervision on parole.

Compiler's Comments

2007 Amendment: Chapter 238 inserted (6)(b) requiring that achievements listed in 46-23-1027(2) must be considered significant in deciding whether to grant a conditional discharge; inserted (6)(c) providing that the department is relieved of supervision if the board discharges a parolee from supervision; inserted (6)(d) allowing the board to return a conditionally discharged parolee to the status of a regular parolee for good cause; and made minor changes in style. Amendment effective October 1, 2007.

1995 Amendment: Chapter 125 at end of (6)(a) inserted phrase relating to unreasonable risk of danger to victim; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

1993 Amendment: Chapter 579 inserted (6)(c) providing that if the Department certifies to the Board that the probation and parole office workload or a district has exceeded the optimum, the Board cannot parole a prisoner to that district office unless it grants a conditional discharge, that the Department may recommend a conditional discharge, and that the Board need not accept the recommendation; and made minor changes in style. Amendment effective April 28, 1993.

1989 Amendment: Inserted (6) regarding conditional discharge.

Applicability: Section 4, Ch. 195, L. 1989, provided: "[This act] applies to persons under probation or parole supervision on or after [the effective date of this act]." Effective October 1, 1989.

Administrative Rules

ARM 20.7.1101 Conditions on probation or parole.

Case Notes

Parole Officer Duty of Care to Supervise Parolees — Jury Instruction Properly Given: Corliss was paroled, after serving time for an execution-style slaying with a handgun, under the condition that he not possess a firearm. While on a visit, with the approval of his parole officer, to Washington state to look for work, Corliss failed to return to Montana within the established time, failed to see a parole officer in Washington, had a temporary restraining order obtained against him by a girlfriend because of threats made to her and her family, and had an altercation with his wife involving a handgun. In neither instance of violence did Corliss's parole officer investigate the circumstances of the violence. Later, Corliss shot and killed one friend of his girlfriend and injured another. Both the estates of the deceased woman and the wounded woman brought actions against the state for negligent supervision of Corliss's parole. The state objected to an instruction given by the District Court concerning a parole officer's duty of care, claiming that there must be some special relationship between the parole officer and the person injured by a parolee in order for a duty of care to arise. The Supreme Court reviewed statutes defining negligence, statutes describing the general duty of one individual toward another, and statutes

concerning parole and concluded that Robbins had a general duty to exercise reasonable care in the supervision of Corliss and had a duty to the killed and injured women in particular. Starkenburg v. St., 282 M 1, 934 P2d 1018, 54 St. Rep. 214 (1997). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Erroneous Parole Revocation: Given the issue of whether a parolee who, after a full revocation hearing, had been found by the Board of Pardons (now Board of Pardons and Parole) not to have violated his parole could nevertheless be confined pending submission of an acceptable new parole plan, the Supreme Court held that the parolee must be released within 30 days from the decision and that the Board was under a duty to develop and approve a parole plan within that period. Lopez v. Crist, 176 M 352, 578 P2d 312 (1978).

46-23-1022. Parole services.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

46-23-1023. Arrest of alleged parole violator.

Compiler's Comments

1999 Amendment: Chapter 505 throughout section substituted "parolee" for "prisoner"; in first sentence in (2) after "giving" inserted "the officer oral authorization and within 12 hours delivering to the place of detention" and in second sentence after "statement" inserted "or oral authorization" and after "releasee" inserted "if the probation and parole officer delivers a written statement within 12 hours of the arrest"; and made minor changes in style. Amendment effective April 28, 1999.

Administrative Rules

ARM 20.2.201 Contested cases — general authority.
ARM 20.2.208 Onsite hearing for parole violation — notice.
ARM 20.2.209 Onsite hearing for parole violation — notice and witnesses.
ARM 20.2.210 Onsite hearing for parole violations — hearing.
ARM 20.2.211 Onsite hearing for parole violation — finding.
ARM 20.2.212 Onsite hearing for furlough violation.

Case Notes

No Entitlement to Probable Cause Hearing Upon Revocation of Parole Rather Than Probation — Goebel Clarified: Gundrum was arrested for a parole violation, and his parole was revoked. Gundrum contended that he was illegally restrained because he was not afforded a probable cause hearing within 36 hours of his arrest as provided in 46-23-1012 and discussed in St. v. Goebel, 2001 MT 73, 305 M 53, 31 P3d 335 (2001), and St. v. Giddings, 2001 MT 76, 305 M 74, 29 P3d 475 (2001). Gundrum cited the language in Goebel that 46-23-1012 applies to individuals whose "probation or parole" was revoked between April 28, 1999, and May 1, 2001. The Supreme Court held that the Goebel decision, as it related to parole revocation, was in error. Although 46-23-1012 applies to probation revocation, this section applies to parole revocation. There is no strict time period for a probable cause hearing related to a parole violation; rather, 46-23-1024 simply requires that a hearing be held within a reasonable time. Further, Goebel and Giddings both dealt with probation violations, and the Supreme Court declined to apply the same hearing requirements to parole violations. Gundrum's incarceration was legal. Gundrum v. Mahoney, 2001 MT 246, 307 M 96, 36 P3d 890 (2001).

Revocation of Suspension of Part of Sentence While Nonsuspended Part Being Served: The District Court had authority to revoke suspension of part of a sentence when, prior to having begun to serve the suspended part, the prisoner was released on parole before serving the whole of the nonsuspended part of the sentence and violated conditions of probation relating to the suspended part. Christofferson v. St., 272 M 518, 901 P2d 588, 52 St. Rep. 909 (1995).

Parolee's Wallet at Scene of Homicide — Probable Cause for Arrest: There was probable cause or reasonable grounds to believe accused committed acts constituting a violation of his parole conditions where his wallet was found at the scene of a criminal homicide. Accused could not successfully contend on appeal following deliberate homicide conviction that statements made to police should be suppressed for being the result of an arrest without probable cause. St. v. Plouffe, 198 M 379, 646 P2d 533, 39 St. Rep. 1064 (1982).

46-23-1024. Initial hearing after arrest.

Compiler's Comments

1999 Amendment: Chapter 505 in (1) substituted "parolee" for "prisoner"; inserted (1)(b) providing exception of hearing within reasonable time after arrest if parolee was charged in

court with violation of law; at beginning of (2) inserted "The hearing is an onsite hearing and must be held"; and made minor changes in style. Amendment effective April 28, 1999.

1995 Amendment: Chapter 546 near end of (2) substituted "board of pardons and parole" for "board of pardons"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Administrative Rules

ARM 20.2.201 Contested cases — general authority.

ARM 20.2.208 through ARM 20.2.211 Onsite hearing for parole violation — procedure.

Case Notes

"No Contact" Agreement Construed: A probation agreement stated: "You will have no contact with the victim of this offense or her family." Defendant claimed that because the victim made contact with him, rather than vice versa, he did not violate probation. Defendant misconstrued the agreement, and his contacts with the victim constituted a probation violation. St. v. Pease, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

Parole Violation — Evidence Not Within Scope of Appeal Properly Excluded: Defendant convicted of parole violation contended that tape recordings, which might have shown distress and suicidal tendencies, were useful in his development of a defense of "duress" and "necessity". However, admission of the evidence was properly denied because it was cumulative and irrelevant to the issue of parole violation and revocation of his suspended sentence. St. v. Pease, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

Revocation of Suspended Portion of Sentence — No Due Process Violation: Defendant was convicted of aggravated assault and sexual intercourse without consent and was sentenced to a term of 40 years in the Montana State Prison. The sentence review board modified the sentence to 40 years with 20 years suspended provided that the defendant successfully complete a sex treatment program. Upon defendant's failure to complete the program, the District Court, following four hearings, ordered the original 40-year sentence to be reinstated. Defendant appealed, alleging due process violations for failure to follow parole and probation revocation procedures. The Supreme Court, in affirming the revocation, ruled that the right to a speedy trial, while guaranteed in criminal prosecutions, is not applicable in revocation of probation proceedings and that no preliminary hearing is required before a revocation proceeding when detention is not involved. St. v. Friedman, 225 M 373, 732 P2d 1322, 44 St. Rep. 313 (1987). See also St. v. Stangeland, 233 M 230, 758 P2d 776, 45 St. Rep. 1446 (1988).

Revocation of Parole Without Preliminary On-Site Hearing or Counsel at Final Hearing: The Supreme Court held that a preliminary on-site hearing was not necessary in this situation. The purpose of an on-site hearing is to "determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. Cf. Goldberg v. Kelly, 397 US 267". In this case, defendant's presence in another state clearly established probable cause that defendant had violated his parole. Not only was he not supposed to be outside of Montana, he was not supposed to be away from Galen State Hospital. He would have had no mitigating circumstances of misunderstanding to voice at an on-site hearing. At a final parole revocation hearing defendant had no constitutional right to counsel. Owens v. Risley, 217 M 35, 702 P2d 1, 42 St. Rep. 1000 (1985).

Admissibility of Suppressed Evidence: Evidence of drugs seized in a search conducted under a defective warrant, although not admissible in prosecution for possession of the drugs, was properly considered in hearing on revocation of parole. St. v. Thorsness, 165 M 321, 528 P2d 692 (1974).

Appointment of Counsel Not Required: Under this section, a parole violator is required to be brought before board for hearing, but court hearing is not required; the parole violator does not have constitutional right but has statutory right to an attorney at parole revocation hearing, and board is not required to furnish parolee an attorney during such hearing. Petition of Wing, 154 M 501, 464 P2d 302 (1969).

Promptness of Hearing: When 5-month delay by parole board (now Board of Pardons and Parole) was seemingly caused by parolee being in hospital, requirement under this section that hearing be "prompt" was not violated. Petition of Spurlock, 153 M 475, 458 P2d 80 (1969).

46-23-1025. Report to and action by board.

Compiler's Comments

2003 Amendment: Chapter 559 throughout section substituted "hearing panel" for references to board; in (2) in second sentence after "parole" deleted "or conditional release"; in (4) near beginning substituted "the hearing panel determines" for "it appears" and after "prisoner's" substituted "return to the custody of Montana law enforcement, the department, or the

department's agent" for "arrest"; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 13, Ch. 559, L. 2003, was a saving clause.

Severability: Section 14, Ch. 559, L. 2003, was a severability clause.

1995 Amendment: Chapter 125 inserted (3) relating to violation of condition of release requiring payment of restitution; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Administrative Rules

ARM 20.2.201 Contested cases — general authority.

ARM 20.2.208 through ARM 20.2.211 Onsite hearing for parole violation — procedure.

Title 20, chapter 25, subchapter 8, ARM Revocation of parole.

ARM 20.25.802 Contested revocation hearings.

Case Notes

No Standing to Raise Constitutionality of Restitution Statutes Absent Showing of Direct Personal Injury: The 2003 Legislature amended the state restitution statutes, and Thaut sought to challenge the constitutionality of the amendments on numerous grounds. However, Thaut was unable to show a direct personal injury resulting from application of the restitution laws. Pursuant to St. v. Krantz, 241 M 501, 788 P2d 298 (1990), and Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140 (1996), Thaut lacked standing to challenge the constitutionality of the restitution statutes, and the Supreme Court declined to address the issue. St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004). See also St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), in which defendant established direct economic injury and thus standing to challenge the constitutionality of repayment conditions on equal protection grounds through the District Court's order to repay $2,398 in costs of appointed counsel.

Revocation of Parole Without Preliminary On-Site Hearing or Counsel at Final Hearing: The Supreme Court held that a preliminary on-site hearing was not necessary in this situation. The purpose of an on-site hearing is to "determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. Cf. Goldberg v. Kelly, 397 US 267". In this case, defendant's presence in another state clearly established probable cause that defendant had violated his parole. Not only was he not supposed to be outside of Montana, he was not supposed to be away from Galen State Hospital. He would have had no mitigating circumstances of misunderstanding to voice at an on-site hearing. At a final parole revocation hearing defendant had no constitutional right to counsel. Owens v. Risley, 217 M 35, 702 P2d 1, 42 St. Rep. 1000 (1985).

Admissibility of Suppressed Evidence: Evidence of drugs seized in a search conducted under a defective warrant, although not admissible in prosecution for possession of the drugs, was properly considered in hearing on revocation of parole. St. v. Thorsness, 165 M 321, 528 P2d 692 (1974).

Appointment of Counsel Not Required: Under this section, a parole violator is required to be brought before board for hearing, but court hearing is not required; the parole violator does not have constitutional right but has statutory right to an attorney at parole revocation hearing, and board is not required to furnish parolee an attorney during such hearing. Petition of Wing, 154 M 501, 464 P2d 302 (1969).

Promptness of Hearing: When 5-month delay by parole board (now Board of Pardons and Parole) was seemingly caused by parolee being in hospital, requirement under this section that hearing be "prompt" was not violated. Petition of Spurlock, 153 M 475, 458 P2d 80 (1969).

Attorney General's Opinions

Use of Less Than Full Board for Parole Revocation Hearings: The Board of Pardons (now Board of Pardons and Parole) may conduct parole revocation hearings using a single member designated by the board chairman if the full board makes that examiner's decision final, and the single member's decision may be appealed by the offender at a new hearing before the full board. 37 A.G. Op. 23 (1977).

Collateral References

Acquittal in criminal proceeding as precluding revocation of parole on same charge. 76 ALR 3d 578.

46-23-1027. Parole achievement credit.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

46-23-1031. Supervisory fees — account established.

Compiler's Comments

2009 Amendment: Chapter 66 in (1)(a)(i) at beginning deleted "under intensive supervision or conditional release". Amendment effective March 25, 2009.

2005 Amendments — Composite Section — Coordination: Section 6, Ch. 360, L. 2005, a coordination section, provided that if House Bill No. 288 is passed and approved and if it amends 46-23-1031, then [section 3 of this act], amending 46-23-1031, is void and 46-23-1031 must be amended as follows: in (1)(a)(i) after "pay to the" substituted "department" for "clerk of the district court that has jurisdiction over the person during the person's supervision"; inserted (1)(a)(ii) requiring payment of a supervisory fee by a person under continuous satellite-based monitoring; in (1)(c) near middle after "subsection (1)(a)" inserted "or (1)(b)"; in (2)(b) at beginning substituted "The department" for "Prior to July 1, 2003, district court clerks shall deduct from the total supervisory fees collected pursuant to subsection (1) the administrative cost of collecting and accounting for the fees and shall deposit the remaining amount into the state special revenue account established in subsection (2)(a). After June 30, 2003, district court clerks" and at end after "subsection (2)(a)" deleted "as specified by the supreme court administrator"; and made minor changes in style. House Bill No. 288 was approved as Ch. 473, L. 2005. Section 3, Ch. 473, L. 2005, amended sec. 8, Ch. 360, L. 2005, to provide that this amendment is effective October 1, 2005.

Chapter 473 in (1)(a)(i) after "shall pay to" substituted "the department" for "the clerk of the district court that has jurisdiction over the person during the person's supervision"; and in (2)(b) deleted former first sentence that read: "Prior to July 1, 2003, district court clerks shall deduct from the total supervisory fees collected pursuant to subsection (1) the administrative cost of collecting and accounting for the fees and shall deposit the remaining amount into the state special revenue account established in subsection (2)(a)" and at beginning substituted "The department" for "After June 30, 2003, district court clerks" and at end deleted "as specified by the supreme court administrator". Amendment effective October 1, 2005.

Preamble: The preamble attached to Ch. 360, L. 2005, provided: "WHEREAS, the United States Department of Justice has published confirmed statistics that over 60% of serious and violent offenders in state prisons have a history of prior convictions and that the number of prisoners convicted for violent sexual assault has increased by an annual rate of 15% each year since 1980; and

WHEREAS, criminals who commit sexual and violent crimes have shown unusually high recidivism rates, thereby posing an unacceptable level of risk to the community; and

WHEREAS, intensive supervision of sexual or violent offenders is a crucial element to both the rehabilitation of the released convicts and the safety of the surrounding community; and

WHEREAS, mature technological solutions now exist to provide improved supervision and behavioral control of sexual or violent offenders following their release; and

WHEREAS, these solutions can now also provide law enforcement and correctional professionals with significant new tools for electronic correlation of the constantly updated geographical location of supervised sexual or violent offenders following their release with the geographic location of reported crimes, both to possibly link released offenders to crimes or to possibly exclude released offenders from ongoing criminal investigations; and

WHEREAS, continuous 24-hour-a-day, 7-day-a-week electronic monitoring of those convicted of sexual offenses is a valuable and reasonable requirement for those convicts who are placed on probation, who failed to register as sexual or violent offenders as required by law, or who have been released from incarceration while they remain under the active supervision of the state."

Severability: Section 7, Ch. 360, L. 2005, was a severability clause.

2003 Amendment: Chapter 386 in (1)(a) near beginning of first sentence after "parolee" inserted "or person committed to the department who is supervised by the department under intensive supervision or conditional release" and after "pay" inserted "to the clerk of the district court that has jurisdiction over the person during the person's supervision", inserted second sentence providing for a $50 transfer processing fee, and at beginning of third sentence after "The" substituted "interstate transfer fees required by this subsection" for "fee" and at end after "collected by the" substituted "department" for "clerk of the district court with jurisdiction during the probationer's or parolee's period of supervision under this part"; in (1)(b) at beginning after "court" inserted "department", after "fee" inserted "required by subsection (1)(a)", near middle after "payment of the" inserted "supervisory", and near end after "cause the" substituted "person" for "probationer or parolee"; in (2)(b) near beginning of first sentence after "total" inserted "supervisory" and in second sentence after "deposit the" substituted "total supervisory

fees collected pursuant to subsection (1)" for "fees"; and made minor changes in style. Amendment effective April 17, 2003.

2002 Amendment: Chapter 13 in (2)(b)(i) at beginning inserted "Prior to July 1, 2003"; inserted (2)(b)(ii) relating to deposit as specified by the supreme court administrator; and made minor changes in style. Amendment effective August 16, 2002.

1999 Amendment: Chapter 505 in (1)(a) after "fee" substituted "of no less than $120 a year and no more than $360 a year" for "of $120 a year" and after "prorated at" inserted "no less than". Amendment effective April 28, 1999.

Effective Date: Section 4, Ch. 577, L. 1993, provided that this section is effective July 1, 1993.

Case Notes

No Error in Allowing Parole Officer to Set Restitution Schedule — Refusal to Waive Administrative Fees Proper: Denham contended that it was error for the sentencing court to delegate the scheduling of monthly restitution payments to a parole officer because the version of 46-18-244 in effect at the time of the crime did not provide for that delegation of authority. The Supreme Court held that the amendments to the statute were purely procedural and did not constitute retroactive legislation, impair Denham's rights, or impose additional duties on Denham, so allowing the parole officer to set the restitution schedule was not error. Denham also appealed the $60,099 restitution and the 10% administrative fee and minimal surcharges. However, Denham assured the court at sentencing of his ability to pay the restitution amount, so it was reasonable to assume that he also had the ability to pay the administrative fee and surcharges. The sentencing court was affirmed. St. v. Denham, 2005 MT 26, 326 M 24, 107 P3d 1263 (2005).

Extra Conditions in Sentencing Order Not Mentioned in Oral Sentence Stricken: The District Court that sentenced Waters imposed two extra conditions in the sentencing order that were not contained in the plea agreement or presentence investigation or contained in the oral sentence: (1) payment of supervision fees; and (2) submission to Texas authorities. Pursuant to St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), the oral pronouncement controls. Thus, Waters contended that only the conditions contained in the oral sentence could be imposed. The Supreme Court clarified Lane, noting that Waters was on notice of the conditions in the plea agreement and presentence investigation and that those terms applied despite the ambiguous sentencing conditions that were imposed orally. However, the court remanded for an amendment of the written sentence to strike the submission to Texas authorities, which was never mentioned, and to strike the payment of supervision fees as well, unless it was determined that payment of the fees would not impose a significant hardship on Waters, pursuant to this section. St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142, 56 St. Rep. 901 (1999), followed in St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Parolee and Probationer Supervision Fee Not Violative of Ex Post Facto Restriction: Frazier asserted that because he was sentenced prior to the enactment of this section, the supervisory fee assessed in that section against parolees and probationers could not be retroactively applied to him or other parolees and probationers similarly situated. For a criminal or penal statute to be ex post facto, it must: (1) be retrospective, applying to events occurring before its enactment; and (2) disadvantage the affected offender. A civil sanction will implicate ex post facto concerns only if it can be fairly characterized as punishment. The legislative history of this section indicated that the supervisory fee was assessed to help defray the costs of supervision and to hold parolees and probationers accountable, rather than to punish. Because the fee is administrative rather than punitive, it does not violate the prohibition against ex post facto laws. Frazier v. Dept. of Corrections, 277 M 82, 920 P2d 93, 53 St. Rep. 551 (1996), distinguishing St. v. Leistiko, 256 M 32, 844 P2d 97 (1992).

46-23-1032. Federal forfeiture funds — use.

Compiler's Comments

Effective Date: Section 4, Ch. 219, L. 1995, provided that this section is effective July 1, 1995.

Code Commissioner Change: Pursuant to sec. 5, Ch. 546, L. 1995, the Code Commissioner substituted Department of Corrections for Department of Corrections and Human Services.

Part 11
Interstate Compact for Adult Offender Supervision

Part Administrative Rules

ARM 20.7.1101 and 20.7.1102 Conditions on probation or parole — reduction to written agreement signed by probationer or parolee.

46-23-1115. Interstate Compact for Adult Offender Supervision — enactment and text — short title.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Case Notes

DECISIONS UNDER FORMER LAW

Governmental Entity Liable for Tortious Acts of Contractor Transporting Prisoners: Paull was a prisoner who was injured in an auto accident while being extradited to Park County by a private prisoner transportation service. The District Court summarily dismissed Paull's tort claim against the state and county for his injuries after the state and county argued that they owed Paull no actionable duty because the injuries were inflicted by the transportation company or its employees and that Paull's injuries were not foreseeable. The court concluded that the state owed Paull no duty because the state had no contractual or agency relationship with the company and that the county had no duty because a contractor-independent contractor relationship existed between the county and the company. Paull appealed, and the Supreme Court reversed. The court first addressed the county's liability, considering whether the county had a contractor-independent contractor relationship with the company. Under Beckman v. Butte-Silver Bow County, 2000 MT 112, 299 M 389, 1 P3d 348 (2000), an exception to the general rule that contractors are not liable for torts of their independent contractors applies if the activity is inherently or intrinsically dangerous. The District Court found that the activity in question was driving, which commonly is not an inherently dangerous activity, so the Beckman exception did not apply. The Supreme Court disagreed. Transportation of prisoners is more than just driving and is an inherently dangerous activity; therefore, under Beckman, a county or other governmental entity that contracts to have prisoners transported by an independent contractor may be held vicariously liable for injuries caused by the contractor. Any claim must still be established under the ordinary rules of negligence, requiring proof of the existence of a legal duty on the part of the contractor, breach of duty, causation, and damages. A contractor is not liable for every tort by an independent contractor engaged in inherently dangerous work, but only those torts that arise from risks caused by engaging in the dangerous activity. Here, the risk of driver misconduct was an inherent danger in the transportation of prisoners and part of the peculiar risk of harm arising from that activity. Likewise, the state had a duty to exercise ordinary care in returning Paull to Montana for probation revocation proceedings. Although the state was not strictly liable for any injury during prisoner transportation regardless of fault, the state may be held liable for tortious acts or omissions of its agents undertaking prisoner transportation if the state allows other entities to do the work. Because the acts or omissions of the transportation company for which the state or county might be liable were yet to be determined, summary judgment was inappropriate, and the case was remanded for further proceedings. Paull v. Park County, 2009 MT 321, 352 M 465, 218 P3d 1198 (2009).

Failure to Conduct Preliminary Onsite Hearing in Extradition Case — No Due Process Violation: In 1989, Hardy pleaded guilty to four counts of burglary and was sentenced to four concurrent terms of 10 years in prison with 9 years suspended. In 1990, Hardy was released on probation to serve the suspended portion of his sentence, and pursuant to the Uniform Act for Out-of-State Parolee Supervision (now repealed and replaced with 46-23-1115), supervision of his parole was transferred to Utah. While in Utah, Hardy committed other crimes, and Utah refused to continue parole supervision. Hardy pleaded no contest to the Utah offenses. After judgment and sentencing in Utah, Hardy was extradited back to Montana where his suspended sentence was revoked, he was sentenced to four concurrent terms of 9 years in prison, and he was not given credit for the 2 years he spent on probation in Utah. Hardy contended that there was a violation of his due process rights in not receiving a preliminary hearing upon his return to Montana, that his Montana probation officer wrongly informed him that his probation would not be revoked for misdemeanor convictions, and that he was improperly denied credit for his street time while on probation in Utah. In this case, a preliminary onsite hearing would have contributed nothing to a determination of whether Hardy had violated his probation. As evidenced by his no contest pleas and admissions, Hardy indisputably violated the conditions of his probation. A preliminary onsite hearing would not have led to any other finding. Failure to provide Hardy with a hearing did not prejudice his substantial rights. St. v. Hardy, 278 M 516, 926 P2d 700, 53 St. Rep. 998 (1996).

Representations of Parole Violations by Parole Officer Not Clearly Erroneous — Revocation Proceeding Not Estopped: In 1989, Hardy pleaded guilty to four counts of burglary and was sentenced to four concurrent terms of 10 years in prison with 9 years suspended. In 1990, Hardy

was released on probation to serve the suspended portion of his sentence, and pursuant to the Uniform Act for Out-of-State Parolee Supervision (now repealed and replaced with 46-23-1115), supervision of his parole was transferred to Utah. While in Utah, Hardy committed other crimes, and Utah refused to continue parole supervision. Hardy pleaded no contest to the Utah offenses. After judgment and sentencing in Utah, Hardy was extradited back to Montana where his suspended sentence was revoked, he was sentenced to four concurrent terms of 9 years in prison, and he was not given credit for the 2 years he spent on probation in Utah. Hardy contended that his Montana probation officer wrongly informed him that his probation would not be revoked for misdemeanor convictions and that his probation should thus not have been revoked. The Supreme Court noted that Montana did not participate in plea negotiations between Hardy and the State of Utah and that Hardy knowingly, voluntarily, and with assistance of counsel entered into a no contest plea agreement. The representations to Hardy by his Montana parole officer were not clearly erroneous. The court's conclusion that Montana was not estopped from proceeding with revocation based on the parole officer's representations was correct. St. v. Hardy, 278 M 516, 926 P2d 700, 53 St. Rep. 998 (1996).

Interstate Probation — Retaking Violator — Hearing Not Always Required: Montana probationer who had been transferred to Idaho was arrested for assault and then transferred back to Montana, where his probation was revoked after a hearing. He petitioned the Supreme Court for a Writ of Habeas Corpus on the grounds that he had been denied due process because he was not given a preliminary hearing in Idaho. The Supreme Court held that he had not been denied due process and that he was not entitled to a preliminary onsite hearing because he did not have a liberty interest at the time of the revocation proceedings since he was under lawful arrest in Idaho at the time. St. v. Howell, 222 M 136, 720 P2d 1174, 43 St. Rep. 1119 (1986).

Insufficient Evidence — Remand for Evidentiary Hearing: While working in North Dakota on the recommendation of his Montana probation officer, defendant whose Montana sentence had been suspended pleaded guilty to North Dakota charges of driving under the influence, no driver's license, and escape from lawful custody. He was returned to Montana and his suspended sentence was revoked. On appeal, the Supreme Court remanded for an evidentiary hearing because: (1) it was not clear from the record whether his right to due process was violated; (2) there may have been a plea bargain consented to by Montana in which North Dakota stated there would be no recommendation of probation violation if defendant pleaded guilty; and (3) there was insufficient evidence, in view of unresolved fact issues, to support the revocation. St. v. Monteith, 216 M 413, 701 P2d 993, 42 St. Rep. 911 (1985).

Revocation of Parole: When an individual's parole revocation failed to meet the statutory requirements of 46-23-1101 through 46-23-1106 (all now repealed and replaced with 46-23-1115) and the requirements of Morrissey v. Brewer, 408 US 471, 33 L Ed 2d 484, 92 S Ct 2593 (1972), the individual's parole must be reinstated. Fisher v. Crist, 182 M 124, 594 P2d 1140 (1979).

Waiver of Hearing: The failure to demand an onsite hearing cannot be construed to be a waiver of that right. Fisher v. Crist, 182 M 124, 594 P2d 1140 (1979).

Constitutionality: Requirement that parolee sign waiver of extradition before release to another state was not unconstitutional, and parolee could be detained for parole violation by unauthorized departure from the host state. In re Petition of Schwartz, 154 M 505, 463 P2d 316 (1970), certiorari denied, 398 US 913, 26 L Ed 2d 75, 90 S Ct 1713 (1970).

Return of Parolee Without Extradition: Parolee's rights under United States Constitution were not violated when parolee was returned to state from Oregon for parole violations without resort to extradition and, even if constitutional right was involved, it was waived by parolee's agreement with state wherein, as condition of parole, he waived certain rights. In re Petition of Dixson, 149 M 412, 430 P2d 642 (1967).

CHAPTER 24
TREATMENT OF VICTIMS AND WITNESSES

Chapter Compiler's Comments

Preamble: The preamble to Ch. 554, L. 1985, which enacted this chapter, provided:

"WHEREAS, without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with some exceptions, these individuals are either ignored by the criminal justice system or simply used as a means to identify and punish offenders; and

WHEREAS, all too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship, first as a result of the criminal act, and then as a result of contact with a criminal justice system unresponsive to the real needs of such victim; and

WHEREAS, while the defendant is provided with counsel who can explain both the criminal justice process and the rights of the defendant, the victim or witness has no counterpart and is usually not even notified when the defendant is released on bail, the case is dismissed, a plea to a lesser charge is accepted, or a court date is changed; and

WHEREAS, the victim and witness who cooperate with the prosecutor often find that they must share the pretrial waiting room with the defendant or his family and friends; and

WHEREAS, the victim may lose valuable property to a criminal only to lose it again for long periods of time to law enforcement officials until the trial, and sometimes until all appeals are over; and many times the property is damaged or lost, which is particularly stressful for the elderly or the poor; and

WHEREAS, the majority of serious crimes fall under the jurisdiction of state and local law enforcement agencies.

THEREFORE, the Legislature of the State of Montana finds it appropriate to provide for the fair and proper treatment of crime victims and witnesses in the criminal justice system."

Chapter Collateral References

Validity, construction, and application of state constitutional or statutory victims' bill of rights. 91 ALR 5th 343.

Victim impact evidence in capital sentencing hearings—post-Payne v. Tennessee. 79 ALR 5th 33.

Part 1
General Provisions

46-24-103. Duty of attorney general.

Compiler's Comments

1995 Amendment: Chapter 125 inserted second and third sentences relating to written notice of rights and services available to victims; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

46-24-104. Consultation with victim of certain offenses.

Compiler's Comments

1995 Amendment: Chapter 125 at beginning inserted introductory phrase concerning time of consultation and near middle, after "felony offense", inserted reference to misdemeanor offense involving bodily injury; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Case Notes

No Common-Law Duty of County to Notify Tenant of Release of Detainee: Leanne Miller obtained a protective order prohibiting her husband, Tommy, from contacting Leanne, her property, or her children. When Tommy was arrested following multiple violations of the restraining order, Leanne requested that the Gallatin County detention center notify her upon Tommy's release. However, the center did not contact Leanne when Tommy was released. Tommy then went to Leanne's rental home, killed her, and set fire to the home. The landlord filed a negligence action against the county for damages to the property resulting from the county's failure to notify Leanne, asserting that the county had a common-law duty to the landlord. The District Court granted summary judgment to the county, and the landlord appealed, but the Supreme Court affirmed. The complaint was couched in terms of the county's duty to Leanne, but cited no independent common-law duty extending to the landlord. Without a prevailing common-law theory, the cause of action derived solely from 46-24-203 and this section, regardless of whether those sections were cited or not. Therefore, under 46-24-105, the landlord was precluded from recovering against the county based on the failure to notify Leanne of Tommy's release, and summary judgment was proper. Bos v. Gallatin County, 2003 MT 162, 316 M 292, 71 P3d 1209 (2003).

46-24-105. No cause of action for damages.

Case Notes

No Common-Law Duty of County to Notify Tenant of Release of Detainee: Leanne Miller obtained a protective order prohibiting her husband, Tommy, from contacting Leanne, her property, or her children. When Tommy was arrested following multiple violations of the restraining order, Leanne requested that the Gallatin County detention center notify her upon Tommy's release. However, the center did not contact Leanne when Tommy was released. Tommy then went to Leanne's rental home, killed her, and set fire to the home. The landlord filed a negligence action against the county for damages to the property resulting from the county's

failure to notify Leanne, asserting that the county had a common-law duty to the landlord. The District Court granted summary judgment to the county, and the landlord appealed, but the Supreme Court affirmed. The complaint was couched in terms of the county's duty to Leanne, but cited no independent common-law duty extending to the landlord. Without a prevailing common-law theory, the cause of action derived solely from 46-24-104 and 46-24-203, regardless of whether those sections were cited or not. Therefore, under this section, the landlord was precluded from recovering against the county based on the failure to notify Leanne of Tommy's release, and summary judgment was proper. Bos v. Gallatin County, 2003 MT 162, 316 M 292, 71 P3d 1209 (2003).

46-24-106. Crime victims — family members — right to attend proceedings — exceptions — right to receive documents — rights during interview.

Compiler's Comments

2007 Amendment: Chapter 424 inserted (6) providing that a criminal offense victim has a right to a copy of all public documents filed with the court with exceptions, providing that if the victim is under 18, copies must be provided to the victim's parent or guardian, and listing exceptions; and inserted (7) providing that a victim has the right to a victim advocate's presence during interviewing when requested. Amendment effective October 1, 2007.

2005 Amendment: Chapter 33 in definition of victim in (5)(a) after "injury" inserted "or reasonable apprehension of bodily injury"; and made minor changes in style. Amendment effective March 18, 2005.

Retroactive Applicability: Section 3, Ch. 33, L. 2005, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to crimes committed before [the effective date of this act]." Effective March 18, 2005.

Saving Clause: Section 3, Ch. 104, L. 2001, was a saving clause.

Effective Date: Section 4, Ch. 104, L. 2001, provided that this section is effective on passage and approval. Approved March 22, 2001.

Part 2
Services to Victim, Witness

46-24-201. Services to victims of crime.

Compiler's Comments

2007 Amendment: Chapter 424 in (1)(b) at end inserted "including the right to receive documents under 46-24-106"; in (1)(c) at end inserted "and including the right to be accompanied during interviews as provided in 46-24-106"; and made minor changes in style. Amendment effective October 1, 2007.

1995 Amendment: Chapter 125 in (1), near end, substituted "written notice, in the form supplied by the attorney general, of the following" for "information on the following"; substituted current (1)(b) relating to access to information by victim and defendant for former (2) that read: "(2) community-based victim treatment programs"; inserted (2) requiring law enforcement personnel to provide victim information on community-based victim treatment programs; inserted (3) relating to identification of investigating officer and prosecuting attorney; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

46-24-202. Notification of available protective services.

Compiler's Comments

1995 Amendment: Chapter 125 at end inserted reference to process for obtaining protective order.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

46-24-203. Prompt notification to victims and witnesses of certain offenses.

Compiler's Comments

1999 Amendment: Chapter 395 in (1)(d) and near beginning of (1)(e) inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 125 inserted (1)(c) relating to charges filed against an accused; at end of (1)(d), after "trial date", deleted "the sentencing schedule, the sentence imposed, the term of imprisonment, if imposed, and the release of the accused from imprisonment"; inserted (1)(e) relating to presentence report; inserted (1)(f) relating to sentencing hearing; inserted (1)(g) relating to information concerning incarceration; in (2), after "felony offense", inserted reference to misdemeanor offense involving bodily injury; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Code Commissioner Change: Pursuant to sec. 5, Ch. 546, L. 1995, the Code Commissioner substituted Department of Corrections for Department of Corrections and Human Services.

Case Notes

No Common-Law Duty of County to Notify Tenant of Release of Detainee: Leanne Miller obtained a protective order prohibiting her husband, Tommy, from contacting Leanne, her property, or her children. When Tommy was arrested following multiple violations of the restraining order, Leanne requested that the Gallatin County detention center notify her upon Tommy's release. However, the center did not contact Leanne when Tommy was released. Tommy then went to Leanne's rental home, killed her, and set fire to the home. The landlord filed a negligence action against the county for damages to the property resulting from the county's failure to notify Leanne, asserting that the county had a common-law duty to the landlord. The District Court granted summary judgment to the county, and the landlord appealed, but the Supreme Court affirmed. The complaint was couched in terms of the county's duty to Leanne, but cited no independent common-law duty extending to the landlord. Without a prevailing common-law theory, the cause of action derived solely from 46-24-104 and this section, regardless of whether those sections were cited or not. Therefore, under 46-24-105, the landlord was precluded from recovering against the county based on the failure to notify Leanne of Tommy's release, and summary judgment was proper. Bos v. Gallatin County, 2003 MT 162, 316 M 292, 71 P3d 1209 (2003).

46-24-204. Scheduling changes.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

46-24-205. Notification to employer or creditor — limitations on employer.

Compiler's Comments

1995 Amendment: Chapter 125 inserted (3) prohibiting employer from discharging or disciplining victim or family for participation in criminal justice proceeding; inserted (4) defining member of the victim's family; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

46-24-206. Property return — right to be heard on disposition of evidence.

Compiler's Comments

1997 Amendment: Chapter 186 inserted (2) regarding a victim's opportunity to be heard as to the appropriate disposition of evidence that is not the victim's property; and made minor changes in style. Amendment effective July 1, 1997.

46-24-211. Information concerning appeal or postconviction remedies.

Compiler's Comments

2003 Amendment: Chapter 114 in two places before "part 25" inserted "Title 41, chapter 5". Amendment effective October 1, 2003.

1999 Amendment: Chapter 532 in two places inserted reference to hearing under part 25. Amendment effective October 1, 1999.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

46-24-212. Information concerning confinement.

Compiler's Comments

2003 Amendment: Chapter 559 in (1)(d) after "parole" inserted "or the hearing panel conducting a parole hearing". Amendment effective July 1, 2003.

Saving Clause: Section 13, Ch. 559, L. 2003, was a saving clause.

Severability: Section 14, Ch. 559, L. 2003, was a severability clause.

1997 Amendments: Chapter 42 in introduction, in (1)(d), and in (3)(c) substituted "board of pardons and parole" for "board of pardons". Amendment effective March 12, 1997.

Chapter 189 throughout section substituted reference to Board of Pardons and Parole for reference to Board of Pardons; substituted present (1)(a) through (1)(c) regarding information to be provided to a victim for former language that read: "promptly inform the victim of the estimated date of the prisoner's release from confinement in the Montana state prison, if reasonably ascertainable"; in (1)(d), at beginning, deleted "promptly inform the victim of"; inserted (1)(e) concerning community of residence after parole; and made minor changes in style.

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

Code Commissioner Change: Pursuant to sec. 5, Ch. 546, L. 1995, the Code Commissioner substituted Department of Corrections for Department of Corrections and Human Services.

46-24-213. General requirements for information.

Compiler's Comments

Severability: Section 42, Ch. 125, L. 1995, was a severability clause.

46-24-218. Identity theft report — process — investigation.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

46-24-219. Application to expunge record — identity theft passport required — notice — fee waiver — rules.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

46-24-220. Identity theft passport — application — issuance — uses — penalty for false report.

Compiler's Comments

2007 Amendment: Chapter 195 in (1)(a) near middle after "state" substituted "or to a resident of this state" for "and", after "report" inserted "in this state or another state", and near end after "victim of" substituted "identity theft as described in" for "a violation of"; inserted (1)(c) allowing a resident who became an identity theft victim in another state to apply directly to the department of justice and requiring the victim to provide certain information; inserted (2)(c) providing that an identity theft passport is equivalent to a police report or investigative report; inserted (5) providing a penalty for knowingly giving a false report to obtain an identity passport; and made minor changes in style. Amendment effective October 1, 2007.

Effective Date: This section is effective October 1, 2005.

Administrative Rules

Title 23, chapter 19, subchapter 6, ARM Identity theft passport program.

CHAPTER 30
UNIFORM CRIMINAL EXTRADITION ACT

Chapter Case Notes

Applicability to Juveniles: Since juveniles were not intentionally omitted from the provisions of Title 46, ch. 30, commonly known as the "Uniform Criminal Extradition Act", and because there is no additional procedural protection for juveniles under the Act, a Governor's warrant that fulfilled the applicability considerations outlined in In re Petition of Blackburn, 215 M 440, 701 P2d 715, 42 St. Rep. 525 (1985), was properly applied to extradition of a juvenile, since juveniles are not to be treated any differently than adults by the asylum state. Coble v. Magone, 229 M 45, 744 P2d 1244, 44 St. Rep. 1766 (1987).

Extradition for Criminal Nonsupport: Although a child support order issued by another state is a civil and not a criminal action, failure to pay the support may be a crime (felony criminal nonsupport) in that state and the defendant is subject to extradition for criminal proceedings. Crabtree v. St., 186 M 340, 607 P2d 566 (1980).

Chapter Attorney General's Opinions

No Entitlement to Bail After Waiver of Extradition — State Jurisdiction Only to Effect Transport: There is no provision for bail either after an arrest on a Governor's extradition warrant or upon waiver of extradition, so a fugitive prisoner, after waiver of extradition, is not entitled to bail. Once extradition is waived, Montana District Courts retain jurisdiction only to effect transport of the fugitive to another state. 50 A.G. Op. 7 (2004).

Nondelinquent Youth Charged With Crime in Another State: Because Montana has not adopted Art. XVIII of the Interstate Compact on Juveniles, which provides that the Compact applies to juveniles charged with being delinquent by reason of violation of any criminal law, a youth who has not run away, escaped, or been adjudged delinquent is outside the scope of the Interstate Compact on Juveniles in Montana. A juvenile residing in Montana, and charged with a crime in another state, may be extradited under the Uniform Criminal Extradition Act, Title 46, ch. 30. The soundest policy is to extradite any juvenile charged with a crime in another state, regardless of whether a juvenile court or an adult court has final jurisdiction. 41 A.G. Op. 24 (1985).

Chapter Collateral References

Probable cause: necessity that demanding state show probable cause to arrest fugitive in extradition proceedings. 90 ALR 3d 1085.

Juveniles: extradition of juveniles. 73 ALR 3d 700.

Subsequent proceedings: discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings. 33 ALR 3d 1443.

Part 1
General Provisions

46-30-101. Definitions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: Expanded definition of executive authority to include chairman of recognized Indian tribe within Montana; and expanded definition of state to include Indian reservation within Montana. Amendment effective April 6, 1991.

Part 2
Extradition to Another State From This State

46-30-202. Prosecution pending in this state at time of requisition.

Uniform Commission Comments

Source: Alabama Code of 1923, section 4174, changed.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-203. Extradition of persons who left demanding state involuntarily.

Uniform Commission Comments

The reason for this section lies in the fact that there is a conflict in the decisions upon the question whether a person who has been removed from a state under the compulsion of the authority of that state can be classed as a "fugitive" from that state so that his return can be secured through extradition proceedings. See, In re Whittington, 34 Cal. App. 344, 167 P 404; Hart v. Mangum, 146 Ga. 497, 91 S.W. 543; People ex rel. Hutchings v. Mallon, 245 N.Y. 521, 157 N.E. 842; State ex rel. Shapiro v. Wall, 187 Minn. 246, 244 N.W. 811.

46-30-211. Demand — form.

Uniform Commission Comments

This section was based in part upon Act of Congress of 1793, and decisions in Davis case, 122 Mass. 324, and Pearce v. Texas, 155 U.S. 387; cf. Scott on Interstate Rendition, section 91. As to the effect to be attributed to the papers accompanying the demand, see Kentucky v. Dennison, 24 How. 66, 104-109. The recognition of informations in states which allow them is probably supported by Hogan v. O'Neill, 255 U.S. 52. As to what the papers must show, see Hyatt v. People ex rel. Corkran, 188 U.S. 691; Innes v. Tobin, 240 U.S. 127; Scott, Interstate Rendition, section 96. On the violation of parole, see Hughes v. Pflanz, 138 Fed. 980.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Burden of Proof of Identity Upon Issuance of Warrant: Once the Governor of Montana has issued a warrant for the arrest and extradition of an accused, a presumption arises that the accused is the demanded fugitive. The burden of proof then shifts to the accused to prove beyond a reasonable doubt that he is not the fugitive charged in the demanding state. Upon failure of the accused to produce the evidence, the District Court may properly deny a writ of habeas corpus. In re Henrichs, 237 M 59, 771 P2d 967, 46 St. Rep. 620 (1989).

Misspelling of Petitioner's Name — Extradition Proceedings Not Defective: Slight misspelling of petitioner's name on a criminal complaint and arrest warrant, where "Henrichs" was spelled "Hendricks", constituted a technical defect and did not render extradition proceedings defective in light of the fact that the description accompanying the warrant correctly described the petitioner. Under the doctrine of idem sonans, two names spelled differently are regarded as the same if they sound alike in their pronunciation. In re Henrichs, 237 M 59, 771 P2d 967, 46 St. Rep. 620 (1989).

Adequacy of Demand for Extradition — Technical Pleading Rules Inapplicable: Papers demanding extradition need not meet the technical rules of pleading. The court should consider

whether they satisfactorily show that the person has been charged with a crime, no matter how inartfully they may be drawn. In re Petition of Blackburn, 215 M 440, 701 P2d 715, 42 St. Rep. 525 (1985).

Scope of Inquiry on Challenge to Extradition: The scope of inquiry by a court in an extradition proceeding is limited to whether: (1) the extradition documents on their face are in order; (2) the petitioner has been charged with a crime in the demanding state; (3) the petitioner is the person named in the request for extradition; and (4) the petitioner is a fugitive. Petitioner's claim that the transaction at issue in the state seeking his extradition from Montana constitutes a civil matter goes to the underlying charge and is thus beyond the scope of inquiry, though he could pursue that claim in the requesting state. In re Petition of Blackburn, 215 M 440, 701 P2d 715, 42 St. Rep. 525 (1985).

46-30-212. Investigation by governor.

Uniform Commission Comments

Source: Taken from Connecticut Statutes, sec. 1566.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-213. Issuance of arrest warrant by governor.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Warrant of Asylum State's Governor — Prima Facie Evidence: The warrant of the asylum state's Governor for rendition of a person another state is seeking extradition of is prima facie evidence of all the information in the warrant, including identity and that the person is a fugitive and is properly charged with a crime. In re Petition of Blackburn, 215 M 440, 701 P2d 715, 42 St. Rep. 525 (1985).

46-30-214. Recall of warrant or alias warrant.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-215. Execution of warrant.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-217. Rights of accused persons — habeas corpus.

Uniform Commission Comments

The present law of Massachusetts, Connecticut, Delaware and Minnesota allows merely an "opportunity" to the accused to demand an investigation. New York and some other states prescribe definite time. For a uniform act, an indefinite time to be made certain by a judge before whom the accused shall be brought, would seem the plan most likely to satisfy all the states. This is the law in Oklahoma.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Generally 1308
Dismissal 1309
Speedy Trial 1310

GENERALLY

Application for Writ of Habeas Corpus in Asylum State: Defendant was extradited to this state from another state and sentenced to prison. The remedy for a fugitive arrested in another state who opposes extradition is to apply for a writ of habeas corpus in the asylum state. Defendant, who did not oppose extradition in the asylum state before his return to this state, may not now attempt to do so in Montana. St. v. Kingery, 239 M 160, 779 P2d 495, 46 St. Rep. 1587 (1989), followed in Walker v. McCormick, 260 M 301, 858 P2d 373, 50 St. Rep. 1053 (1993).

Burden of Proof of Identity Upon Issuance of Warrant: Once the Governor of Montana has issued a warrant for the arrest and extradition of an accused, a presumption arises that the accused is the demanded fugitive. The burden of proof then shifts to the accused to prove beyond a reasonable doubt that he is not the fugitive charged in the demanding state. Upon failure of the accused to produce the evidence, the District Court may properly deny a writ of habeas corpus. In re Henrichs, 237 M 59, 771 P2d 967, 46 St. Rep. 620 (1989).

Misspelling of Petitioner's Name — Extradition Proceedings Not Defective: Slight misspelling of petitioner's name on a criminal complaint and arrest warrant, where "Henrichs" was spelled "Hendricks", constituted a technical defect and did not render extradition proceedings defective in light of the fact that the description accompanying the warrant correctly described the petitioner. Under the doctrine of idem sonans, two names spelled differently are regarded as the same if they sound alike in their pronunciation. In re Henrichs, 237 M 59, 771 P2d 967, 46 St. Rep. 620 (1989).

Scope of and Necessity for Investigation: Section 46-30-212 does not require that the accused be given notice of an investigation, nor does it require an investigation of the demand for extradition. It simply gives the Governor the discretion to check the demanding papers. The legal rule for a century or more has been that the executive of the asylum state may act upon the requisition papers in the absence of the accused and without notice to him. The Governor's investigative authority and the scope of his discretion is limited to determining that the person demanded is charged with a crime and is a fugitive from justice and to the adequacy of the demand. The accused is entitled to a hearing with the aid of counsel before a judge of a court of record on the above issues, but there is no right of the accused to have an investigation by or a hearing or other appearance before the Governor. In re Petition of Blackburn, 215 M 440, 701 P2d 715, 42 St. Rep. 525 (1985).

Scope of Inquiry on Challenge to Extradition: The scope of inquiry by a court in an extradition proceeding is limited to whether: (1) the extradition documents on their face are in order; (2) the petitioner has been charged with a crime in the demanding state; (3) the petitioner is the person named in the request for extradition; and (4) the petitioner is a fugitive. Petitioner's claim that the transaction at issue in the state seeking his extradition from Montana constitutes a civil matter goes to the underlying charge and is thus beyond the scope of inquiry, though he could pursue that claim in the requesting state. In re Petition of Blackburn, 215 M 440, 701 P2d 715, 42 St. Rep. 525 (1985).

DISMISSAL

No Court Authority to Quash Writ of Extradition — Governor's Warrant Effective Despite Expiration of Federal Statutory Time Limit: Defendant contended that 18 U.S.C. 3182 gave the District Court authority to dismiss his case when he was not picked up by out-of-state authorities within 30 days after he was served with a Governor's warrant. Under the federal statute, the court could discharge him, if he was detained, or release him from bail, but the 30-day provision did not allow dismissal of the case or grant the court authority to quash the writ of extradition. The Supreme Court found the 30-day limit to be discretionary, not mandatory. Under 46-30-302 and 46-30-304, the governor's warrant was legally effective even though the 30-day limit had expired. St. v. Campbell, 233 M 502, 761 P2d 393, 45 St. Rep 1678 (1988).

Authority to Dismiss: A judge had no authority under 46-13-101 to grant defendant's motion to dismiss based on a defense which went to the general issue to be determined at trial or under 46-13-201 (renumbered 46-13-401) because he did not set forth the reasons for dismissal in an order entered on the minutes. St. v. Cole, 174 M 380, 571 P2d 87 (1977).

Dismissal on Application of Prosecutor: Where defendant did not move to dismiss or demur to second information which was filed after defendant had pleaded to first information, and thus was improperly filed under this section as it read at that time, but rather entered plea to second information and moved to dismiss first information, and where defendant entered no objection to second information at subsequent trial and did not question the information on appeal, defendant waived any right he may have had to object to second information as improper amendment to first information. Gransberry v. St., 149 M 158, 423 P2d 853 (1967).

"In Furtherance of Justice": Since the Legislature did not define the phrase "in furtherance of justice" as used in predecessor to this section, it is left for the court's judicial discretion, exercised in view of a defendant's constitutional rights and the interests of society, to determine what particular grounds warrant dismissal of a pending criminal action, and mandamus will not issue to control the court's discretion. State ex rel. Anderson v. Gile, 119 M 182, 172 P2d 583 (1946).

Operation and Effect: After dismissal of an indictment because of substantial defects therein, the District Court may, but is not required to, submit the case to another grand jury, or permit or

order the County Attorney to file an information charging the defendant with the same offense ineffectually sought to be charged against him by the indictment. St. v. Vinn, 50 M 27, 144 P 773 (1914).

SPEEDY TRIAL

Factors to Consider: There are four factors to be considered in determining whether the right to a speedy trial is violated: (1) length of delay; (2) reason for delay; (3) defendant's assertion of the right; and (4) prejudice to the defendant. Length of delay is a triggering mechanism, and a delay of 317 days is sufficient to trigger an inquiry into the other factors. A delay due to the operation of the system is chargeable to the state. An accused must take some affirmative action to obtain a trial to be entitled to a discharge for delay. This burden is satisfied by making an appropriate motion. The incarceration of the defendant for the period of the delay demonstrates prejudice against him. St. v. Puzio & Allen, 182 M 163, 595 P2d 1163 (1979).

Good Cause for Delay: Although the defendant was not brought to trial until 8 months after entry of plea, there was good cause for the delay because defendant made four motions which had to be fully considered and there were several substitutions of presiding judges, often at the defendant's request. Also, under these circumstances it could not be said that the defendant's trial was not postponed upon his application. St. v. Nelson, 178 M 280, 583 P2d 435 (1978).

Not Proper Issue in Asylum State: The issue of lack of speedy trial is not properly cognizable by a court of the asylum state in a habeas corpus proceeding in that court contesting extradition to another state. In re Hart, 178 M 235, 583 P2d 411 (1978).

Delay Attributable to Defendant: Although the defendant was not brought to trial within 6 months after the filing of the information as required under former law, the defendant was not denied his right to a speedy trial because trial had originally been set for a date within the 6-month period and was removed from the trial calendar only when the defendant sought supervisory control on an original procedure filed in the Supreme Court, even though the cause was not set for trial until 2 months after the Supreme Court had denied defendant's petition for supervisory control and returned the matter to the trial court. St. v. Lagerquist, 152 M 21, 445 P2d 910 (1968).

Delay Attributable to Prosecutor: Under former statute providing that court shall dismiss charges against a defendant who is not brought to trial within 6 months after the filing of the information unless the trial has been postponed upon application of defendant, defendant was entitled to dismissal, even though defendant had demurred to the information and had not entered a plea, since County Attorney had failed to call up the demurrers for a hearing as he was entitled to do before the 6-month period had expired. State ex rel. Sullivan v. District Court, 150 M 203, 433 P2d 146 (1967).

Collateral References

Right of extraditee to bail after issuance of Governor's warrant and pending final disposition of habeas corpus claim. 13 ALR 5th 118.

46-30-218. Penalty for violating accused's rights.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-225. Guilt or innocence of accused, when inquired into.

Uniform Commission Comments

Scott on Interstate Rendition, Chapter XVIII.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Criminal Nonsupport — Examination of Merits: In extradition proceedings for criminal nonsupport, the District Court erred in considering the merits of out-of-state charges against defendant. Only procedural matters as set forth in Mich. v. Doran, 439 US 282, 58 L Ed 2d 521, 99 S Ct 530 (1978), are permissible under Art. IV, sec. 2, U.S. Const. Crabtree v. St., 186 M 340, 607 P2d 566 (1980).

Presence in Demanding State: This section does not prevent inquiry in habeas corpus proceedings brought by the accused as to whether the accused was in the demanding state at the time of the offense, and the accused should have been allowed to introduce evidence that he was not. State ex rel. Hart v. District Court, 157 M 287, 485 P2d 698 (1971).

46-30-226. Confinement of accused in jail on route.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-227. Arrest of accused before making of requisition.

Uniform Commission Comments

Arkansas Statutes, section 3674, is almost the same as the law of Colorado, Illinois and Kansas. This section was combined, however, in part with the law of Indiana, section 1900, modified.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-228. Written waiver of extradition proceedings.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-229. Prior waiver of extradition.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Part 3
Procedure for Arresting Accused Without Warrant

Part Attorney General's Opinions

No Entitlement to Bail After Waiver of Extradition — State Jurisdiction Only to Effect Transport: There is no provision for bail either after an arrest on a Governor's extradition warrant or upon waiver of extradition, so a fugitive prisoner, after waiver of extradition, is not entitled to bail. Once extradition is waived, Montana District Courts retain jurisdiction only to effect transport of the fugitive to another state. 50 A.G. Op. 7 (2004).

46-30-301. Arrest of accused without warrant.

Uniform Commission Comments

See 11 Ruling Case Law, p. 720: "The arrest may be made either by virtue of a warrant from a magistrate or by an officer or private person, who may justify the arrest by showing that prima facie a felony or other crime has been committed by the prisoner in another state, or that he stands charged therewith." To the same effect see Scott on Interstate Rendition, p. 161. An arrest without warrant was sustained in the following cases where the accused stood charged with a felony punishable by imprisonment for more than one year. Simmons v. Van Dyke, 138 Ind. 380 (forgery); In re Henry, 29 How. Pr. (N.Y.) 185 (robbery); Dow's case, 18 Pa. 37 (forgery); State v. Taylor, 70 Vt. 1 (burglary).

The preliminary draft of this Section provided for arrest without warrant in all cases where the accused stood charged with a "felony" in the demanding state. Because of the belief that "felony" did not have a uniform meaning, the Conference substituted the expression "charged with a crime punishable by death or life imprisonment". The Conference has become convinced that the enactment of this substituted language would result in restricting too severely the machinery for the enforcement of the criminal law, and would in many instances change the present practice of arresting without a warrant persons who have committed felonies punishable by imprisonment for more than one year but less than for life. To avoid this restrictive effect, the Conference in 1932 revised the section to provide for arrest without a warrant where the accused stands charged "with a crime punishable by death or imprisonment for a term exceeding one year". This is an adoption of the usual definition of "felony".

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: At end of first sentence, after "term", substituted "of 1 year or more" for "exceeding 1 year"; and made minor changes in style. Amendment effective April 6, 1991.

1983 Amendment: In last sentence, changed "this" to "his".

46-30-302. Commitment to await requisition.

Uniform Commission Comments

Source: Alabama Code of 1923, section 4168, restricted.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

No Court Authority to Quash Writ of Extradition — Governor's Warrant Effective Despite Expiration of Federal Statutory Time Limit: Defendant contended that 18 U.S.C. 3182 gave the District Court authority to dismiss his case when he was not picked up by out-of-state authorities within 30 days after he was served with a Governor's warrant. Under the federal statute, the court could discharge him, if he was detained, or release him from bail, but the 30-day provision did not allow dismissal of the case or grant the court authority to quash the writ of extradition. The Supreme Court found the 30-day limit to be discretionary, not mandatory. Under this section and 46-30-304, the governor's warrant was legally effective even though the 30-day limit had expired. St. v. Campbell, 233 M 502, 761 P2d 393, 45 St. Rep 1678 (1988).

Applicability of Time Limits: The time limits in 46-30-302 and 46-30-304 refer only to the length of detention permitted before an accused person must be released from custody in the asylum state. These sections do not require dismissal of extradition proceedings for any supposed time limits on issuance of the Governor's warrant. These sections have no applicability once a Governor's warrant has been issued. Once the Governor of Montana issues his warrant, all questions involving the prior arrest and detention are rendered immaterial. In re Petition of Blackburn, 215 M 440, 701 P2d 715, 42 St. Rep. 525 (1985), followed in St. v. Campbell, 233 M 502, 761 P2d 393, 45 St. Rep. 1678 (1988), and in St. v. Holliman, 247 M 365, 805 P2d 52, 48 St. Rep. 56 (1991).

46-30-303. Bail while awaiting requisition.

Uniform Commission Comments

Source: Alabama Code of 1923, section 4169, modified.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Attorney General's Opinions

No Entitlement to Bail After Waiver of Extradition — State Jurisdiction Only to Effect Transport: There is no provision for bail either after an arrest on a Governor's extradition warrant or upon waiver of extradition, so a fugitive prisoner, after waiver of extradition, is not entitled to bail. Once extradition is waived, Montana District Courts retain jurisdiction only to effect transport of the fugitive to another state. 50 A.G. Op. 7 (2004).

46-30-304. Extension of time of commitment or bail.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

No Court Authority to Quash Writ of Extradition — Governor's Warrant Effective Despite Expiration of Federal Statutory Time Limit: Defendant contended that 18 U.S.C. 3182 gave the District Court authority to dismiss his case when he was not picked up by out-of-state authorities within 30 days after he was served with a Governor's warrant. Under the federal statute, the court could discharge him, if he was detained, or release him from bail, but the 30-day provision did not allow dismissal of the case or grant the court authority to quash the writ of extradition. The Supreme Court found the 30-day limit to be discretionary, not mandatory. Under 46-30-302 and this section, the governor's warrant was legally effective even though the 30-day limit had expired. St. v. Campbell, 233 M 502, 761 P2d 393, 45 St. Rep 1678 (1988).

Applicability of Time Limits: The time limits in 46-30-302 and 46-30-304 refer only to the length of detention permitted before an accused person must be released from custody in the asylum state. These sections do not require dismissal of extradition proceedings for any supposed time limits on issuance of the Governor's warrant. These sections have no applicability once a Governor's warrant has been issued. Once the Governor of Montana issues his warrant, all questions involving the prior arrest and detention are rendered immaterial. In re Petition of Blackburn, 215 M 440, 701 P2d 715, 42 St. Rep. 525 (1985), followed in St. v. Campbell, 233 M

502, 761 P2d 393, 45 St. Rep. 1678 (1988), and in St. v. Holliman, 247 M 365, 805 P2d 52, 48 St. Rep. 56 (1991).

46-30-305. Forfeiture of bail.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 4
Extradition to This State From Another State

Part Case Notes

Application for Writ of Habeas Corpus in Asylum State: Defendant was extradited to this state from another state and sentenced to prison. The remedy for a fugitive arrested in another state who opposes extradition is to apply for a writ of habeas corpus in the asylum state. Defendant, who did not oppose extradition in the asylum state before his return to this state, may not now attempt to do so in Montana. St. v. Kingery, 239 M 160, 779 P2d 495, 46 St. Rep. 1587 (1989), followed in Walker v. McCormick, 260 M 301, 858 P2d 373, 50 St. Rep. 1053 (1993).

46-30-401. Application for issuance of requisition.

Compiler's Comments

1997 Amendment: Chapter 42 in (2) and (4) substituted "board of pardons and parole" for "parole board"; and made minor changes in style. Amendment effective March 12, 1997.

1981 Amendment: Substituted "governor" for "government" in the first sentence of (5).

46-30-402. Requisition by governor.

Uniform Commission Comments

Source: Illinois Law, section 8, modified.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-403. Extradition of persons held in another state.

Uniform Commission Comments

Source: This section is based upon an amendment added to the Laws of New Jersey in 1933 C.N.J.L. 1933, Chapter 314.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-404. Immunity from service of civil process.

Uniform Commission Comments

Scott on Interstate Rendition, 136.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-405. No immunity from other criminal prosecutions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

46-30-411. Expenses of bringing fugitives back to this state.

Compiler's Comments

2001 Amendment: Chapter 371 in (1) near end after "audited by the" substituted "governor" for "attorney general"; and made minor changes in style. Amendment effective October 1, 2001.

46-30-412. Restrictions on compensation for assisting return of fugitive.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

CHAPTER 31
INTERSTATE AGREEMENT ON DETAINERS

Chapter Case Notes

Arrest Warrant Not Sufficient to Trigger Interstate Act: An arrest warrant, unless based upon an untried indictment, information, or complaint, is insufficient to trigger the Interstate Agreement on Detainers. Blakey v. District Court, 232 M 178, 755 P2d 1380, 45 St. Rep. 972 (1988).

Error in Dismissal of Detainer: The Montana District Court erred in dismissing a detainer from Colorado after mistakenly determining that the accusatory instrument was itself subject to dismissal in the receiving state, Colorado. Blakey v. District Court, 232 M 178, 755 P2d 1380, 45 St. Rep. 972 (1988), followed in Walker v. McCormick, 260 M 301, 858 P2d 373, 50 St. Rep. 1053 (1993).

Sending State's Failure to Comply: Relief should not be denied a defendant when officials of the sending state fail to comply with the provisions to which they are bound. St. v. Seadin, 181 M 294, 593 P2d 451 (1979).

Chapter Collateral References

Detainers: validity, construction, and application of Interstate Agreement on Detainers. 98 ALR 3d 160.

Part 1
Contents of Agreement

46-31-101. Agreement on detainers — enactment and text.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1985 Amendment: In Article III(1) substituted "within 180 days" for "at the next term of court".

Case Notes

Institutional Delays in Trial Not Chargeable Against Requesting State Absent Notice of Request for Speedy Trial: While in federal custody in Texas, Dodson filed a speedy trial request under the Interstate Agreement on Detainers Act (IAD) with officials in Texas after Montana filed a warrant for Dodson's arrest. However, Texas officials failed to forward the speedy trial request, so Dodson moved to dismiss the Montana charges based on Montana's failure to bring him to trial in Montana within 180 days of filing the charges. The dismissal motion was denied and Dodson was ultimately convicted on the Montana charges. Dodson appealed on grounds that the Montana charges should have been dismissed for lack of a speedy trial pursuant to the IAD. The Supreme Court disagreed. The speedy trial clock provisions are not triggered until the prosecutor and court receive the prisoner's request pursuant to the IAD. In cases where delay is occasioned by the custodial state's failure to forward the request, causing harm or detriment to the prisoner, the institutional delays against the custodial state should not be charged against the requesting state that had no notice of the delay or control over the institution causing the delay. St. v. Dodson, 2009 MT 419, 354 M 28, 221 P3d 687 (2009), following Fex v. Mich., 507 US 43 (1993). See also St. v. Seadin, 181 M 294, 593 P2d 451 (1979), and St. v. Wolfe, 250 M 400, 821 P2d 339 (1991).

Speedy Trial — Failure to Petition for Disposal of Charges Properly Considered by District Court in Attributing Delay to Defendant: Stewart was convicted on state theft and forgery charges and appealed his sentence to the Supreme Court, which stayed execution of the state sentence. Conspiracy and mail fraud charges were then filed by the United States, and Stewart was tried, convicted, and incarcerated. After Stewart's state conviction was overturned by the Supreme Court, a warrant was issued for his arrest on other state charges and a detainer was sent to the federal prison. Stewart was informed of his right to request final disposition of the state charges under Article III of the Interstate Agreement on Detainers, but he did not file a petition. Stewart was then released from federal prison and brought to Lincoln County, Montana, to face the state charges. He moved to dismiss the charges for lack of a speedy trial. The District Court denied the motion. The Supreme Court held that the District Court properly analyzed Stewart's speedy trial claim under the four-part test set forth in Barker v. Wingo, 407 US 514 (1972). The record shows that 245 days elapsed from the filing of the detainer to Stewart's release to state officials for trial in Montana. Stewart was aware of his right to petition for disposition of the state charges during that time but failed to do so. The Supreme Court held that those days were therefore properly charged to Stewart and were not the fault of the state.

The Supreme Court also found that Stewart was not prejudiced by the delay. St. v. Stewart, 266 M 525, 881 P2d 629, 51 St. Rep. 910 (1994).

Running of Speedy Trial Clock Begins Upon Entry Into Term of Imprisonment: After being imprisoned in the Montana State Prison for felony assault (now assault with a weapon), Walker was extradited to Ohio, where he was tried and convicted of aggravated murder. Ohio then placed a detainer on Walker, and he was returned to Montana to complete his term of imprisonment. Walker brought a petition for a writ of habeas corpus, claiming that his trial in Ohio was not conducted in accordance with the speedy trial requirements of the Interstate Agreement on Detainers. The Supreme Court held that the 180-day speedy trial clock imposed by this section began to run when Walker was imprisoned in Montana and not on the date he requested final disposition. The trial was therefore well within the 180-day limit, and the Supreme Court denied the petition. Walker v. McCormick, 260 M 301, 858 P2d 373, 50 St. Rep. 1053 (1993).

Failure to Trigger IAD Speedy Trial Provision: Wolfe argued that he had been denied a speedy trial because the state had failed to try him within 180 days as required by the Interstate Agreement on Detainers (IAD). The Supreme Court held that Wolfe had failed to file with the District Court the papers required by the IAD and therefore had failed to trigger the 180-day provision. St. v. Wolfe, 250 M 400, 821 P2d 339, 48 St. Rep. 1001 (1991).

Speedy Trial — Incarceration in Another State — Delays Attributable to Defendant: Eleven days after his arraignment in Montana for burglary, defendant was arrested in Idaho for burglary and felony theft, convicted, and sentenced to the Idaho State Prison for 5 years. On January 22, 1985, Montana filed a detainer in Idaho. Defendant asserted his right to a speedy trial in Montana by requesting final disposition of the charges against him on June 19, 1985. Defendant requested a delay of his trial on September 3, 1985, and trial was held on October 22, 1985. Defendant appealed his conviction in Montana on the grounds that his right to a speedy trial had been violated and the charges against him should have been dismissed. The Supreme Court found that a total of 196 days of the 393-day delay were attributable to defendant. The presumption that defendant did not receive a speedy trial, which was raised by the 393-day delay between defendant's arrest and his trial, was satisfactorily overcome. Defendant's own conduct prevented the state from bringing him to trial within 180 days. He cannot now complain that he was not given a speedy trial. St. v. Grant, 227 M 181, 738 P2d 106, 44 St. Rep. 994 (1987), followed in St. v. Stewart, 266 M 525, 881 P2d 629, 51 St. Rep. 910 (1994).

Probation Violation Charge: A probation violation charge is not an "untried indictment, information, or complaint" for purposes of Art. III of the compact, and the person charged thus need not be tried within 180 days of his request for a final disposition of the charge. Carchman v. Nash, 87 L Ed 2d 516, 105 S Ct 3401 (1985).

Attorney General's Opinions

Application for Speedy Trial — Waiver of Extradition: When a criminal defendant charged in Montana but imprisoned in another state makes application for speedy trial under the Interstate Agreement on Detainers, that application operates as a waiver of extradition. 37 A.G. Op. 166 (1978).

Expense of Transporting Criminal Defendants Under Interstate Agreement on Detainers: No state agency has been given the duty or the authority to bear the expense of transporting criminal defendants to and from Montana under the Interstate Agreement on Detainers. Therefore, the costs must be paid by the county in which the charges have been brought and whose County Attorney has filed the detainer. 37 A.G. Op. 166 (1978).

46-31-102. Jurisdiction of district courts.

Attorney General's Opinions

Expense of Transporting Criminal Defendants Under Interstate Agreement on Detainers: No state agency has been given the duty or the authority to bear the expense of transporting criminal defendants to and from Montana under the Interstate Agreement on Detainers. Therefore, the costs must be paid by the county in which the charges have been brought and whose County Attorney has filed the detainer. 37 A.G. Op. 166 (1978).

Part 2
Enforcement of Agreement

46-31-201. Public agencies to cooperate in enforcement.

Attorney General's Opinions

Application for Speedy Trial — Waiver of Extradition: When a criminal defendant charged in Montana but imprisoned in another state makes application for speedy trial under the Interstate

Agreement on Detainers, that application operates as a waiver of extradition. 37 A.G. Op. 166 (1978).

Expense of Transporting Criminal Defendants Under Interstate Agreement on Detainers: No state agency has been given the duty or the authority to bear the expense of transporting criminal defendants to and from Montana under the Interstate Agreement on Detainers. Therefore, the costs must be paid by the county in which the charges have been brought and whose County Attorney has filed the detainer. 37 A.G. Op. 166 (1978).

46-31-202. Warden to give over inmate.

Attorney General's Opinions

Expense of Transporting Criminal Defendants Under Interstate Agreement on Detainers: No state agency has been given the duty or the authority to bear the expense of transporting criminal defendants to and from Montana under the Interstate Agreement on Detainers. Therefore, the costs must be paid by the county in which the charges have been brought and whose County Attorney has filed the detainer. 37 A.G. Op. 166 (1978).

46-31-203. Coordinator of agreement.

Compiler's Comments

Distribution of Agreements: Section 7, Ch. 215, L. 1963, read: "Copies of this act shall, upon its approval, be transmitted to the governor of each state, the attorney general and the administrator of general services of the United States, and the council of state governments."

Attorney General's Opinions

Expense of Transporting Criminal Defendants Under Interstate Agreement on Detainers: No state agency has been given the duty or the authority to bear the expense of transporting criminal defendants to and from Montana under the Interstate Agreement on Detainers. Therefore, the costs must be paid by the county in which the charges have been brought and whose County Attorney has filed the detainer. 37 A.G. Op. 166 (1978).

46-31-204. Penalty for escape from custody on detainer.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Chapter 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Attorney General's Opinions

Expense of Transporting Criminal Defendants Under Interstate Agreement on Detainers: No state agency has been given the duty or the authority to bear the expense of transporting criminal defendants to and from Montana under the Interstate Agreement on Detainers. Therefore, the costs must be paid by the county in which the charges have been brought and whose County Attorney has filed the detainer. 37 A.G. Op. 166 (1978).

TITLE 47
ACCESS TO LEGAL SERVICES

Title Law Review Articles

Bespeaking Justice: A History of Indigent Defense in Montana, Taylor, 68 Mont. L. Rev. 363 (2007).

The Invisible Pillar of Gideon, Gershowitz, 80 Ind. L.J. 571 (2005).

History's Lesson for the Right to Counsel, Thomas, 2004 U. Ill. L. Rev. 543 (2004).

Title Collateral References

Attorney and Client *key* 23; Criminal Law *key* 641.11, 641.13(3).

7A C.J.S. Attorney and Client §§138 through 141; 22 C.J.S. Criminal Law §277.

21A Am. Jur. 2d Criminal Law §§1108 through 1116.

For the Defense: Enacting a Statewide Public Defender System in Montana, A Report to the 59th Legislature by the Law and Justice Interim Committee, Mont. Leg. Ser. Div. (2004).

CHAPTER 1
STATEWIDE PUBLIC DEFENDER SYSTEM

Chapter Compiler's Comments

Implementation: Section 68, Ch. 449, L. 2005, provided: "(1) The governor shall appoint the members of the public defender commission established pursuant to [section 5] [2-15-1028] no later than July 1, 2005.

(2) The department of administration shall provide staff support to the commission beginning July 1, 2005, and continuing until the commission hires a chief public defender and until the chief public defender hires necessary staff for the commission and the office of state public defender.

(3) By December 31, 2005, the commission shall hire a chief public defender and issue any requests for proposals for consulting services and technical assistance that may be needed to help establish the office of state public defender provided in [section 7] [47-1-201].

(4) Standards and procedures required to implement the provisions of [sections 1 through 4 and 6 through 14] [Title 47, ch. 1] must be established, and the office of state public defender must be opened by no later than July 1, 2006.

(5) During fiscal year 2006, a commission member is entitled to $50 for each day that the member spends conducting the official business of the commission.

(6) The department of administration shall assist the commission in developing a public defender information technology system that utilizes existing resources as much as possible and that interfaces with state executive branch, judicial branch, and local computer systems to the extent necessary and practicable to ensure that data required to effectively manage public defender caseloads and track costs can be efficiently collected and analyzed."

Transition — Transfer of County and City Employees to State Employment — Rights: Section 69, Ch. 449, L. 2005, provided: "(1) Employees of county or city public defender offices who are employed by a county or city on June 30, 2006, may be transferred to state employment in the office of state public defender provided for in [section 7] [47-1-201]. Transferred employees become state employees on July 1, 2006.

(2) All transferred employees become subject to the state classification plan on July 1, 2006, except those specifically exempted under [section 7(2) and (3)(a)] [47-1-201(2) and (3)(a)].

(3) The salary of transferred county or city employees on July 1, 2006, must be the same as it was on July 1, 2005, plus any salary increases provided for by the county or city not exceeding 4%.

(4) An employee's compensation may not be reduced as the result of the transfer to the state classification plan.

(5) This section does not preserve the right of any former county or city employee to any salary or compensation, including longevity benefits, that was not accrued and payable as of June 30, 2006.

(6) A transferred employee may elect to become a member of the state employee benefit plan beginning July 1, 2006, or remain on the employee's county or city benefit plan through the remainder of the plan year in effect on June 30, 2006. For an employee who elects to remain on a county or city benefit plan, the monthly state contribution toward insurance benefits must be

transferred to the county or city benefit plan. Any benefit costs in excess of the state contribution must be paid by the employee.

(7) Accumulated sick and vacation leave and years of service with a county or city must be transferred fully to the state and become an obligation of the state on July 1, 2006. On January 1, 2007, and on January 1, 2008, the counties and cities with office of public defender employees who are transferred to state employment by this section shall pay the state 12.5% of the sick leave accrual and 50% of vacation leave accrual for each employee who is transferred to state employment. The transferred employees shall retain their accumulated sick and vacation leave. Any liability for accumulated compensatory time of employees who are transferred from county or city employment to state employment under this section is not transferred to the state and remains an obligation of the county or city that employed the employee prior to the transfer, subject to federal law and the county's or city's personnel policies.

(8) A transferred employee who is not already covered by the public employees' retirement system provided in Title 19, chapter 3, becomes a new member of the public employees' retirement system on July 1, 2006, and is subject to the provisions of Title 19, chapter 3.

(9) A collective bargaining agreement in effect on July 1, 2006, may not be construed as binding on the state. However, transferred employees are entitled to organize and collectively bargain pursuant to Title 39, chapter 31."

Transition of Appellate Defender Commission and Office: Section 70, Ch. 449, L. 2005, provided: "(1) The terms of members of the appellate defender commission established in 2-15-1020 terminate on June 30, 2006, when that section is repealed.

(2) Commission staff in the office of appellate defender established pursuant to the Appellate Defender Act in 46-8-210 through 46-8-213 [all now repealed] must be officially transferred to the office of state public defender established pursuant to [section 7] [47-1-201]. The transfer is effective July 1, 2006, at which time the position of chief appellate defender becomes exempt from the classification and pay plan pursuant to 2-18-103 and [section 7(3)(a)(ii)] [47-1-201(3)(a)(ii)]. The compensation and benefits of the chief appellate defender and other staff of the office of appellate defender may not be reduced as a result of this transfer and the chief appellate defender and other staff of the office of appellate defender remain entitled to all compensation, rights, and benefits accrued as of June 30, 2006.

(3) The appellate defender commission and the public defender commission shall work together to provide that the duties and responsibilities of the appellate defender commission and the caseload of the staff of the office of appellate defender are transferred to the public defender commission and office of state public defender in a manner that ensures continuity of services. On July 1, 2006, all work of the appellate defender commission must officially be transferred to the supervision of the public defender commission and the chief public defender.

(4) Subject to the provisions of [section 5] [2-15-1028], a member of the appellate defender commission may be appointed by the governor to simultaneously serve on the public defender commission and the appellate defender commission until the appellate defender commission terminates pursuant to this section. A member serving on both commissions simultaneously is entitled to the compensation provided for the public defender commission in [section 68(5)] [not codified] when engaged in the official duties of the public defender commission, provided that expenses paid pursuant to 2-18-501 through 2-18-503 may not be paid twice for the same period of time."

Rights to Property: Section 71, Ch. 449, L. 2005, provided: "(1) Subject to subsection (2), office equipment, computer equipment, furniture, and fixtures that are owned by a county or city and used by employees of a public defender office on June 30, 2006, remain the property of the county or city unless otherwise agreed upon by the county or city and the state.

(2) (a) An employee of a county or city public defender office who becomes a state employee under [section 69] retains the right to use all property relating to the functions of the office and being used by the employee on June 30, 2006. The property includes records, office equipment, computer equipment, supplies, contracts, books, papers, documents, maps, grant and earmarked account balances, vehicles, and all other similar property. However, the employee may not use or divert money in a fund or account for a purpose other than as provided by law.

(b) Whenever the state replaces office equipment, computer equipment, furniture, or fixtures used as provided in subsection (2)(a) and still owned by a county or city, the right to use the replaced property reverts to the county or city.

(3) This section does not apply to property owned by the federal government."

Implementation — Determination of Actual Costs — Legislative Audit — Report: Section 72, Ch. 449, L. 2005, provided: "(1) The legislature's intent is to provide that:

(a) funding responsibilities for public defender services pursuant to [sections 1 through 4 and 6 through 14] [Title 47, ch. 1] will be shared by state and local government; and

(b) the counties, consolidated governments, and cities will pay their share of costs through a reduction in the county's, consolidated government's, or city's base entitlement share under 15-1-121.

(2) To fulfill the intent of subsection (1) for Cascade County, Gallatin County, Lewis and Clark County, Missoula County, Flathead County, and Yellowstone County, an audit, by or at the direction of the legislative auditor, must be conducted on all actual costs for public defender services in district court and justice's court proceedings incurred from July 1, 1998, through June 30, 2004, for which records exist. The audit must separate the costs by expenditure category and distinguish between costs paid by a county and costs paid or reimbursed by the state.

(3) Each county audited under subsection (2) shall reimburse the legislative auditor for 50% of the cost of the audit for that county.

(4) By April 30, 2006, the results of the audit must be reported to the governor's budget office, the legislative audit committee, the legislative finance committee, and the law and justice interim committee.

(5) The law and justice interim committee shall prepare legislation to be introduced in the 2007 legislative session that will amend 15-1-121 to provide that the base entitlement share for Cascade County, Gallatin County, Lewis and Clark County, Missoula County, Flathead County, and Yellowstone County is adjusted by an appropriate amount arrived at based on the audit and in consultation with the legislative finance committee, the legislative audit committee, representatives of the counties, the governor's office, the American civil liberties union, the attorney general's office, and all other interested and participating parties.

(6) (a) For the fiscal year beginning July 1, 2011, and every 5 years thereafter, the legislative fiscal analyst shall compare the percentage change in general fund revenue for the previous 5 years to the percentage change in the amounts allocated to local governments under the provisions of 15-1-121, as amended in 2005, and the actual costs for public defender services in [this act] for the same time period.

(b) The results of the comparison must be presented to the governor, legislative finance committee, law and justice interim committee, and supreme court by September 1 of the following fiscal year.

(7) As used in this section:

(a) "actual costs" means all expenditures by a county for public defender services in justice court and all expenditures by a county for public defender services in district court that were not reimbursed by the office of court administrator pursuant to 3-5-901; and

(b) "public defender services" means all services and support associated with providing defendants in district court or justice court proceedings with assigned, appointed, or contracted attorneys, including:

(i) compensation;

(ii) personal expenses, including travel, meals, and lodging;

(iii) office operating costs, including rent, utilities, supplies, postage, copying, computer systems, and other office operating costs;

(iv) professional and paraprofessional support services, including services provided by investigators, paralegals, researchers, and secretaries;

(v) services required to support a defense, including transcripts, witnesses, and other support;

(vi) professional support, including professional education and training;

(vii) costs of psychiatric evaluations under 46-14-202 and 46-14-221, including the cost of examinations and other associated expenses; and

(viii) other services or support provided by the county to provide assigned, appointed, or contracted defense counsel in justice court and district court proceedings."

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

Effective Date: Section 80(1), Ch. 449, L. 2005, provided: "Except as provided in subsection (2), [this act] is effective on passage and approval." Approved April 28, 2005.

Part 1
General

47-1-104. Statewide system — structure and scope of services — assignment of counsel at public expense.

Case Notes

Showing of Good Cause Required Prior to Appointment of State Public Defender in Habeas Corpus Proceedings: More than a simple motion is required before the Supreme Court will

appoint the Office of State Public Defender (OSPD) to represent a person seeking habeas corpus relief. In such case, OSPD counsel will be appointed only upon a demonstration of good cause. A showing of likelihood of the illegality of the sentence of the person seeking relief, and that the sentence will be shortened or terminated if habeas corpus relief is granted, is required before OSPD counsel will be appointed. A statement that an applicant is untrained or unskilled in the law is insufficient, without more, to establish good cause. Dyer v. Mahoney, 2008 MT 117, 342 M 495, 182 P3d 737 (2008).

Appointment of Public Defender Prior to Filing of Petition for Postconviction Relief Prohibited: Section 46-8-104 provides that a District Court may order that counsel from the Office of State Public Defender represent an eligible person who has filed a postconviction action or proceeding under certain circumstances, but nothing in that section allows appointment of a public defender in advance of the filing of a petition for postconviction relief. Further, this section does not give a District Court authority to appoint counsel employed by the public defender system to represent a person who may desire to file a petition for postconviction relief but who has not done so. Office of St. Pub. Defender v. District Court, 2007 MT 333, 340 M 234, 178 P3d 693 (2007).

Attorney General's Opinions

Discretion of Public Defender Commission and Office of State Public Defender to Retain City and County Defender Employees: Senate Bill No. 146 (Ch. 449, L. 2005), which created a new state public defender system, contained a transition section that allowed but did not require the Public Defender Commission and the Office of State Public Defender to hire current city and county public defender employees. Thus, it was within the discretion of the Commission and the Office whether to retain current city and county public defender employees for the new public defender system. 51 A.G. Op. 10 (2005).

Law Review Articles

Bespeaking Justice: A History of Indigent Defense in Montana, Taylor, 68 Mont. L. Rev. 363 (2007).

Toward a "Civil Gideon" Under the Montana Constitution: Parental Rights as the Starting Point, McNeal, 66 Mont. L. Rev. 81 (2005).

Collateral References

Validity, construction, and application of state recoupment statutes permitting state to recover counsel fees expended for benefit of indigent criminal defendants. 39 ALR 4th 597.

47-1-105. Commission — duties — report — rules.

Administrative Rules

Title 2, chapter 69, ARM Statewide public defender system.

Attorney General's Opinions

Discretion of Public Defender Commission and Office of State Public Defender to Retain City and County Defender Employees: Senate Bill No. 146 (Ch. 449, L. 2005), which created a new state public defender system, contained a transition section that allowed but did not require the Public Defender Commission and the Office of State Public Defender to hire current city and county public defender employees. Thus, it was within the discretion of the Commission and the Office whether to retain current city and county public defender employees for the new public defender system. 51 A.G. Op. 10 (2005).

47-1-111. Eligibility — determination of indigence — rules.

Compiler's Comments

2009 Amendment: Chapter 467 in (1)(d) inserted second sentence authorizing court to deny assignment of counsel after inquiry; and made minor changes in style. Amendment effective July 1, 2009.

Administrative Rules

ARM 2.69.301 Determination of indigency.

Case Notes

No Mistake of Law in City Court's Failure to Appoint Counsel Given Defendant's Prior Refusal of Appointed Counsel or Appropriate Request: Compton was arrested in Flathead County and charged with first offense DUI. At both Compton's initial appearance in City Court and at the subsequent arraignment hearing, Compton refused appointed counsel. However, a few days later, Compton submitted a whimsical, handwritten document to the Office of State Public Defender (OSPD) in Whitefish requesting appointment of counsel. The OSPD then appeared in court and requested permission to file a notice of appearance on behalf of Compton, but the judge

refused to enter the OSPD's appearance because of the absence of documents demonstrating an attorney-client relationship. The OSPD then faxed the handwritten document to the court, but the judge declined to appoint counsel absent a request from Compton, either in person or by an appropriate written request. The OSPD then filed a petition for supervisory control with the Supreme Court requesting that the court order the City Judge to appoint the OSPD to represent counsel. The Supreme Court noted that a writ of supervisory control is appropriate only in extraordinary circumstances when a court is proceeding under a mistake of law that will result in significant injustice if not corrected. Here, the OSPD was unable to demonstrate a mistake of law. Under 47-1-111, it is assumed that a court's initial order for appointment of counsel will follow an appropriate request by a defendant. Compton had twice refused appointed counsel, and the handwritten request lacked credibility and was inappropriate, so refusal to appoint counsel absent a request from Compton, either in person or by an appropriate written request, was not a mistake of law. The Supreme Court denied the petition for supervisory control, noting that if Compton desired appointed counsel, he could submit an appropriate request and that his eligibility could then be determined in accordance with statute. Office of St. Pub. Defender v. Whitefish City Court, 2008 MT 79, 342 M 141, 188 P3d 43 (2008), distinguishing Rios v. Justice's Court, 2006 MT 256, 334 M 111, 148 P3d 602 (2006).

Conditions for Appointment of Appellate Counsel: The Supreme Court found 46-8-104 to be vague, confusing, lacking in legislative guidance, and either overbroad or underinclusive with regard to appointment of counsel for defendants. The court determined that it will appoint counsel when a defendant's, petitioner's, or appellant's motion or petition demonstrates that: (1) a statute specifically mandates appointment of counsel; (2) the defendant, petitioner, or appellant is clearly entitled to counsel under the U.S. or Montana Constitution; or (3) extraordinary circumstances exist that require appointment of counsel to prevent a miscarriage of justice. The motion or petition must reference specific facts and documents in the record and cite specific jurisprudential, statutory, or constitutional authority to demonstrate the existence of a condition warranting appointment of counsel. (Note: The 2007 Legislature revised 46-8-104 to provide guidance as suggested in Dillard.) Dillard v. St., 2006 MT 328, 335 M 87, 153 P3d 575 (2006).

When Review of Indigency to Take Place: Any review of a defendant's eligibility for public defender services takes place after the state public defender's office has conducted a determination of the defendant's eligibility for public defender services. The court's review of the office's determination takes place only when one of the parties seeks review. However, nothing in this section contemplates the court initiating the review process based on its own doubts about a defendant's eligibility or authorizes a procedure designed to place the court in a gatekeeper role by asserting primary authority over indigency determinations. Rios v. Justice's Court, 2006 MT 256, 334 M 111, 148 P3d 602 (2006).

Collateral References

Determination of indigency entitling accused in state criminal case to appointment of counsel on appeal. 26 ALR 5th 765.

Part 2
Public Defender Services

47-1-201. Office of state public defender — personnel — compensation — expenses — reports.

Compiler's Comments

2009 Amendment: Chapter 486 in (5) at beginning of introductory clause deleted "Beginning July 1, 2006"; inserted (9) regarding reporting requirements of the office of public defender; and made minor changes in style. Amendment effective July 1, 2009.

Case Notes

Applicable Statutory Scheme for Providing Interpreter for Deaf Person in Criminal Proceeding — Payment of Interpreter's Fees: Alkire was arrested and charged in Municipal Court for criminal trespass to vehicles and was assigned representation by the Office of State Public Defender (OSPD). Because Alkire was hearing impaired, he requested and was granted a team of interpreters. A question then arose regarding whether the OSPD or the county was responsible for costs associated with the appointment of the team of interpreters. The court determined that, pursuant to 47-1-201, the OSPD was responsible for the costs. Alkire contended that 49-4-503 provided that the court was required to bear the costs. On a writ of supervisory control, the Supreme Court considered two possible statutory schemes for determining the entity responsible for the costs. Scheme no. 1 provides interpreters for the deaf in official proceedings

pursuant to Title 49, ch. 4, part 5, and 49-4-509 requires the court to pay, from the county general fund, reasonable compensation for services plus travel and transportation expenses for an interpreter who is appointed in a criminal proceeding. Scheme no. 2 arises from a combination of Title 26, ch. 2, part 5, 46-15-116, and 47-1-201, and requires payment by the OSPD for witness and interpreter fees, including interpreter fees in a criminal proceeding. The Supreme Court concluded that scheme no. 1 was more specific because it pertained to providing an interpreter for a deaf person in a criminal proceeding, while scheme no. 2 was more general and pertained to the appointment of interpreters and translators generally and who are treated as witnesses. In this case, the more specific statutory scheme no. 1 for an interpreter for Alkire in the criminal proceeding prevailed over the general provisions of scheme no. 2, so the trial court erred in requiring that the OSPD bear the costs of the interpreters. Thus, the writ of supervisory control was granted, and the case was remanded to Municipal Court for further proceedings directing that the costs of the interpreters be paid from the county fund. Alkire v. Missoula Municipal Court, 2008 MT 223, 344 M 260, 186 P3d 1288 (2008).

Attorney General's Opinions

Discretion of Public Defender Commission and Office of State Public Defender to Retain City and County Defender Employees: Senate Bill No. 146 (Ch. 449, L. 2005), which created a new state public defender system, contained a transition section that allowed but did not require the Public Defender Commission and the Office of State Public Defender to hire current city and county public defender employees. Thus, it was within the discretion of the Commission and the Office whether to retain current city and county public defender employees for the new public defender system. 51 A.G. Op. 10 (2005).

Collateral References

Right of public defenders to join collective bargaining unit. 108 ALR 5th 241.

47-1-216. Contracted services — rules.

Administrative Rules

ARM 2.69.601 Reasonable compensation.

TITLE 48
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